

NOTES



INTRODUCTION

1. Richard J. Bonnie and Bernard Guyer, "Injury as a Field of Public Health: Achievements and Controversies," *Journal of Law, Medicine, and Ethics* 30 (2002): 267–69.
2. Windle Turley and James E. Rooks Jr., *Firearms Litigation* (New York: Shepard's-McGraw-Hill, 1988), 12.
3. See, e.g., Garen J. Wintemute, "The Future of Firearm Violence Prevention: Building on Success," *Journal of the American Medical Association* 282, no. 5 (1999): 476; Susan DeFrancesco, "Children and Guns," *Pace Law Review* 19 (1999): 278–84.
4. Wintemute, "Future," 475–77.
5. For a recent survey of this public health approach to gun violence, see David Hemenway, *Private Guns, Public Health* (Ann Arbor: University of Michigan Press, 2004).
6. Turley and Rooks, *Firearms Litigation*, 12; Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (New York: St. Martin's, 2003), 101–2.
7. DeFrancesco, "Children and Guns," 282–83.
8. See chapters 5, 6, 7, 8, and 10 of this book.
9. Richard E. Kaye, Annotation, "Products Liability: Firearms, Ammunition, and Chemical Weapons," *American Law Reports*, 5th ser., 96 (2003), §2a.
10. George L. Blum, Annotation, "Firearm or Ammunition Manufacturer or Seller's Liability for Injuries Caused to Another by Use of Gun in Committing Crime," *American Law Reports*, 5th ser., 88 (2003), §6a.
11. As of November 2004, the only unreversed jury verdict in favor of plaintiffs, based on defective design, is *Maxfield v. Bryco Arms*, Index # 841-636 (Sup. Ct. CA., Alameda County 2003). Jury verdicts in favor of plaintiffs that

were overturned on appeal include *Hamilton v. Beretta U.S.A. Corp.*, 727 N.Y.S.2d 7 (2001) (manufacturer liability), and *Grunow v. Valor Corp. of Florida*, No. CL 00-9657 (Fla. Cir. Ct., Palm Beach County Jan. 27, 2003) (distributor liability).

12. *Johnson v. Bull's Eye Shooter Supply*, a case arising out of a widely publicized sniper shooting in Washington, DC, was settled for the limit of the manufacturer's insurance policy without any admission of liability. See Fox Butterfield, "Sniper Victims in Settlement with Gun Maker and Dealer," *New York Times*, Sept. 10, 2004, A10. Claims brought by several California municipalities against the gun industry resulted in a settlement with gun distributors in which they agreed to voluntary restrictions on marketing. See Jean Guccione, "Dealers, Firms Accept Curbs, Settle Gun Suits," *Los Angeles Times*, Aug. 22, 2003, 3. *Mathieu v. Beretta*, involving a design defect claim, ended in a monetary settlement for an undisclosed amount. See <http://www.gunlawsuits.org/docket/casestatus.php?RecordNo=51> (last accessed Nov. 2004).

13. Restatement (Second) Torts §519 (1977).

14. For examples, see 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," *Missouri Law Review* 65 (2000): 6n16, 8–10.

15. Some courts have also held that the doctrine of strict liability for abnormally dangerous activities is limited to abnormally dangerous uses of land. See Lytton, "Tort Claims," 8–9.

16. *Kelley v. R.G. Industries*, 497 A.2d 1143 (Md. 1985).

17. Monica Fennell, "Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiates a Model State Gun Control Law," *Hamline Journal of Public Law and Policy* 13 (1992): 43–49.

18. Howard L. Siegel, "Winning without Precedent: *Kelley v. R.G. Industries*," *Litigation* 14, no. 4 (1988): 32–34.

19. *Ibid.*, 34. Appeal to the Supreme Court of Maryland occurred prior to any trial in the case and was initiated by the Federal District Court, which certified questions to the Supreme Court in order to clarify questions of state law.

20. Restatement (Second) Torts §401A (1977); Restatement (Third) Products Liability §2 (2001).

21. For examples, see Lytton, "Tort Claims," 6n17, 10–21.

22. W. Keeton, D. Dobbs, R. Keeton, and D. Owens, *Prosser and Keeton on Torts*, 5th ed. (St. Paul, MN: West, 1984).

23. For examples, see Lytton, "Tort Claims," 11n51.

24. *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1211 (N.D. Tex. 1987).

25. Restatement (Third) Torts Products Liability §2(b) (2001).

26. See, e.g., *Dix v. Beretta*, No. 750681:9 (Cal. Super. Ct., Alameda

County, Aug. 2, 2004) (discussed in *Andrews Litigation Reporter*, vol. 6, Aug. 2004, at 3).

27. See, e.g., Petition in *Morial v. Smith & Wesson Corp.*, No. 98-18578 (Civ. Dist. Ct. Parish of Orleans 1998). Personalization, or “smart gun,” technology includes equipping guns with microchips that would allow a gun to fire only upon recognition of the fingerprints of an authorized user or with sensors that would allow a gun to fire only when held by a person wearing a special ring or lapel pin. Anne Eisenberg, “Smart Guns Can Check Identities before Firing,” *New York Times*, Sept. 10, 1998, 63; Leslie Wayne, “‘Smart’ Guns Proving Not to Be a Quick Fix,” *New York Times*, June 15, 1999, A24.

28. See, e.g., *Dix v. Beretta*.

29. Gary Kleck, “Guns Aren’t Ready to Be Smart,” *New York Times*, March 11, 2000, A15; Olson, *The Rule of Lawyers*, 113, 123–24; Peter H. Brown and Daniel G. Abel, *Outgunned: Up against the NRA* (New York: Free Press, 2003), 64–65.

30. *Dix v. Beretta* (jury verdict in favor of defendants); *Maxfield v. Bryco Arms*, Index # 841-636 (Sup. Ct. CA., Alameda County 2003) (jury verdict in favor of plaintiff).

31. See, e.g., *Bloxham v. Glock Inc.*, 53 P.3d 196 (Ariz. Ct. App. 2002).

32. Trial Transcript of Feb. 3, 1999, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (No. CV-95-0049) (E.D.N.Y. 1999), 3829–37, 3908–9; Sporting Arms and Ammunition Manufacturers’ Institute, *Non-Fiction Writer’s Guide: A Writer’s Resource to Firearms and Ammunition* (1998), 12.

33. Keeton et al., *Prosser and Keeton*, §56.

34. *Ibid.*

35. *Riordan v. International Armament Corp.*, 477 N.E. 2d 1293, 1295 (Ill. App. Ct. 1985).

36. *First Commercial Trust Co. v. Lorcin Engineering, Inc.*, 900 S.W.2d 202, 203 (Ark. 1995).

37. *Hamilton v. Beretta*, 727 N.Y.S. 2d 7 (2001).

38. For a more detailed analysis of these claims, see Lytton, “Tort Claims,” 34

39. In a special verdict, the jury found fifteen of the twenty-five defendant manufacturers negligent, found that the negligence of nine of them was a proximate cause of harm to the plaintiffs, and assessed damages against three of the nine. *Hamilton v. Beretta*, at 10–11. The rest of this paragraph draws on pp. 15–16 of the court’s opinion.

40. *Merrill v. Navegar*, 110 Cal. Rptr. 2d 370 (Cal. 2001). All references to this case can be found at this citation.

41. For the view that plaintiffs have misconstrued these advertising claims, see Randy E. Barnett and Don B. Kates, “Under Fire: The New Consensus on the Second Amendment,” *Emory Law Journal* 45 (1996): 1139, 1197.

42. *Cal. Civ. Code* §1714.4 (repealed). For further analysis of the repeal, see my discussion in chapter 6.

43. See, e.g., *Bloxham v. Glock Inc.*, 53 P.3d 196 (Ariz. Ct. App. 2002); *Lemongello v. Will Co., Inc.*, No. 02-C-2952 (W. Va. Cir. Ct. Kanawha County 2003).
44. For example, *Bloxham* (dismissed) and *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003) (pending).
45. Restatement (Second) Torts §821B (1977).
46. *City of Chicago v. Beretta*, 2004 Ill. LEXIS 1665 at 64–5 (Ill. 2004).
47. See *City of Philadelphia v. Beretta*, 126 F. Supp. 2d 882, 902 (E.D. Pa. 2000).
48. *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 201 (1st Dept. 2003).
49. *City of Gary, Ind. ex rel King v. Smith & Wesson Corp.*, 94 F. Supp. 2d 947 (N.D. Ind. 2000).
50. *People ex rel. Spitzer*, 761 N.Y.S.2d at 208 (Rosenberger, J., dissenting).
51. *NAACP v. AcuSport Corp.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).
52. *City of New York v. Beretta USA Corp.*, No. 00CV 3641 [JBW] [CLP], 2004 WL 764959 (E.D.N.Y. Apr. 12, 2004).
53. *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003), *cert. denied*, 125 S.Ct. 865 (2005).
54. See, e.g., Complaint, *City of Bridgeport v. Smith & Wesson*, No. CV-99-036-1279 (Conn. Super. Ct. 1999) (filed Jan. 27, 1999), 18; Complaint, *California v. Arcadia Mach. & Tool, Inc.*, No. BC210894 (Cal. Super. Ct. Los Angeles 1999) (filed May 25, 1999), 34.
55. See, e.g., *Ganim v. Smith & Wesson*, 780 A.2d 98 (Conn. 2001); *Arcadia*, No. BC210894; *Gary ex rel. King v. Smith & Wesson Corp.*, 2003 WL 23010035 (Ind.) (Dec. 23, 2003); *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568 (Mass. Super. Jul. 13, 2000).
56. On the so-called remoteness doctrine, see Victor E. Schwartz, “The Remoteness Doctrine: A Rational Limit on Tort Law,” *Cornell Journal of Law & Public Policy* 8 (1999): 421.
57. *Ganim v. Smith & Wesson*, 26 Conn. L. Rptr. 39, 40 (Conn. Super. Ct. 1999), *aff’d* 780 A.2d 98 (Conn. 2001) (dismissing the City of Bridgeport suit).
58. See, e.g., *City of Philadelphia v. Beretta*, 126 F. Supp. 2d 882, 894, 895 (E.D. Pa. 2000), *aff’d on other grounds*, 277 F.3d 415 (3d Cir. 2002).
59. Keeton et al., *Prosser and Keeton*, §42.
60. See, e.g., *City of Philadelphia v. Beretta*.
61. See Timothy D. Lytton, “Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors? Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine,” *Tulane Law Review* 76 (2002): 727 (discussing the doctrine); see also at 776–77. For more recent examples, see *City of Gary, Ind. ex rel King v. Smith & Wesson Corp.*, 94 F. Supp. 2d 947 (N.D. Ind. 2000).
62. See Lytton, “Free Public Services Doctrine,” 776–77.
63. Franklin Zimring and Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* (New York: Oxford University Press, 1997), 2.

64. Shannon Frattaroli and Stephen P. Teret, “Why Firearm Injury Surveillance?” *American Journal of Preventative Medicine* 15, 3d supp. (1998): 2–5.

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CHAPTER 1

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CHAPTER 2

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3. See note 1.

