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A PRELIMINARY CONSIDERATION OF ISSUES RAISED IN THE FIREARMS SELLERS IMMUNITY BILL

Frank J. Vandall*

S.659 A BILL**
To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

I. INTRODUCTION

Snipings, mass-murders by disgruntled employees, children shooting children, and a vast number of spousal murders are everyday news across the country. In the numerous lawsuits brought by individual victims and over 30 cities, it has been alleged that gun manufacturers and sellers have an important role to play in designing guns to be safer and in closely monitoring gun sales. The courts are weighing these issues and have dismissed a large number of individual and city suits for various reasons. As the Senate debates the Bill (S. 659) that shields those in the gun trade from liability, several issues need to be examined. These considerations suggest that complete immunity is premature and the various gun liability cases should be permitted to work their way through the judicial process. Part One examines the collapse of the gun suits in the state courts. Part Two evaluates the gun violence epidemic. Part Three considers critical gun control policies, and Part Four weighs the judicial construction of the Second Amendment.

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** S. 659, 108th Cong. (2003). The Bill may be found in Appendix A.
A. Suits Against The Gun Manufacturers Are Foundering In The State Courts

In Merrill v. Navegar, the California Court of Appeals held that Navegar, the manufacturer of an automatic weapon known as the TEC-9, should be held liable to the surviving families of the eight victims who were murdered by an irate law firm client. The novel basis of the suit was that Navegar negligently advertised and marketed the TEC-9 to people who were likely to use it for criminal purposes. The court cited Bureau of Alcohol, Tobacco, and Firearms (BATF) data which found “due to its unsurpassed firepower, concealability, and low price,” the TEC-9 was a favorite among violent criminals. The BATF report stated that the TEC models are used in one out of every five crimes involving gun violence. Merrill had been heralded as a forward-looking decision for gun responsibility. In August, 2001, the California Supreme Court reversed Merrill v. Navegar on the basis that the negligence action against Navegar fell within California Code Section 1714.4: “(a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.” The court rejected the court of appeals’ view that this section prohibited only a strict liability action and ruled that Section 1714.4 also applied to a case sounding in negligence:

[M]ost of the evidentiary matters relevant to applying the risk/benefit test in strict liability cases “are similar to the issues typically presented in a negligent design case.” . . . This similarity is not surprising, because to say that a product was “negligently designed” is to say it “was defective, for purposes of establishing liability under a theory of negligence . . . .” This similarity also is not accidental; over the years, we have incorporated a number of negligence principles into the strict liability doctrine, including Barker’s risk/benefit test. . . .

2. See id. at 155.
3. Id.
4. Id.
6. Merrill v. Navegar, 28 P.3d 116, 133 (Cal. 2001). Section 1714.4 has since been repealed. “The primary effects of Chapter 913 are to repeal Section 1714.4 and to amend . . . its provisions to the design, distribution, and marketing of firearms and ammunition.” J. Fowler, Will a Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?, 34 MCGEORGE L. REV. 339, 348 (2003).
[T]his is a products liability action based on negligence, which asserts that the TEC-9/DC9 was defective in design because the risks of making it available to the general public outweighed the benefits of that conduct, and that defendants knew or should have known this fact. Plaintiffs may not avoid this conclusion, or the legislative policy section 1714.4 reflects, simply by declining to use the word defect or defective.\textsuperscript{7} 

The second important suit, against the gun manufacturers, to meet a roadblock was \textit{Hamilton v. Accu-Tek}.\textsuperscript{8} The foundation of \textit{Hamilton} was the theory that there was a negligent over-saturation of guns in the southern states.\textsuperscript{9} As a result of this, guns were obtained by straw purchases and transported to New York and Chicago, where they were banned, and there sold on the black market.\textsuperscript{10} The plaintiffs claimed “the manufacturers’ indiscriminate marketing and distribution practices generated an underground market in handguns, providing youths and violent criminals with easy access to the instruments they have used with lethal effect.”\textsuperscript{11} The key to this suit was that the manufacturers of handguns foresaw these saturation sales and encouraged them.\textsuperscript{12} The jury found in favor of the victims and against the gun manufacturers.\textsuperscript{13} The plaintiffs claimed on a certified question that:

\begin{quote}
the jury could reasonably have concluded that in considering all the circumstances – industry knowledge of widespread trafficking in new handguns, heavy movement of guns from “weak law” to “strong law” states and risks associated with criminals’ easy access to these dangerous instruments – defendants were negligent in failing to take appropriate steps to reduce the risk of their products’ being sold to persons with a propensity to misuse them.\textsuperscript{14}
\end{quote}

The federal district court’s holding in \textit{Hamilton} was seriously undermined by the New York Court of Appeals.\textsuperscript{15} On a certified question from the federal district court, the New York Court of Appeals held that under New York law, no duty extended from the gun manufacturers to the shooting victims because the connection was

\begin{itemize}
\item \textsuperscript{7} \textit{Merrill}, 28 P.3d at 125-26.
\item \textsuperscript{9} \textit{Id}. at 835.
\item \textsuperscript{10} \textit{Id}. at 808-09.
\item \textsuperscript{11} \textit{Id}. at 808.
\item \textsuperscript{12} \textit{Id}. at 827.
\item \textsuperscript{13} \textit{Id}.
\item \textsuperscript{14} \textit{Hamilton}, 62 F. Supp. 2d 802.
\item \textsuperscript{15} \textit{Hamilton v. Beretta U.S.A. Corp.}, 750 N.E.2d 1055 (2001).
\end{itemize}
The pool of possible plaintiffs is very large – potentially, any of the thousands of victims of gun violence. Further, the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that the defendants were a direct link in the causal chain that resulted in the plaintiffs’ injuries, and that the defendants were realistically in a position to prevent the wrongs. Giving plaintiffs’ evidence the benefit of every favorable inference, they have not shown that the gun used to harm plaintiff Fox came from a source amendable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.

