1-1-2023

The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment

Hillel Y. Levin
Alex W. Smith Professor of Law & UGA Law in Atlanta Director *University of Georgia School of Law*, hlevin@uga.edu

Timothy D. Lytton
Alex W. Smith Professor of Law & UGA Law in Atlanta Director *Georgia State University College of Law*, tlytton@gsu.edu

THE CONTOURS OF GUN INDUSTRY IMMUNITY: SEPARATION OF POWERS, FEDERALISM, AND THE SECOND AMENDMENT

Hillel Y. Levin[*] & *Timothy D. Lytton*[**]

Abstract

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA), granting the firearms industry sweeping immunity from civil lawsuits. However, PLCAA immunity is not absolute. This Article demonstrates that both state and federal courts have fundamentally misread PLCAA when adjudicating cases involving the scope of gun industry immunity. Properly understood, PLCAA permits lawsuits against the gun industry so long as they are based on statutory causes of action rather than common law. While broadly preempting state common law claims, PLCAA affords state legislatures autonomy in deciding how to regulate the gun industry within their borders.

Additionally, this Article addresses unresolved questions concerning constitutional limits on gun industry regulation. PLCAA explicitly strikes a balance between three constitutional principles. It safeguards the individual right to keep and bear arms by protecting the gun industry from civil litigation that would unduly curtail civilian access to firearms. It insists that the separation of powers requires that gun industry regulation should derive from legislation—not common law adjudication. It affords state governments autonomy in deciding how to regulate the gun industry, recognizing that there are regional differences in attitudes about how to best reduce firearms-related violence. We counsel against interpretations of the Second Amendment's application to gun industry regulation that would expand the right to keep and bear arms at the expense of other important constitutional principles such as the separation of powers and federalism.

* Alex W. Smith Professor of Law, University of Georgia School of Law.

** Regents' Professor and Professor of Law, Georgia State University College of Law. We are grateful to Joseph Blocher, Jake Charles, Bill Dodge, Nora Freeman Engstrom, Jonathan Lowy, Clark Neily, Bob Rabin, Peter Schuck, and participants in the Emory-UGA workshop for helpful comments on earlier versions of this Article. Thanks also to Pam Branon, David Lerner, Savanna Nolan, and Stephen Wolfson for insightful research assistance.

INTRODUCTION

The United States is awash in firearms,[1] and gun-related violence is an issue of widespread public concern.[2] High-profile mass shootings[3] across the country for more than two decades[4] have raised serious

1. *See, e.g.*, Glenn Thrush, *U.S. Gun Production Triples Since 2000, Fueled by Handgun Purchases*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/05/17/us/politics/gun-manufacturing-atf.html [https://perma.cc/95JB-F5PE] (reporting that there are currently 400 million privately owned firearms in the United States and that U.S. annual domestic gun production rose from 3.9 million in 2000 to 11.3 million in 2020); Joe Walsh, *U.S. Bought Almost 20 Million Guns Last Year—Second-Highest Year on Record*, FORBES (Jan. 5, 2022, 3:46 PM), https://www.forbes.com/sites/joewalsh/2022/01/05/us-bought-almost-20-million-guns-last-year--second-highest-year-on-record/?sh=71bd6a5213bb [https://perma.cc/6DSC-PFEC] (reporting a record 22.8 million gun purchases in the United States in 2020); Joe Walsh, *Record 2.8 Million AR-15 and AK-Style Rifles Entered U.S. Circulation in 2020, Gun Group Says*, FORBES (July 20, 2022, 4:49 PM), https://www.forbes.com/sites/alisondurkee/2022/07/20/record-28-million-ar-15-and-ak-style-rifles-entered-us-circulation-in-2020-gun-group-says/?sh=4ad362d827ca [https://perma.cc/A537-PQ37] (citing industry association estimates of twenty million AR-15 and AK-style semiautomatic rifles in the United States owned by private individuals or police); Thomas Black, *Americans Have More Guns Than Anywhere Else in the World and They Keep Buying More*, BLOOMBERG (May 25, 2022, 2:03 PM), https://www.bloomberg.com/news/articles/2022-05-25/how-many-guns-in-the-us-buying-spree-bolsters-lead-as-most-armed-country [https://perma.cc/FV6E-KFGM] (documenting that the United States has the most heavily armed civilian population in the world, with 120.5 firearms per 100 residents, double that of Yemen, which has the second most heavily armed population).

2. *See Americans' Experiences, Concerns, and Views Related to Gun Violence*, AP-NORC (Aug. 23, 2022), https://apnorc.org/projects/americans-experiences-concerns-and-views-related-to-gun-violence/ [https://perma.cc/WQ6P-QK35] (reporting survey results suggesting that three-fourths of Americans view gun-related violence as a "major problem"). It should be noted that there were a record number of murders committed with firearms in the United States in 2020, but the rate of such murders remains below the rate of 7.2 murders per 100,000 people in 1974. *See* John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/V2EG-HQVH].

3. *See* Saeed Ahmed, *Halfway Through Year, America has Already Seen at Least 309 Mass Shootings*, NPR: WITF (July 5, 2022, 5:08 AM), https://www.npr.org/2022/05/15/1099008586/mass-shootings-us-2022-tally-number [https://perma.cc/F278-JVXH] (noting an average of more than eleven mass shootings per week in 2022). The Gun Violence Archive defines a mass shooting as a single incident in which four or more people are shot and/or killed at the same general time and location, not including the shooter. *General Methodology*, GUN VIOLENCE ARCHIVE (Jan. 03, 2022), https://www.gunviolencearchive.org/methodology [https://perma.cc/6XPM-XFJG]. There is no standard definition of a "mass shooting," though Congress defined a "mass killing" as "3 or more killings in a single incident" following the Sandy Hook school shooting in Newtown, Connecticut, in 2012. Investigative Assistance for Violent Crimes Act of 2012, Pub. L. No. 112-265, § 2, 126 Stat. 2435, 2435 (2013) (codified as amended at 28 U.S.C. § 530C). While some use Congress's "three or more" standard, others use the "four or more" standard set forth by the FBI's definition of a mass murder. DUCHESS HARRIS & JENNIFER SIMMS, MASS SHOOTINGS IN AMERICA 9–10 (2019).

4. *See Number of Victims of the Worst Mass Shootings in the United States Between 1982 and January 2023*, STATISTA (Mar. 28, 2023), https://www.statista.com/statistics/476101/worst-

questions about the responsibility of gun makers for firearms violence.[5] Victims and their families have filed lawsuits alleging that the industry has blood on its hands.[6] They argue that gun makers have designed a new generation of semiautomatic rifles adapted from military weapons and have aggressively marketed them to civilians through advertising campaigns and video games aimed at young men looking to experience the thrill of combat.[7] Plaintiffs in these lawsuits hope to change the way that firearm manufacturers do business.[8] They want gun makers to reduce the lethality of weapons intended for the civilian market, dial down violent imagery in their marketing campaigns, and police their distribution networks to prevent illegal sales.[9]

This attempt at regulation through litigation has been thwarted by the Protection of Lawful Commerce in Arms Act (PLCAA, pronounced "placa"), a federal statute passed in 2005 that immunizes the gun industry from civil lawsuits arising out of the criminal misuse of a weapon.[10] In attempting to get around this barrier, plaintiffs have argued, with limited success, that some theories of recovery fall outside the scope of PLCAA immunity. Litigation has generated multiple and conflicting holdings regarding the scope of gun industry immunity.[11] These various

mass-shootings-in-the-us/ [https://perma.cc/2DAG-UT37] (listing mass shootings in U.S. towns and cities).

5. *See* Ryan Busse, *The Gun Industry Created a New Consumer. Now It's Killing Us*, ATLANTIC (July 29, 2022, 5:01 PM), https://www.theatlantic.com/ideas/archive/2022/07/firearms-industry-marketing-mass-shooter/670621/ [https://perma.cc/62J9-RK34]; *see also* Press Release, Comm. on Oversight and Accountability Democrats, Oversight Committee to Hold Hearing with AR-15 Manufacturers on Their Role in America's Gun Violence Epidemic (July 19, 2022), https://oversightdemocrats.house.gov/news/press-releases/oversight-committee-to-hold-hearing-with-ar-15-manufacturers-on-their-role-in [https://perma.cc/2SZJ-UQKQ] (announcing a meeting between congressional oversight committee and representatives of major gun manufacturers to discuss the role of firearms in America's gun violence epidemic); Peter Applebome, *Gun Manufacturers Say Assault Weapons Ban May Push Them Out of Connecticut*, N.Y. TIMES, May 23, 2013, at A19 (describing how gun restrictions may push gunmakers out of Connecticut); Sheryl Gay Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. TIMES, at A1 (Oct. 21, 2005) (discussing a congressional shield from liability lawsuits for gun manufacturers); James Sterngold, *California Justices Bar Suit Against Gun Manufacturer*, N.Y. TIMES, at A8 (Aug. 7, 2001) (discussing the Supreme Court of California's decision to prohibit victims of a shooting from holding the gun manufacturers liable).

6. *See, e.g.*, Chris Welch & Deborah Feyerick, *Why Sandy Hook Parents are Suing a Gunmaker*, CNN HEALTH (Feb. 22, 2016, 8:52 PM), https://www.cnn.com/2016/02/22/health/sandy-hook-families-gun-lawsuit [https://perma.cc/GPZ8-JA6M].

7. *See, e.g.*, Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 273–74 (Conn. 2019).

8. Chris McGreal, *Gun Crime Victims are Holding the Firearms Industry Accountable—by Taking Them to Court*, GUARDIAN (June 7, 2022, 2:00 PM), https://www.theguardian.com/us-news/2022/jun/07/gun-crime-victims-lawsuits-firearms-industry [https://perma.cc/E5GW-3P9A].

9. *See id.*

10. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 1, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903).

11. *See infra* Section II.A.

conclusions all share one thing: they fundamentally misunderstand the nature and structure of PLCAA.

Judges and commentators have mistakenly interpreted PLCAA merely as a crude exercise in interest group politics designed to protect gun makers from unwanted litigation.[12] By contrast, we argue that, in passing PLCAA, Congress also developed a finely tuned statutory scheme for regulating the gun industry in accordance with the constitutional principles of separation of powers, federalism, and the right to keep and bear arms. PLCAA endorses a particular conception of the separation of powers by blocking attempts to regulate the gun industry using common law tort litigation and insisting that gun industry regulation is the exclusive province of Congress and state legislatures.[13] PLCAA affirms the principle of federalism by affording state legislatures autonomy in deciding how to regulate the gun industry within their borders, recognizing that there are regional differences in attitudes about how to best reduce firearms-related violence.[14] PLCAA defends the Second Amendment right of individuals to keep and bear arms by shielding gun manufacturers and sellers from liability exposure that might unduly restrict the supply of firearms available to civilians.[15]

Unfortunately, judges and scholars have largely ignored this statutory scheme when interpreting PLCAA.[16] Instead, they have engaged in fruitless debates over the plain meaning of individual statutory terms and misguided speculation about legislative intent. The resulting cacophony obscures the constitutional principles that undergird PLCAA's statutory scheme for regulating the gun industry. Properly understood, PLCAA permits lawsuits against the gun industry so long as they are based on statutory causes of action. It requires states seeking to regulate the gun industry to pass legislation rather than to rely on common law litigation.

The U.S. Supreme Court's emerging Second Amendment jurisprudence casts a shadow over PLCAA. In 2005, PLCAA explicitly codified the view that the Second Amendment affords gun manufacturers and sellers a measure of constitutional protection to ensure that firearms are commercially available to civilians.[17] The Supreme Court's subsequent 2008 decision in *District of Columbia v. Heller*[18] held that the Second Amendment protects an individual right to firearms ownership,

12. *See, e.g.*, Kimberly Wehle, *The Best Hope for Fixing America's Gun Crisis*, THE ATLANTIC (June 19, 2022), https://www.theatlantic.com/ideas/archive/2022/06/us-gun-violence-mass-shooting-courts-tort-law/661283/ [https://perma.cc/FGB4-LWF9].

13. *See infra* notes 229–46 and accompanying text.

14. *See infra* notes 248–50 and accompanying text.

15. *See infra* notes 235–38 and accompanying text.

16. One notable exception is Hilary J. Higgins et al., *States' Rights, Gun Violence Litigation, and Tort Immunity*, 48 J.L. MED. & ETHICS 83, 83, 87 (2020).

17. *See infra* notes 253–54 and accompanying text.

18. 554 U.S. 570 (2008).

and it raised questions about the nature and extent of that protection.[19] The Court's 2022 decision in *New York State Rifle and Pistol Association v. Bruen*[20] introduces a radically new methodology[21] for determining the scope of Second Amendment protection, which has generated additional ambiguity and introduced the possibility that courts could interpret the Second Amendment to confer broad constitutional immunity from civil lawsuits on the gun industry that would entirely displace PLCAA.[22] This issue is not entirely new. Scholars have analyzed the question of gun industry immunity from civil lawsuits under the Second Amendment for nearly thirty years.[23] However, those analyses must now be revisited in light of *Bruen*'s new test, and this is the first law review article to do so.

After exploring several doctrinal options available to courts, we recommend that courts construe any rights to make and sell firearms that

19. *Id.* at 619–27. *Heller* established an individual right against federal restrictions on firearms ownership which the Court extended two years later to state restrictions. *See* McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010). *See generally* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (discussing ambiguities in applying Second Amendment scrutiny to legal restrictions on firearms).

20. 142 S. Ct. 2111 (2022).

21. *See infra* Section IV.B.

22. *See infra* Section IV.C.