4. See, e.g., John R. Lott, *The Bias against Guns* (Washington, DC: Regnery, 2003); Gary A. Mauser and Dennis Maki, “An Evaluation of the 1977 Canadian Firearms Legislation: Robbery Involving a Firearm,” *Applied Economics* 35 (2003): 423–36; James B. Jacobs, *Can Gun Control Work?* (Oxford: Oxford University Press, 2002); Joyce Lee Malcolm, *Guns and Violence: The English Experience* (Boston: Harvard University Press, 2002), chaps. 5–8; Jeffrey A. Miron, “Violence, Guns, and Drugs: A Cross-Country Analysis,” *Journal of Law and Economics* 44 (2001): 615; David B. Kopel, “Treating Guns Like Consumer Products,” *University of Pennsylvania Law Review* 148 (2000): 1213; John R. Lott, *More Guns, Less Crime*, 2d ed. (Chicago: University of Chicago Press, 2000); Kleck, *Targeting Guns*; Chester L. Britt, Gary Kleck, and David J. Bordua, “A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment,” *Law and Society Review* 30 (1996): 61–379; Joseph Sheley and James Wright, *In the Line of Fire: Youth, Guns and Violence in Urban America* (New York: Aldine, 1995), 151; Samuel Walker, *Sense and Nonsense about Crime and Drugs* (New York: Wadsworth, 1994), chaps. 10 and 13; David B. Kopel, *The Samurai, the Mountie, and the Cowboy* (Buffalo, NY: Prometheus, 1992); Hans Toch and Alan Lizotte, “Research and Policy: The Case of Gun Control” in *Psychology and Social Policy*, ed. P. Suedfeld and P. Tetlock (New York: Hemisphere Publications, 1990); Gary A. Mauser and Richard Holmes, “Evaluating the 1977 Canadian Firearms Control Legislation: An Econometric Approach,” *Evaluation Review* 16 (1993): 603; Brandon Centerwall, “Homicide and the Prevalence of Handguns: Canada and the United States, 1976 to 1980,” *American Journal of Epidemiology* 134 (1991): 1245–65; James D. Wright and Peter Rossi, *Armed and Dangerous: A Survey of Felons and Their Firearms* (New York: Aldine, 1986); Alan Lizotte, “The Costs of Using Gun Control to Reduce Homicide,” *Bulletin of the New York Academy of Medicine* 62 (1986): 539; James D. Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime, and Violence in the United States* (New York: Aldine, 1983); John Kaplan, “The Wisdom of Gun Prohibition,” *Annals of the American Academy of Political and Social Sciences* 455 (1981): 11; Raymond Kessler, “Enforcement Problems of Gun Control: A Victimless Crimes Analysis,” *Criminal Law Bulletin* 16 (1980): 131.

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14. Barnett and Kates, “Under Fire,” 1236–42.

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43. For an updated version of this 1995 article, see Kleck and Kates, *Armed*, chap. 2.

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CHAPTER 3

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2. Hounshell, *From the American System to Mass Production*, 322.
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5. There are nine types of Federal Firearms Licenses: Type 01, “Dealer in firearms other than destructive devices”; Type 02, “Pawnbroker in firearms other than destructive devices”; Type 03, “Collector of curios and relics”; Type 06, “Manufacturer of ammunition for firearms other than ammunition for destructive devices or armor piercing ammunition”; Type 07, “Manufacturer of firearms other than destructive devices”; Type 08, “Importer of firearms/ammunition other than destructive devices or armor piercing ammu-

dition”; Type 09, “Dealer in destructive devices”; Type 10, “Manufacturer of destructive devices, ammunition for destructive devices, or armor piercing ammunition”; and Type 11, “Importer of destructive devices, ammunition for destructive devices, or armor piercing ammunition.” Bureau of Alcohol, Tobacco, and Firearms, *Types of Federal Firearms License*, formerly available at http://atf.treas.gov/firearms/nlc/ffl/ffl_types.htm.

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9. See Erichson, chapter 5, this volume.

10. The web site of the Brady Center to Prevent Gun Violence provides updates on the status of public entity lawsuits against the gun industry. See <http://www.gunlawsuits.org/docket/docket.php#pec> (last accessed Nov. 17, 2004).

11. See Vanessa O’Connell and Paul M. Barrett, “As Lawsuits Falter, a Big Gun Maker Retools Its Image,” *Wall Street Journal*, Oct. 16, 2002, A1.

12. See Richard A. Nagareda, “Outrageous Fortune and the Criminalization of Mass Torts,” *Michigan Law Review* 96 (1998): 1121–98.

13. *Ibid.*, 1137–43.

14. Joseph Sanders, *Bendectin on Trial* (Ann Arbor: University of Michigan Press, 1998), 131–32.

15. See John C. P. Goldberg and Benjamin C. Zipursky, “Cause for Concern: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims against Gun Manufacturers,” *Connecticut Law Review* 32 (summer 2000): 1411–23.

16. See Timothy D. Lytton, “Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors? Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine,” *Tulane Law Review* 76 (2002): 727–81.

17. For excellent intellectual histories of tort law in the United States, see G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 2003); John C. P. Goldberg, “Twentieth Century Tort Theory,” *Georgetown Law Journal* 91 (2003): 513–83.

18. John C. P. Goldberg, “Unloved: Tort in the Modern Legal Academy,” *Vanderbilt Law Review* 55 (2002): 1510–11.

19. See Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown and Company, 1881).

20. Leon Green, “Tort Law Public Law in Disguise (Part I),” *Texas Law Review* 38 (1959): 1.

21. William L. Prosser, *Handbook on the Law of Torts* (St. Paul, MN: West, 1941), 15. I am grateful to John Goldberg for pointing me to this telling passage from Prosser.

22. See generally Guido Calabresi, *The Costs of Accidents* (New Haven: Yale University Press, 1970); see also *ibid.*, 135–43.

23. Michael L. Wells, “Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer,” *Georgia Law Review* 26 (spring 1992): 727.

24. See, e.g., Jules Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992); Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995); Arthur Ripstein, *Equality, Responsibility, and the Law* (New York: Cambridge University Press, 1999).
25. See Barry E. Adler, Jules Coleman, and Arthur Ripstein, “Lawyers, Guns, and Money,” *Cornell Journal of Law and Public Policy* 10 (fall 2000): 154–58.
26. *Ibid.*, 158–59.
27. Gary T. Schwartz, “Cigarette Litigation’s Offspring: Assessing Tort Issues Related to Guns, Alcohol, and Other Controversial Products in Light of the Tobacco Wars,” *Pepperdine Law Review* 27 (2000): 754.
28. Ronald Reagan, *Public Papers of the Presidents of the United States: Ronald Reagan 1981*, vol. 1 (Washington, DC: Government Printing Office, 1982).
29. William J. Clinton, *Public Papers of the Presidents of the United States: William J. Clinton 1996*, vol. 1 (Washington, DC: Government Printing Office, 1997), 79.
30. See Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, and Matthew Rabin, “Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism,’” *University of Pennsylvania Law Review* 151 (2003): 1211–54; Christine Jolls, Cass R. Sunstein, and Richard Thayer, “A Behavioral Approach to Law and Economics,” *Stanford Law Review* 50 (1998): 1471–550.
31. See Stephen G. Breyer, *Breaking the Vicious Circle* (Cambridge, MA: Harvard University Press, 1993).
32. See Lisa Heinzerling, “Regulatory Costs of Mythic Proportions,” *Yale Law Journal* 107 (1998): 1981–2070.
33. 3 C.F.R. 127 (1981).
34. Lisa Schultz Bressman, “Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State,” *New York University Law Review* 78 (2003): 487.
35. 3 C.F.R. 638 (1993).
36. See Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (June 2001): 2290–99.
37. 3 C.F.R. 204 (2002).
38. See Brent W. Landau, “State Bans on City Gun Lawsuits,” *Harvard Journal on Legislation* 37 (summer 2000): 623–38; see also Lytton, chapter 6, this volume.
39. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).
40. *Daubert*, 509 U.S. at 583.
41. *Ibid.*, 590.
42. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
43. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

44. See David Faigman, David Kaye, Michael Saks, and Joseph Sanders, eds., *Modern Scientific Evidence* (St. Paul, MN: West, 2002).
45. See Donald G. Gifford, “Public Nuisance as a Mass Products Liability Tort,” *University of Cincinnati Law Review* 71 (spring 2003): 741–837; see also Note, “Developments in the Law—The Paths of Civil Litigation,” *Harvard Law Review* 113 (2000): 1752–875.
46. See Robert L. Rabin, “Enabling Torts,” *DePaul Law Review* 49 (winter 1999): 435–53.
47. Michael D. Green, D. Michal Freedman, and Leon Gordis, “Reference Guide on Epidemiology,” in Federal Judicial Center, *Reference Manual on Scientific Evidence* (Washington, DC: Lexis, 2000), 348–49.
48. *Ibid.*, 340–45.
49. See David W. Robertson, “The Common Sense of Cause in Fact,” *Texas Law Review* 75 (1997): 1770.
50. Aaron Twerski and Anthony J. Sebok, “Liability without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability,” *Connecticut Law Review* 32 (summer 2000): 1403.
51. *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 513–15 (E.D.N.Y. 2003).
52. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988).
53. The song appears on Tom Lehrer, *That Was the Year That Was*, reprise compact disc 6179.
54. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291 (2000) (O’Connor, J., plurality opinion).
55. *Morrison v. Olson*, 487 U.S. 654 (1988).
56. *Ibid.*, 730 (Scalia, J., dissenting).

CHAPTER 8

1. Much of the description of the tobacco problem and tobacco control policy efforts draws from Robert Rabin and Stephen Sugarman, eds., *Regulating Tobacco* (New York: Oxford University Press, 2001); Robert Rabin and Stephen Sugarman, eds., *Smoking Policy* (Oxford: Oxford University Press on Demand, 1993); the many reports on smoking from the U.S. surgeon general (see <http://www.cdc.gov/tobacco/>), and the author’s personal experience in the tobacco control movement.

2. Much of the description of the gun problem and gun control policy efforts draws from other chapters in this book; James B. Jacobs, *Can Gun Control Work?* (New York: Oxford University Press, 2002); J. Ludwig and P. Cook, eds., *Evaluating Gun Policy* (Washington, DC: Brookings Institute, 2002); Philip J. Cook and Jens Ludwig, “Litigation as Regulation: Firearms,” in *Regulation through Litigation*, ed. W. Kip Viscusi (Washington, DC:

AEI-Brookings Joint Center for Regulatory Studies, 2002); Gary Kleck, *Targeting Guns* (New York: Aldine, 1997); Brady Campaign to Prevent Gun Violence (<http://www.bradycampaign.org/>); Violence Policy Center (<http://www.vpc.org/>); “First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws from the Task Force on Community Preventive Services” (<http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>).

3. Franklin E. Zimring and Jeffrey Fagan, “The Search for Causes in an Era of Crime Declines: Some Lessons from the Study of New York City Homicide,” *Crime and Delinquency* 46 (2000): 446; Jeffrey Fagan, Franklin E. Zimring, and June Kim, “Declining Homicide in New York City: A Tale of Two Trends,” *Journal of Criminal Law and Criminology* 88 (1998): 1277.