The third important challenge to the firearms industry was the more than thirty suits by various cities including New Orleans, Atlanta, and Chicago. Most of these suits have foundered. The goal of the municipal suits was to recover the expenses paid by the cities in dealing with gun violence. Several suits were dismissed on appeal for various causes.

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16. Id. at 1062.
17. Id.
18. See New York City Sues Gun Industry, U.S. NEWSWIRE, June 20, 2000:
   In October 1998, the Legal Action Project filed for the City of New Orleans the first lawsuit ever brought by a governmental entity against the gun industry. Since that time, cities and counties across the nation, including Atlanta, Boston, Chicago, Los Angeles and Philadelphia, have launched a legal attack on the gun industry to hold it accountable for designing and distributing guns with no regard for public health and safety. The Legal Action Project represents 25 out of the 32 cities and counties that have filed suit so far.

19. For example, the Chicago suit is asking for over 433 million dollars in damages for primary and secondary costs associated with gun violence, including the costs of extra police, medical costs, and welfare expenditures for surviving families. See Fox Butterfield, Chicago is Suing Over Guns From Suburbs, N.Y. TIMES, Nov. 13, 1998, at A4. See also Roberto Suro, Suits Against Guns Use Tobacco Model, THE NEW ORLEANS TIMES-PICAYUNE, Dec. 24, 1998, at A1 (stating that the New Orleans suit seeks recovery for the city’s costs of “police protection, emergency services, facilities and services, as well as lost tax revenues due to the gun manufacturers’ products and actions”).
reasons. Part of the Atlanta suit was dismissed because strict liability was held not available to the city; the New Orleans case was dismissed because “it improperly intruded on the state’s exclusive power to regulate the firearms industry.”20 The Cincinnati suit was thrown out because it “is an improper attempt to have [the] Court substitute its judgment for that of the legislature.” Strict liability and negligent design, as well as public nuisance and fraud claims, have been rejected.21 The recent victories by the gun manufacturers in both design defect and damage to cities, suggest that widespread immunity is unnecessary at this time.

II. THE UNITED STATES IS FACING A GUN VIOLENCE EPIDEMIC

The United States is facing a large number of injuries and deaths from firearms on a regular and continuing basis.22 Over 13,000 adults and children died from gun related deaths in 1992.23 More Americans were murdered with firearms in 1993 through 1994 than were killed in 8.5 years of combat in the Viet Nam war.24 The total of handgun deaths in 1992 (13,220) “exceeds the combined total of Great Britain, Sweden,
Switzerland, Japan, Australia, and Canada by nearly 13,000 deaths.\textsuperscript{25} Professor Zimring found an epidemic of gun violence among youths aged 10-17.\textsuperscript{26} The violence is not uniformly distributed across society. Instead black males die proportionately more than white males as a result of gun violence.\textsuperscript{27}

The gun immunity legislation glosses over the substantial risk of being shot by non-criminals.\textsuperscript{28} There is an assumption that the risk of gun violence comes solely from criminals,\textsuperscript{29} but a substantial percentage of homicides are committed by non-criminals.\textsuperscript{30} Spouses and friends, for example, are a common target of gun violence.\textsuperscript{31} In many cases, the

\begin{itemize}
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Franklin E. Zimring, \textit{Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic}, 59 LAW \& CONTEMP. PROBS. 25, 26 (1996) (“This essay is a brief examination of three dimensions of the juvenile firearms use epidemic of the period since 1985.”).
  \item \textsuperscript{28} See, e.g., Katherine Kaufer Christoffel, \textit{Toward Reducing Pediatric Injuries From Firearms: Charting a Legislative and Regulatory Course}, 88 PEDIATRICS 294, 300 (1991) (arguing that “most shootings are not committed by felons . . . but are acts of passion that are committed using a handgun that is owned for home protection.”); David Kairys, \textit{A Carnage in the Name of Freedom}, PHILADELPHIA INQUIRER, Sept. 12, 1988, at A15 (“That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage . . .”).
  \item \textsuperscript{29} See, e.g., Randy E. Barnett & Don B. Kates, \textit{Under Fire: The New Consensus on the Second Amendment}, 45 EMORY L.J. 1139, 1245 (1996) (“The homicide data collected over the past thirty-five years have consistently shown that 70-80% of those charged with murder had prior adult records, with an average adult criminal career of six or more years, including four major felony arrests.”); Phillip J. Cook, Stephanie Molliconi & Thomas B. Cole, \textit{Regulating Gun Markets}, 86 J. CRIM. L. \& CRIMINOLOGY 59, 63 (1995) (“An effective transfer-regulating scheme that prevents guns from going to dangerous people would be nearly as successful as a much more intrusive scheme targeted at current gun owners. Each new cohort of violent criminals must obtain guns somewhere.”).
  \item \textsuperscript{30} See infra note 31. However, Don B. Kates suggested in a private conversation with the author that there are no shootings by persons without criminal records. Interview with Don B. Kates in Chicago, Ill. (Fall 2002). See also D.B. Kates and D.D. Polsby, \textit{The Myth of the “Virgin Killer,”} Nov. 2000, on file with author.
  \item \textsuperscript{31} A firearm in the home is forty-three times more likely to injure a member of the household (whether a homicide, suicide, or unintentional shooting) than to injure an intruder. \textit{See Arthur L. Kellerman \& Donald Reay, Protection or Peril? An Analysis of Firearm-Related Deaths in the Home}, 314 NEW ENG. J. MED. 1557, 1560 (1986). Further it is estimated that 150,000 cases of domestic violence involve firearms, and that in these cases “death was twelve times as likely to
shooter had no criminal record. Typical cases involve one spouse shooting another, or friends who are shot while “playing” with a firearm. Children are often victims of gun violence. A common fact pattern involves a young child finding a gun in his or a family member’s home and using it to shoot a playmate or a sibling.