23. *See, e.g.*, David B. Kopel & Richard E. Gardner, *The* Sullivan *Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 738, 765 (1995) (contending that the Second Amendment limits the civil liability of firearm manufacturers based on parallels to First Amendment limits on the civil liability of media outlets); Jerry J. Phillips, *The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States*, 32 CONN. L. REV. 1337, 1343–47, 1350 (2000) (examining potential Second Amendment restrictions on tort claims against firearm manufacturers); Brannon P. Denning, *Gun Litigation & the Constitution*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 315, 319–22 (Timothy D. Lytton ed., 2006) [hereinafter SUING THE GUN INDUSTRY] (raising objections to analogies between the First and Second Amendments in considering constitutional limitations on civil claims against gun manufacturers); David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 230 (2014) (arguing that restrictions on businesses that manufacture and sell firearms are subject to Second Amendment scrutiny); Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 496–97 (2014) (asserting that the Second Amendment protects the right to manufacture and sell firearms); Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 987–89 (2017) (suggesting that the Second Amendment may preclude tort claims against gun manufacturers and sellers that impinge on the right of gun ownership for the purposes of self-defense); Joseph Blocher & Darrell A.H. Miller, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 296–99 (2016) (examining the question of whether laws that place incidental burdens on firearms ownership and use are subject to Second Amendment scrutiny); Lars Noah, *Does the Threat of Tort Liability Unduly Burden the Right to Bear Arms?*, DUKE CTR. FOR FIREARMS L. (Apr. 6, 2022), https://firearmslaw.duke.edu/2022/04/does-the-threat-of-tort-liability-unduly-burden-the-right-to-bear-arms/ [https://perma.cc/B3CG-75LX] (discussing that "commentators have endorsed greater use of private litigation in order to accomplish a modicum of gun control in the absence of serious legislative and regulatory oversight").

gun manufacturers might have under the Second Amendment as derivative of the rights of individuals to keep and bear arms, thereby entitling manufacturers to more qualified protections than those afforded to individual gun owners.[24] As we will explain, adopting this approach would honor the Supreme Court's commitment to robust constitutional protection of the right to keep and bear arms without trampling the constitutional principles of separation of powers and federalism that are integral to the statutory scheme for regulating the gun industry established by Congress in PLCAA. Our conclusions regarding the applicability of the Second Amendment to civil lawsuits against gun manufacturers remain tentative because each of the post-*Bruen* doctrinal options that we identify has potentially far-reaching constitutional implications beyond the scope of this Article's focus on gun industry immunity. We will spell out those implications, which provide an agenda for future research.

Our analysis of gun industry immunity proceeds as follows. Part I examines the use of tort litigation against gun makers as a strategy for reducing the criminal misuse of firearms. We explain the plaintiffs' legal theories and analyze how they hope to leverage litigation to reform the industry. We also highlight open questions about the potential efficacy of these efforts.

Part II then introduces PLCAA and critically assesses the leading appellate court opinions regarding the scope of PLCAA immunity in the context of several high-profile cases against gun manufacturers. In analyzing these opinions, we show that courts misapprehend the statutory scheme that PLCAA establishes and fail to recognize the full range of the constitutional principles that it serves. The courts have mistakenly interpreted PLCAA as solely designed to protect gun manufacturers from unwanted litigation. However, as our critical analysis will show, this erroneous understanding of PLCAA's text, structure, and purpose has generated confusion regarding the limits of gun industry immunity.

Part III develops our theory of PLCAA. We analyze the statutory scheme for gun industry regulation that PLCAA establishes, and we explain how this scheme serves constitutional principles that PLCAA's text explicitly endorses. We then demonstrate how our theory resolves the complex problems of statutory interpretation that have vexed and divided appellate courts and scholars.

In Part IV, we analyze the implications of the Supreme Court's emerging Second Amendment jurisprudence for the future of lawsuits against the gun industry. We identify key ambiguities raised by *Bruen*'s novel methodology for assessing the constitutionality of firearms restrictions under the Second Amendment. Here, we highlight the

24. *See infra* notes 310–16 and accompanying text.

constitutional cost of adopting an expansive view of the right to keep and bear arms that would supplant PLCAA, and we point the way to a more constitutionally well-balanced path.

Before proceeding, we wish to offer two clarifications. First, although gun industry litigation covers all entities engaged in the business of selling firearms—including manufacturers, distributors, wholesalers, importers, and retailers[25]—our analysis focuses primarily on manufacturers. Claims against manufacturers have been less successful than claims against retail dealers. No plaintiff has ever secured an unreversed judgment against a firearm manufacturer for injuries caused by criminal misuse of a weapon.[26] By contrast, plaintiffs have prevailed in several lawsuits against retail sellers, both before and after the passage of PLCAA.[27] Further, the stakes in claims against manufacturers are higher than in claims against other sellers. Manufacturers have much greater influence than other sellers over the design, marketing, and distribution of weapons. Moreover, potentially bankrupting liability in lawsuits against manufacturers has more far-reaching implications for private gun ownership than the prospect of bankrupting liability in lawsuits against downstream sellers. These considerations make claims against manufacturers potentially more significant.

Second, we make no claims about whether specific firearm designs, marketing campaigns, or distribution practices increase the risk of the criminal misuse of firearms. That is, we do not know if civil lawsuits against the gun industry will, if successful, meaningfully reduce firearm-related violence. However, we do favor responsible research into these

25. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 4, 119 Stat. 2095, 2097 (2005) (codified at 15 U.S.C. § 7903) (defining the term "engaged in the business" as "a seller of ammunition . . . 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").

26. *See infra* notes 46–51, 58–63 and accompanying text.

27. *See, e.g.*, Yanan Wang, *Landmark Jury Verdict Orders Gun Shop to Pay Nearly $6 Million to Injured Police Officers*, WASH. POST (Oct. 14, 2015, 6:23 AM), https://www.washingtonpost.com/news/morning-mix/wp/2015/10/14/an-unprecedented-jury-verdict-orders-gun-shop-to-pay-nearly-6-million-to-injured-police-officers/ [https://perma.cc/H25A-Q8NY] (holding retail seller liable for selling handgun subsequently used to shoot two police officers); Peter Hall, *Wal-Mart Settles Victims' Lawsuit Over Ammo in 2015 Shootings*, MORNING CALL (June 5, 2018, 12:46 PM), https://www.mcall.com/news/breaking/mc-walmart-settles-shooting-ammunition-sale-lawsuit-20170406-story.html [https://perma.cc/M463-5EB8] (retail store settled claim after court ruling that negligent sale of ammunition was not covered by PLCAA); Kalina v. Kmart Corp., No. CV-90-269920 S., 1993 WL 307630, at *1, *8 (Conn. Super. Ct. Aug. 5, 1993) (discussing whether a retail seller could be liable for selling a rifle and ammunition to a man who subsequently used them to kill his estranged wife). Claims against retail dealers typically allege violations of federal firearms regulations at the time of sale. This has made it comparatively easier for plaintiffs to establish proximate cause and, in post-PLCAA cases, to qualify for PLCAA's predicate exception.

questions. Given the firearms industry's hostility to such research,[28] we think that litigation is likely to be an effective and reasonable way to obtain information critical to such research. Moreover, even if we were convinced that litigation is not an effective regulatory tool, the reality is that, for now at least, these lawsuits exist, and more are likely to come. Proper resolution of them requires careful assessment of the statutory and constitutional dimensions of gun industry immunity.

I. TORT LITIGATION AS A GUN CONTROL STRATEGY

In the 1980s, gun violence victims and their families began suing firearm manufacturers, distributors, and retailers for injuries caused by criminal misuse of weapons that they sold.[29] By the late 1990s, municipalities adopted a similar strategy, bringing more than thirty lawsuits against industry defendants that sought to recoup the public costs of responding to urban gun violence.[30] In response to these lawsuits, the gun industry successfully lobbied thirty-four state legislatures to grant immunity to gun manufacturers and sellers from lawsuits alleging injuries caused by the unlawful misuse of firearms by downstream users.[31] In

28. Wendy E. Wagner, *Stubborn Information Problems & The Regulatory Benefits of Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 23, at 271, 274 (detailing industry efforts to conceal information regarding firearms designs, marketing, and sales); Larry Keane, *Biden's Dangerous Gun Control Plans: Repealing Tiahrt*, NAT'L SHOOTING SPORTS FOUND. (Oct. 14, 2020), https://www.nssf.org/articles/bidens-dangerous-gun-control-plans-repealing-tiahrt/ [https://perma.cc/582D-VNBM] (supporting continued legal restrictions on public access to firearm trace data). The National Rifle Association has also historically opposed public funding of research on firearms-related violence. Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, PSYCH. SCI. AGENDA (2013), https://www.apa.org/science/about/psa/2013/02/gun-violence [https://perma.cc/35K8-VCS3]; *see also* Mainon A. Schwartz, *Firearms-Related Appropriations Riders*, CONG. RSCH. SERV. 2 (Nov. 22, 2019), https://crsreports.congress.gov/product/pdf/IF/IF11371/2 [https://perma.cc/JJK6-E9QN] (explaining that Department of Health and Human Services agencies disagree on the extent to which legislation "limits . . . researching gun violence").

29. *See, e.g.*, Linton v. Smith & Wesson, 469 N.E.2d 339, 339 (Ill. App. Ct 1984); Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1295 (Ill App. Ct. 1985); Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, *in* SUING THE GUN INDUSTRY, *supra* note 23, at 1, 5 [hereinafter Lytton, *Introduction*]; Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 63 (2000); Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390, 398 (2021). *See generally* Higgins et al., *supra* note 16 (listing lawsuits against gun industry defendants for claims arising out of criminal misuse of a weapon).

30. *See* Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, *in* SUING THE GUN INDUSTRY, *supra* note 23, at 129, 137–40 (discussing suits brought by multiple municipalities).

31. *See Gun Industry Immunity*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/ [https://perma.cc/KV3B-XGDA] (last visited July 29, 2022).

2005, Congress went further by passing PLCAA, granting the industry nationwide immunity.[32] Although the volume of litigation declined following the passage of PLCAA,[33] gun violence victims, their families, and government entities have continued to file lawsuits against gun industry defendants, arguing that certain lawsuits are beyond the reach of PLCAA immunity or fall within one of its exceptions.[34] In this Part, we briefly describe the liability theories in these lawsuits and the thinking behind their use as a strategy for gun industry regulation.

A. *Theories of Civil Liability in Lawsuits Against the Gun Industry*

Dozens of lawsuits against gun manufacturers have asserted a variety of liability theories related to the design, marketing, and distribution of firearms.[35] In claims focused on firearm design, plaintiffs allege that manufacturers' design choices increase the risk of criminal assault with a weapon and the risk of injury when a weapon is used in an assault.[36] Some argue that the design of inexpensive, small, easily concealable handguns, sometimes referred to as "Saturday Night Specials," makes them more attractive to criminals.[37] Others maintain that the styling and semiautomatic firing capacity of rifles, such as AR-15-style rifles, make them more attractive to criminals and inflict more extensive injuries on a larger number of victims when used.[38]

Cases against the firearms industry also target manufacturers' marketing campaigns, arguing that they increase the risk of criminal misuse of weapons. For example, plaintiffs contend that advertisements

---

32. Timothy D. Lytton, *Afterword: Federal Gun Industry Immunity Legislation*, *in* SUING THE GUN INDUSTRY, *supra* note 23 at 339, 339; Mullenix, *supra* note 29, at 399–400.

33. Mullenix, *supra* note 29, at 403–04.

34. *See, e.g.*, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. CV 21-11269, 2022 WL 4597526, at *10 (D. Mass. Sept. 30, 2022) (claiming that lawsuits alleging violation of foreign firearms laws are beyond the scope of PLCAA immunity, discussed *infra* Section II.B); Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 278 (Conn. 2019) (relying on PLCAA's predicate exception, discussed *infra* Section II.A).

35. Lytton, *Introduction*, *supra* note 29, at 3, 5.

36. On the increasing lethality of firearms designs, see Tom Diaz, *The American Gun Industry: Designing and Marketing Increasingly Lethal Weapons*, *in* SUING THE GUN INDUSTRY, *supra* note 23, at 84, 98–99; Phil Klay, *How Did Guns Get So Powerful?*, NEW YORKER (June 11, 2022), https://www.newyorker.com/tech/annals-of-technology/how-did-guns-get-so-powerful [https://perma.cc/2FRL-QDNP].

37. *See, e.g.*, Kelley v. R.G. Indus. Inc., 497 A.2d 1143, 1153–54 (Md. 1985) (finding that the small size and concealability of "Saturday Night Specials" makes them "particularly attractive for criminal use"). The Maryland legislature overturned a rule established in this case subjecting firearm manufacturers to strict liability for harms caused by the sale of weapons found to be abnormally dangerous. *See* Lytton, *supra* note 29, at 6.

38. *See, e.g.*, *Bushmaster*, 202 A.3d at 276 (discussing plaintiff's allegation that AR-15-platform weapons are "especially well-suited for combat and enable a shooter to inflict unparalleled carnage").

touting a weapon's "excellent resistance to fingerprints,"[39] suggesting that a firearm is as "tough as your toughest customer,"[40] and using the tagline "Consider Your Man Card Reissued"[41] contribute to the criminal misuse of firearms. Some plaintiffs make similar assertions with respect to the product placement of brand-name firearms in video games that simulate close combat.[42]

Plaintiffs also take aim at manufacturers' distribution practices, arguing that they increase the risk of illegal gun trafficking and the illegal sale of weapons by irresponsible retail dealers. To this end, they have documented the distribution of weapons in large quantities to small towns known to be origination points for illegal gun trafficking.[43] Likewise, they show that manufacturers continue to supply retail stores despite manufacturers' knowledge that these shops sell a disproportionate number of weapons recovered from crime scenes.[44]

Although we offer no assessment of the merits of these claims—that is, whether the industry's practices contribute to unlawful misuse by downstream actors in a manner that may open the industry to legal liability—we note that the tort theories asserted in these cases are similar to theories of liability that were successfully asserted against the asbestos, tobacco, and opioid industries.

B. *Regulation Through Litigation*

When litigation generates liability exposure, it can financially and reputationally incentivize an industry to change its conduct in ways that reduce the risk of harm.[45] This is the strategy behind lawsuits against the gun industry.[46] However, so far, the strategy has not worked. Courts have dismissed most claims either because judges failed to recognize a

39. Merrill v. Navegar, Inc., 28 P.3d 116, 132 (Cal. 2001).

40. *Id.*

41. Dave Collins, *Sandy Hook Families to Focus on Gun Marketing After $73M Settlement*, INS. J. (Feb. 22, 2022), https://www.insurancejournal.com/news/national/2022/02/22/655117.htm [https://perma.cc/U325-9S8U].