4. Much of the description of tobacco litigation draws from Stephen D. Sugarman, “Book Reviews,” *Journal of Policy Analysis and Management* 22 (2003): 712; Stephen D. Sugarman, “Review of W. Kip Viscusi, *Smoke-filled Rooms: A Postmortem on the Tobacco Deal*” *Law and Politics Book Review* 13 (January 2003): 1; Stephen D. Sugarman, “Mixed Results from Recent United States Tobacco Litigation,” *Tort Law Review* 10 (2002): 94; Stephen D. Sugarman, “The Smoking War and the Role of Tort Law,” in *The Law of Obligations: Essays in Celebration of John Fleming*, ed. P. Cane and J. Stapleton (Gloucestershire: Clarendon, 1998).

5. Restatement (Third) Torts: Products Liability §2(b) (1998).

6. Restatement (Second) Torts § 402A, comment i (1965).

7. Restatement (Third) Torts: Products Liability § 2, comment e (1998).

8. Restatement (Third) Torts: Liability for Physical Harm (Basic Principles), Tentative Draft No. 1 (2001) § 20.

9. *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985).

10. *Md. Code Ann.* art. 27 § 36-1.

11. Jim Hughes, “Punitive-Award Limits Awaiting Legal Bellwether,” *Denver Post*, January 12, 2004.

12. *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (2000); V. Wakefield, “Patience, Persistence Pay Off for Man Who Beat Big Tobacco,” *Florida Times Union*, March 9, 2001.

13. “Ex-Smoker’s Estate Receives Settlement,” *Associated Press*, August 28, 2003, previously available at <http://www.ajc.com/news/content/news/ap/ap-story.html/National/AP.V0808.AP-Smokers-Trial.htm>.

14. G. Winter, “Jury Awards \$5.5 Million in a Secondhand Smoke Case,” *New York Times*, June 20, 2002.

15. *Engle v. R. J. Reynolds Tobacco Corp.*, No. 94-08273 CA-22 (Fla. Civ. Ct., Nov. 6, 2000).

16. Barry Meier, “Huge Award for Smokers Is Voided by Appeals Court,” *New York Times*, May 22, 2003.

17. Susan Finch, “Jurors Gives Split Tobacco Verdict,” *Times Picayune*, July 29, 2003.

18. Myron Levin, “Tobacco Giant, in a Shift, Pays Victim,” *Los Angeles Times*, October 2, 2003.
19. “Federal Appeals Court Upholds Dismissal of Damage Claims in HMO Lawsuit,” Philip Morris Press Release, September 16, 2003.
20. Myron Levin, “Philip Morris Loses Lawsuit,” *Los Angeles Times*, March 22, 2003.
21. For a more optimistic appraisal, see R. Daynard, “Why Tobacco Litigation?” *Tobacco Control* 12 (2003): 1.
22. See, e.g., Stanton A. Glantz, John Slade, Lisa A. Bero, Peter Hanaver, and Deborah E. Barnes. *The Cigarette Papers* (Berkeley: University of California Press, 1996).
23. Much of the description of gun litigation draws from other chapters in this book and Peter Harry Brown and Daniel G. Abel, *Outgunned: Up against the NRA* (New York: Free Press, 2003).

CHAPTER 9

1. At the symposium of this volume’s contributors, a lively discussion occurred concerning whether it is accurate or useful to refer to the gun control plaintiffs as a collective “they.” Those contributors who advocate strict controls emphasized the absence of any unified grand strategy similar to that of the NAACP Legal Defense and Education Fund during the civil rights movement. Indeed, these advocates pointed to many differences—with respect to litigation goals, liability theories, public education strategies, and other factors—among gun control groups and even within the relatively well-coordinated coalition of municipalities suing the industry. Other contributors, while acknowledging these differences, insisted that the many points of agreement and cooperation among gun control groups justify the use of the shorthand “they.”
 2. See Kahan, Braman, and Gastil, chapter 4, this volume.
 3. See Robert L. Rabin, “The Third Wave of Tobacco Tort Litigation,” in *Regulating Tobacco*, ed. Robert Rabin and Stephen D. Sugarman (Oxford: Oxford University Press on Demand, 2001), 176–206.
 4. I am unaware of any significant gun control tort litigation in Europe. This is certainly not because of an absence of firearms in private hands there. According to a United Nations study released in July 2003, there are an estimated 67 million privately owned firearms in the European Union states, or roughly seventeen guns per one hundred people, with almost double that rate in France and Germany. This compares with between eighty-three and ninety-six guns per one hundred people in the United States. Daniel B. Schneider, “Firearms in Europe,” *New York Times*, July 10, 2003, A6. See also “Switzerland and the Gun,” *BBC News*, Sept. 27, 2001, <http://news.bbc.co.uk/1/hi/world/europe/1566715.stm>.

5. See, e.g., Gregory Korte, “Drop Gun Suit, City Advised,” *Cincinnati Enquirer*, Apr. 30, 2003, available at 2003 WL 55041752 (firm representing city says it spent \$425,000 in billable hours and \$136,000 in expenses in unsuccessful suit); John Tierney, “A New Push to Grant Gun Industry Immunity from Suits,” *New York Times*, Apr. 4, 2003, A12 (trade association says litigation has cost industry more than \$100 million in legal fees).

6. See Wagner, chapter 11, this volume; see also *Johnson v. Bulls Eye Shooter Supply*, 2003 WL 21639244 (Wash. Super. Ct. June 27, 2003); *City of Chicago v. Beretta*, 2004 Ill. LEXIS 1665 (Ill. 2004).

7. Kahan, Braman, and Gastil, in chapter 4 of this volume, argue, based on other conflicts over culturally divisive issues, that a response of this kind is readily predictable.

8. Fox Butterfield, “Lawsuits Lead Gun Maker to File for Bankruptcy,” *New York Times*, June 24, 1999, A14 (Davis Industries).

9. Mike Allen, “Colt to Curtail Sale of Handguns,” *New York Times*, Oct. 11, 1999, A1.

10. See <http://www.gunlawsuits.org/docket/smithandwesson.php>.

11. See, e.g., Brent W. Landau, “State Bans on City Gun Lawsuits,” *Harvard Journal on Legislation* 37 (2000): 623, 626.

12. See Douglas C. Bice and David D. Hemley, “The Market for New Handguns: An Empirical Investigation,” *Journal of Law and Economics* 45 (2002): 251.

13. Wendy Wagner, in chapter 11 of this volume, discusses this new information.

14. See William Glaberson, “Gun Makers Repel Lawsuit by N.A.A.C.P.,” *New York Times*, July 22, 2003, B1.

15. Philip Cook and Jens Ludwig, “Litigation as Regulation: Firearms,” in *Regulation through Litigation*, ed. W. Kip Viscusi (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2002), 91.

16. See, e.g., James B. Jacobs, *Can Gun Control Work?* (New York: Oxford University Press, 2002).

17. I recognize, of course, that tort adjudication is one form of risk regulation. See Peter H. Schuck, “Comment: Regulation, Litigation, and Science,” in *Regulation through Litigation*, ed. Viscusi, 178–81. For the present purpose, however, I use “risk regulation” to refer to nonjudicial regulatory techniques.

18. Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY: Foundation Press, 1958); cf. Akhil Reed Amar, “Law Story,” *Harvard Law Review* 102 (1989): 688 (critiquing the legal process theory generally).

19. See, e.g., Isaac Ehrlich and Richard Posner, “An Economic Analysis of Legal Rulemaking,” *Journal of Legal Studies* 3 (1974): 257; Rogers M. Smith, “Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law,” *American Political Science Review* 82 (1988): 89.

20. Neil K. Komisar, *Imperfect Alternatives: Choosing Institutions in Law*,

Economics, and Public Policy (Chicago: University of Chicago Press, 1994); see also Peter H. Schuck, *The Limits of Law: Essays on Democratic Governance* (St. Paul, MN: Westview, 2000), 420.

21. Courts may also need to address institutional competence issues when they engage in statutory interpretation requiring them to decide whether the legislature did, or the court should, decide the legal question at issue.

22. Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983), 178.

23. See, e.g., Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: Brookings Institute, 1977); Ross Sandler and David Schoenbrod, *Government by Decree: What Happens When Courts Run Government* (New Haven: Yale University Press, 2003); sources cited in Schuck, *The Limits of Law*, 466n103.

24. See, e.g., Komesar, *Imperfect Alternatives*; Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Cambridge, MA: Belknap, 2003), chap. 8; Schuck, *The Limits of Law*, chap. 13.

25. The discussion of these criteria draws, sometimes verbatim, on Schuck, *The Limits of Law*, chap. 13, especially pt. II.

26. Substitute weapons are highly likely. Kates, chapter 2, this volume; see also Jim Yardley, “Rat Poison: Murder Weapon of Choice in Rural China,” *New York Times*, Nov. 17, 2003, A3.

27. When, as is usually the case, more than one institution contributes to the policy system for managing a particular social problem, the question becomes, How can the resources of those institutions best be combined and coordinated?

28. The discussion that follows draws, sometimes verbatim, on Schuck, *The Limits of Law*, 350–51.

29. See generally Jacobs, *Can Gun Control Work?* chap. 2.

30. See Erichson, chapter 5, this volume.

31. See Wagner, chapter 11, this volume.

32. See generally Guido Calabresi and Alvin Klevorick, “Four Tests for Liability in Torts,” *Journal of Legal Studies* 14 (1985): 585.

33. See George L. Priest and Benjamin Klein, “The Selection of Disputes for Litigation,” *Journal of Legal Studies* 13 (1984): 1; cf. Theodore Eisenberg, “Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases,” *Georgetown Law Journal* 77 (1989): 1567; Donald Wittman, “Is the Selection of Cases for Trial Biased?” *Journal of Legal Studies* 14 (1985): 185.

34. An exception might occur in some states if plaintiffs manage to reach the punitive damages stage and the state’s punitive damage rules permit introduction of such ability-to-pay evidence.

35. Kahan, Braman, and Gastil, in chapter 4, while emphasizing cultural conflicts, are also concerned with what I call political information. They claim—erroneously or too broadly, in my view—that the politics of gun control is what they call the politics of “avoidance” rather than of “adventence” in that it fails to recognize and confront the symbolic or cultural dimension of

political conflict. See generally chapter 4. In truth, however, much political activity entails the self-conscious manipulation and exploitation of precisely these symbolic or cultural meanings. The politics of gun control is no exception.

36. The rest of this paragraph draws heavily on Schuck, *The Limits of Law*, 225–26.

37. *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md.1985).

38. See *Cal. Civ. Code* § 1714 (repealed) (abrogating holdings of *Coulter v. Superior Court*, 21 Cal. 3d 144 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313 (1976); *Vesely v. Sager*, 5 Cal. 3d 153 (1971)).

39. See Jacobs, *Can Gun Control Work?* 42 and 233n15 (discussing annual sales rates).

40. *Ibid.*, 51–52.

41. See Charles C. Sipos, Note, “The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms,” *Vanderbilt Law Review* 55 (2002): 1297, 1303.

42. James A. Henderson Jr. and Aaron D. Twerski, “Closing the American Products Liability Frontier: The Rejection of Liability without Defect,” *New York University Law Review* 66 (1991): 1263, 1310–11 (explaining the propensity of excessive liability to produce black markets).

43. Jacobs, *Can Gun Control Work?* 165.

44. See Steven Croley, “Public Interested Regulation,” *Florida State University Law Review* 28 (2000): 7.

45. Jacobs, *Can Gun Control Work?* 38–39. I am extrapolating from the 1999 data that Jacobs presents in his tables 3.1 and 3.2 estimating the annual growth in the gun stock.

46. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

47. This information may come from many sources, including feedback from judicial decisions interpreting or enforcing the regulatory policy.

48. The rest of this paragraph draws heavily on Peter H. Schuck, “The New Judicial Ideology of Tort Law,” in *New Directions in Liability Law*, ed. W. Olson (Montpelier, VT: Capital City Press, 1988).

49. See Jacobs, *Can Gun Control Work?* 51, table 3.4.

50. *Ibid.*, 50.

51. See Lytton, chapter 6, this volume.

52. See Kahan, Braman, and Gastil, chapter 4, this volume.

53. Schuck, *The Limits of Law*, 319–20.

54. See generally, Jacobs, *Can Gun Control Work?*

55. Centers for Disease Control and Prevention, “First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Early Childhood Home Visitation and Firearms Laws,” *Morbidity and Mortality Weekly Report* 52, no. RR-14 (2003): 18, <http://www.cdc.gov/mmwr/PDF/rr/rr5214.pdf>.

56. See, e.g., David A. Harris, “Superman’s X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology,” *Temple Law Review* 69 (1996): 1; Laura B. Riley, “Concealed Weapon Detectors and the Fourth

Amendment: The Constitutionality of Remote Sense-Enhanced Searches,” *UCLA Law Review* 45 (1997): 281; Christopher Slobogin, “Technologically Assisted Physical Surveillance: The American Bar Association’s Tentative Draft Standards,” *Harvard Journal of Law and Technology* 10 (1997): 383.

CHAPTER 10

1. For examples, see Walter Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America’s Rule of Law* (New York: St. Martin’s, 2003), 94–98, 306–14; Michael Krauss, *Fire and Smoke: Government Lawsuits and the Rule of Law* (Oakland, CA: Independent Institute, 2000); Anne Giddings Kimball and Sarah L. Olson, “Municipal Firearms Litigation: Ill Conceived from Any Angle,” *Connecticut Law Review* 32 (2000): 1301–3; Jeff Reh, “Social Issue Litigation and the Route around Democracy,” *Harvard Journal on Legislation* 37 (2000): 515–20; Phillip D. Oliver, “Rejecting the Whipping-Boy Approach to Tort Law: Well-Made Handguns Are Not Defective Products,” *University of Arkansas at Little Rock Law Journal* 14 (1991): 5; Catherine Crier, *The Case against Lawyers* (New York: Broadway Books, 2002), 4.

2. Peter H. Schuck, “The New Judicial Ideology of Tort Law,” in *New Directions in Liability Law*, ed. Walter Olson (Montpelier, VT: Academy of Political Science, 1988), 15; Peter H. Schuck, *The Limits of Law* (St. Paul, MN: Westview, 2000), 363–64; Peter H. Schuck, chapter 9, this volume.

3. W. Kip Viscusi, “Overview,” in *Regulation through Litigation*, ed. W. Kip Viscusi (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2002), 2.

4. Douglas McCollam, “Long Shot,” *American Lawyer*, June 1999 (interview with plaintiffs’ lawyer Wendell Gauthier); Andrew J. McClurg, “Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver,” *University of Arkansas at Little Rock Law Journal* 14 (1991): 516–17; Carl Bogus, *Why Lawsuits Are Good for America* (New York: New York University Press, 2001), 8–9, 211–12, 219–20.

5. David Rosenberg, “The Regulatory Advantage of Class Action,” in *Regulation through Litigation*, ed. Viscusi, 244–304.

6. For a thoughtful discussion of tort law’s role in complementing legislative and agency regulation, see Robert L. Rabin, Keynote Paper, “Reassessing Regulatory Compliance,” *Georgetown Law Journal* 88 (2000): 2049, 2060–84. See also Peter D. Jacobson and Kenneth E. Warner, “Litigation and Public Health Policy Making: The Case of Tobacco Control,” *Journal of Health Politics, Policy, and Law* 24, no. 4 (1999): 769–804; Charles Fried and David Rosenberg, *Making Tort Law: What Should Be Done and Who Should Do It?* (Washington, DC: AEI Press, 2003), 78–103.

7. The Bureau of Alcohol, Tobacco, Firearms and Explosives has issued

an opinion that the Gun Control Act does not control the sale of firearms parts, except for frames or receivers, silencer parts, certain machine gun parts, and large-capacity ammunition feeding devices. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Federal Firearms Regulations Reference Guide* (Washington, DC: ATF P 5300.4) (10–95), 104, question (A6).

8. For a discussion of this unreported case, see Timothy D. Lytton, “Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims against Firearms Manufacturers,” *Brooklyn Law Review* 64 (1998): 681.

9. Title 41, 18 U.S.C. §21(a)(29)(B) (2003).

10. The trial judge rejected the plaintiffs’ negligence per se claim based on violation of federal law, refusing to adjudicate the question of whether the defendant’s gun kit was covered by the statutory definition of a firearm, which included “any combination of parts from which a firearm . . . can be assembled.” See Lytton, “Halberstam v. Daniel,” 687.

11. It is also possible, as indicated by the statutory language cited in note 7, that Congress did indeed intend to regulate gun kits.

12. 33 P.3d 638 (N.M. Ct. App. 2001), *cert. denied*, *Smith v. Bryco Arms*, 34 P.3d 610 (N.M. October 17, 2001).

13. *Bryco Arms*, 33 P.3d at 643.

14. *Ibid.*

15. *Consumer Products Safety Act*, Public Law 92-573 § 2, *U.S. Statutes at Large* 86 (1972):1207, *codified as* 15 U.S.C. §2074 (2003).

16. For a recent U.S. Supreme Court articulation of this principle, see *Spritsma v. Mercury Marine*, 537 U.S. 51 (2002).

17. See *City of Chicago v. Beretta*, 2004 Ill. LEXIS 1665 at *64–65 (Ill. 2004).

18. For a more detailed discussion, see 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,” *Missouri Law Review* 65 (2000): 42–45. See also Allen Rostron, “Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products,” *UCLA Law Review* 52 (2004): 151.

19. See *Hymowitz v. Eli Lilly*, 73 N.Y.2d 487 (1989), *cert. denied sub. nom. Rexall Drug Co. v. Tigue*, 493 U.S. 444 (1989).

20. For example, see Schuck, “New Judicial Ideology”; Olson, *Rule of Lawyers*, 94–98, 306–14; Krauss, *Fire and Smoke*; Reh, “Social Issue Litigation,” 515–20; Oliver, “Rejecting the Whipping-Boy Approach”; Crier, *The Case against Lawyers*, 4.

21. Complaint, *City of Chicago v. Beretta*, No. 98 CH 015596, 72 (Cir. Ct. Cook County 2002).

22. See Schuck, “New Judicial Ideology,” 16.

23. Peter H. Brown and Daniel G. Abel, *Outgunned: Up against the NRA* (New York: Free Press, 2003), 172–92; Olson, *Rule of Lawyers*, 123.

24. Brown, *Outgunned*, 193–234; Olson, *Rule of Lawyers*, 126–27; Timothy

D. Lytton, “Lawsuits against the Gun Industry: A Comparative Institutional Analysis,” *Connecticut Law Review* 32 (2000): 1247, 1259–66.

25. See Brady Center to Prevent Gun Violence, Legal Action Project, *Reforming the Gun Industry: California*, <http://www.gunlawsuits.org/docket/cities/cityview.php?RecordNo=13>.

26. For further discussion, see Charles C. Sipos, “The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms,” *Vanderbilt Law Review* 55 (2002): 1297.

27. Rabin, “Reassessing Regulatory Compliance,” 2061–70; Wendy Wagner, Symposium Article, “Rough Justice and the Attorney General Litigation,” *Georgia Law Review* 33 (1999): 935.

28. For example, see the affidavit of Robert I. Hass, former senior vice president of marketing and sales at Smith & Wesson, quoted in David Kairys, “Legal Claims of Cities against the Manufacturers of Handguns,” *Temple Law Review* 71 (1998): 1, 7; testimony of Robert Ricker, former NRA lobbyist and former president of the American Shooting Sports Council, summarized in *NAACP v. AcuSport Corp.*, 210 F.R.D. 446, 450–453 (2002).

29. “Percentage of Firearms Licensees Inspected,” BATFE web site, http://www.atf.treas.gov/pub/gen_pub/2000annrpt_html/goals.htm; *Firearms Owner’s Protection Act*, 18 U.S.C. §923(g)(1)(B)(ii)(I) (2003).

30. Rabin, “Reassessing Regulatory Compliance,” 2084.

31. *MacPherson v. Buick Motor Co.*, 271 N.Y. 382 (1916); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57 (1963).

32. See James A. Henderson Jr., “MacPherson v. Buick Motor Company: Simplifying the Facts while Reshaping the Law,” in *Torts Stories*, ed. Robert L. Rabin and Stephen D. Sugarman (New York: Foundation Press, 2003), 59–63.

33. *O’Brien v. Muskin Corp.*, 463 A.2d 298 (1983); *Kelley v. R.G. Industries*, 497 A.2d 1143 (1985).

CHAPTER 11

1. Violence Policy Center, “Litigation against the Gun Industry” (table of litigation), <http://www.vpc.org/litigate.htm>; Peter D. Jacobson and Soheil Soliman, “Litigation as Public Health Policy: Theory or Reality?” *Journal of Law, Medicine, and Ethics* 30 (2002): 224, 233.

2. Timothy D. Lytton, introduction, this volume.

3. Peter Harry Brown and David Abel, *Outgunned: Up against the NRA* (New York: Free Press, 2003), 216–20.

4. Richard A. Epstein, “Implications for Legal Reform,” in *Regulation through Litigation*, ed. W. Kip Viscusi (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2002), 325; Peter H. Schuck, “The New Judicial

Ideology of Tort Law,” in *New Directions in Liability Law*, ed. Walter Olson (Montpelier, VT: Capital City Press, 1988), 4–17.

5. Kenneth S. Abraham, *The Forms and Functions of Tort Law* (Westbury, CT: Foundation Press, 2002), 14–20.

6. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, *Prosser and Keeton on the Law of Torts* (St. Paul, MN: West, 1984), 3.

7. *Ibid.*

8. Walter Olson, “Big Guns,” *Reason*, Oct. 1999, 60; Peter H. Schuck, “Benched,” *Washington Monthly*, Dec. 2000, 35.

9. Tracy R. Lewis, “Protecting the Environment When Costs and Benefits Are Privately Known,” *RAND Journal of Economics* 27 (1996): 819, 826–31.

10. Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: University of Chicago Press, 1994), 7.

11. Constance A. Nathanson, “Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns,” *Journal of Health Politics, Policy, and Law* 24 (1999): 421, 422.

12. *Ibid.*, 477, 479.

13. Wendy Wagner, “Commons Ignorance: Why the Environmental Laws Have Failed Us,” *Duke Law Journal* 53 (2004): 1601.

14. See, e.g., Robert Vaughn, “Consumer Access to Product Safety Information and the Future of the Freedom of Information Act,” *Admin. Law Journal* 5 (1991): 673.

15. Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon, 1985).

16. Morton Mintz, *At Any Cost: Corporate Greed, Women, and the Dalkon Shield* (New York: Pantheon, 1985).

17. *Bichler v. Eli Lilly and Co.*, 436 N.E.2d 182, 185 (N.Y. 1982).