Some suggest that an individual will be safer with a gun in the home, yet the facts point the other way. Dr. Arthur Kellerman found that a person in a household with a gun is forty-three times more likely to be shot than the intruder. Even if the high percentage of suicides is removed from this statistic, it still means that a person with a gun or a member of her family is much more likely to be shot than the intruder. A gun owner is more at risk of being shot than someone who does not own a gun.

Because of the large number of shootings, the nature of secondary education is changing. In responding to concerns about gun violence, public schools are spending millions of dollars to insure that no guns occur.” Bassin, supra note 23, at 356.

32. See Nicholas Dixon, Why We Should Ban Handguns in the United States, 12 ST. LOUIS U. PUB. L. REV. 243, 265-66 (1993) (“Gun control measures that are targeted solely at those with criminal records fail to protect us from the most likely source of handgun murder: ordinary citizens.”); see also HEARINGS BEFORE THE SUBCOMM. ON CRIME OF THE COMM. ON THE JUDICIARY, 94th Cong. 1774 (1975) (statement of Delfgott, Coordinator, Coalition for Handgun Control of Southern California, Inc.):

Most murders (seventy-three percent) are committed impulsively by previously law abiding citizens during arguments with family members or acquaintances. . . . A readily available gun is what turns an assault into a murder. The handgun, often kept in the home for self-defense, is six times as likely to be used against a family member as it is to be used against an intruder.

Id.

33. See supra notes 30-31.

34. See supra note 22, infra note 35.

35. Lyda Longa, Boy Finds Gun, Kills 5-Year-Old Brother, ATLANTA J. & CONST., June 21, 1999, at 1A (“Minutes before the shooting, Roshon, his brother, and three other youngsters had been playing with water pistols when they found a loaded .380 semiautomatic handgun in a box stuffed with garbage.”).

36. See Kellerman & Reay, supra note 31, at 1559. But Professor Kleck argues that if attacked, an armed individual will fare better than an unarmed one. Gary Kleck’s analysis of 1979-85 national data in Point Blank shows the following comparative rates of injury: only 12.1-17.4% of gun-armed victims resisting robbery or assault were injured; 24.7-27.3% of victims who submitted were nevertheless injured; 40.1-48.9% of those who screamed were injured, as were 24.7-30.7% of those who tried to reason with or threaten the attacker, and 25.5-34.9% of those who resisted.


38. Id.
will enter the schools. Public schools have erected fences, purchased metal detectors, hired full-time guards, required the children to purchase and carry see-through book bags, and conduct extensive locker searches. Many schools now have zero tolerance for weapons.

The problem is that the schools may become safe from firearm violence, but the risk of children being shot will remain; the shooting venue will shift from inside the school to outside the school. Children will face the risk of being shot while off school property: on the street, in their home or in a friend’s home. Gun dealers can be asked to exercise

39. Judy Mann, *Unheeded Warnings, Tragic Endings*, THE WASHINGTON POST, Mar. 09, 2001, at C09 (“The sad truth is that no one can predict which troubled kid is going to start shooting up his school. Millions of dollars have been spent in the last couple of years on safe-school projects, including one in San Diego County, where the latest carnage occurred, and no clear pattern has emerged.”).

40. See David C. Anderson, *Curriculum, Culture and Community: The Challenge of School Violence*, 24 CRIME & JUSTICE 317, 334 (1998) (noting that many schools use “hard security measures” to counteract gun violence including searching lockers, closing the school during lunch, use of security officers who routinely searched students, use of drug sniffing dogs, metal detectors, and use of closed circuit television). *Id.* Anderson argues that more innovative approaches through curriculum, the administration, and the community have had success. See David Hall, *Shootings Spotlight School Safety Proposal Seeks to Put Officers in All Michigan Schools*, SOUTH BEND TRIBUNE, May 3, 1999, at b6:

The school shooting in Littleton, Colo., has prompted one Michigan legislator to propose police officers be posted in public schools . . . . He also suggested that one way to deal with annual costs of the program would be to handle them jointly between the schools and the police department.

*Id.* Ellen O’Brien, *Deadly Acts Put Focus on Need for Prevention: Colorado School Killings/The Threat of Violence*, THE BOSTON GLOBE, Apr. 21, 1999, at A30 (discussing, in part, the use of metal detectors, both stationary and hand held, in Boston schools); Mary Ellen Moore, *School Security Chiefs Deal with Guns*, THE PATRIOT LEDGER (Quincy, Mass.), Apr. 27, 1996, at 34 (“School security staffs have become an integral part of public school systems, . . . and are often represented at faculty meetings, PTA meetings and sporting events.”).

41. See Paul M. Bogos, “Expelled. No Excuses. No Exceptions.”—Michigan’s Zero—Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. DET. MERCY. L. REV. 357, 374-76, n.118 (1997). Under Michigan’s program, a student found possessing a weapon on school grounds is permanently expelled from all schools in the state and no alternative educational program is provided. *Id.* at 359. The zero tolerance standard has created its own set of problems, however, because the application of the standard can lead to ridiculous results. In 1995, a twelve-year old boy was expelled for turning in a gun brought to school by another student. See Zero Tolerance Proves to Be a Little Ridiculous in Knawha, CHARLESTON GAZETTE & DAILY MAILING, Dec. 8, 1995, at 4A.

42. This is especially true in areas where the school is part of an already unsafe neighborhood. See Anderson, supra note 40, at 328. Based on a “reanalysis of the Safe School Study data,” it was determined that “neighborhood social conditions [are] . . . an important predictor of disorder within schools, along with school size and resources, organization of instruction, and school climate and discipline.” *Id.*

43. See Thomas J. Walsh, *The Limits and Possibilities of Gun Control*, 23 CAP. U. L. REV. 639, 641 (1994) (recounting incidents of youth gun violence and victimization including the injury of a seven year old boy who was in his home and was wounded by a stray bullet from a gunfight in
more care in order to make certain that guns do not reach children. Gun manufacturers can be asked to design guns that cannot be operated by children.  