42. *Id.*; *see also* Busse, *supra* note 5 (discussing the placement of firearms in video games and mentioning that the rifle used in the Uvalde shooting is featured in the Call of Duty: Modern Warfare video game).

43. *See, e.g.*, Iletto v. Glock Inc., 349 F.3d 1191, 1214 (9th Cir. 2003).

44. *Id.* at 1205.

45. *See generally* Robert D. Cooter, *Economic Theories of Legal Liability*, 5 J. ECON. PERSPS. (1991) (explaining how litigation can change conduct because of economic incentives and risk of harm).

46. *Analysis: Sandy Hook Settlement About More than Money*, INS. NEWSNET (Feb. 18, 2022), https://insurancenewsnet.com/oarticle/analysis-sandy-hook-settlement-about-more-than-money [https://perma.cc/4QCT-H6LU] ("'This case was never about damages in the sense of compensation,' Josh Koskoff, the families' lead attorney, said in a Tuesday news conference. 'It was about damages in the sense of forcing change. It was about damages in the sense of realizing the goals of these families, to do whatever they can to prevent the next Sandy Hook.'").

sufficient connection between gun makers' conduct and firearm-related violence to support liability[47] or because of PLCAA immunity.[48] In a few cases, plaintiffs survived dismissal but abandoned their claims before trial.[49]

A few cases against manufacturers have ended in settlement. A 2000 agreement in a lawsuit brought by the U.S. Department of Housing and Urban Development against Smith & Wesson required modifications in the design, distribution, and sale of the company's weapons.[50] But the company was subsequently sold and a later presidential administration did not enforce the agreement, so most of the changes were never implemented.[51] A 2004 settlement of claims against Bushmaster arising out of the Washington, D.C. sniper shootings generated a modest payout of $550,000 by the manufacturer's liability insurer without an admission of liability.[52] In 2011, Kahr Arms paid $600,000 to settle a claim based on the company's negligent failure to control its inventory, which enabled employees to take guns not stamped with serial numbers from its factory, one of which was subsequently used in a criminal shooting.[53] The 2022 settlement with the Sandy Hook families mentioned above was not with Remington, the gun manufacturer, but with various insurance carriers that held policies with Remington Outdoor Company, which had been dissolved in bankruptcy by the time of the settlement.[54] Additionally, in 2022, several manufacturers of so-called "ghost guns"—firearms sold in the form of component parts for assembly by consumers that are not

47. *See, e.g.*, Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 29–30 (2d Cir. 2001).

48. *See, e.g.*, Ileto v. Glock, Inc., 565 F.3d 1126, 1142 (9th Cir. 2009).

49. *See, e.g.*, Howard L. Siegel, *Winning Without Precedent:* Kelley v. R.G. Industries, 14 LITIG. 32, 33–34 (1988); Robert G. Seidenstein, *Gun Suits Dead, at Least for Now*, N.J. LAW. (2004); Prescott v. Slide Fire Sols., 410 F. Supp. 3d 1123, 1146 (D. Nev. 2019).

50. Andrew Cuomo, Hous. & Urb. Dev. Sec'y, Remarks, Smith & Wesson Agreement (Mar. 17, 2000), https://archives.hud.gov/remarks/cuomo/speeches/smwsagr.cfm [https://perma.cc/87ZB-PZME]; *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, U.S. DEP'T OF HOUS. & URB. DEV. https://archives.hud.gov/news/2000/gunagree.html [https://perma.cc/W7B3-7YU3] (last visited Mar. 27, 2023); Gary Fields, *Bush Administration Backs Away From Deal With Smith & Wesson*, WALL ST. J. (Aug. 1, 2001, 12:01 AM), https://www.wsj.com/articles/SB996614184693850497 [https://perma.cc/DNJ8-D3GG].

51. Fields, *supra* note 50.

52. Fox Butterfield, *Sniper Victims in Settlement With Gun Maker and Dealer*, N.Y. TIMES (Sept. 10, 2004), https://www.nytimes.com/2004/09/10/us/sniper-victims-in-settlement-with-gun-maker-and-dealer.html [https://perma.cc/A2N9-4LA2].

53. Molly O'Toole, *Record Settlement for Shooting Victim vs Gunmaker*, REUTERS (July 26, 2011, 1:54 PM), https://www.reuters.com/article/guns-settlement/record-settlement-for-shooting-victim-vs-gunmaker-idUKN1E76P0WD20110726 [https://perma.cc/62RW-3H8L].

54. F. Riehl, *National Shooting Sports Foundation Statement on Settlement in* Soto v. Bushmaster, AMMOLAND (Feb. 17, 2022), https://www.ammoland.com/2022/02/national-shooting-sports-foundation-statement-on-settlement-in-soto-v-bushmaster/#axzz7xCF41SZm [https://perma.cc/5NN5-BDQB].

subject to federal background checks—settled lawsuits brought by the New York Attorney General.[55] The manufacturers agreed to cease sales to New York residents and to share purchaser information with state authorities.[56]

That said, plaintiffs' win–loss rate to date may not be a reliable indicator of the viability of lawsuits against the gun industry. Litigation phenomena sometimes develop and mature over time, as early defeats prompt plaintiffs' attorneys to refine their liability theories, and judges and juries become more receptive to them.[57] For example, in the early 2000s, individuals addicted to oxycodone, their families, and government entities began filing lawsuits against drug makers based on allegations that their design, marketing, and distribution practices increased the risk and extent of injuries and deaths associated with opioid addiction.[58] Drug makers won all but one of these early cases on summary judgment.[59] However, as plaintiffs persisted, they collected more information, put forward theories of recovery with greater specificity, and found judges more receptive to them.[60] Today, drug makers, distributors, and retail sellers of oxycodone are paying out billions of dollars in judgments and

55. Sarah Lim, *Litigation Highlight: New York Officials Alleged Ghost Gun Manufacturers Created a Public Nuisance – Now the Settlements Have Started*, SECOND THOUGHTS BLOG (Nov. 23, 2022), https://firearmslaw.duke.edu/2022/11/litigation-highlight-new-york-officials-alleged-ghost-gun-manufacturers-created-a-public-nuisance-now-the-settlements-have-started/ [https://perma.cc/2RY5-224N].

56. *Id*. In February 2023, the family of a school-shooting victim settled a claim against an online retailer who sold the ammunition used in the attack. Juan A. Lozano, Suit Settled Over Sale of Texas School Shooter's Ammo, AP (Feb. 10, 2023), https://apnews.com/article/politics-dimitrios-pagourtzis-texas-education-lawsuits-32f2c6083e187d48759b1feef9f87ce4 [https://perma.cc/K8HF-L499].

57. On the maturation of mass tort litigation, see Mullenix, *supra* note 29, at 410–21 (discussing the signposts for the evolution of mass tort litigation).

58. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1122–30 (2014) (listing theories of liability that plaintiffs have invoked to support their claims); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 21–22 (2021) ("[I]ndividual plaintiffs lodged an array of claims from strict liability to fraud and negligence."); Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L. MED. & ETHICS 351, 353 (2018) ("At the heart of most claims were allegations that drug makers fraudulently and negligently marketed their drugs as substantially less addictive, thus leading to addiction and overuse.").

59. Ausness, *supra* note 58, at 1130.

60. Gluck et al., *supra* note 58, at 354–56 ("The complaints generally allege that the companies downplayed the risk of addiction; promoted a misleading 'pseudoaddiction' concept; denied the risks of higher dosages; and exaggerated the ease with which addiction in patients could be detected and managed.").

settlements and have changed the way they design, market, and distribute their products to reduce the risk of opioid addiction.[61]

We offer here no judgment on the success of this litigation as a strategy for reducing opioid addiction. Nor do we take the position that the responsibility of drug makers for opioid addiction is analogous to the responsibility of gun makers for firearms-related violence. We raise opioid litigation merely as an example of how litigation phenomena sometimes mature in ways that favor the success of plaintiffs' claims.[62]

There are some indications that, prior to the passage of PLCAA, some courts were becoming more receptive to plaintiffs' legal theories in lawsuits against gun manufacturers. In a handful of cases, federal and state courts recognized causes of action against gun makers based on theories of negligent design, marketing, and distribution, as well as strict product liability and public nuisance. In a 1985 case, a state supreme court recognized the plaintiff's theory of recovery on interlocutory appeal, but the plaintiffs subsequently abandoned the case before trial.[63] A 1998 case made it to a jury, but the jury found in favor of the defendants because jurors considered the link between the manufacturer's distribution practices and the plaintiffs' injuries too attenuated.[64] Another case made it to a jury that found in favor of the plaintiffs but was reversed on appeal.[65] In other cases, appellate courts ruled in favor of plaintiffs in pretrial appeals, but plaintiffs' claims were later dismissed based on PLCAA immunity[66] or abandoned by plaintiffs unable to shoulder

61. Jan Hoffman, *Sacklers and Purdue Pharma Reach New Deal With States Over Opioids*, N.Y. TIMES (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/health/sacklers-purdue-oxycontin-settlement.html [https://perma.cc/9BAL-KREQ].

62. For other examples, see generally REGULATING TOBACCO (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (tobacco regulation and litigation); RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991) (contraceptive litigation); TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008) (clergy sexual abuse litigation).

63. Kelley v. R.G. Indus. Inc., 497 A.2d 1143, 1159 (Md. 1985) ("[W]e conclude that it is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products."); Siegel, *supra* note 49, at 34.

64. Halberstam v. S.W. Daniel, Inc., No. 1:95-cv-03323-JBW-MDG (E.D.N.Y. 1998); Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 682 (1998) ("[W]hile the *Halberstam* case offers new hope to future plaintiffs of avoiding dismissal of their claims, it also provides a sober warning that plaintiffs will ultimately fail if they continue to rely on highly speculative arguments linking firearm manufacturers to gun violence.").

65. Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1059 (N.Y. 2001).

66. *See, e.g.*, Ileto v. Glock Inc., 565 F.3d 1126, 1146 (9th Cir. 2009).

mounting litigation costs.[67] One such case is still pending twenty-three years after it was filed—and after surviving several PLCAA-based challenges.

Plaintiffs have also had some success post-PLCAA. A lawsuit filed by the City of Gary, Indiana, in 1999 survived several PLCAA-based challenges and is still pending.[68] The Connecticut Supreme Court recognized the Sandy Hook families' claim based on unfair trade practices before the case ultimately settled in bankruptcy court.[69] And, for the first time, gun violence victims have sued U.S. gun manufacturers in a foreign jurisdiction beyond the reach of PLCAA, in Canada, where plaintiffs' negligent design claims survived a motion to dismiss.[70]

Moreover, it would be a mistake to assess the impact of lawsuits against the gun industry exclusively based on litigation outcomes. The litigation process, regardless of which party ultimately prevails, can help shape public policy by framing issues, generating information, and influencing agendas.[71] Tort litigation often frames issues in terms that prompt consideration of institutional reform. Plaintiffs' attorneys file lawsuits when they can establish the doctrinal requirements of wrongdoing, causation, and damages in claims against wealthy institutional defendants capable of paying sizeable settlements or judgments.[72] Consequently, tort claims highlight allegations of egregious misconduct by powerful institutions that cause significant injury. Such stories are attractive to journalists and their editors, and the resulting media coverage popularizes this framing. When it comes to firearms-related violence, there are many ways to frame the problem. Media coverage frequently points to the personal responsibility of a shooter,[73] the inadequate security measures by venue operators where a shooting

67. *See, e.g.*, Mireia Artigot i Golobardes, City of Cincinnati v. Beretta, U.S.A. Corp. et al.: *An Analysis of U.S. Lawsuits Against the Firearms Industry* 4 (InDret, Working Paper No. 183, 2003) ("Despite the favorable ruling of the Ohio Supreme Court, the City of Cincinnati ultimately dropped the case, [due] to mounting costs.").

68. *See* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 424, 428–29 (Ind. Ct. App. 2007).

69. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 272–73 (Conn. 2019). On the increasing use of bankruptcy to resolve mass tort claims, see Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1154 (2022). For another example of a court accepting plaintiffs' theories of liability post PLCAA, see Prescott v. Slide Fire Sols., 410 F. Supp. 3d 1123, 1140–43 (D. Nev. 2019).

70. Price v. Smith & Wesson Corp., 154 O.R. 3d 675, 676 (Ont. 2021).

71. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1842 (2008); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 350–51 (2021).

72. *See, e.g.*, Erichson, *supra* note 30, at 130–31.

73. *See* Jared Michael Jashinsky et al., *Media Agenda Setting Regarding Gun Violence Before and After a Mass Shooting*, 4 FRONTIERS IN PUB. HEALTH 1, 7 (2016).

occurs,[74] the failure of mental health professionals to intervene before a shooting,[75] and the poor quality of background checks for gun purchases.[76] Lawsuits against gun makers add an additional dimension to the framing by suggesting that industry reforms could help prevent firearms-related violence.[77]

Lawsuits that advance to the discovery phase can also prompt change by generating information. Industry players have powerful financial and reputational incentives to conceal information related to their misconduct.[78] In turn, inadequate information and industry influence can stymie policymaking, implementation, and enforcement.[79] Civil discovery empowers plaintiffs to compel disclosure of institutional misconduct that, if it results in public disclosure of this information, can shame industries into adopting voluntary reforms, spur new forms of government oversight, and prompt more vigilant enforcement of existing regulations.[80] In the firearms context, lawsuits against gun makers have uncovered evidence that manufacturers are aware of the pathways by which their weapons are diverted into illegal markets, leading to calls for reform.[81]

Civil suits may also lead to reform by increasing the salience of issues on the policy agendas of legislatures and agencies.[82] The media coverage that litigation attracts sometimes generates public pressure for a response from government policymakers. In this way, tobacco and opioid litigation both played a significant role in making tobacco control and opioid regulation top priorities among governmental policymakers, which resulted in ambitious policy reforms.[83] Thus far, it is unclear whether lawsuits against gun makers have contributed to the prioritization of firearms regulation by policymakers, which is already a consistent

74. *See* Ruth DeFoster & Natashia Swalve, *Guns, Culture or Mental Health? Framing Mass Shootings as a Public Health Crisis*, 33 HEALTH COMM. 1211, 1213 (2018).