18. Gary Markowitz and David Rosner, *Deceit and Denial: The Deadly Politics of Industrial Pollution* (Berkeley: University of California Press, 2002).

19. *West v. Johnson and Johnson Prods., Inc.*, 220 Cal. Rptr. 437, 442–43 (Cal. Ct. App. 1985).

20. Joseph Sanders, “The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts,” *Hastings Law Journal* 43 (1992) 301, 321.

21. Joni Hersch, “Breast Implants: Regulation, Litigation, and Science,” in *Regulation through Litigation*, ed. Viscusi, 143–44.

22. Robert Rabin, “The Third Wave of Tobacco Litigation,” in *Regulating Tobacco*, ed. Robert L. Rabin and Stephen D. Sugarman (New York: Oxford University Press, 2001), 197.

23. See, e.g., Howard M. Erichson, chapter 5, this volume.

24. See, e.g., Fed. R. Civ. P. 11, 12(b)(6); Model Rules of Prof'l Conduct R. 3-1.

25. Phillip J. Cook and Jens Ludwig, “Litigation as Regulation: Firearms,” in *Regulation through Litigation*, ed. Viscusi, 67, 89.

26. Peter H. Schuck, “Mass Torts: An Institutional Evolutionist Perspective,” *Cornell Law Review* 80 (1995): 941, 969–73.
27. Lytton, introduction, this volume; Lytton, chapter 6, this volume.
28. See generally Lytton, chapter 6, this volume (describing the Maryland litigation).
29. Cook and Ludwig, “Litigation as Regulation: Firearms,” 68.
30. See Harvard Injury Control Center’s National Violent Injury Statistics System, <http://www.hsph.harvard.edu/hicrc/nviss/>.
31. Division of Behavioral and Social Sciences and Education, National Research Council, National Academy of Science, *Firearms and Violence: What Do We Know?* (Washington, DC: National Academy Press, forthcoming 2004).
32. Gary Kleck and Don Kates, *Armed: New Perspectives on Gun Control* (Buffalo, NY: Prometheus, 2001), 155; Mark Duggan, “More Guns, More Crime,” *Journal of Political Economy* 109 (2001): 1086.
33. Memorandum from Steven M. Silwa, CEO and president of Colt, to Zilkha Capital Partners et al., June 28, 1999, “iColt Offering Memorandum Draft,” 27, <http://www.gunlawsuits.org/pdf/docket/041803.pdf>. Later in the memorandum, Colt discusses seven prototype “safe guns” under development in 1999, five of which had patents pending with anticipated release dates from 2000 through 2006. *Ibid.*, 34.
34. Tom Diaz, *Making a Killing: The Business of Guns in America* (New York: New Press, 1999), 15.
35. Brown and Abel, *Outgunned*, 127, 140–43, 155, 195, 205, 276–80.
36. Brady Center to Prevent Gun Violence, *Smoking Guns: Exposing the Gun Industry’s Complicity in the Illegal Gun Market* (Washington, DC: Brady Center to Prevent Gun Violence, 2003), 2. See Gary Gordon, “Insurers and Manufacturers Succeeded in Sealing Asbestos Records,” *Star Tribune*, Dec. 28, 2003, formerly available at <http://www.startribune.com/stories/484/4288864.html> (discussing “gag” settlements).
37. Diaz, *Making a Killing*, 5.
38. Brady Center, “Special Interest Rider Makes Crime Gun Data Secret,” Feb. 13, 2003, www.bradiycampaign.org/press/release.asp?Record=451.
39. Cook and Ludwig, “Litigation as Regulation: Firearms,” 74n23.
40. Brady Center, *Smoking Guns*, 34; Cook and Ludwig, “Litigation as Regulation: Firearms,” 82–83.
41. *NAACP v. AcuSport, Inc.*, 271 F.Supp. 2d 435, 503 (E.D.N.Y. 2003). Unless otherwise indicated, all references to this case are found at this citation.
42. Public Law 94-284, § 3(e), *U.S. Statutes at Large* 90 (1976): 504.
43. *National Firearms Act of 1934*, 26 U.S.C. §5801 et seq.; *Crime Control Act of 1994*, 42 U.S.C. § 13701 et seq. See also BATFE, “Firearms Laws in the United States,” <http://www.atf.treas.gov/field/columbus/press/gunlaws.htm>.
44. Cook and Ludwig, “Litigation as Regulation: Firearms,” 71.
45. Brown and Abel, *Outgunned*, 91–103.

46. Diaz, *Making a Killing*, 55.
47. *The Gun Control Act of 1968*, 18 U.S.C. § 921 et seq.
48. *McClure-Volkmer Act of 1986* or *Firearm Owners' Protection Act of 1986*, Public Law 99-308, *U.S. Statutes at Large* 100 (1986): 449, sec. 103(1).
49. *Ibid.* at sec. 103(6).
50. *NAACP v. AcuSport, Inc.*, 271 F.Supp. 2d 435, 521–22 (E.D.N.Y. 2003).
51. BATFE, *Operation Snapshot* (Washington, DC: Government Printing Office, 1993); BATFE, *Operation Snapshot: An Analysis of the Retail Regulated Firearms Industry* (Washington, DC: Government Printing Office, 1998).
52. William H. Rodgers, *Environmental Law* (St. Paul, MN: West, 1994), 39–42.
53. *Ibid.*
54. S. P. Baker, B. O'Neill, M. J. Ginsburg, and G. Li, *The Injury Fact Book* (New York: Oxford University Press, 1992).
55. David Hemenway, Editorial, "Regulation of Firearms," *New England Journal of Medicine* 339 (1998): 843.
56. Nathanson, "Social Movements," 463, 465–66.
57. *Ibid.*, 474.
58. Brown and Abel, *Outgunned*, 258.
59. See Diaz, *Making a Killing*, 65–66 (discussing some of these smaller organizations).
60. Robert Spitzer, *The Politics of Gun Control* (Chatham, NJ: Chatham House, 1998).
61. Douglas S. Weil and David Hemenway, "I Am the NRA: An Analysis of a National Random Sample of Gun Owners," *Violence and Victims* 8 (1993): 353; Douglas S. Weil and David Hemenway, "Reply to Commentary: A Response to Kleck," *Violence and Victims* 8 (1993): 377.
62. Weil and Hemenway, "I Am the NRA," 363.
63. Brady Center, *Smoking Guns*, 31 (citing National Shooting Sports Foundation [NSSF] survey documents produced in litigation).
64. *Ibid.*, 361; "Vote on Lawsuit Preemption Could Be Near," formerly available at <http://www.nraila.org/LegislativeUpdate.asp?FormMode=DetailandID=804>; Brown and Abel, *Outgunned*, 213–24.
65. This is reinforced by NRA defender Gary Kleck's own apparent obliviousness to these positions. Weil and Hemenway, "Reply to Commentary," 379–81.
66. Compare tables 1 and 2 in *ibid.*, 378, 382. It is also possible that this majority is the least active in NRA leadership and meetings since they are the most complacent about the prospect of greater legal controls. *Ibid.*, 361 (less than 10 percent of the members eligible to vote in 1992, for example, returned their ballots).
67. Nathanson, "Social Movements," 473.
68. Brady Center, *Smoking Guns*, 20 (citing Riker deposition).
69. Diaz, *Making a Killing*, 53–60; Nathanson, "Social Movements," 455.
70. Ronald G. Shaiko, *Voices and Echoes for the Environment: Public Interest Representation in the 1990s and Beyond* (New York: Columbia University Press, 1999), 152, 161, 165, 173.

71. Jim Leitzel, Comment, in Viscusi, *Regulation through Litigation*, 99.
72. *NAACP v. AcuSport, Inc.*, 271 F.Supp. 2d 435, 521–22 (E.D.N.Y. 2003); Silwa, Colt Memorandum, 27–28, 31.
73. Leitzel, Comment, 101.
74. Diaz, *Making a Killing*, part II; see also chap. 10 (focusing on public relations tactics of the gun industry).
75. Brady Center, *Smoking Guns*, part 2.
76. Philip J. Hilts, *Smokescreen: The Truth behind the Tobacco Industry Cover-Up* (Reading, MA: Addison-Wesley, 1996), 17, 46.
77. Rebecca Dresser, Wendy Wagner, and Paul Giannelli, “Breast Implants Revisited: Beyond Science on Trial,” *Wisconsin Law Review* 1997 (1997): 705, 743–44.
78. Brady Center, *Smoking Guns*, 15–16.
79. Brown and Abel, *Outgunned*, 298; “Pushing the Envelope: Smith & Wesson Settlement with Cities and Counties Suing the Gun Industry,” formerly available at www.gunsuits.org.
80. Brown and Abel, *Outgunned*, 66–67, 157–58; Fox Butterfield, “Lawsuits Lead Gun Maker to File for Bankruptcy,” *New York Times*, June 24, 1999, A14.
81. In 1997, total small arms shipments were only \$1.2 billion. U.S. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Commerce in Firearms in the United States* (Washington, DC: Government Printing Office, 2000).
82. Brown and Abel, *Outgunned*, 73.
83. Lytton, chapter 6, this volume.
84. Brown and Abel, *Outgunned*, 216–20.
85. See, e.g., Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* (New York: W.W. Norton, 1996).
86. See Rachana Bhowmik, “Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry,” *Journal of Law and Policy* 11 (2002): 67, 127–34; see also Lietzel, Comment, 95–96, 98.
87. Barbara Vobejda, “Colt to Discontinue Cheaper Handguns,” *Washington Post*, Oct. 12, 1999, E1.
88. Brady Center, *Smoking Guns*, 15.
89. William Hermann, “Safety Reigns at Yearly Las Vegas Gun Show,” *Arizona Republic*, Jan. 19, 2000.
90. National Association of Firearms Retailers, “Don’t Lie for the Other Guy,” formerly available at <http://www.nafr.org/DontLie/index.html>. See also Brady Center, *Smoking Guns*, 9.
91. Carol Vinzant, “Gun Victims’ Silver Bullet? The New Secret Weapon in Gun Litigation,” <http://slate.msn.com/?id=2075714>.
92. See Steven Shavell, “The Optimal Structure of Law Enforcement,” in *A Reader on Regulation*, ed. Robert Baldwin (London: Oxford University Press, 1998), 307.
93. William M. Sage, “Regulating through Information: Disclosure Laws and American Health Care,” *Columbia Law Review* 99 (1999): 1701; Bradley

Karkkainen, “Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?” *Georgetown Law Journal* 89 (2001): 257.

94. W. Kip Viscusi, “Overview,” in *Regulation through Litigation*, ed. Viscusi, 1.

95. Stephen P. Teret et al., “Support for New Policies to Regulate Firearms: Results of Two National Surveys,” *New England Journal of Medicine* 339 (1998): 813–14.

96. Weil and Hemenway, “I Am the NRA,” table 3, 360.

97. See Nathanson, “Social Movements,” 440; Spitzer, *Politics of Gun Control*, 118; Jens Ludwig and Philip J. Cook, “The Benefits of Reducing Gun Violence: Evidence from Contingent-Valuation Survey Data,” *Journal of Risk and Uncertainty* 22 (2001): 207.

98. Brady Center, *Smoking Guns*, 18 (quoting Riker deposition).

99. Brady Center, “Gun Dealers, Distributors Agree to Reform to Curb Illegal Market in California,” <http://www.bradycampaign.com/press/release.asp?Record=503>.