III. AN ANALYSIS OF GUN CONTROL AND LIABILITY POLICY

This section will evaluate the foundational issues surrounding gun control and liability. Clear answers to these fundamental questions are needed before sweeping immunity is imposed.

A. Self Protection

Many issues surrounding the use of firearms for self-protection are unresolved. Scott Jacobs argues that the cost of guns does not exceed the benefit.

In contrast with the 500,000 violent crimes and 15,377 firearms related homicides committed in the United States during 1992, only 308 cases were classified as justifiable homicide by a private citizen using a firearm in self defense against a felonious perpetrator. . . . the statistics do not account for those instances where the defending citizen was injured or killed while attempting armed self defense.

In contrast David Kopel and Scott Little argue that “there is copious evidence that a significant number of crimes are deterred every year by gun wielding Americans . . . . Studies of prison inmates confirm that criminals are deterred when they believe that their potential victims are armed.”

Arguably the possession of a gun in the home presents a risk to every member of the family. Dr. Arthur Kellerman found that, when there was a gun in the home, it was much more likely that someone in the home, father, mother, one of the children or a guest, would be shot other than an intruder. Newspaper accounts of gun use are disturbing:

44. A basic reason for tort liability is to ask the defendant to exercise reasonable care. Perhaps a gun manufacturer could design a child-proof handgun.


47. See supra note 31 and accompanying text.

48. Id. See also Anthony Spangler, 62-Year-Old Accidentally Shoots Himself, Grandson, THE
a spouse comes home unexpectedly at night, and is shot and killed; a family member gets into an argument and one is shot; a child finds a gun and shoots his mother, father, sibling, or a playmate; or a young child is injured while playing with a gun. Women, especially, are at risk when there is a gun in the house. The substantial risk to the members of the gun owners’ family must therefore be weighed against the slight risk of dying at the hands of an armed criminal, before immunity is granted.54

FORT WORTH STAR-TELEGRAM, Sept. 11, 2000, at 3 (where a man accidentally shot himself and his 11-year-old grandson when the gun discharged while cleaning it).

49. See, e.g., Woods Cross Man Shoots Pregnant Wife By Accident, THE DESERET NEWS (Salt Lake City, Utah), Mar. 1, 2001, at B03 (where a man shot his pregnant wife believing she was an intruder).

50. See, e.g., Sarah Antonacci, Police Say Man Killed Wife, Turned Gun On Self; Couple From Buffalo Were Married 11 Years, THE STATE JOURNAL-REGISTER (Springfield, Ill.), Sept. 12, 2000, at 1 (where an argument over their impending separation apparently led a man to kill his wife and then turn the gun on himself).

51. See, e.g., Gun Play: Game of Life and Death, ATLANTA J. & CONST., Nov. 15, 1999, at 8A (where a twelve-year-old boy fatally fired his mother’s gun at his friend’s back, believing that the gun was unloaded).

52. See, e.g., Beth Warren, Police Probing Case of Girl, 4, Killed by Gun, ATLANTA J. & CONST., Aug. 23, 2000, at I1J (where a four-year-old girl spotted her aunt’s gun on a shelf, bounced on the bed high enough to reach it, and fatally shot herself).

53. See, e.g., Max B. Baker, Crimes Against Women Targeted, THE FORT WORTH STAR-TELEGRAM, Jan. 12, 2001, at 1 (recounting an incident in which a man came home to find his wife in the kitchen with another man, shooting her 6 times in a moment of “sudden passion”); Christopher Goffard, Household Conflict Ends in Shootings, ST. PETERSBURG TIMES, Apr. 3, 1999, at 1 (where a man came into the kitchen and shot his wife and niece after a history of domestic conflicts); Ryan Frank, Cooper Mountain Man Indicted in Wife’s Killing, THE OREGONIAN, Nov. 15, 2000, at B02 (where a man shot his wife in the kitchen of their home the morning after the couple decided she should move out); John Marzulli, Mary Engels, Austin Fenner & Henri E. Cauvin, S.I. Cop Kills Wife, Self, DAILY NEWS (New York, NY), Oct. 21, 1998, at 3 (where a police officer shot his wife then himself in the kitchen of their home).

54. Dixon, supra note 32, at 277-78:

Taking handguns from law-abiding citizens does not deprive them of many methods of self-defense. They still have the option of escaping or calling for help, using weapons other than handguns, using their bare hands, reasoning with the criminal, or simply not resisting. . . . It is possible that in some cases a victim would be able to avoid theft, injury, or even death had she been armed with a handgun. This “cost” of my proposal needs to be weighed against the likely negative results of the defensive use of handguns described above: unnecessary and excessive use of handguns in self-defense; and the deaths shown by Kellerman and Reay to result from the abuse of handguns in the home.

Id. See also id, at 282:

Whatever protection would be lost by disarming the small number of women who currently own handguns is outweighed by the reduction in all violence against women that would be affected by a handgun ban, which would take one of the most potent weapons out of the hands of many potential assailers.

Id.
B. Enforce Existing Gun Control Laws

Gun advocates suggest that, rather than enacting more laws limiting the ownership and sale of guns, the federal government should enforce existing laws. They argue that penalties should be stiffened for criminals who commit crimes with guns. For example, the National Rifle Association (NRA) advocates Project Exile, where every convicted felon apprehended with a gun or committing a crime with a gun will go to prison for five years.