75. *See* Emma E. McGinty et al., *News Media Framing of Serious Mental illness and Gun Violence in the United States, 1977-2012*, 104 AM. J. PUB. HEALTH 406, 407 (2014).

76. *See* Jashinsky et al., *supra* note 73, at 6.

77. *See* Lytton, *supra* note 71, at 1842–43.

78. *See* Wagner, *supra* note 28, at 274.

79. *See* Peter H. Schuck, *Why Regulating Guns through Litigation Won't Work*, *in* SUING THE GUN INDUSTRY, *supra* note 23, at 225, 231.

80. *See* Wagner, *supra* note 28, at 275–81.

81. Declaration of Robert A. Ricker in Support of Plaintiffs' Opposition to Defendant Manufacturers' Motion for Summary Judgment at 8, People v. Arcadia Mach. & Tool, Inc., No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003), *aff'd sub. nom.* In re Firearm Cases, 24 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005).

82. *See* Lytton, *supra* note 71, at 1837.

83. *See generally* Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029 (2019) (tracking the outcomes of the nationwide tobacco settlement and how its lessons might apply to future nationwide opioid settlements).

concern of policymakers due to the inevitable attention that mass shootings bring to the issue.[84]

In our view, it is too early to render judgment about the viability or desirability of litigation as a means of reducing firearms-related violence. On the one hand, litigation has not yet succeeded in firmly establishing that the industry's practices increase the risk of firearms-related violence—a connection that is essential to justify the kinds of industry and regulatory reforms that litigation against the tobacco and opioid industries spurred.[85] Moreover, it is not clear that civil discovery has revealed meaningful information about the industry that is not already publicly available or well-known to law enforcement and policymakers through trace data and criminal investigations.[86] And, given the constant barrage of mass shootings, it is not evident that lawsuits contribute in any meaningful way to public awareness of gun violence or pressure on policymakers to adopt new laws.

On the other hand, litigation has raised important questions about whether gun makers' design choices, marketing campaigns, and distribution practices increase the risk of firearms-related violence and whether industry reforms could help reduce that risk. The civil discovery process might also generate information relevant to addressing these questions that would otherwise be unavailable given the industry's lack of transparency and the paucity of government investigations.[87]

Although we do not offer an enthusiastic endorsement of lawsuits against gun makers, we believe that the maturation of this litigation phenomenon may clarify the responsibility of gun makers for firearms-related violence—one way or another. Tort litigation offers an opportunity for highly contextual, fact intensive examination of this issue, which is informed by various forms of expertise, subjected to the adversarial process, and, ultimately, tempered by the commonsense judgments of jurors. Regulation through litigation is not a panacea and ought not be idealized. But litigation does make often underappreciated contributions to advancing reasonable risk regulation.[88]

---

84. Michael Luca et al., *The Impact of Mass Shootings on Gun Policy*, 181 J. PUB. ECON. 1, 2 (2020).

85. *See* Mullenix, *supra* note 29, at 432–33.

86. *See id.* at 430–31.

87. *See, e.g.*, Memorandum of Law in Support of New York's Motion for a Preliminary Injunction Against Ongoing Ghost Gun Component Sales at 1, 6–8, N.Y. v. Arm or Ally, LLC, No. 451972/2022 (N.Y. Sup. Ct. July 13, 2022); *National Tracing Center*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, https://www.atf.gov/firearms/national-tracing-center [https://perma.cc/F57N-L5D7] (last visited Aug. 1, 2022).

88. Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 AM. J. OF PUB. HEALTH 1991, 1992 (2007).

Critics of lawsuits against the gun industry argue that exposing manufacturers to litigation arising out of the criminal misuse of weapons would destroy the U.S. firearms industry.[89] This claim warrants serious skepticism. First, the gun industry faced hundreds of such lawsuits prior to passage of state immunity laws and PLCAA, and manufacturers successfully absorbed the litigation costs.[90] Second, even if plaintiffs could prove that particular product designs, marketing campaigns, or distribution practices unreasonably increase the risk of criminal misuse of weapons, the examples of tobacco and opioid litigation suggest that industries producing products for which there remains sustained demand develop ways to manage their liability exposure through a combination of changes in the way they do business and global settlements.[91]

Tort litigation against gun manufacturers is dominated by disagreements over the scope of PLCAA immunity. In the next Part, we analyze these disagreements and demonstrate that judicial efforts to resolve them suffer from an interpretive myopia unmindful of the statutory scheme established by PLCAA to regulate the firearms industry. In short, we believe that when it comes to interpreting PLCAA, appellate courts have been shooting in the dark.

II. CONFLICTING INTERPRETATIONS OF PLCAA IMMUNITY

Any lawsuit that seeks to hold a gun manufacturer liable for the unlawful use of one of its firearms by a downstream user must contend with PLCAA's broad grant of immunity.[92] PLCAA states that, with several exceptions, a civil action "may not be brought in any Federal or State Court"[93] by "any person,"[94] including "any governmental entity,"[95] "against a manufacturer or seller"[96] of "a firearm"[97] for injury "resulting

89. Alex Seitz-Wald, *Biden Wants to End Gun-Maker Liability Protections. That Could Sink the Industry, Advocates Say.*, NBC NEWS (Apr. 9, 2011 7:48 AM), https://www.nbcnews.com/politics/white-house/biden-wants-end-gun-maker-liability-protections-could-sink-industry-n1263556 [https://perma.cc/QYF9-HRVR].

90. *See* William Haltom & Michael McCann, *Litigation, Mass Media, and the Campaign to Criminalize the Firearms Industry*, 4 OÑATI SOCIO-LEGAL SERIES 725, 733–36 (2014).

91. Lytton, *supra* note 29, at 68–69.

92. 15 U.S.C. § 7902(a) (prohibiting the bringing of a "qualified civil liability action").

93. *Id.*

94. *Id.* § 7903(5)(A) (defining "qualified civil liability action").

95. *Id.* § 7903(3) (defining "person").

96. *Id.* § 7903(5)(A) (defining "qualified civil liability action"); *see also id.* § 7903(2) (defining "manufacturer"); *id.* § 7903(6) (defining "seller").

97. *Id.* § 7903(4) (defining "qualified product"). PLCAA also grants immunity to manufacturers and sellers of ammunition and component parts of a firearm or ammunition. *Id.*

from the criminal or unlawful misuse"[98] of the firearm "by the person or a third party."[99]

In Section II.A, we focus on what we take to be potentially the most consequential of PLCAA's exceptions, known as the "predicate exception." We survey conflicting judicial interpretations of this exception. In Section II.B, we consider a novel challenge to the reach of PLCAA immunity in a lawsuit filed by the government of Mexico against U.S. gun manufacturers. We examine arguments put forward by distinguished international law scholars who assert that PLCAA immunity does not extend to lawsuits arising out of the unlawful misuse of firearms outside of the United States. Our critical analysis of judicial opinions and scholarly commentary in this Part highlights what we see as a fundamental misunderstanding of the statutory scheme established by PLCAA for regulating the firearms industry.

A. *The Predicate Exception*

PLCAA does not grant immunity from "an action in which a manufacturer or seller . . . knowingly violated a State or Federal statute applicable to the sale or marketing" of a firearm, ammunition, or component part, "and the violation was a proximate cause of the harm for which relief is sought."[100] This exception to PLCAA immunity is known as the "predicate exception" because it rests on a defendant's violation of an underlying, or "predicate" statute.[101] Plaintiffs have invoked the predicate exception based on two types of statutes, namely: (1) statutes that are framed generally but that do not explicitly state that they apply to the gun industry, and (2) statutes that explicitly apply to the gun industry.

---

98. *Id.* § 7903(5)(A) (defining "qualified civil liability action").

99. *Id.* (defining "qualified civil liability action"). PLCAA includes a list of six exceptions which subject gun makers and sellers to civil liability for various forms of unlawful conduct, specific types of negligence, breach of warranty, and product defects. *Id.* Commentators have offered detailed analyses of these exceptions, which we will not repeat here. *See, e.g.*, VIVIAN S. CHU, CONG. RSCH. SERV., THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS 2–8 (2012).

100. § 7903(5)(A)(iii).

101. City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 260 (E.D.N.Y. 2005), *rev'd in part on other grounds*, 524 F.3d 384 (2d Cir. 2008) (coining the term "predicate exception"). Just because a state statute is a predicate statute, a civil action based on the statute may not trigger the predicate exception unless the defendant manufacturer can be said to have violated it. *See* District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 169–70 (D.C. 2008). *District of Columbia* held that a state strict liability law for gun injuries does not qualify as a predicate statute because it does not provide norms governing sale that can be violated; rather, it merely insures injury victims for losses occasioned by the manufacturer's product. *Id.* Thus, the defendant-manufacturer cannot be said to have "violated" a state statute applicable to the sale of a firearm. *Id.*

First, plaintiffs in several lawsuits have invoked the predicate exception based on allegations that manufacturers' sales and marketing practices violated state public nuisance or unfair trade practices statutes.[102] Plaintiffs have argued that these statutes are "applicable" to the sale or marketing of firearms and, therefore, qualify as predicate statutes, which exempt plaintiffs' claims from PLCAA immunity.[103] Defendants have responded that, in the context of PLCAA, the term "applicable" means that the statute specifically and expressly applies to the sale or marketing of firearms, and that a generic statute is not sufficient.[104] In addressing this question, courts have reached conflicting conclusions.[105]

Second, in 2021, New York amended its public nuisance statute to insert provisions that specifically and expressly regulate firearms sales and marketing, rendering the statute unambiguously "applicable" to the sale or marketing of firearms.[106] Several other states, including California and New Jersey, passed similar laws aimed at triggering PLCAA's predicate exception.[107] Firearm manufacturers have challenged these new firearms nuisance provisions by arguing that they are preempted by PLCAA and are unconstitutional on a number of grounds.[108] These challenges are working their way through federal courts in all of these jurisdictions.

1. Generic Statutes

In a series of four cases involving disputes over whether generic state nuisance or unfair trade practices laws qualify as predicate statutes, courts in different jurisdictions have applied similar principles of statutory interpretation to reach contradictory results. Judicial disagreement has centered on the meaning of the term "applicable" in PLCAA's predicate exception. Each of these courts interpreted this term differently. We begin with a brief description of the claims and outcomes in four leading cases, and then we compare the courts' analyses in each of the cases.

---

102. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 390 (2d Cir. 2008) (addressing plaintiff's attempt to use public nuisance statute as predicate); Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 274 (Conn. 2019) (addressing plaintiff's attempt to use unfair trade practices statute as predicate).

103. *Beretta*, 524 F.3d at 390; *Bushmaster*, 202 A.3d at 274.

104. *Beretta*, 524 F.3d at 390; *Bushmaster*, 202 A.3d at 274.

105. *Compare Beretta*, 524 F.3d at 390 (holding that a public nuisance statute could not serve as a predicate), *with Bushmaster*, 202 A.3d at 275 (holding that an unfair trade statute could serve as the predicate).

106. *See* N.Y. GEN. BUS. LAW § 898-b to -c (McKinney 2023).

107. *See* CAL. CIV. CODE § 3273.50 (West 2023); N.J. STAT. ANN. § 2C:58-35 (West 2023); DEL. CODE ANN. tit. 10, § 3930 (2023); WASH. REV. CODE. § 7.48 (2023).

108. *See infra* Section II.A.2.

a. The Cases

In *Smith & Wesson Corp. v. City of Gary* (*Smith & Wesson*),[109] which is currently pending, the city claims that defendant-handgun manufacturers sold their products in violation of a state public nuisance statute.[110] The city alleges that the gun makers supplied their products to retail dealers whom they knew routinely sold firearms to individuals who were ineligible to purchase them and that many of those firearms were subsequently recovered by police from crime scenes.[111] In an interlocutory appeal affirming the trial court's denial of the defendants' motion to dismiss, the Court of Appeals of Indiana held that the state's generic nuisance statute was "applicable"—which the court interpreted as meaning "[c]apable of being applied"—to the sale or marketing of firearms and, therefore, qualified as a predicate statute.[112]

In *City of New York v. Beretta U.S.A. Corp*. (*Beretta*),[113] the city similarly alleged that defendant-firearm manufacturers sold their products in violation of a state public nuisance statute by distributing them in ways that manufacturers knew would facilitate the diversion of firearms into illegal markets.[114] A federal district court held that this statute was "applicable"—which it interpreted to mean "capable of being applied"—to the sale or marketing of a firearm and, therefore, could serve

109. 875 N.E.2d 422 (Ind. Ct. App. 2007). For the sake of consistency, we have chosen to refer to the cases discussed in this section by the name of the first firearm manufacturer listed in each case.

110. *Id.* at 425.

111. *Id.* The Indiana public nuisance statute on which the city relied states the following: "Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." IND. CODE § 32-30-6-6 (2023).

112. *Smith & Wesson*, 875 N.E.2d at 431 (internal citation omitted). The city also alleged that the defendants violated state laws specifically governing the sale of firearms, and the court held that those violations qualified for the predicate exception. *Id.* at 432–34. This case is still pending in the Indiana state courts twenty-three years after it was first filed in 1999. City of Gary v. Smith & Wesson Corp., 126 N.E.3d 813, 819 (Ind. Ct. App. 2019). In 2015, Governor Mike Pence signed an amendment making Indiana's state immunity statute retroactive to August 26, 1999—four days before the city filed its original complaint. *Id.* at 822. The Indiana Court of Appeals held that the 2015 amendment did not bar the city's claims. *Id.* at 828-30. The case is currently in discovery. Meredith Colias-Pete, *Judge: Gary Can Start Getting Gun Sales Records*, CHICAGO TRIB. (June 13, 2023), https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-gary-gun-suit-discovery-st-0614-20230613-ritgephvxzg65cvbzqe5yx3bli-story.html [https://perma.cc/D8SX-E6X4].

113. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008).