100. As of September 13, 2003, no information on this settlement could be located on either the NRA or NSSF web sites.

101. Jim Wasserman, “Assembly Passes Requiring Gun Design Changes,” *ContraCosta Times*, Sept. 5, 2003, <http://www.bayarea.com/mld/cctimes/news/6697952.htm>.

102. Dresser, Wagner, and Giannelli, “Breast Implants Revisited,” 744.

103. Lytton, chapter 6, this volume; see also Daniel LeDuc, “Shooting for a Safer Deadly Weapon; Gunmakers, Lawmakers Look to High-Tech Locks and Personalized Pistols,” *Washington Post*, Feb. 28, 2000, A1. Similar regulatory developments occurred in New Jersey and Massachusetts. *Mass. Gen. Laws* chap.140 § 131K (2003).

104. The day the legislation was passed, the NRA posted the development on its web site with a single, explanatory sentence: “The California Assembly passed a bill Sept. 4 requiring new safety designs in semi-automatic handguns sold in the state after 2006 and 2007. ‘It’s really simple why we’re doing this. We’re doing this because the (Democratic) majority doesn’t like guns,’ said Assemblyman Ray Haynes, R-Temecula,” *NRA News Center*, Sept. 5, 2003 (posted on web site on Sept. 7, 2003; no longer available on Sept. 8, and legislation received no coverage on Sept. 8).

CHAPTER 12

The authors thank Laura Nigro for significant assistance in fieldwork.

1. See Richard Ericson, Aaron Doyle, and Dean Barry, *Insurance as Governance* (Toronto: University of Toronto Press, 2003); Richard Ericson and

Aaron Doyle, *Uncertain Business: Risk, Insurance, and the Limits of Knowledge* (Toronto: University of Toronto Press, 2004); Tom Baker, “Risk, Insurance, and the Social Construction of Responsibility,” in *Embracing Risk: The Changing Culture of Insurance and Responsibility*, ed. Tom Baker and Jonathan Simon (Chicago: University of Chicago Press, 2002).

2. An Acte concerninge matters of Assurances, amongste Merchantes, 1601, 43 Eliz., c. 12 (Eng.).

3. See *Fla. Stat.* ch. 458.320 (2003) (medical malpractice insurance); see also *Fla. Admin. Code Ann.* r. 62-730.170(2)(a) (2003) (insurance for hazardous waste transporters).

4. Carol Heimer, “Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation through Insurance,” in *Embracing Risk*, ed. Baker and Simon, 116.

5. See generally George M. Cohen, “Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions,” *Connecticut Insurance Law Journal* 4 (1997–98): 305.

6. See Tom Baker, “Containing the Promise of Insurance: Adverse Selection and Risk Classification,” in *Risk and Morality*, ed. Richard V. Ericson and Aaron Doyle (Toronto: University of Toronto Press, 2003).

7. See Richard V. Ericson and Kevin D. Haggerty, “The Policing of Risk,” in *Embracing Risk*, ed. Baker and Simon, 238 (describing how police departments collect information in a manner that is designed to be useful to insurance companies).

8. Tom Baker, “Blood Money, New Money, and the Moral Economy of Tort Law in Action,” *Law and Society Review* 35 (2001): 275–320.

9. A decision to exclude selective risks from the liability insurance pool does not mean that there are no means to socialize the losses that result. For business activities, shareholders and creditors will absorb some of the loss, and, to the extent that victims have first-party insurance, the losses will be spread through those insurance pools.

10. Cf. Marc Galanter, “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change,” in *In Litigation: Do the “Haves” Still Come Out Ahead?* ed. Herbert M. Kritzer and Susan S. Silbey (Stanford, CA: Stanford Law and Politics, 2003), 13.

11. Our assumption, however, is that life insurance companies have not in fact tested the effect of gun ownership one way or the other. Cf. Brian J. Glenn, “The Shifting Rhetoric of Insurance Denial,” *Law and Society Review* 37 (2000): 779.

12. Insurance Services Office, Inc., “Homeowners 3—Special Form” in *Personal Risk Management and Insurance* (Dallas: International Risk Management Institute, 2001), 17. See *State Farm Fire and Cas. Co. v. Morgan*, 2003 WL 1796004 (7th Cir. 2003) (declaring no obligation for an insurer to defend a policyholder against criminal charges of reckless homicide involving the use of a gun); *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 530 S.E.2d 93 (N.C. Ct. App.

2000) (exempting insurer from its obligation to defend policyholder claiming that the use of his gun was solely for self-defense); see also *Auto-Owners Ins. Co. v. Harrington*, 565 N.W.2d 839 (Mich. 1997); *Chapman by Ricciardi v. Wis. Physicians Serv. Ins. Corp.*, 523 N.W.2d 152 (Wis. Ct. App. 1994).

13. See Tom Baker, *Insurance Law and Policy: Cases, Materials, and Problems* (New York: Aspen, 2003), 498–505; *American Family Mut. Ins. Co. v. White*, 65 P.3d 449 (Ariz. Ct. App. 2003).

14. Baker, *Insurance Law and Policy*, 498–505. But see *Safeco Ins. Co. v. Robert S.*, 26 Cal 4th 758 (2001) (declining to apply an exclusion for “illegal acts”).

15. Standard homeowners’ and renters’ policies contain a special \$2,500 limit “for loss by theft of firearms or related equipment.” Insurance Services Office, Inc., “Homeowners 3—Special Form,” 3–4. Applicants can purchase additional theft coverage through an “increased special limits of liability” endorsement. *Ibid.*, 13.E.212–13. Firearms losses arising out of perils other than theft are covered up to the insured’s limit of coverage for personal property.

We were able to determine the underwriting policies of three of the five largest residential insurance carriers in the United States (State Farm, Allstate, and Travelers). In combination, these three companies wrote \$12.5 billion in homeowners’ premiums in 2000, representing 36.7 percent of the market. See Insurance Information Institute, *The Fact Book 2002* (New York: Insurance Information Institute, 2002), 61. In underwriting a residential package policy, none of the three asks whether the applicant has a gun, except to the extent that the agent is attempting to inquire whether the applicant will need additional first-party property coverage for the guns. See David Tideman, counsel, State Farm Insurance Cos., telephone interview with author, June 19, 2003 (“I don’t think that we actually mandate that the information be communicated to us. Of course, if some extreme situation, like the keeping of an arsenal, came to the attention of the local agent, we might take some underwriting action on that.”). State Farm’s web site confirms that questions about gun ownership are the exception rather than the rule. While the site does not yet quote homeowners’ insurance online, it does quote renters’ insurance, and it will produce a quote on both property and liability insurance without any inquiry into the gun habits of the prospective insured. State Farm Ins. Cos., “Renters Rate Quote,” <http://www.statefarm.com/quote/renters.htm> (accessed June 24, 2003). Allstate’s and Travelers’s underwriting policies appear to be similar. See Marissa Quiles, media relations, Allstate Insurance Co., e-mail to author, May 29, 2003 (Allstate does not ask a prospective insured if she owns or keeps guns, “except to the extent the agent is attempting to determine whether the policyholder will need additional property coverage for the firearms.”); Travelers Property Casualty Corp., “Homeowners E-Quote General Insurance Information,” http://www.travelerspc.com/personal/equote/homecondrent/HCR_general.cfm (accessed June 19, 2003) and “Homeowners E-Quote Information about Your Valuable Items,” http://www.travelerspc.com/personal/equote/homecondrent/HCR_valuables.cfm (accessed June 19, 2003) (indicat-

ing that Travelers does not ask its prospective insureds whether they own guns, except in the context of scheduled personal property insurance).

16. Evidently one gun rights group has concluded that State Farm is unfairly reluctant to insure gun owners and has publicized the charge. “State Farm Frowns on Guns,” *Conservative Monitor* <http://www.conservativemonitor.com/news/2001020.shtml>. The NRA carried a brief description of the incident on its web site. See National Rifle Association, “State Farm Insolence,” formerly available at <http://www.nrahq.org/publications/tag/gjioe.asp> (describing State Farm’s failure to offer adequate gun coverage to a homeowner).

17. Nor, in our view, is it anti-gun to ask people whether they own guns in order to evaluate whether gun ownership increases or reduces the risk of liability or property insurance claims. Thus, an insurance company should be able to conduct internal research through the policy renewal process in order to evaluate whether a gun in the home increases or decreases the risk of injury or property loss.

18. See Brady Campaign to Prevent Gun Violence, “Firearm Facts,” <http://www.bradycampaign.org/facts/research/firefacts.asp>. We extrapolate that there were 2,598 fatal and nonfatal gun injuries in that year. By contrast, in 1996 there were 3,552,907 motor vehicle injuries and fatalities. National Highway Traffic Safety Administration, *Report to Congress: The Effect of Increased Speed Limits in the Post-NMSL Era* (Washington, DC: National Highway Traffic Safety Administration, 1998), 15.

19. From a public health perspective, the more effective insurance-based strategy may well be to persuade insurers to offer discounts for gun locks and smart guns as a way to reduce crime losses (and to reduce the flow of stolen guns into the hands of criminals). Of course, the kind of person who purchases a gun lock or a smart gun may well be the kind of person who is less likely to have a gun stolen in the first place. Although this “propitious selection” would not undercut the utility of discounts to insurers, it would reduce the public health benefits of the discount. Cf. Peter Siegelman, “Adverse Selection in Insurance Markets: An Exaggerated Threat,” *Yale Law Journal* 113 (2004): 1223.

20. International Risk Management Institute, Inc., *Classification Cross-Reference* (Dallas: International Risk Management Institute, 1999), 228. Information for the following two paragraphs draws on this publication.

21. A.M. Best Co., *Best’s Underwriting Guide* (2003). This is not a public document. We obtained a copy from an underwriter on the condition that we not reveal the source. This information is used for much of the remainder of this section.

22. Cynthia Michener, media relations, Hartford Financial Services Group, e-mail to author, July 28, 2003.

23. Donna Choquette, underwriter, Safeco Property and Casualty Insurance Cos., interview with author, June 26, 2003.

24. Insurance Information Institute, *The Fact Book 2002*, 21.

25. John Badowski, managing director, National Association of Firearms Retailers, telephone interview with author, Aug. 11, 2003 (hereinafter Badowski interview).

26. Robert Chiarello, broker, Joseph Chiarello and Co., Inc., telephone interview with author, Aug. 7, 2003 (hereinafter Chiarello interview).

27. Badowski interview. We asked Badowski if retailers had attempted to solve their insurance availability problems by asking the manufacturers they represent for vendors' protective liability endorsements—in other words, if the retailers were solving their insurance problems by transferring them to the manufacturer. Badowski says that the business sophistication of gun dealers varies greatly—some are sizable concerns with their own risk management departments, and others are small mom-and-pop operations with little insurance savvy—and consequently awareness of that technique is spotty. Badowski confirmed that some retailers have indeed approached the problem that way, but he had no sense of how common it was. He said that he did not perceive the practice to be widespread.