The assumption is that gun sales and ownership is heavily regulated. Section 2(3) of the Bill finds, for example, that “The manufacturers...are heavily regulated by Federal, State, and local laws.” In fact there are few meaningful gun regulations. This was shown quite clearly in the recent New York suit, Hamilton v. Accu-Tek, which had as its foundation the theory that there was an over-saturation of guns in the South. Because of this, they

55. Wayne LaPierre, 2000 NRA Annual Meeting of Members (May 20, 2000), available at http://www.narhq.org/transcripts/wlpam.shtml (“If the issue is making our streets safer from gun crime, prosecution is the answer. If the issue is making our kids safer from gun accidents, education is the answer. If the issue is making our schools safer, then parenting and mentoring is the answer.”). See also Charlton Heston, Truth and Consequences (Apr. 16, 1999) available at http://www.nrahq.org/transcripts/yale.asp:

[T]he Clinton Administration is not prosecuting violations of federal gun law. In fact, they reversed the Bush Administration’s policy of prosecuting felons with guns. Instead, with plea bargains, a wink and a nod, they’ve been letting armed felons off the hook. From 1992 to 1998, prosecutions have been cut almost in half. ... Passing laws is what keeps politicians’ careers alive. Enforcing laws is what keeps you alive. But nobody’s getting arrested, nobody’s going to jail, it’s all a giant scam. It’s not real life. It’s a big lie.

Id.


57. Heston, supra note 55

Project Exile simply enforces existing federal law. Project Exile means every convicted felon caught with a gun, no matter what he’s doing, will go to prison for five years. No parole, no early releases, no discussion, period. ... Project Exile, in its first year in Richmond, cut gun homicides by 62 percent. And as you’d expect, related gun crimes like robbery, rape and assault also plummeted. That means hundreds of people in Richmond today are alive and intact who, without Project Exile, would be dead or bleeding. For years the NRA has demanded that Project Exile be deployed nationwide.

Id.


were purchased and transported to New York and Chicago, where they were banned, and sold on the black market. If guns had been regulated in a meaningful way, they would not have been sold beyond saturation in the South and would not have made their way into the hands of violent criminals in New York and Chicago. Gun immunity will provide a stamp of approval on sales that exceed the saturation point.

Existing gun regulations leave gaps large enough to permit 7.5 million gun sales per year. The teen shooters in the past several years obtained their guns from parents, friends, or at gun shows. None of the teens had meaningful criminal records and obtaining guns was apparently effortless.

There are only a few meaningful limitations on the sale of guns: one is the ban on automatic weapons and another is the ban on sales of guns to known criminals. The errors, fueled by gun advocates, are that Americans have only criminals to fear and that citizens are safe in their homes as long as they have a gun. The reality is that the average

61. The plaintiffs claimed that “the manufacturers’ indiscriminate marketing and distribution practices generated an underground market in handguns, providing youths and violent criminals with easy access to the instruments they have used with lethal effect.” Hamilton, 62 F. Supp. 2d at 808.

62. Suggestions for regulation included:
(1) requiring distributors to sell only to stocking gun dealers, i.e., retailers who stock guns for sale from legitimate retail outlets, (2) prohibiting sales at gun shows, where widespread unrecorded and unsupervised sales to nonresponsible persons were said to take place, and (3) analyzing trace requests to locate retailers who disproportionately serve as crime gun sources, and cutting off distributors who do business with them.


64. Butterfield, supra note 19.

65. See Gary Harmon, Pain of Columbine Still Lives, COX NEWS SERVICE, Apr. 15, 2000 (statement of Dr. Bob Sammons, a Grand Junction psychiatrist). “The Columbine killers had criminal records, but their lawbreaking wasn’t of the frequency or extremity that would suggest the destruction they actually caused.” Id. See also Butterfield, supra note 19.

66. 18 U.S.C. § 922(b) (2000) (“It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver — (4) to any person any destructive device, machinegun . . . short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity.”).

67. 18 U.S.C. § 922(d) (2000): It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person — (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance . . . .

68. For a strong rebuttal argument, see Kairys, supra note 28, at 4:

The more handguns there are, the more people see them as necessary for self-defense.
citizen is much more at risk from their spouses, friends, and children with guns than they are from criminals.\(^\text{69}\)

The Brady Bill is often mentioned in discussions and was passed for the purpose of reducing gun sales to criminals and certain other classes of citizens.\(^\text{70}\) It does not prevent the sale or purchase of guns by law-abiding citizens.\(^\text{71}\) The Brady Bill merely provides for a short waiting period\(^\text{72}\) and a prohibition of purchases by criminals.\(^\text{73}\) It requires background checks to see if the purchaser has a criminal record.\(^\text{74}\) Recent studies suggest that the Brady Bill has been effective in prohibiting the purchase of guns by approximately 500,000 criminals.\(^\text{75}\) The Brady Bill did not prevent the Columbine and the District of Columbia sniper shooters from obtaining the guns they needed, however.

Their spread is very much an epidemic, carried by fear rather than a virus. It is an unusual epidemic in that the cause is widely seen as the cure, as fear breeds more fear and guns create demand for more guns . . . .