114. *Id.* at 389–91. The provisions of the state's public nuisance statute invoked by the city states, "A person is guilty of criminal nuisance in the second degree when . . . [b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons . . . ." N.Y. PENAL LAW § 240.45 (McKinney 2022).

as a predicate statute.[115] A divided panel of the U.S. Court of Appeals for the Second Circuit reversed, holding that the term "applicable" in PLCAA's predicate exception denotes statutes that either "expressly regulate firearms, or . . . that courts have applied to the sale and marketing of firearms . . . [or] that clearly can be said to implicate the purchase and sale of firearms."[116] Under this narrower definition of "applicable," the court found that the state's generic public nuisance law did not qualify as a predicate statute.[117]

In *Ileto v. Glock, Inc.* (*Glock*),[118] family members of shooting victims alleged that defendant-firearm manufacturers sold more firearms than the legal market could absorb to profit from resale of the weapons to distributors whom they knew or should have known sold them to individuals ineligible to purchase firearms.[119] The plaintiffs' claims relied on common law theories of negligence and public nuisance.[120] California's general tort law is codified in the state's Civil Code, and the plaintiffs argued that California's codified tort law qualified as a predicate statute under PLCAA.[121] A divided panel of the U.S. Court of Appeals for the Ninth Circuit concluded that the purpose of PLCAA was to preempt general tort claims and consequently held that the plaintiffs could not rely on general tort provisions of the California Code to invoke PLCAA's predicate exception.[122]

In *Soto v. Bushmaster Firearms International, LLC* (*Bushmaster*),[123] administrators of the estates of children murdered in the Sandy Hook Elementary shooting alleged that the maker of the semiautomatic rifle used in the assault knowingly advertised and marketed the weapon "for civilians to use to carry out offensive, military style combat missions against their perceived enemies" in violation of the Connecticut Unfair

115. 401 F. Supp. 2d 244, 261 (E.D.N.Y. 2005), *rev'd in part on other grounds*, 524 F.3d 384 (2d. Cir. 2008).

116. *Beretta*, 524 F.3d at 404.

117. *Id.*

118. Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009).

119. *Id.* at 1130.

120. *Id.* at 1132.

121. *Id.* at 1133.

122. *Id.* at 1138. The Court of Appeals for the Ninth Circuit argued in *Glock* that the Indiana Supreme Court's holding in *Smith & Wesson v. City of Gary*, namely that the state's public nuisance statute qualified as a predicate statute under PLCAA, had "limited persuasive value" because the decision in that case also rested, in the alternative, on allegations that the defendant handgun manufacturers in that case had violated state laws expressly regulating the sale of handguns. *Id.* at 1135 n.5 (citing Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 432–34 & n.7 (Ind. Ct. App. 2007)).

123. 202 A.3d 262 (Conn. 2019).

Trade Practices Act.[124] The Connecticut Supreme Court held that the state's generic unfair trade practices law qualifies as a predicate statute, and it remanded the case for trial.[125] *Bushmaster* appealed the ruling to the U.S. Supreme Court, which declined to hear the case, presumably to allow state court proceedings to run their full course.[126] Remington Arms, the parent company of Bushmaster, subsequently filed for bankruptcy, immediately staying pretrial proceedings in civil court.[127] The company was sold off in pieces at auction, and the Sandy Hook families ultimately settled with various insurance carriers that held policies with the dissolved company.[128]

b. Understanding the Courts' Disagreements

Conventional practice in interpreting statutes is to begin with the language of the statute. If the language is unambiguous, then, in most cases, the court's inquiry ends and a statutory term's unambiguous meaning applies.[129] However, if the language is ambiguous, courts go on to consider other sources of statutory meaning, including canons of interpretation, legislative history, and an assessment of which interpretation best furthers the statutory purpose.[130] The detailed analysis of these four cases that follows illustrates how, when interpreting the term "applicable" in PLCAA's predicate exception, sophisticated judges applying this standard interpretive methodology in cases involving substantially similar facts could reach different conclusions. The result has been to generate confusion regarding the limits of PLCAA immunity. Later, in Part III, we will argue that this confusion stems from a failure to appreciate that PLCAA's grant of limited immunity from lawsuits is merely one element in a statutory scheme for regulating the gun industry

124. *Id.* at 272. The act provides that "No person shall engage in . . . unfair or deceptive acts or practices in the conduct of any trade or commerce." CONN. GEN. STAT. § 42-110b (2023). The Connecticut courts have interpreted unfair trade practices to include lawful conduct that "offends public policy" or is otherwise "immoral, unethical, oppressive, or unscrupulous." *See, e.g.*, Monetary Funding Grp., Inc., v. Pluchino, 867 A.2d 841, 849–50 (Conn. App. 2005).

125. *Bushmaster*, 202 A.3d at 325.

126. *See* Remington Arms Co. v. Soto, 140 S. Ct. 513 (2019).

127. Kristin Hussey & Rick Rojas, *Remington's Bankruptcy Stalls Ruling in Sandy Hook Families' Suit*, N.Y. TIMES, Apr. 1, 2018, at A20.

128. Rick Rojas et al., *Families Settle Gunmaker Suit For $73 Million Over Massacre*, N.Y. TIMES (Feb. 17, 2022), https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html [https://perma.cc/RD5V-EM33]; *Reactions to Sandy Hook Families Remington Settlement*, INS. NEWSNET (Feb. 18, 2022), https://insurancenewsnet.com/oarticle/reactions-to-sandy-hook-families-remington-settlement [https://perma.cc/PCG3-E5AK]; Riehl, *supra* note 54.

129. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395–400 (2003). *See generally* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (discussing the traditional process courts use when interpreting a statute).

130. HILLEL Y. LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE 260 (3d ed. 2021).

in accordance with the constitutional principles of separation of powers, federalism, and the right to keep and bear arms.

c. Textual Ambiguity

The judges in these cases first disagreed over whether the term "applicable" in PLCAA is ambiguous. All the judges in *Smith & Wesson* and the district court judge and dissenting appellate court judge in *Beretta* concluded that "applicable" is unambiguous.[131] As the dissenting opinion in *Beretta* explained, just as "edible" means capable of being eaten and "flammable" means capable of being burned, so too "applicable" means "capable of being applied."[132] Judges who concluded that "applicable" was unambiguous relied on primary dictionary definitions and cited judicial usage in case law.[133]

By contrast, the majority in *Beretta*, all the judges in *Glock*, and the majority in *Bushmaster* concluded that the statutory term "applicable" is ambiguous.[134] As the majority opinion in *Glock* explained, the term "applicable," in some contexts, may not mean "capable of being applied" but rather specifically relevant:

> For instance, if someone says, "the following rules are applicable to the game of basketball," one would expect to hear a list of rules concerning traveling, foul shots, and the like. One would *not* expect to hear that force equals mass times acceleration or that an object falls at an increasing rate of 9.8 meters per second per second. The rules of physics undeniably apply to the game of basketball in the broad sense of the term "applicable," but a speaker who listed those rules would almost certainly be doing so for comic effect.[135]

Like judges who found the term "applicable" unambiguous, those who found the term ambiguous also cited dictionaries, pointing out variation in meaning between primary and secondary definitions.[136] Having found the term "applicable" ambiguous, this second group of judges invoked

131. Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 431 (Ind. App. Ct. 2007); City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 261 (E.D.N.Y. 2005), *rev'd in part on other grounds*, 524 F.3d 384 (2d Cir. 2008); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 406 (2d Cir. 2008) (Katzmann, J., dissenting).

132. *Beretta*, 524 F.3d at 406 (Katzmann, J., dissenting) (emphasis omitted) (quoting Berhe v. Gonzales, 464 F.3d 74, 84 (1st Cir. 2006)).

133. *Id.* at 404–06; *Smith & Wesson*, 875 N.E.2d at 431; *Beretta*, 401 F. Supp. 2d at 262, *aff'd in part, judgment rev'd in part*, 524 F.3d 384 (2nd Cir. 2008).

134. *See Beretta U.S.A. Corp.*, 524 F.3d at 401; Ileto v. Glock, Inc., 565 F.3d 1126, 1134 (9th Cir. 2009); Soto v. Bushmaster Firearms Int'l, 202 A.3d 262, 302 (Conn. 2019).

135. *Glock*, 565 F.3d at 1134 & n.4.

136. *See id.* at 1133–34; *Bushmaster*, 202 A.3d at 302.

interpretive canons, legislative history, and statutory purpose.[137] But their analyses led them to divergent conclusions.[138]

d. Canons of Interpretation

In applying interpretive canons, judges analyzed the implications of PLCAA's explicit mention of two types of statutory violations that would qualify for the predicate exception:

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18[.][139]

The majority in *Beretta* invoked the canon of *ejusdem generis* to infer that these examples limit the general category of statutes applicable to the sale or marketing of a firearm to statutes specifically designed to regulate firearms transactions.[140] The majority in that case additionally relied on the canon of reading provisos narrowly to support this conclusion.[141] It also referenced the canon of absurdity to suggest that if the court were to interpret "applicable" as meaning capable of being applied, the predicate exception would be so expansive as to eliminate altogether the liability shield that PLCAA's principle provisions provide.[142]

The majority in *Glock* similarly relied on the examples provided by PLCAA to narrow its interpretation of the category of statutes applicable to the sale of a firearm.[143] The *Glock* majority also employed the rule against surplusage in arguing that "if any statute that 'could be applied'

137. *See, e.g.*, *Glock*, 565 F.3d at 1134.

138. *Compare Glock*, 565 F.3d at 1134 (finding California tort causes of action not "applicable" as exceptions under PLCAA), *with Bushmaster*, 202 A.3d at 308 (finding a law barring unfair trade practices "applicable").

139. 15 U.S.C. § 7903(5)(A)(iii)(I)–(II).

140. *See Beretta*, 524 F.3d at 401–02.

141. *Id.* at 403.

142. *Id.*

143. *See Glock*, 565 F.3d at 1134.

to the sales and manufacturing of firearms qualified as a predicate statute, there would be no need to list examples at all."[144] The majority cryptically stated that "[t]he illustrative predicate statutes pertain specifically to sales and manufacturing activities, and most also target the firearms industry specifically. . . . [But] some of the examples do not pertain exclusively to the firearms industry."[145] However, the majority did not identify which of the examples, both of which reference "qualified product[s],"—defined by PLCAA as firearms, component parts of firearms or ammunition—do not pertain exclusively to the firearms industry.[146] From this statement, one court subsequently held that, under *Ileto*, a generic state unfair trade practices statute could serve as a predicate statute.[147] Under this interpretation, *Ileto* stands for the proposition that a generic statute related to sales and manufacturing can qualify as a predicate statute, based on PLCAA's two examples of predicate statutes, which the *Beretta* majority relied upon to reach the opposite conclusion.[148]

By contrast, the court in *Bushmaster* argued that the federal courts' reliance on *ejusdem generis* was misplaced because the legislative history of this statutory language revealed a different reason for the choice of these two examples.[149] The *Bushmaster* court also declared the canon of

144. *Id.* (emphasis omitted).

145. *Id.*

146. *Id.* at 1134–35.

147. Prescott v. Slide Fire Sols., 410 F. Supp. 3d 1123, 1138–39 (D. Nev. 2019).

148. *Beretta*, 524 F.3d at 402–03.

149. *See* Soto v. Bushmaster Firearms Int'l, 202 A.3d 262, 315–16. The court pointed out that bills similar to PLCAA introduced in 2001 and 2003 included the same exception to immunity for state and federal laws applicable to the sale or marketing of a firearm but did not include any examples. *Id.* According to the court:

> The legislative history indicates that the record keeping and unlawful buyer illustrations were added to the bill that became law during the 109th Congress not to define or clarify the narrow scope of the exception but, rather, because, in 2002, two snipers had terrorized the District of Columbia and surrounding areas. . . . In 2003, the families of the victims of the sniper attacks brought a civil action against the gun dealer that ultimately resulted in a $2.5 million settlement. During the legislative debates, many of the members who spoke in opposition to the bill that ultimately became PLCAA argued that the bill would have prevented victims of the sniper attacks from bringing an action against that gun dealer, even though the dealer's carelessness had allowed the snipers to obtain the assault weapon. Indeed, it was in part for that very reason, and the public outcry over the sniper attacks, that prior versions of the bill failed to pass.
>
> To deflect these potent political attacks, the author and other supporters of the 2005 incarnation of the bill pointed to the recently added record keeping and illegal buyer exception language as evidence that victims of the sniper attacks would not have been barred from pursuing their action under the predicate exception. Indeed, several legislators strongly suggested that these examples of

reading provisos narrowly misplaced based on its view that it was not the purpose of PLCAA to shield firearms sellers from liability for wrongful or illegal conduct.[150] It similarly dismissed reliance on the canon of absurdity by explaining that exposing firearm manufacturers to liability for illegal conduct would not undermine immunity for lawful commerce in arms.[151]

Next, the court in *Bushmaster* relied on the canon of meaningful variation in explaining that "[i]f Congress had intended to limit the scope of the predicate exception to violations of statutes that are *directly*, *expressly*, or *exclusively* applicable to firearms, however, it easily could have used such language, as it has on other occasions."[152] Invoking federalism canons, the court argued that PLCAA immunity should be read to avoid federal incursion into areas traditionally considered the province of state police powers—such as the regulation of advertising that threatens public health—absent a clear statement in the statute.[153] Finally, the court deployed the *in pari materia* rule by comparing PLCAA to a similar bill under consideration at the same time to immunize fast food restaurant companies from liability for consumers' obesity and related health problems.[154] That legislation contained a nearly identical predicate exception, and the house report accompanying the bill explicitly cited state unfair trade practices laws as an example of a type of predicate statute.[155]

e. Legislative History

Courts also found support in legislative history for their conflicting views regarding whether generic laws qualified as predicate statutes. The majority in *Beretta* acknowledged, "We are mindful that '[c]ontemporaneous remarks of a sponsor of legislation are by no means controlling in the analysis of legislative history,'" but then cited

> predicate statutes were specifically added to PLCAA to make clear that the lawsuits arising from the sniper attacks would not have been barred by PLCAA.
>
> The most reasonable interpretation of this legislative history, then, is that the record keeping and unlawful buyer illustrations were included in the final version of PLCAA not in an effort to define, clarify, or narrow the universe of laws that qualify as predicate statutes but, rather, simply to stave off the politically potent attack that PLCAA would have barred lawsuits like the one that had arisen from the widely reported Beltway sniper attacks.

Id. (citations omitted).