28. See generally Scott E. Harrington, *Tort Liability, Insurance Rates, and the Insurance Cycle*, in Richard J. Herring and Robert L. Litem, Brookings-Wharton Paper on Financial Services (Washington, DC: Brookings Institute, 2004) (describing the phases of underwriting cycles); Sean M. Fitzpatrick, "Fear Is the Key: A Behavioral Guide to Underwriting Cycles," *Connecticut Insurance Law Journal*, 10:255–75 (2004). At some point in the 2000–2001 period, the commercial property casualty insurance market entered a "hard" phase that continued through early 2004.

29. A.M. Best Co., *Best's Underwriting Guide*.

30. *Ibid.*

31. One reader suggested that the higher hazard rating for sporting goods stores might reflect the fact that they are less competent at selling guns. While that may be the case, the fact that sporting goods stores carry the same hazard index for liability risks whether they sell guns or not (see text at note 20) suggests that gun risks are not a significant component of liability risks for sporting goods stores.

32. A.M. Best Co., *Best's Underwriting Guide*.

33. See Northland Insurance Company, "Hunting Club Liability Application" (2002).

34. "Hunt Clubs Quick Application for General Liability Insurance," formerly available at <http://www.locktonrisk.com/nrains/huntclubsapp.asp>.

35. "Rifle Clubs Quick Application for General Liability Insurance," formerly available at <http://www.locktonrisk.com/nrains/rifleclubsapp.asp>.

36. Chiarello interview.

37. Sporting Activities Insurance Ltd., "Your Ally in Risk Management," <http://www.sail-bm.com/yairm.htm> (accessed August 2, 2004).

38. Sporting Activities Insurance Ltd., "Defending an Industry under Attack," <http://www.sail-bm.com/daiua.htm>.

39. Tom McDermott, telephone interview with author, Aug. 11, 2003 (hereinafter McDermott interview).

40. Chiarello interview.

41. Joseph Chiarello and Co., Inc., “Application for Sporting Firearms Business Insurance” (2002).

42. Joseph Chiarello and Co., Inc., “Application for Products Liability Insurance” (2003).

43. Carol Vinzant, “Gun Victims’ Silver Bullet? The New Secret Weapon in Gun Litigation,” *Slate*, Dec. 18, 2002, <http://slate.msn.com/id/2075714/>.

44. Davis’s prior carrier had charged \$285,000 a year with a self-insured retention of \$25,000 per claim; Leeds and London charged Davis only \$75,000 a year for the same coverage. McDermott interview.

45. *Ibid.* See also Sharon Walsh, “Insurers Put Pressure on Gun Industry,” *Washington Post*, Nov. 26, 1999, sec. A.

46. See Robert Tillman, *Global Pirates: Fraud in the Offshore Insurance Industry* (Boston: Northeastern University Press, 2002).

47. McDermott interview.

48. See Phil Zinkewicz, “‘The Perfect Storm’: As in the Movie, Are Conditions Right for State Guaranty Funds to Get Horrendously Hit?” *Rough Notes*, Dec. 2002, <http://www.roughnotes.com/rnmagazine/2002/december02/12p66.htm>.

49. Chiarello interview.

50. *Ibid.* See Michele Lawler, underwriter, Carpenter Insurance Group, letter to Laura Nigro, research assistant, University of Connecticut School of Law, June 11, 2003 (describing endorsements for many other risks, including asbestos and terrorism but excluding guns).

51. See *Beretta U.S.A. Corp. v. Federal Ins. Co.*, 17 Fed.Appx. 250, 252 (4th Cir. 2001) (holding that the insurer was not obligated to defend Beretta in twelve municipal lawsuits because the policy did not provide products liability coverage).

52. Chiarello interview; see also Phil Zinkewicz, “United Coastal Rides High through Turbulent Seas,” *Rough Notes*, Oct. 2001, <http://www.roughnotes.com/rnmag/october01/10p64.htm>. Even SAIL has adopted a new mass tort exclusion in more recent policies, however. Chiarello interview.

53. Lexington Insurance Co., *Industry Liability Claims Exclusion* (2002).

54. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 129 (Conn. 2001).

55. *Ellett Bros., Inc. v. U.S. Fid. and Guar. Co.*, 275 F.3d 384 (4th Cir. 2001), *cert. denied* 537 U.S. 818 (2002) (holding that “the term ‘damages’ as used in the [USF and G policy], does mean legal damages only, and therefore does not extend to claims for equitable relief”). The types of claims brought in the California suits differ from the types of claims brought elsewhere, though, and consequently the result of this suit may not have broad applicability. At the time, the California legislature barred California municipalities from bringing the

most common claim—the claim that “negligent marketing” of guns caused direct monetary damage to municipalities in the form of increased policing and health costs—and consequently their prayers for relief were composed entirely of equitable remedies. See former *Cal. Civ. Code* § 1714.4 (repealed). See *SIG Arms Inc. v. Employers Ins. of Wasau*, 122 F. Supp. 2d 255 (D. N.H. 2000) (granting declaratory judgment for gun manufacturer against its insurer—in a case involving the scope of the insurer’s defense requirement under the policy—because of the breadth of the policy regarding defense coverage).

56. See, e.g., Walter J. Andrews and Michael J. Levine, “Is There Insurance Coverage for Lawsuits against the Firearm Industry?” *Nevada Law Journal* 2 (2002): 533; Steven M. Levy and Mary Kay Lacey, “Are Sales of Dangerous Products Such as Guns ‘Accidents’ for Purposes of Liability Insurance Coverage?” *A.L.I.-A.B.A. Continuing Education* (2000) (available on Westlaw at SE64 ALI-ABA 1085).

57. Chiarello interview; McDermott interview. See also Sharon Walsh, “Insurers Put Pressure on Gun Industry,” *Washington Post*, Nov. 26, 1999, sec. A.

58. Tillman, *Global Pirates*.

59. See, e.g., entry for “sporting goods stores” under “general liability”:

The sale of guns and ammunition presents the most serious exposure. This is more typical of general line stores than specialty stores; specialty shops, such as gunsmiths or hunting shops, may carry a full line of firearms. The potential for injury is severe, and all firearms should be secured in display cases. Customers should not have unsupervised access to guns. Additionally, all firearms must be displayed unloaded and kept separate from ammunition at all times. See Gunsmiths for more information. (A.M. Best Co., *Best’s Underwriting Guide*)

60. See, e.g., Baker, *Insurance Law and Policy*, 492.

61. See Robert Hartwig Sr., *Liability Trends, Issues, and Jury Verdicts: Impact on Insurance Liability and Excess Casualty Markets* (New York: Insurance Information Institute, October 2002). See also Robert Hartwig, senior vice president and chief economist, Insurance Information Institute, e-mail to author, September 3, 2003.

62. See Tom Baker, “On the Genealogy of Moral Hazard,” *Texas Law Review* 75 (1996): 255.

63. Nevertheless, we recognize that others may not be so ready to dismiss moral hazard concerns. The answer to those concerns need not be the intentional harm exclusion, however, because there exists a much more effective approach to addressing that concern. Instead of excluding intentional harm claims, liability insurance contracts could cover those claims but authorize the insurer to subrogate against the responsible insured for the limited purpose of recovering damages paid in satisfaction of claims based on that harm. Cf.

Ambassador Ins. Co. v. Montes, 388 A.2d 603 (1978) (holding that a liability insurance company that paid an intentional tort claim may subrogate against its insured.). See Baker, *Insurance Law and Policy*, 488n3 (discussing the legislative and/or administrative actions necessary for the elimination of internal harm exclusions).

64. Although compensation is no longer a favored goal of liability among many tort law scholars (e.g., Shavell), it remains a fundamental purpose of tort law as articulated by lawmakers. See, e.g., *Lodge v. Arett Sales Corp.*, 1994 WL 421428 (Conn. 1998). Cf. John Fleming, “The Collateral Source Rule and Loss Allocation in Tort Law,” *California Law Review* 54 (1966): 1549 (suggesting that tort liability will and should become only a secondary source of compensation “to the extent that the cost of compensation has not been met by another source”). See also Tom Baker, “Reconsidering Insurance for Punitive Damages,” *Wisconsin Law Review* 1998 (1998): 101–30.

65. Jennifer Wriggins, “Domestic Violence Torts,” *Southern California Law Review* 75 (2001): 121.

CHAPTER 13

1. See generally Andrew J. McClurg, David B. Kopel, and Brannon P. Denning, eds., *Gun Control and Gun Rights: A Reader and Guide* (New York: New York University Press, 2002), chap. 4; Symposium, “Guns and Liability in America,” *Connecticut Law Review* 32 (2000): 1159; David B. Kopel and Richard E. Gardiner, “The Sullivan Principles: Protecting the Second Amendment from Civil Abuse,” *Seton Hall Legislative Journal* 19 (1995): 737; Jerry J. Phillips, “The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States,” *Connecticut Law Review* 32 (2000): 1337; William L. McCoskey, Note, “The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits against the Gun Industry,” *Indiana Law Journal* 77 (2002): 873.

2. McCoskey, “The Right of the People to Keep and Bear Arms,” 875n17.

3. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

4. See generally Boris I. Bittker, *Bittker on the Regulation of Interstate and Foreign Commerce* (New York: Aspen Law and Business, 1999 and 2005 Supp.), chap. 6.

5. *Ibid.*, § 6.06.

6. See, e.g., *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989).

7. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

8. Kopel and Gardiner, “The Sullivan Principles.”

9. See Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000), 304–7.

10. *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964) (footnote omitted). Unless otherwise indicated, all references to *New York Times v. Sullivan* are from this citation, and all quotes can be found within this citation.

11. Kopel and Gardiner, “The Sullivan Principles.” All references to Kopel and Gardiner in this section are drawn from this source.

12. *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964).

13. *Ibid.*

14. See, e.g., *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (“[A] fundamental principle [of American law is] that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen.”).

15. Kopel and Gardiner, “The Sullivan Principles,” 748.

16. See *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003).

17. I suppose that one might argue, initially, that *Sullivan* was a mistaken decision and that it should certainly not be extended to other areas. See Richard A. Epstein, “Was *New York Times v. Sullivan* Wrong?” *University of Chicago Law Review* 53 (1986): 782 (suggesting that it was).

18. See, e.g., Brannon P. Denning, “Gun Shy: The Second Amendment as an ‘Underenforced Constitutional Norm,’” *Harvard Journal of Law and Public Policy* 21 (1998): 719; Brannon P. Denning, “Can the Simple Cite Be Trusted? Lower Court Interpretation of *United States v. Miller* and the Second Amendment,” *Cumberland Law Review* 26 (1996): 961.

19. See *Presser v. Illinois*, 116 U.S. 252 (1886).

20. See, e.g., Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

21. See Daniel A. Farber, *The First Amendment*, 2d ed. (New York: Foundation Press, 2003), 86–91 (summarizing the post-*Sullivan* cases and the questions they have raised).

22. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Unless otherwise noted, the remainder of this section draws on the Court’s opinion in this case.

23. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). This case is summarized in the remaining part of this section. All quotes are available at this citation.

24. See note 17 and the accompanying text in the chapter.

25. David G. Browne, “Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply Its First Amendment Expertise to the Great Second Amendment Debate,” *William and Mary Law Review* 44 (2003): 2287, 2293.

26. Don B. Kates Jr., “The Second Amendment and the Ideology of Self-Protection,” *Constitutional Commentary* 9 (1992): 87.

