NOTES

INTRODUCTION


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).


8. See chapters 5, 6, 7, 8, and 10 of this book.


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 00-9677 (Fla. Cir. Ct., Palm Beach County Jan. 27, 2003) (distributor liability).


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.


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.


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


23. For examples, see Lytton, “Tort Claims,” 11n51.


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

34. Ibid.


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.


44. For example, Bloxham (dismissed) and Ileto v. Glock, Inc., 349 F.3d 1191 (9th Cir. 2003) (pending).


50. People ex rel. Spitzer, 761 N.Y.S.2d at 208 (Rosenberger, J., dissenting).


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).


CHAPTER 1


6. National Center for Injury Control and Prevention, WISCARS.


14. Only 30 percent of the gun deaths included in the CDC’s 2000 data specify whether the gun involved was a long gun or a handgun. For 70 percent of those deaths, this basic information is recorded as unknown or not specified. See
United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Office of Analysis, Epidemiology, and Health Promotion, Compressed Mortality File.


25. Ibid.


27. Vernick et al., “Unintentional and Undetermined Firearm Related Deaths.”


36. Bureau of Alcohol, Tobacco, and Firearms, *Commerce in Firearms in the United States* (2000). For refutation of the argument that gun dealers who sell more guns will have more crime guns traced back to them so the number of traces is not a good indicator of corrupt or negligent dealer activity see G. J. Wintemute, “Relationship between Illegal Use of Handguns and Handgun Sales Volume,” *Journal of the American Medical Association* 284, no. 5 (2000): 566–67.


45. G. J. Wintemute, M. A. Wright, C. M. Drake, and J. J. Beaumont,


50. Personal communication with Gregory T. Gundlach, JD, PhD, MBA, professor of marketing, Coggin College of Business, University of North Florida.


59. D. J. Wiebe, “Homicide and Suicide Risks Associated with Firearms in


Murphy, and Betty L. Smith, *Deaths: Final Data for 2000*, *National Vital Statistics Reports* 50, no. 15 (Washington, DC: CDC, 2002). Incidentally, the 2001 murder rate was slightly lower (6.06), not counting the September 11 terrorist-caused deaths.


3. See note 1.


7. George Newton and Franklin Zimring, *Firearms and Violence in America*.

8. Kleck, Targeting Guns, chap. 3.


23. Kleck, Targeting Guns, 236.


26. See the review of laws in Jacobs, Can Gun Control Work? chap. 2.


34. See note 29.


38. See discussion in Kleck and Kates, Armed, 17–18.

39. Franklin Zimring and Gordon Hawkins, “Concealed Handgun Permits:


42. See note 4.

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


45. Ibid.


55. See, e.g., John Sloan et al., “Correspondence,” *New England Journal of Medicine* 323 (1990): 136 (“Coming from an official spokesman for the National Rifle Association, Blackman’s invective is no surprise. . . . We understand [his] need to attack this paper; it is what he is paid to do”). For other examples see Kleck and Kates, *Armed*, chap. 2, nn. 7, 8, 28, 29, 33.


58. Newton and Zimring, *Firearms and Violence* (Ammunition might have to be replaced every twenty-five years or so, but no great amount of it is needed to use a gun in crime).


63. See note 16.
68. Ibid., 165.
69. Jacobs, Can Gun Control Work? 120 (author’s emphasis); Lott, The Bias against Guns, 229–32.
70. Under California law, for instance, the potential penalty for robbery is nine years plus a one-year enhancement if a gun was used. Cal. Penal Code §§ 215, 12022 (West 2004).

CHAPTER 3

2. Hounshell, From the American System to Mass Production, 322.
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-
nition”; 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/fll/fll_types.htm.


13. See also William J. Vizzard, Shots in the Dark: The Policy, Politics, and Symbolism of Gun Control (Lanham, MD: Rowman and Littlefield, 2000), 23 (estimating that “the current number of guns in the United States most likely exceeds 220 million and grows at a rate of about 4 million per year”).


17. Ibid., 2.


27. U.S. Department of the Treasury, *Commerce in Firearms in the United States*, 6, fig. 1. Unless otherwise noted, this report is the source of the information presented in the following four paragraphs.


43. Colt’s Manufacturing, “Colt History.”
44. Dean K. Boorman, The History of Smith & Wesson Firearms (Guilford, CT: Lyons Press, 2002), 18–19.
47. Ibid., x.
54. See, e.g., “Handguns Today: Autoloaders,” in Gun Digest 2000, 54th ann. ed. (1999): 117 (“As the concealed-carry movement grows across the country, the demand for small but powerful handguns grows.”).
56. See, e.g., Jack Lewis, The Gun Digest Book of Assault Weapons, 3d ed. (Northbrook, IL: DBI Books, 1993), 41 (“one could not afford to waste even one round climbing over their heads when you were hosing them down”).
63. G. J. Wintemute, “The Relationship between Firearm Design and
Firearm Violence,” *Journal of the American Medical Association* 275, no. 22 (1996): 1749 (“Reports from major cities document a contemporaneous increase in the overall severity of firearm-related injuries. The transition from revolvers to pistols is considered a key factor by many observers.”).


CHAPTER 4


2. For a sampling of work, from a variety of disciplines, addressing the cultural groundings of gun control attitudes (both pro and con), see Jan E. Dizard, Robert M. Muth, and Stephen P. Andrews, “Introduction: Guns Made Us Free—Now What?” in *Guns in America: A Reader*, ed. Jan E. Dizard,


10. See generally Douglas and Wildavsky, *Risk and Culture*.


12. See ibid., 51–52.


19. Indeed, even individuals who are in a position to evaluate complex data for themselves are subject to such influences. Slovic, for example, reports experimental data showing that variation among professional toxicologists on persuasiveness of animal-carcinogen studies is explained by differences in cultural orientation. Ibid. See also Jonathan J. Kohler, “The Influence of Prior Beliefs on Scientific Judgments,” Organizational Behavior and Human Decision Processes 56 (1993).