150. *Id.* at 317.
151. *See id.* at 312.
152. *Id.* at 302.
153. *See id.* at 312–13.
154. *Id.* at 317.
155. *See id.*

statements by the House and Senate sponsors of the bill specifically referring to New York City's lawsuit against *Beretta* as an "example[] . . . of exactly the type of . . . lawsuit[] this bill will eliminate."[156] The majority in *Glock* offered a similar caveat that "[w]e are mindful of the limited persuasive value of the remarks of an individual legislator[,]" before citing statements by legislators specifically referring to that case as an example of the type of lawsuit that the bill was intended to block.[157] Both opinions invoked a statement by the Senate sponsor, echoed by other supporters of the bill, asserting that the predicate exception applied only to the violation of federal firearms laws.[158] "Recognizing the limited weight owed to such statements," the *Beretta* majority concluded, "[W]e think that the statements nevertheless support the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry . . . ."[159]

The court in *Bushmaster* and the dissent in *Glock* also relied on legislative history but reached the opposite conclusion. The court in *Bushmaster* acknowledged that "[w]e do not dispute that, over the course of the hundreds of pages of coverage of the legislative debates, a few congressional supporters of PLCAA made a few brief references to predicate statutes as being firearms specific."[160] However, it suggested that the analyses of legislative history by the majorities in *Beretta* and *Glock* "overlooked . . . dozens of statements by PLCAA's drafter and cosponsors that imply or directly state that the predicate exception applies . . . [to] violation[s] of *any* applicable law, and not only those laws that specifically govern the firearms trade."[161]

---

156. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 403 (2d Cir. 2008) (alterations to second quotation in original).

157. Ileto v. Glock, Inc., 565 F.3d 1126, 1137 (9th Cir. 2009).

158. *See Beretta*, 524 F.3d at 403; *Ileto*, 565 F.3d at 1137. The statement is as follows:

> Let me again say, as I said, if in any way they violate State or Federal law or alter or fail to keep records that are appropriate as it relates to their inventories, they are in violation of law. This bill does not shield them, as some would argue. Quite the contrary. If they have violated existing law, they violated the law, and I am referring to the Federal firearms laws that govern a licensed firearm dealer and that govern our manufacturers today.

Beretta, 524 F.3d at 403.

159. *Id.* at 404.

160. 202 A.3d at 322.

161. *Id.* The *Bushmaster* court cited multiple statements by the Senate sponsor suggesting that the predicate exception applied to violations of statutes of general applicability. For example: "Any manufacturer, distributor, or dealer who knowingly violates *any* [s]tate or [f]ederal law can be held civilly liable under the bill" and "this bill does not protect any member of the gun industry from lawsuits for harm resulting from *any illegal actions* they have committed" and "if a gun dealer or a manufacturer acted in an illegal or irresponsible way . . . this bill would not preempt

f. Statutory Purpose

Perhaps unsurprisingly by this point, these courts also differed in their views of PLCAA's statutory purpose. The majority in *Beretta* asserted that PLCAA's primary purpose was to shield from lawsuits the design, marketing, and distribution of guns conducted in conformity with federal and state firearms laws.[162] The majority in *Glock* viewed the primary purpose as preempting civil claims based on theories of liability originating in common law torts, such as negligence and nuisance.[163] The court in *Bushmaster* concluded that the primary purposes of PLCAA were to preclude only civil claims based on novel theories of recovery but not well-established theories such as violation of the state's unfair trade practices law.[164] The dissent in *Glock* concluded that the purpose of PLCAA was to prohibit only lawsuits against the firearms industry based on vicarious liability, not a gun manufacturer's own misconduct.[165] Each of these opinions justifies its characterization of PLCAA's purpose by reference to specific language in the statute's first section, which includes multiple and varying "[f]indings" and "purposes."[166]

g. Summary

To review, and as illustrated in Figure 1 below, in four leading cases courts produced four contradictory approaches to the issue of whether a generic statute is "applicable" to the manufacturing or sale of a firearm within the meaning of PLCAA. One court (*Smith & Wesson*) held that the term "applicable" as used in PLCAA is unambiguous and that, therefore, violation of a generic statute may trigger the predicate exception. A second court (*Glock*) found the term "applicable" to be ambiguous and concluded that violation of a generic statute related to sales and manufacturing could trigger the predicate exception, but not if it codifies a common law cause of action. A third court (*Beretta*) similarly found the term "applicable" to be ambiguous and, based on interpretive canons, legislative history and analysis of PLCAA's purpose, concluded that violation of a generic statute could trigger the predicate exception only if it has been applied to or clearly implicates firearms sales specifically. And a fourth court (*Bushmaster*) agreed that the term "applicable" is

---

or in any way protect them." *Id.* at 323–24 n.83. According to the court, the Senate sponsor, at one point during floor debate of the bill, suggested that a local zoning law could qualify as a predicate statute. *Id.* at 324 n.84. The dissent in *Glock* similarly concludes that PLCAA's legislative history favors a broad interpretation of "applicable" as capable of being applied to. *See Glock*, 565 F.3d at 1160.

162. *See Beretta*, 524 F.3d at 402–03.

163. *See Glock*, 565 F.3d at 1135.

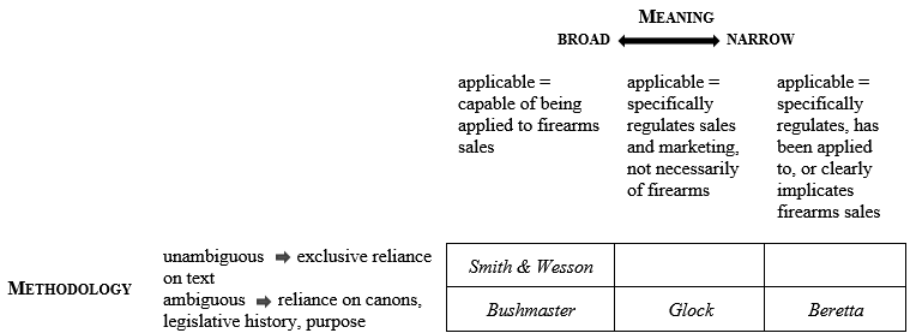
164. *See Bushmaster*, 202 A.3d at 309.

165. *See Glock*, 565 F.3d at 1159 (Berzon, C.J., concurring in part and dissenting in part).

166. 15 U.S.C. § 7901.

ambiguous and, based on interpretive canons, legislative history, and analysis of PLCAA's purpose, concluded that violation of a generic statute does trigger the predicate exception. Figure 1 illustrates this confusing doctrinal landscape.

Figure 1. Interpretation of the Predicate Exception



In Part III, we will return to these cases and suggest that the indeterminacy they have produced arises out of inattention to the statutory scheme in which the predicate exception is embedded and which it is designed to serve. We will demonstrate how proper attention to this scheme leads to a more coherent interpretation of PLCAA's predicate exception. For the moment, though, we leave these cases to the side and assess the other type of lawsuit that seeks to leverage PLCAA's predicate exception: civil suits based on statutes specifically designed to trigger the predicate exception.

2. Statutes Designed to Trigger the Predicate Exception

After the Second Circuit rejected the civil claims against firearm manufacturers in *Beretta*, the State of New York wished to reopen its courts to civil lawsuits against the gun industry. In light of the Second Circuit's interpretation of PLCAA's predicate exception, the state legislature passed a public nuisance statute that explicitly and specifically applies to the marketing and sale of firearms.[167] A section of the New

167. *See* N.Y. GEN. BUS. LAW § 898 (McKinney 2023). The statute was a direct response to *Beretta*:

PURPOSE:

York General Business Laws titled "Sale, Manufacturing, Importing and Marketing of Firearms," now states that "[n]o gun industry member, by conduct unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a [firearm]."[168] The statute mandates that firearm manufacturers and sellers implement "[r]easonable controls and procedures" to prevent the illegal diversion of their products, defined as:

> policies that include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts . . . as well as sales . . . to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of [the state unfair trade practices statute].[169]

The statute deems any violation of these provisions as a public nuisance and authorizes the attorney general, a city attorney, or any person injured by a violation of the statute to file a lawsuit in state or federal court for injunctive relief to abate the nuisance or for money damages.[170] In short, New York created a statutory cause of action that replicates the various claims made by individuals and government entities

---

> To regulate the sale, manufacture, importation and marketing of firearms in relation to creating or maintaining a condition that endangers safety or health through the sale, manufacturing, importing or marketing of firearms within the guidelines of City of New York v. Beretta USA Corp., 524 F3d 384 (2d Cir. 2008).

S.B. 7196, 2021–22 Leg., Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/S7196 [https://perma.cc/VV5M-MAYC]. For other examples of state laws that similarly regulate the firearm industry, see Assemb. B. 1594, 2021–22 Leg., Reg. Sess. (Cal. 2022), https://legiscan.com/CA/text/AB1594/id/2601230 [https://perma.cc/9G9S-NMQP] (California); Assemb. B. 1765, 2022-23 Leg., Reg. Sess. (N.J. 2023), https://legiscan.com/NJ/bill/A1765/2022 [https://perma.cc/8F5Z-NP78] (New Jersey); S.B. 302, 2021-22 Leg., Reg. Sess. (Del. 2022), https://legis.delaware.gov/BillDetail/129672 [https://perma.cc/MAK6-XVQC] (Delaware); S.B. 5078, 2023-24 Leg., Reg. Sess. (Wash. 2023), https://app.leg.wa.gov/billsummary?BillNumber=5078&Initiative=false&Year=2023 [https://perma.cc/PE3K-NNTL] (Washington).

168. N.Y. GEN. BUS. LAW § 898-b(1) (McKinney 2023). Like PLCAA, the New York statute also covers the marketing and sale of firearms parts and ammunition. *Compare* 15 U.S.C. § 7903(4) (defining "qualified product" to include any "component part of a firearm or ammunition"), *with* N.Y. GEN. BUS. LAW § 898-a(4) (defining "[g]un industry member" to include persons related to "ammunition, ammunition magazines, and firearms accessories").

169. N.Y. GEN. BUS. LAW § 898-a(2).

170. *Id.* § 898-d to -e.

against gun manufacturers by adopting explicit statutory language so as to qualify for the predicate exception to PLCAA immunity. New York's new firearms nuisance provisions have prompted similar legislation in California,[171] New Jersey,[172] Delaware,[173] and Washington.[174] In New Jersey, the attorney general created an office specifically dedicated to suing gun manufacturers under the state's new firearms nuisance law.[175]

The National Shooting Sports Foundation (NSSF) (the leading gun industry trade association) and numerous firearms companies unsuccessfully challenged the New York statute in federal district court based on theories of the supremacy clause, the dormant commerce clause, and vagueness.[176] Pending challenges by the NSSF to the New Jersey, Delaware, and Washington laws also raise objections based on the commerce clause, the due process clause, the First Amendment, and the Second Amendment.[177] In Part IV below we address the Second Amendment's applicability to state laws designed to trigger PLCAA's predicate exception. But here, we focus exclusively on a question of statutory interpretation: do state firearms nuisance statutes qualify as predicate statutes for the purposes of PLCAA's predicate exception?

In the face of statutory language that specifically refers to the sale and marketing of firearms, the NSSF nevertheless asserts that these statutes are not "applicable" to the sale or marketing of a firearm under PLCAA.[178] The NSSF insists that "the term 'applicable' . . . must be read 'in the context of the surrounding language and of the statute as a whole.'"[179] The organization argues that "[t]he predicate exception was intended to apply to knowing violations of clearly-defined federal and state statutes applicable to the sale and marketing of firearms, such as those governing firearm sales record-keeping requirements and illegal

171. Firearms Industry Responsibility Act, CAL. CIV. CODE § 3273.50-52 (West 2023).

172. N.J. STAT. ANN. § 2C:58-35 (West 2023).

173. DEL. CODE ANN. tit. 10, § 3930 (2023).

174. WASH. REV. CODE § 7.48 (2023).

175. Steve Janoski, *NJ Creates Office to Sue Gun Manufacturers, Vowing to 'Hold the Industry Accountable'*, N. JERSEY (July 25, 2022), https://www.northjersey.com/story/news/new-jersey/2022/07/25/nj-creates-gun-manufacturer-lawsuit-office/65381925007 [https://perma.cc/CM85-3L5L].

176. Nat'l Shooting Sports Found. v. James, 604 F. Supp. 3d 48, 55, 57, 60, 63–64, 65 (N.D.N.Y. 2022).

177. *See* Complaint at 21–31, Nat'l Shooting Sports Found. v. Jennings, No. 1:22-cv-1499-UNA (D. Del. Nov. 16, 2022) [hereinafter Jennings Complaint]; Complaint at 20–30, Nat'l Shooting Sports Found. v. Platkin, No. 3:22-cv-06646 (D. N.J. Nov. 16, 2022); Complaint at 21-37, Nat'l Shooting Sports Found. v. Ferguson, No. 2:23-cv-00113 (E.D. Wash. Apr. 25, 2023).

178. *See* Jennings Complaint, *supra* note 177, at 16.

179. *See id.* at 16 (quoting City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400 (2d Cir. 2008)).

disposal of firearms . . . similar to the examples given in the PLCAA"[180] but does not include "statutes that merely impose broad duties of care"[181] to implement "ill-defined 'reasonable controls' to somehow prevent firearms from being used in a crime or unlawfully possessed . . . ."[182]

According to the NSSF, each of these new state firearms nuisance laws "undermines the PLCAA's intended purposes"[183] by "trying to resurrect the very kinds of lawsuits that the PLCAA was enacted to eliminate."[184] The NSSF insists that its interpretation

> is the only sensible way to read the predicate exception, as interpreting it to permit states to reinstate exactly the same kinds of novel public nuisance suits that led Congress to enact the PLCAA through the simple expedient of codifying the same amorphous theories in statutes would "allow the predicate exception to swallow the statute."[185]

A state may not, concludes the NSSF, rely on a statute designed to trigger the predicate exception to "accomplish through legislation what it was unable to accomplish through litigation."[186] These arguments initially prevailed in the NSSF's challenge to New Jersey's firearms nuisance statute. In that case, a federal district court granted a preliminary injunction blocking implementation of the law, but a federal appellate court later vacated the injunction.[187]

However, a federal district court rejected these arguments in the NSSF's challenge to the New York statute.[188] In response to the NSSF's interpretation of the term "applicable" in the predicate exception, the court cited *Beretta* in holding that the New York firearms nuisance statute unambiguously qualified as a predicate statute because it "expressly regulates firearms."[189] In response to the NSSF's arguments about PLCAA's purpose, the court found that the purposes of PLCAA were to prevent novel common law claims against firearm manufacturers and sellers and to block the use of litigation to circumvent the legislative

180. Complaint for Declaratory Judgment and Injunctive Relief at 20, *James*, F. Supp. 3d 48 (No. 1:21-cv-01348) [hereinafter James Complaint].