27. See Kopel and Gardiner, “The Sullivan Principles,” 769 (using one business example).

28. See McClurg, Kopel and Denning, *Gun Control and Gun Rights*.

29. See Brady Center to Prevent Gun Violence, *Lawsuit Preemption Statutes*, <http://www.gunlawsuits.org/docket/cities/preemption.asp>.

30. See H.R. 1036, 108th Cong., 2d sess.

31. See, e.g., *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); see also *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

32. See, e.g., “Editorial, Criminals, Not Gun Makers, Should Pay the Price for Misuse,” *Charleston [WV] Gazette and Daily Mail*, April 4, 2003, 4A, available at 2003 WL 5455611 (arguing that suits against gun manufacturers threaten Second Amendment rights); Paul Craig Roberts, “Gun Control: The Criminal Lobby,” *Washington Times*, April 26, 2003, A10, available at 2003 WL 7710129 (“All that is required for a small wealthy elite to destroy the Second Amendment is a gullible jury and a judge who permits a class action suit to expropriate the powers of legislators.”); see also Press Release, “Foley Pushes Ban on Frivolous Lawsuits against Gun Manufacturers,” April 9, 2003, available at 2003 WL 11709826 (touting Representative Mark Foley [R-FL]’s support for H.R. 1036; accusing those opposing the bill immunizing manufacturers of opposing Second Amendment rights); James G. Lakely and Stephen Dinan, “Democrats Eye Filibuster on Gun Bill,” *Washington Times*, May 14, 2003, A4, available at 2003 WL 7711278 (quoting sponsor of H.R. 1036 as saying that “[t]he antigun lobby is continually coming up with things to go against our Second Amendment rights and to bring in trial lawyers and litigation against law-abiding citizens. We think that’s outrageous, and that’s what this bill is intended to stop.”).

33. See, e.g., *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829); *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 575, 581 (1997).

34. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). See *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 413 (1994).

35. See *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336–37 (1989).

36. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

37. See, e.g., *BMW v. Gore*, 517 U.S. 559, 572 n.17 (1996); *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

38. See, e.g., *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 829–30 (N.D. Ohio 2000); *City of Gary, Ind. ex rel King v. Smith & Wesson Corp.*, 94 F. Supp. 2d 947, 949–51 (N.D. Ind. 2000); *Camden v. Beretta U.S.A. Corp.*, 81 F. Supp. 2d 541, 547–49 (D.N.J. 2000); *Boston v. Smith & Wesson Corp.*, 66 F. Supp. 2d 246, 249–50 (D. Mass. 1999); see also James Fleming Jr., Geoffrey C. Hazard Jr., and John Leubsdorf, *Civil Procedure*, 5th ed. (New York: Foundation Press, 2001), §§ 2.25–2.26, 2.31 (discussing requirements for “arising under” jurisdiction and for removal).

39. See, e.g., *NAACP v. AcuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003); *Gary*, 94 F. Supp. 2d at 949–51.

40. See *AcuSport, Inc.*, 271 F. Supp. 2d at 435; *White*, 97 F. Supp.2d at 829–30; *Camden County Bd. Freeholders*, 123 F. Supp.2d at 253–55; *Camden*, 81

F. Supp.2d at 547–49; *Boston*, 66 F. Supp. 2d at 246; *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d1136, 1150 (Ohio, 2002); *District of Columbia v. Beretta U.S.A. Corp.*, 2002 WL 31811717, at *43–45; *Gary ex rel. King v. Smith & Wesson Corp.*, 2001 WL 333111 (Ind. Ct. App.) (Jan. 11, 2001) (unpublished), at *6, *rev'd* 2003 WL 23010035 (Ind.) (Dec. 23, 2003). See also Allen Rostron, “The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law,” *Michigan State University-Detroit College of Law Review* 2003 (2003): 115, 151–56.

41. See notes 69–74 and the accompanying text in the chapter.

42. 517 U.S. 559 (1996). Unless otherwise noted, references to this case and quotes from this case are all available at this citation.

43. *Ibid.*, 571–72.

44. *BMW v. Gore*, 517 U.S. 559, 571 (1996) (footnote omitted).

45. The citation to DCCD as well as the discussion of damages as “economic sanctions” strongly suggests, contrary to a recent assertion of the Indiana Supreme Court—see *Gary ex rel. King v. Smith & Wesson, Corp.*, 2003 WL 23010035 (Ind.) (Dec. 23, 2003)—that *BMW* involves the DCCD to some extent. The *Gary* court wrote that “we think *BMW* is a due process case, not a Commerce Clause case.” *Ibid.*, *9.

46. *BMW*, 517 U.S. at 572n17.

47. See notes 43–47 and the accompanying text in the chapter.

48. See *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435, 463 (E.D.N.Y. 2003) (rejecting arguments that the dormant Commerce Clause doctrine preempts state lawsuits); *City of Gary*, 94 F. Supp.2d at 949–51 (“Defendant’s deduction that if the Commerce Clause empowers Congress to regulate interstate commerce, then the Commerce Clause itself, even in the absence of Congressional regulation, must also have preemptive effect, is a faulty syllogism. . . . [T]he Commerce Clause itself does not wholly preempt state regulation of interstate commerce to any extent.”); *Camden v. Beretta U.S.A. Corp.*, 81 F. Supp. 2d 541, 547–49 (D.N.J. 2000) (“[S]imply because a state law or claim may have an effect on interstate commerce does not mean that such law is precluded by the Commerce Clause.”); see also *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806 (Del. Super. Ct.) (Dec. 1, 2000), at *8 (unpublished) (“[D]efendants do not even allege in passing that federal preemption applies to the handgun industry.”).

49. See *City of Gary*, 94 F. Supp.2d 947 at 951 (“The defendants’ arguments that Gary’s action violates the Commerce Clause . . . is a defense, not a basis for removal as an exception to the well-pleaded complaint rule.”); *Camden*, 81 F. Supp.2d at 547–49; *Boston v. Smith & Wesson Corp.*, 66 F. Supp. 2d 246, 249–50 (D. Mass. 1999); see also James, Hazard, and Leubsdorf, *Civil Procedure*, § 2.31, at 156 (“an action based on state law may not be removed to federal court on the ground that the defendant has a defense of counterclaim that rests on federal law,” footnote omitted).

50. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir.2001); see also *City of Boston*, 2000 WL 1473568, at *11 (“The

applicability of the Commerce Clause to causes of action under state tort and contract law is unsettled.”).

51. *City of Boston*, 2000 WL 1473568, at *11.

52. *Camden County Bd. Freeholders*, 123 F. Supp.2d at 255; *City of Boston*, 2000 WL 1473568, at *13–14; see also *Boston*, 66 F. Supp.2d at 49–50 (conceding that “the Commerce Clause may affect the measure of plaintiffs’ relief should plaintiffs prove successful in their suit”); *Camden*, 81 F. Supp.2d at 547–49.

53. See *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 829–30 (N.D. Ohio 2000); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1150 (Ohio 2002); *Boston*, 2000 WL 1473568, at *13–14.

54. *City of Gary*, 2001 WL 333111, at *6.

55. *City of Gary v. Smith & Wesson Co.*, 2003 WL 23010035 (Ind.) (Dec. 23, 2003), at *9 (“[W]e think *BMW* is a due process case, not a Commerce Clause case.”). Cf. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (treating *BMW* as a DCCD case but nevertheless concluding that it did not prohibit suit for negligence and nuisance claims).

56. *City of Gary*, 2003 WL 23010025 at *10.

57. *District of Columbia v. Beretta U.S.A. Corp.*, 2002 WL 31811717 (D.C. Super. Ct.) (Dec. 16, 2002), at *44 (discussing the D.C. Strict Liability Act, which “confers strict liability for all damages that flow from the discharge of such weapons inside the District, without regard to any allegation of proof or ‘fault’”). Unless otherwise noted, references to this case and quotes from this case are all available at this citation.

58. The court also expressed doubt as to the true “non-discriminatory” nature of the ordinance and whether it would even pass muster under *Pike* balancing. See *ibid.*, *45

59. *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435, 465 (E.D.N.Y. 2003) at *18 (“The Commerce Clause furnishes no defense under the circumstances of the instant case to conduct occurring inside and outside the state that causes a public nuisance within the state; any burden placed on interstate commerce is far outweighed by the substantial positive effect on the New York public’s health and safety that more scrupulous supervision of the sale of their handguns by gun manufacturers and distributors would have.”); see also *Camden County Bd. Freeholders*, 123 F. Supp.2d at 254–55; see also *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003). But see note 62.

60. *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806 (Del. Super. Ct.) (Dec. 1, 2000), at *8 (unpublished).

61. See, e.g., *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (holding that state tort claim preempted for defective design preempted by federal law); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (assuming that congressional statutes could preempt state tort law claims).

62. See, e.g., *Morgan v. Virginia*, 328 U.S. 373, 380 (1946) (noting that state may not avoid the DCCD “by simply invoking the convenient apologetics of the police power,” internal quotations omitted).

63. See notes 37–41 and the accompanying text in the chapter.

64. See, e.g., *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336–37 (1989); Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 2d ed. (New York: Aspen Law and Business, 2002), 422–23.

65. *Pharm. Research and Mf. of America v. Walsh*, 538 U.S. 644 (2003) (refusing to strike down state program funding prescription drug benefit for its citizens with rebates charged drug manufacturers providing drugs for state Medicaid program).

66. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1216–17 (9th Cir. 2003).

67. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also *Ileto*, 349 F.3d at 1217.

68. *Healy v. Beer Institute*, 491 U.S. 324, 336–37 (1989) (footnotes and citations omitted).

69. Cf. *Cooley v. Bd. Wardens*, 53 U.S. (12 How.) 298, 319 (1851) (“Whatever subjects of . . . are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”).

70. *Healy v. Beer Institute*, 491 U.S. 324, 326–31 (1989) (describing Connecticut’s “price-affirmation” statute for beer sales).

71. See Brady Center to Prevent Gun Violence, Legal Action Project, “Theories in Lawsuits Brought by Cities and Counties Against the Gun Industry,” available at <http://www.gunlawsuits.org/docket/cities/theories.php> (last accessed Nov. 29, 2004).

72. There is another problem here: federal consumer product safety legislation, to the chagrin of gun control advocates, specifically *exempts* guns from its provisions. See 15 U.S.C. § 2052(a)(1)(E) (2002). This raises the real possibility that—insofar as that choice is indicative of congressional desire to leave safety aspects of firearms *unregulated*—its choice preempts states (and state courts) from undertaking to regulate in its stead.

73. See Neal Devins, “I Love You Big Brother,” *California Law Review* 87 (1999): 1283.

74. *City of Gary ex rel. King v. Smith & Wesson, Corp.*, 2003 WL 23010035 (Ind.) (Dec. 23, 2003). Unless otherwise noted, references to this case and quotes from this case are all available at this citation.

75. *Ibid.* (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)).

76. *Pharm. Research and Mf. of America v. Walsh*, 123 S. Ct. 1855, 1870–71 (2003).

77. Jack L. Goldsmith and Alan O. Sykes, “The Internet and the Dormant Commerce Clause,” *Yale Law Journal* 110 (2001): 785, 806. All of the following quotations to Goldsmith and Sykes are taken from this article.

78. See *Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (distinguishing, in the Ninth Circuit, *BMW* on the ground that “plaintiffs [had] abandoned all requests for injunctive relief and economic sanctions in the form of punitive damages to protect the rights of citizens from other states”).