\(\text{Id. See also Dixon, supra note 32, at 275:}\)

\(\text{[I]}\text{t is in response to the proliferation of handguns that an increasing number of people believe they need to buy a handgun for self-defense. . . . [W]}\text{hile some potential criminals may be deterred by a heavily-armed citizenry, others will arm themselves with more and more powerful firearms in order to outgun resisters. Trading gunfire or playing chicken with increasingly heavily-armed criminals is a tenuous basis for the defense of society.}\)

\(\text{Id.}\)

\(\text{69. See Kellerman & Reay, supra note 31, at 1559:}\)

\(\text{Guns kept in King County homes were involved in the deaths of friends or acquaintances 12 times as often as in those of strangers. Even after the exclusion of firearm-related suicides, guns kept at home were involved in the death of a member of the household 18 times more often than in the death of a stranger.}\)

\(\text{Id.}\)

\(\text{70. 18 U.S.C. § 922 (2000).}\)

\(\text{71. \text{Id.}\}\)

\(\text{72. 18 U.S.C. § 922(c) (2000).}\)

\(\text{73. 18 U.S.C. § 922(d) (2000):}\)

\(\text{It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person — (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance. . . .}\)

\(\text{Id.}\)

\(\text{74. 18 U.S.C. § 922(s)(2) (2000).}\)

\(\text{75. President William Clinton, Democratic National Convention (Aug. 14, 2000) ("We put 100,000 new police officers in every street, virtually, in every community throughout these United States. We stopped the manufacture of 19 specific kinds of assault weapons, and we have prevented a half-million felons, fugitives and domestic abusers from buying guns, because of the Brady Bill.").}\)
C. Personal Responsibility

Gun immunity proponents suggest that the key to gun liability is personal responsibility. Their foundational position is that only the shooter should be held liable and not the gun dealer or the gun manufacturer. This is the essence of the immunity legislation. The problem with this argument is that it sets up a strawman. Almost all criminals are judgment proof. If they aren’t before the shooting, they are after the shooting because their assets have gone to pay their attorney. Young children and teen shooters are judgment proof because they have no assets. Indeed if we assume that the value of a life today is one million dollars, then practically all shooters are judgment proof. Complete immunity for firearms sellers argues that this million dollar loss must always remain on the shoulders of the innocent victim and their families, and that the gun industry must be excused from responsibility. Under the immunity bill, the families of the victims of the District of Columbia sniper will have no legal recourse.

76 See Heston, supra note 54 (“If you say guns create carnage, I would answer that you know better. Declining morals, disintegrating families, vacillating political leadership, an eroding criminal justice system and social morals that blur right and wrong are to blame — certainly more than any legally owned firearm.”).

77 Heston, supra note 55 (“When . . . gunmakers are responsible for criminals’ acts . . . something is wrong.”). See also NRA-ILA Research & Information Division, “Junk Lawsuits Against Gun Manufacturers” (visited July 13, 2000), available at http://nraila.org/research/19990825-LawsuitPreemption-001.shtml (“In all these suits the plaintiffs seek to wipe out centuries-old tort law principle . . . . Defendants can’t be held liable for injuries that occur only because a properly operating product is criminally or negligently misused.”).

78 The strawman insulates the manufacturer from liability: if the manufacturer is not held liable and the perpetrator is judgment-proof, no one bears the responsibility for the harm caused by the firearm. See Kairys, supra note 28, at 7-8 (“This structure, which the manufacturers have created, also provides them with a deceptive deniability: they can claim that they have no responsibility for whatever occurs after they sell to the wholesalers, which hides their lack of even minimal safeguards or concern for the public or costs to the cities.”).

79 Phillip J. Cook & James A. Leitzel, Perversity, Futility, Jeopardy: An Economic Analysis of the Attack on Gun Control, 59 LAW & CONTEMP. PROBS 96 (1996) (arguing that a system of ex post liability poses difficult problems with collecting a judgment equal to the amount of injury to the victim).

80 While imprisonment may be an alternate form of a fine, there is no guarantee that such punishment will be a sufficient deterrent to the perpetrator in the heat of passion. See id. at 96-97.

81 Id. at 105 (“[M]ost youthful criminals, even those who sell drugs occasionally, have small incomes.”). The situation is further complicated because youths may behave irrationally, choosing to risk the punishment even when it is contrary to their best interests.

82 Id. at 98 (citing W. Kip Viscusi, Strategic and Ethical Issues in the Valuation of Life, STRATEGY AND CHOICE 380 (1992) (estimating the value of life to be between $1 million and $10 million)).
D. Economic Impact

The argument for gun ownership as a means of self-defense needs to be evaluated in terms of micro-economic theory. The benefits from gun ownership must exceed the costs of such ownership in order to be economically efficient. More than 15,000 deaths each year and directly related losses strongly suggest that the costs of gun ownership today substantially exceed the benefits. The suits brought by the cities and shooting victims argue that the costs of gun violence should be shifted to the gun manufacturers. The expenses being paid by the cities and the taxpayers are enormous: “[t]he medical costs of treating the gunshot injuries received during 1994 in the United States was $2.3 billion.” In view of the substantial risks to the homeowner and the family when there is a gun in the home, the alleged benefits from firearm ownership for self-defense are suspect. If there are approximately 15,000 firearm homicides each year (costs), and keeping a gun in the home prevents 308 deaths from attackers (benefits), then if we assume that each life is worth one million dollars, the costs of gun violence ($15 billion) exceed the benefits ($308 million) by more than 14 billion dollars each year. Immunity leaves this huge loss on the victim and society.

IV. IMMUNITY LEGISLATION FOR FIREARMS SELLERS RESTS ON THE ASSUMPTION THAT THE GUN INDUSTRY IS SHIELDED BY THE SECOND AMENDMENT.

Section 2 of the Immunity Bill provides:

“The Congress finds the following: (1) Citizens have a right, protected by the Second Amendment to the United States Constitution,


85. Jacobs, supra note 45.

86. Id.

87. Lietzel supra note 81.

88. This calculation omits the $2.3 billion costs of treating gunshot victims, the costs of increased police and gunfire cleanups, the gun-flight from the cities and the cost of the fear of being shot. On the benefits side, it omits the benefit of feeling secure in the home because of a gun, the thrill of hunting, the sport of shooting tin cans and paper targets. It also omits the value of gun collecting and assumes that each of the 308 attackers would have killed the gun owner.
to keep and bear arms.”

The Second Amendment states:

“A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”

Numerous articles have been written evaluating the Second Amendment. Some authors take the position that individuals have the right to keep and bear arms. Others argue that only a well-regulated militia has the right to keep and bear arms. This section will provide an overview of Second Amendment caselaw and manifest that there is little basis for concluding that firearms sellers are constitutionally immunized by the Amendment.