181. Jennings Complaint, *supra* note 177, at 16.

182. James Complaint, *supra* note 180, at 17.

183. *Id.* at 21.

184. Jennings Complaint, *supra* note 177, at 3.

185. *Id.* at 16 (quoting City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 403 (2d Cir. 2008)).

186. James Complaint, *supra* note 180, at 3.

187. Nat'l Shooting Sports Found. v. Platkin, No. 3:22-cv-06646, 2023 WL 1380388, at *1 (D.N.J. Jan. 31, 2023), *vacated*, Nat'l Shooting Sports Found. v. Att'y Gen. of New Jersey, No. 23-1214, 2023 WL 5286171 (3d Cir. Aug. 17, 2023).

188. *See* Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48, 55 (N.D.N.Y. 2022) ("For the following reasons, Defendant's motion to dismiss is granted . . . .").

189. *Id.* at 60.

branch of government, and it concluded that New York's passage of legislation authorizing a new statutory cause of action posed no obstacle to either of these purposes.[190] The court concluded that "Congress clearly intended to allow state statutes which regulate the firearms industry," and, thus, PLCAA's predicate exception explicitly allows states to accomplish through legislation what they may not accomplish through common law litigation.[191]

Leaving aside its reliance on *Beretta* in interpreting the meaning of the term "applicable," the court's analysis of PLCAA's purpose implicitly relies on the constitutional principles of separation of powers and federalism to justify its conclusion that PLCAA's predicate exception permits private causes of action based on state statutes aimed at regulating the firearms industry. Our theory of PLCAA immunity, presented in Part III, highlights PLCAA's explicit endorsement of these constitutional principles. Moreover, we will show how PLCAA's commitment to these principles permits states to rely not only on statutes specifically designed to trigger the predicate exception but also, for reasons so far entirely ignored by courts that have considered the question, on some generic statutes. However, before presenting our novel interpretation of the predicate exception, it will be helpful to further set the stage for our claims regarding PLCAA's constitutional commitments through the examination of a second category of challenges to PLCAA immunity.

B. *Unlawful Misuse Under Foreign Law*

A recent lawsuit against several gun manufacturers argues that PLCAA immunity does not extend to civil claims arising out of criminal misuse of a weapon under foreign law.[192] In August 2021, the government of Mexico filed a lawsuit in a federal district court in Boston alleging that the design choices, marketing campaigns, and distribution practices of eight leading U.S. gun manufacturers have facilitated illegal cross-border transfer of hundreds of thousands of firearms into Mexico, where they are used to commit crimes.[193] These assertions are by now familiar—they are similar to those asserted in pre-PLCAA lawsuits and some of the post-PLCAA suits that seek to leverage PLCAA's predicate exception. What makes Mexico's lawsuit distinct is the contention that, insofar as its damages arise from downstream users' criminal misuse of weapons under Mexican, rather than U.S. federal or state law, PLCAA

190. *Id.* at 61.

191. *Id.*

192. Complaint at 7, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. 1:21-cv-11269 (D. Mass Aug. 4, 2021) [hereinafter Estados Unidos Mexicanos Complaint].

193. *Id.* at 1.

does not apply.[194] In short, Mexico argues that its lawsuit does not fit PLCAA's definition of a "qualified civil liability action."

The key operative provision of PLCAA states that "[a] qualified civil liability action may not be brought in any Federal or State court."[195] PLCAA defines a "qualified civil liability action" as

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the *criminal or unlawful misuse* of a qualified product by the person or a third party . . . .[196]

Mexico claims that the phrase "criminal or unlawful misuse" means criminal or unlawful under U.S. law and that, therefore, claims resulting from criminal or unlawful misuse under foreign law are not "qualified civil liability actions" and are not barred by PLCAA.[197]

Mexico's interpretation of the phrase "criminal or unlawful misuse" rests on a presumption that federal statutory provisions do not apply to conduct outside the United States. Leading international law scholar Professor William S. Dodge explains in a 2020 Harvard Law Review article that recent U.S. Supreme Court decisions establish this "presumption against extraterritoriality."[198] Dodge explains that the application of the presumption entails two steps: "(1) a 'clear indication' step and (2) a 'focus' step."[199] He elaborates:

> At step one, the court looks for a "clear indication" of the provision's geographic scope. If Congress has clearly indicated when it wants a provision to apply, the court will, sensibly, follow Congress's direction. But if there is no clear indication of the provision's geographic scope, the court moves to step two and determines the "focus" of the provision. The focus might be conduct Congress wishes to prohibit, effects it wishes to prevent, or transactions it wishes

194. *See id.* at 7. Mexico's lawsuit relies on numerous theories, including PLCAA's predicate exception. *Id.* However, the court's analysis of this case focuses exclusively on its novel contention that PLCAA does not apply to civil suits against gun manufacturers arising out of criminal misuse of weapons under foreign law.

195. 15 U.S.C. § 7902(a).

196. *Id.* § 7903(5)(A) (emphasis added).

197. Estados Unidos Mexicanos Complaint, *supra* note 192, at 6–7.

198. William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1609 (2020).

199. William S. Dodge & Ingrid Wuerth, *Mexico v. Smith & Wesson: Does US Immunity for Gun Manufacturers Apply Extraterritorially?*, JUST SECURITY (Aug. 19, 2021), https://www.justsecurity.org/77815/mexico-v-smith-wesson-does-us-immunity-for-gun-manufacturers-apply-extraterritorially/ [https://perma.cc/WJP3-EK3B].

> to protect. If the focus of the provision occurs in the United States and . . . if conduct relevant to the provision's focus occurs in the United States, then applying the provision is considered "domestic" and permissible. Otherwise, applying the statute is considered "extraterritorial" and impermissible.[200]

Dodge emphasizes that if there is a clear indication that a statutory provision's geographic scope is domestic, a court should not conduct a step-two analysis.[201] According to an amicus brief filed in the case by Dodge and fifteen other international law scholars, PLCAA clearly indicates that "criminal or unlawful misuse" refers exclusively to criminal or unlawful misuse under U.S. domestic law.[202] Consequently, they argue that Mexico's claim does not result from the "criminal or unlawful misuse" (as that phrase is properly understood using the presumption against extraterritoriality) of a firearm, and therefore, Mexico's lawsuit is not a qualified civil liability action, which means that it falls outside the scope of PLCAA immunity.[203]

The international scholars begin their analysis by conceding that PLCAA's text "contains no express statement of geographic scope."[204] Nonetheless, they insist that "[e]xamining the context of PLCAA . . . it is clear that 'criminal or unlawful' refers only to U.S. federal and state law and not to foreign law."[205] In support of this assertion, they offer three textual arguments.

First, the amicus brief observes that two of PLCAA's exceptions to immunity refer only to federal and state law.[206] One permits actions against gun sellers convicted of violating federal law governing firearms transfers or state law equivalents.[207] The other, the predicate exception, permits actions against gun sellers who knowingly violate a state or federal statute applicable to the sale or marketing of a firearm.[208] Both of these exceptions apply only to the violation of a U.S. domestic law. According to the amicus brief, the proper inference is that "[i]f Congress intended PLCAA [immunity] to apply to [injuries caused by] the misuse

200. *Id.*

201. *Id.*

202. Brief of Professors of Transnat'l Litig. as Amicus Curiae at 4–8, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. 1:21-cv-11269 (D. Mass. Jan. 31, 2022) [hereinafter Brief of Professors].

203. *Id.*

204. *Id.* at 4.

205. *Id.*

206. *Id.*

207. 15 U.S.C. § 7903(5)(a)(i) (making an exception for "an action brought against a transferor convicted under section 924(h) of title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted").

208. *Id.* § 7903(5)(a)(iii).

of guns that is criminal or unlawful under foreign law, it seems likely that Congress would have drafted these exceptions to refer to foreign law as well."[209]

Second, the brief argues that PLCAA's findings and purposes support their claim that "criminal and unlawful misuse" refers exclusively to U.S. domestic law.[210] Multiple references to the Second Amendment right to keep and bear arms[211] and an express desire to "preserve a citizen's access" to firearms[212] suggest, according to their argument, that "Congress was simply not concerned with providing access to guns for Mexican citizens in Mexico."[213]

Third, the scholars' brief argues that the absence of any reference to foreign governments or liability based on foreign law in PLCAA's findings and purposes suggests that PLCAA does not confer immunity against lawsuits based on foreign law.[214] As the brief explains,

> Congress also notes that guns "are heavily regulated by Federal, State, and local laws," . . . with no mention of foreign laws. Congress specifically identifies the civil actions with which it is concerned as those "commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States." There is no mention of suits by foreign governments or theories of liability based on foreign law.[215]

Although the phrase "and others" could arguably include foreign governments, one inclined toward this position could interpret it, using the canon of *noscitur a sociis*, to refer only to domestic plaintiffs, such as individual plaintiffs.

The district court dismissed Mexico's claims.[216] In contrast to the international law scholars, the court found that, under step one of presumption-against-extraterritoriality analysis.[217] Next, in step two of the analysis, the court found that the case involved a domestic application of the statute.[218] Consequently, the court found that the presumption did

209. Brief of Professors, *supra* note 202, at 5.

210. *See id.* at 6.

211. 15 U.S.C. § 7901(a)(1)–(2).

212. *Id.* § 7901(b)(2).

213. Brief of Professors, *supra* note 202, at 6.

214. *Id.* at 5.

215. *Id.* (citations omitted) (citing 15 U.S.C. §§ 7301(a)(4), 7901(a)(7)).

216. *See* Memorandum and Ord. on Defs.' Motion to Dismiss, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. 1:21-cv-11269-FDS (D. Mass. Sept. 30, 2022) [hereinafter Mexico Memorandum].

217. *Id.* at 23.

218. *Id.* at 23–25.

not apply.[219] In analyzing the focus of the statute in step two, the court emphasized that PLCAA regulates the jurisdiction of courts to hear civil claims against firearm manufacturers and sellers, and the "regulation of the types of cases that can be brought in federal and state courts against domestic defendants is unquestionably a domestic matter."[220] "Indeed," emphasized the court, "the statute seeks to prohibit exactly the type of claim that is currently before this Court."[221]

The court's rejection of the international scholars' analysis rests on an extraterritoriality analysis that ignores the international scholars' arguments. As already explained, PLCAA's definition of a qualified civil liability action covers lawsuits filed by "any person" arising out of the "criminal or unlawful misuse" of a firearm.[222] Whereas the scholars analyzed the extraterritoriality of the phrase "criminal or unlawful misuse," the court analyzed the extraterritoriality of "any person."[223] In step one of its analysis, the court points out that PLCAA defines "any person" to include "any governmental entity."[224] The court then explained that, in this context, "it is well established that generic terms like 'any' . . . do not rebut the presumption against extraterritoriality."[225] The court then concluded that the term "any governmental entity" in PLCAA was ambiguous with regard to whether it included foreign governments.[226]

Having thus found that the statute provides no clear indication regarding whether this statutory provision within PLCAA's definition of a qualified civil liability action includes lawsuits brought by foreign entities, the court proceeded to step two of the analysis, which requires identifying the focus of the provision.[227] The court found that the focus of the provision was the filing of civil lawsuits in U.S. federal and state courts, a purely domestic activity.[228] Thus, as the court explained, Mexico's lawsuit involves a domestic application of PLCAA, so the presumption against extraterritoriality does not apply.[229] In its step-two analysis, the court implicitly found that the "focus" of PLCAA cannot be

219. *Id.* at 23.

220. *Id.* at 24.

221. *Id.*

222. 15 U.S.C. § 7903(5)(A).

223. *Compare* Brief of Professors, *supra* note 202, at 5 ("The conclusion that 'criminal or unlawful' refers only to federal and state law finds confirmation in Congress's codified findings and purposes."), *with* Mexico Memorandum, *supra* note 216, at 22 ("[T]he use of the word 'any' throughout the PLCAA is not sufficient to rebut the presumption.").

224. Mexico Memorandum, *supra* note 216, at 22 (citing § 7903(3)).

225. *Id.* (citing Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 118 (2013)).

226. *Id.*

227. *Id.* at 23.

228. *Id.* at 24.

229. *Id.* at 25.

the criminal or unlawful misuse of third-party downstream users outside of the United States whose conduct gives rise to the plaintiffs' harms because that misconduct is not the "*conduct* Congress wishes to prohibit, *effects* it wishes to prevent, or *transactions* it wishes to protect."[230] In enacting PLCAA, Congress did not seek to regulate the criminal or unlawful misuse of firearms by downstream users. It sought to regulate the filing of civil lawsuits, which, as the court pointed out, is a purely domestic activity.

Nowhere in its opinion does the court address the scholars' claim that the phrase "criminal or unlawful misuse" within the PLCAA's definition of a qualified civil liability action does not include criminal or unlawful misuse under foreign law. We address this argument directly below in Section III.B.2, where we argue that PLCAA gives clear indication that its definition of a "qualified civil liability action" encompasses lawsuits arising out of criminal misuse of a firearm under foreign law or, alternatively, that, at the very least, the question is sufficiently ambiguous to support the court's step-two analysis. Moreover, we suspect that the international scholars' application of the presumption to Mexico's claim in the first place is misplaced. In short, we think that the international legal scholars have misconstrued the scope of PLCAA immunity.

C. *The Need for Coherence*

Now that we have surveyed the legal theories designed to get around PLCAA immunity, either by triggering the predicate exception or by filing claims beyond the reach of PLCAA's immunity provision, the need for a more coherent account of the scope of PLCAA immunity should be evident. Why did Congress grant immunity to the gun industry against lawsuits seeking to hold industry participants liable under common law theories of liability for subsequent misuse of their products by third parties but allow such lawsuits when a predicate state or federal statute applies? Is there a clear indication that PLCAA extends this immunity to gun makers for the criminal misuse of firearms not only in the United States but also abroad? In the next Part, we develop an account of PLCAA immunity that resolves these questions.