29. Lindsay Boyer, “Who Needs Guns?” New York Times, June 19, 1999. (Focus Group: Women Supporters of Gun Control, conducted April 23, 2003. “I also don’t want to live in a society where you have a gun, and you have a gun, and you have a gun.” On file with authors.)
30. See Robert J. Spitzer, *The Politics of Gun Control* (New York: Chatham House, 1995), 25–26, 49. (Focus Group: Male Opponents of Gun Control, recorded April 24, 2003. “[The framers of the Constitution] gave us the right to be able to have free conversation. They gave us a gun to be able to protect that conversation. When that is gone, it’s over.”)


42. Cf. Brooks, *In the Crossfire* (“No one is quite sure at what point the costs of gun regulation will exceed the benefits.”).


45. Ibid.

46. See Vicki L. Smith, “Prototypes in the Courtroom: Lay Representations


58. See ibid., 1139.

59. See ibid.

60. 62 F. Supp. 2d 802 (E.D.N.Y. 1999), vacated, 264 F.3d 21 (2d Cir. 2001).

62. Ibid.
63. Ibid.
64. Ibid.
65. Ibid.
70. Compare Glendon, *Abortion and Divorce in Western Law*.

CHAPTER 5

17. Van Voris, “Gun Cases Use Tobacco Know-How.”
25. Brown and Abel, Outgunned, 10.
26. Ibid., 18.

32. “Following in Tobacco’s Footsteps.”


37. Ibid., 151.


47. Ibid., 105.


49. Barrett, “The Big Bang.”


52. Ibid., 288–89.

53. Ibid., 74.

CHAPTER 6


7. This membership figure is from Richard Robinson, Tennessee field representative for the NRA, quoted in Owen Schroeder, “Movement Afoot to Form Local NRA Committee,” *Leaf-Chronicle*, Jan. 12, 2003, 7B. Davidson, *Under Fire*, 306, puts the figure lower at 2.7 million members in 1998, a figure that may include deceased lifetime members. See also Spitzer, *Gun Control*, 70. 2002 contribution figures are from the State of Pennsylvania’s Department of State web site, formerly available at http://web.dos.state.pa.us/perl/charies/dsf/creapat.cgi. A copy of this information is currently on file with the author. 2000 election contribution figures based on NRA Political Victory Fund financial reports filed with the Federal Election Commission and available at http://www.tray.com. A copy of this information is on file with the author.

8. This membership figure is from Geneva Overholser, “Staying on Target; With Plans for Theme Restaurant on Times Square, the NRA Continues to Lack Common Sense,” *Chicago Tribune*, May 31, 2000, 23 (citing 500,000 Handgun Control, Inc., members). See also Spitzer, *Gun Control*, 90. 2002 contribution figures are from the State of Pennsylvania’s Department of State web site, formerly available at http://web.dos.state.pa.us/perl/charies/dsf/creapat.cgi. A copy of this information is currently on file with the author.

10. Ibid., 80.
13. This paragraph and the next draw heavily on ibid., 232.
29. The “settlement value” of tort claims is calculated in precisely this manner.
35. Ibid., § 2(a)(6).

CHAPTER 7


9. See Ericson, chapter 5, this volume.


13. Ibid., 1137–43.


37. 3 C.F.R. 204 (2002).


40. *Daubert*, 509 U.S. at 583.

41. Ibid., 590.


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48. Ibid., 340–45.


53. The song appears on Tom Lehrer, That Was the Year That Was, reprise compact disc 6179.


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.


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.


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.


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


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.


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


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


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?


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

30. See Erichson, chapter 5, this volume.

31. See Wagner, chapter 11, this volume.


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 “advertence” 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.


40. Ibid., 51–52.


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


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.


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


**CHAPTER 10**


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).


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.


14. Ibid.


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


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


CHAPTER 11


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


7. Ibid.


12. Ibid., 477, 479.


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


27. Lytton, introduction, this volume; Lytton, chapter 6, this volume.

28. See generally Lytton, chapter 6, this volume (describing the Maryland litigation).


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.


49. Ibid. at sec. 103(6).
53. Ibid.
57. Ibid., 474.
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).
68. Brady Center, *Smoking Guns*, 20 (citing Riker deposition).
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.
78. Brady Center, Smoking Guns, 15–16.
82. Brown and Abel, Outgunned, 73.
83. Lytton, chapter 6, this volume.
88. Brady Center, Smoking Guns, 15.


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


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


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...

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


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).


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.


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.


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).


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.


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.


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.


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.


36. Chiarello interview.


40. Chiarello interview.


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.


47. McDermott interview.


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).


55. Ellett Bros., Inc. v. U.S. Fed. 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 235 (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).


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.


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).


CHAPTER 13


5. Ibid., § 6.06.


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


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.”).


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).


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.


28. See McClurg, Kopel and Denning, *Gun Control and Gun Rights*. 
40. See *AcuSport, Inc.*, 271 F. Supp. 2d at 435; *White*, 97 F. Supp.2d at 829–30; *Camden County Bd. of Freeholders*, 123 F. Supp.2d at 253–55; *Camden*, 81

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.


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


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.


55. City of Gary v. Smith & Wesson Co., 2003 WL 23010035 (Ind.) (Dec. 23, 2003), at *9 ("We 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).


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.


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.


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.


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.”).


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 unreregulated—it choice preempts states (and state courts) from undertaking to regulate in its stead.


74. City of Gary ex rel. King v. Smith & Wesson, Corp., 2003 WL 2301035 (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)).


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”).