Gun proponents argue that the Second Amendment means that the government may pass no laws that interfere with citizens purchasing and keeping guns. The anti-gun theorists take the position that the Second Amendment means merely that a militia may purchase and keep guns, but not individual citizens, unless they are members of a militia. It is therefore appropriate for the government to regulate the sale and ownership of guns. Professor Herz suggests that the militia today

89. U.S. CONST. amend. II.


93. Richard M. Aborn, The Battle Over the Brady Bill and the Future of Gun Control Advocacy, 22 FORDHAM URL. L. J. 437 (1995) citing National Rifle Association v. Brady, No. 89-3345 (4th Cir. 1990) (“Gun control opponents have long argued that the amendment bars gun control laws. In fact, they often couch their inflammatory rhetoric with calls to ‘protect the constitutional right to own any gun.’ They have even claimed that the Constitution protects the right of all Americans to own machine guns.”).

94. Id. at 438 (“The Second Amendment, a compromise between the anti-federalists and federalists, was designed to preserve the ability of individual states to maintain state militias.”). See also Armitai Etzioni & Steven Hellend, The Case for Domestic Disarmament, THE COMMUNITARIAN NETWORK, available at http://www.gwu.edu/~ceps/pop.disarm.html [hereinafter Domestic Disarmament] (“The [Supreme] Court, looking at the Second Amendment as a whole, has repeatedly ruled that it refers to the desire of the constitutional Framers to protect state militias from disarming by the federal government, not to protect the individual citizens against disarming by the states.”).

95. See, e.g., David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 557-58 (1991). See also Domestic Disarmament, supra note 94 (“Never in history has a federal court invalidated a law regulating the private ownership of
would be the National Guard. In fact, there is no organization that is precisely equivalent to the militia that existed at the time of the drafting of the Second Amendment. The decided law appears to be on the side of the anti-gun theorists. No case has directly agreed with the pro-gun argument that each citizen has a right to own whatever type of firearms she wants, although there are some cases that can be argued to support the concept of a militia.

A detailed study of the history of the Second Amendment was recently provided by the Fifth Circuit Court of Appeals. In *United States v. Emerson*, decided in October of 2001, the majority carefully examined the text of the Second Amendment and the history surrounding its development:

> [T]he amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves.

96. *See, e.g.*, Herz, *supra* note 62, at 58 (“[C]ourts have consistently found that the Second Amendment guarantees a right to bear arms only for those who are part of the ‘well-regulated Militia’—today’s stateside National Guard.”).

97. *Williams, supra* note 94, at 590:

> Those who support an individual rights view of the Amendment are mistaken in equating the people’s militia and the universe of private gun owners. For one thing, the militia not only may be universal; it must be, because any smaller body would reflect only a partial interest. The threat of corruption may lurk as much in insurrection by private force as in governmental tyranny. Second, while the militia must not be dominated by the state, it also must not be wholly private. Participation in the militia gave citizens an education in civic virtue, prompting them to associate possession of weapons with service to the republic. They also learned to be independent, but as a political body devoted to the common good, not as private individuals. They were independent not from the world, but from whatever forces were seeking at the moment to corrupt the republic—whether state ministers or popular demagogues. Gun owners today do not comprise a universal militia.

*Id.* The author argues that the “Militia” that was contemplated by the Framers was one in which citizens shared the common interest of ensuring that the power remained with the people. *Id.* at 592-93. Since citizens today are driven largely by self-interest and have not united for the good of the community, the Militia no longer exists. *Id.* at 593-594.

and their homes.\footnote{Emerson, 270 F.3d at 236 (quoting Tribe, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) v.1, note 221, at 902).}

The Court then examined the recognized treatises of the 1800s and concluded, “the great Constitutional scholars of the 19th century recognized that the Second Amendment guarantees the right of individual Americans to possess and carry firearms.”\footnote{Id. at 256.} The narrow holding of the case, however, is that a federal statute is constitutional in authorizing the removal of a pistol from a physician who posed a threat to his former wife.\footnote{Id. at 261.}

The leading case law supports the regulation of gun ownership. In \textit{United States v. Miller},\footnote{307 U.S. 174 (1939).} the defendants were arrested for carrying an unregistered sawed-off shotgun.\footnote{Id. at 175.} The National Firearms Act of 1934 required the weapon to be registered.\footnote{Id. (quoting 26 U.S.C. § 1132(d)): Within sixty days after the . . . effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof . . . .} \textit{Miller}, decided in 1939 by the United States Supreme Court, held that federal legislation prohibiting the purchase and sale of sawed-off shotguns was “neither an unconstitutional invasion of the reserve states authority guaranteed by the Tenth Amendment nor did it infringe upon the right to keep and bear arms as protected by the Second Amendment.”\footnote{Jacobs, supra note 45, at 330. See also Miller, 307 U.S. at 178 (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).} The Court held that “Congress had the right to determine whether certain firearms would be restricted in the interest of national public safety and whether those weapons were appropriate for militia use.”\footnote{Jacobs, supra note 45, at 330.}

An important case supporting the extensive regulation of firearms ownership is \textit{Quilici v. Village of Morton Grove}.\footnote{532 F. Supp. 1169 (D. Ill. 1981).} This 1982 Illinois case dealt with a municipal ban on the sale and possession of
handguns.108 The trial judge ruled that Morton Grove’s exercise of its police power permitted the ban on handguns.109 The case was upheld on appeal.110 The defendants requested review by the United States Supreme Court, but certiorari was denied.111 The point of Quilici is that in recent times, the United States Supreme Court has refused to review a municipal ordinance that banned the sale and possession of handguns.

When the Supreme Court decides to enter the gun regulation fray, its decisions are likely to be quite narrow and require a long gestation period.112 The Court will not likely decide all issues surrounding firearms in one or several cases. It is also appropriate to assume that the Supreme Court will follow precedent and approve reasonable regulations dealing with the sale and ownership of guns as it has in the past. Dicta in United States v. Emerson is quite broad and suggests that every person has a right to own a gun, but the Supreme Court has denied certiorari in that case.113 The proposed immunity legislation, if it passes, will have to pass muster before the United States Supreme Court and precedent suggests it will likely fail.

V. CONCLUSION

The general rule for products liability is that all those who participate in the marketing of defective products are subject to liability.114 The House of Representatives reversed that rule for guns in passing the gun sellers immunity bill.115 It wrongly assumed that guns

108. Id. at 1171. The ordinance provided in part that “no person shall possess, in the Village of Morton Grove . . . any handgun, unless the same has been rendered permanently inoperative.” Id. The ordinance specified various limited exceptions for certain individuals, such as peace officers, prison officials, members of the armed forces and national guard, licensed gun collectors, and recreational users complying with specified requirements. Id.
109. Id. at 1179.
110. Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982).
111. Id.
112. No Supreme Court case has squarely addressed the scope of the Second Amendment. However, some cases have whittled away at the sweeping generalization that the Second Amendment guarantees a right to bear arms without restriction. See supra note 236. See also Quilici, 695 F.2d 261 (a ban on handgun possession was not a violation of Second Amendment rights). U.S. v. Emerson could have provided the first meaningful test case. 270 F.3d 203, 260 (2001). An example of a long gestation period is the Supreme Courts treatment of punitive damages. See, B.M.W. v. Gore, 116 S. Ct. 1589 (1996).
113. “We agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms . . .” Emerson, 270 F.3d at 264, cert. denied, 536 U.S. 907 (June 10, 2002).
115. See F.J. VANDALL, STRICT LIABILITY 1-16 (1989).
are essential to self-defense and, therefore, deserving of protection. The House also mistakenly assumed that firearms sellers are clearly immunized by the Second Amendment. These two mistakes substantially undermine the foundation of the Senate version of the Bill, S. 659.

The Senate, in evaluating the firearms manufacturers’ immunity bill, should consider the gun violence epidemic, the foundering of gun cases in the state courts, and the Supreme Court’s interpretations of the Second Amendment. They should allow the courts to continue to hammer-out gun policy over the next several years. Immunization of the gun industry would be a rejection of more than 150 years of products liability theory and fly in the face of the continuing widespread shootings and deaths. The gun industry has an important role to play in reducing gun violence, but they must be encouraged to participate in developing the framework and details of the solution. This is not the appropriate time for giving a pass to the recalcitrant gun industry.

Appendix A

108th CONGRESS
1st Session

S. 659

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

IN THE SENATE OF THE UNITED STATES

March 19, 2003

Dear Colleague:

I am contacting you about . . . an immunity bill that is being considered by the U.S. Senate that, if passed, would grant the gun industry unprecedented immunity from most negligence and products liability cases, something no other industry in America enjoys. The bill is retroactive; it would require the immediate dismissal of many pending cases, such as the case brought by DC-area sniper victims against the gun dealer and manufacturer whose negligence allegedly provided the snipers with their gun, as well as many design defect claims where children and others are injured in unintentional shootings because of defective guns. This legislation is a shocking departure from basic tenets of tort law . . .

Letter from Heidi Li Feldman, Professor, Georgetown Univ. Law Center, to the author (June 20, 2003) (on file with the author). See also Keeton, supra note 114; F. Vandall, E. Wertheimer, M. Rahdert, TORTS, CASES AND PROBLEMS 497-562 (2003).
Mr. CRAIG (for himself, Mr. BAUCUS, Mr. ALEXANDER, Mr. ALLARD, Mr. ALLEN, Mr. BENNETT, Mr. BOND, Mr. BREAUX, Mr. BROWNBACK, Mr. BUNNING, Mr. BURNS, Mr. CAMPBELL, Mr. CHAMBLISS, Mr. COCHRAN, Mr. COLEMAN, Ms. COLLINS, Mr. CORYN, Mr. CRAPO, Mrs. DOLE, Mr. DOMENICI, Mr. DORGAN, Mr. ENSIGN, Mr. ENZI, Mr. FRIST, Mrs. GRAHAM of South Carolina, Mr. GRASSLEY, Mr. GREGG, Mr. HAGEL, Mr. HATCH, Mrs. HUTCHISON, Mr. INHOFE, Mr. JOHNSON, Mr. KYL, Ms. LANDRIEU, Mrs. LINCOLN, Mr. LOTT, Mr. MCCONNELL, Mr. MILLER, Ms. MURKOWSKI, Mr. NELSON of Nebraska, Mr. NICKLES, Mr. REID, Mr. ROBERTS, Mr. SANTORUM, Mr. SESSIONS, Mr. SHELBY, Mr. SMITH, Mr. SPECTER, Mr. STEVENS, Mr. SUNUNU, Mr. TALENT, and Mr. THOMAS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS- The Congress finds the following:
(1) Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.
(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.
(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who...
(5) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(6) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES- The purposes of this Act are as follows:
(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.
(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.
(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.
(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.
(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.
(a) IN GENERAL- A qualified civil liability action may not be brought in any Federal or State court.
(b) DISMISSAL OF PENDING ACTIONS- A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought.

SEC. 4. DEFINITIONS.

In this Act, the following definitions shall apply:

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

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

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

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

(5) QUALIFIED CIVIL LIABILITY ACTION-
(A) IN GENERAL- The term ‘qualified civil liability action’ means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

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

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

(6) SELLER- The term 'seller' means, with respect to a qualified product--
(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;
(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or
(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, consistent with Federal, State, and local law.

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

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