III. A STATUTORY SCHEME FOR GUN INDUSTRY REGULATION

The various cases and theories we have considered all share a common myopia: they all parse specific statutory provisions without attending to their place within the larger statutory scheme for gun industry regulation established by PLCAA. In our view, questions about the scope of PLCAA immunity can be determinately answered only in light of this statutory scheme.

230. Dodge & Wuerth, *supra* note 199 (emphasis added).

A. *PLCAA's Underlying Principles*

The statutory scheme established by PLCAA is an expression of three constitutional principles: (1) the separation of powers; (2) federalism; and (3) the individual right to keep and bear arms guaranteed by the Second Amendment. In this context, the separation of powers refers specifically to the idea that legislatures, not courts, should decide matters of public policy. Federalism refers to the concept of state autonomy guaranteed by the Tenth Amendment and reflected in the structure of the Constitution. PLCAA was advanced primarily by conservative members of Congress, and these three constitutional principles had been central to the conservative legal agenda for many years in a variety of contexts, including tort reform, civil rights, and firearms ownership.[231]

PLCAA is a tort reform statute.[232] A defining characteristic of tort reform is the preemption of state common law causes of action by alternative statutory liability rules.[233] PLCAA's preemption of state common law causes of action is reflected in several of its provisions.

One of PLCAA's findings identifies novel common law actions as an area of particular concern:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others 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.[234]

This finding reflects a conception of separation of powers common among advocates of tort reform, according to which the expansion of civil liability by common law courts is an encroachment on the legislative

231. *See generally* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 (2002) (discussing how tort law reflects socio-economic interests); ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010) (arguing that conservatives have successfully remade constitutional law); PATRICK CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY (2018) (reviewing the history of the interpretation of the Second Amendment in society, politics, and the legal community).

232. *See* R. Clay Larkin, *The Protection of Lawful Commerce in Arms Act: Immunity for the Firearm Industry is a (Constitutional) Bulls-Eye*, 95 KY. L.J. 187, 187 (2006).

233. *See* Karen C. Sokol, *Tort as a Disrupter of Cultural Manipulation: Neuromarketing and the Dawn of the E-Cigarette*, 66 S.C. L. REV. 191, 221–33 (2014).

234. 15 U.S.C. § 7901(a)(7).

function.[235] PLCAA makes this separation of powers concern explicit in the immediately subsequent finding:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine . . . .[236]

PLCAA's focus on the preemption of state common law causes of action is also reflected in its substantive provisions.[237] The exceptions to PLCAA's grant of immunity from liability for harm arising out of the criminal misuse of a weapon all reference statutory rather than common law tort standards of conduct. Three exceptions apply when a manufacturer violates federal or state statutes governing the sale, marketing, transfer, and ownership of firearms or ammunition.[238] The exception for negligence per se[239] similarly requires a statutory violation as the basis of liability.[240] The exception for negligent entrustment[241] includes a statutory definition of negligent entrustment provided by PLCAA.[242] Several courts have held that this definition does not create a new statutory standard for negligent entrustment but merely authorizes claims based on state common law doctrines of negligent entrustment, pointing out that, in the section immediately following the definition of negligent entrustment, PLCAA includes a "Rule of construction" stating that "no provision of this chapter shall be construed to create a public or

235. This is, of course, a contested conception of the role of common law courts. *See* Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L. MED. & ETHICS 556, 556–57 (2004); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 69 (12th prtg. 1946) (discussing that judges have the proper authority to operate and legislate within the "gaps in the law").

236. § 7901(a)(8).

237. *See* Higgins et al., *supra* note 16, at 83–84 (arguing that PLCAA's preemption of state common law but not state statutory law violates the constitutional principle of state autonomy).

238. *See* §§ 7903(5)(A)(i), (iii), (vi).

239. *Id.* § 7903(5)(A)(ii).

240. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 148 (2d ed. 2022) (explaining that the negligence per se rule is applied in cases where a statute is violated if the violation causes harm of the kind the statute was intended to avoid, and causes such harm to a person within the class of persons the statute was intended to protect).

241. *See* § 7903(5)(A)(ii).

242. *Id.* § 7903(5)(B). The exception for breach of contract or breach of warranty (§ 7903(A)(iv)) does not reference common law tort standards, and the exception for defective design (§ 7903(5)(A)(v)) is not an exception to immunity for claims arising out of criminal misuse of the weapon, since it does not apply "where the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.* § 7903(5)(A)(v).

private cause of action or remedy."[243] Notwithstanding this latter provision, PLCAA's definition of negligent entrustment must, at the very least, preempt any state common law doctrines of negligent entrustment that establish a lower threshold for liability. Otherwise, it would be rendered surplusage.

Some of PLCAA's findings do suggest more sweeping immunity that makes no distinction between common law and statutory bases for liability. For example, one finding declares broadly,

> 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 products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.[244]

However, PLCAA's operative provisions explicitly include exceptions to immunity that flatly contradict any implication that PLCAA immunity covers gun manufacturers and sellers irrespective of any statutory violation.[245] Moreover, other provisions in the "Findings" and "Purposes" sections signal limits on PLCAA immunity. For example, PLCAA's first stated purpose is: "To prohibit causes of action against manufacturers, distributors, dealers and importers of firearms or ammunition products, and their trade associations, for the harm *solely caused by* the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended."[246]

The qualifying phrase "solely caused by," here and elsewhere in the statute,[247] suggests that PLCAA immunity does not apply to instances where wrongdoing by a manufacturer, distributor, dealer, or importer contributed to harm caused by the criminal misuse of a firearm.[248]

---

243. *Id.* § 7903(5)(C); *see, e.g.*, *In re* Academy, Ltd., 625 S.W.3d 19, 30 (Tex. 2021); Prescott v. Slide Fire Sols., 410 F. Supp. 3d 1123, 1132–33 (D. Nev. 2019); Phillips v. Lucky Gunner, 84 F. Supp. 3d 1216, 1225 (D. Colo. 2015).

244. § 7901(a)(5); *see also id.* § 7901(a)(3) (discussing lawsuits filed against litigants for harm caused by third-party misuse of firearms).

245. *See id.* § 7903(5)(A).

246. *Id.* § 7901(b)(1) (emphasis added).

247. *Id.* § 7901(a)(6).

248. As a matter of factual causation alone, a manufacturer is always a cause of a gun violence victim's injury by virtue of having sold the weapon. The concept of causation as used here in the statutory term "solely caused by" must denote wrongful cause or proximate cause.

So far, we have argued that PLCAA's preemption of state common law causes of action reflects a conception of separation of powers characteristic of tort reform statutes. Under this conception, expanding civil liability is a legislative, not a judicial, function.[249] Importantly, though, PLCAA's endorsement of statutory liability explicitly includes not only federal but also *state* statutes.[250] This reflects Congress's attention to the constitutional principle of federalism.

As stated in the predicate exception, PLCAA immunity does not cover "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product . . . ."[251] PLCAA defines the term "State" as including "each of the several States of the United States" as well as the District of Columbia, territories and possessions of the United States, and "any political subdivision of any such place."[252] PLCAA's stated purpose "[t]o preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States,"[253] further reflects Congress's interest in both separation of powers and federalism.

Finally, PLCAA's first two legislative findings reflect a commitment to gun rights:

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.[254]
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.[255]

A subsequent finding states, "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others . . . threatens the diminution of a basic constitutional right and civil liberty. . . ."[256] In other words, according to Congress, lawsuits against the gun industry based on unlawful actions by third parties threaten individuals' right to keep and bear arms. This concern is explicit in the statute's stated purposes: "To preserve a citizen's access to a supply of firearms and

249. As noted above, this is a contested conception of the role of common law courts. Lytton, *supra* note 235.

250. *See* §§ 7903(5)(A)(i), (iii).

251. *Id.* § 7903(5)(A)(iii).

252. *Id.* § 7903(7).

253. *Id.* § 7901(b)(6); *see also* 15 U.S.C. § 7901(a)(8) (discussing similar principles).

254. *Id,* § 7901(a)(1).

255. *Id.* § 7901(a)(2).

256. *Id.* § 7901(a)(6).

ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting."[257]

This account of the statutory scheme for gun industry regulation established by PLCAA cashes out as follows. First, PLCAA prohibits what it characterizes as novel common law claims but permits private causes of action created by statutes. In doing so, PLCAA endorses a particular conception of the constitutional separation of powers according to which legislatures, not courts, should make regulatory policy. Second, PLCAA recognizes a role for both federal and state governments in regulating guns by allowing a limited category of lawsuits against the gun industry that are brought pursuant to either federal or state statutes. This reflects PLCAA's commitment to the principle of federalism expressed in the Tenth Amendment and embedded in the structure of government laid out by the Constitution. Third, PLCAA prohibits a wide range of lawsuits against participants in the gun industry that seek to hold them accountable for unlawful misuse of firearms by downstream actors. Here, PLCAA aims to protect citizens' rights to keep and bear arms under the Second Amendment by preserving access to firearms in the civilian market.

In sum, we conceive of PLCAA as the establishment by Congress of constitutional principles that govern gun industry regulation—that is, the rules of recognition[258] that determine the legal validity of efforts to regulate firearms sales and marketing. When we say that PLCAA establishes a statutory scheme, we mean that it organizes an infrastructure of state and federal laws created, interpreted, and administered by legislatures, courts, and agencies in accordance with guiding principles. As we have demonstrated, the guiding principles of this constitutional structure are a conception of the separation of powers that views policymaking as the province of legislatures, federalism, and the individual right to keep and bear arms.

B. *The Limits of PLCAA Immunity*

In light of our understanding of the statutory scheme established by PLCAA for regulation of the gun industry, we now return to questions of statutory interpretation related to the scope of PLCAA immunity.

1. Clarifying the Predicate Exception

In analyzing whether a state statute qualifies as a predicate statute under PLCAA, all the courts that have considered the matter distinguish two issues of statutory interpretation. The first is the meaning of the term "applicable" in PLCAA. The second is the applicability of the state

257. *Id.* § 7901(b)(2).

258. *See* H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. 1991).

statute in question to firearms sales or marketing. That is, one must first know what the term "applicable" in PLCAA encompasses before one can know whether a state statute is applicable to the marketing or sale of a firearm. This way of presenting the issues suggests that the applicability of the state law depends on the interpretation of the federal statutory term "applicable," which is a question of federal law. But this is a mistake shared by all the courts in these cases. In fact, the reverse is true.

Under PLCAA, the determination of the "applicability" of a state law to the sale or marketing of a firearm *is a question of state law because it requires the interpretation of a state statute.* If, as a matter of state law, the underlying state statute applies to the sale or marketing of a firearm, then the statute is "applicable" within the meaning of PLCAA. If it does not, then it is not "applicable" within the meaning of PLCAA. In other words, the term "applicable" in PLCAA has no meaning independent of what it means in state law, and the courts' search for such a meaning in the text of PLCAA, its legislative history, and its various purposes is misguided.[259]

How, then, does a court determine whether an underlying state statute applies to the sale or marketing of a firearm when the statute is generic rather than specific? Fundamentally, this is a question of state law, and courts must answer it by applying the state's chosen methods of statutory interpretation to the state statute in question. Ideally, state courts would answer the question, subject to review by the state's highest court, which has ultimate interpretive authority over a state statute's meaning. Federal judges who confront the question—when a case is in federal court under diversity or supplemental jurisdiction—have two choices. If state law permits, they could certify the question to the highest court in the state.[260] Alternatively, they can apply the state's interpretive methods and

259. Judge Robert Katzmann made a similar argument in his dissent in *Beretta*: "Whether that state statute serves as a predicate statute is a matter of federal law for this Court to address. But the threshold question of what conduct the state statute encompasses is a question of state law." City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 407 (2d Cir. 2008).

260. *See* 32A AM. JUR. 2D, *Federal Courts* § 1073 (2023). As Judge Katzmann put it in his dissent in *Beretta*:

> In keeping with our preference that states define the meaning of their own laws in the first instance, . . . and because the outcome of this case turns on the answer to this important question of state law, I would certify the question of the scope of New York['s] [criminal-nuisance statute] to the highest court of the State of New York, the New York Court of Appeals. . . . If the New York Court of Appeals were to determine that New York's criminal-nuisance statute is, in fact, "applicable to the sale and marketing of firearms," and if the plaintiffs can prove that the defendants' violation of that statute was *knowing*, as is now required under the PLCAA, . . . then the predicate exception would apply.

Beretta, 524 F.3d at 408 (citations omitted).

precedents, doing their best to interpret the statute the way the state's highest court would.

Textual analysis supports our interpretation of the meaning of the term "applicable" in the predicate exception. PLCAA provides definitions of various statutory terms such as "State,"[261] "seller,"[262] unlawful misuse,"[263] and "negligent entrustment,"[264] but no definition of the term "applicable." This suggests that the meaning of the term "applicable" in PLCAA is not to be found in PLCAA. It indicates, instead, that the determination of whether a statute is "applicable" is to be found elsewhere—and with respect to underlying state statutes, that meaning is to be found in state law.

Additionally, PLCAA's "Rule of construction," which states that "no provision of this chapter shall be construed to create a public or private cause of action or remedy,"[265] means that the term "applicable" as used in the predicate exception may not be the source of a statute's qualification as a predicate statute. The source of that status must be elsewhere. In the case of a predicate state statute, the source is state law, while in the case of a predicate federal statute, the source is federal law.

Our approach to defining "applicable" in the predicate exception reflects the principle of federalism that, as we have shown, is central to the statutory scheme established by PLCAA for regulating the gun industry. This scheme authorizes states to pass legislation to regulate the sale and marketing of firearms. PLCAA's commitment to federalism suggests that courts should consider the interpretation of those state statutes a matter of state law. Note that this analysis applies no less to generic statutes than to statutes designed to trigger the predicate exception.

The conception of separation of powers endorsed by PLCAA reveals that, contrary to gun industry objections, the predicate exception allows a state to "accomplish through legislation what it was unable to accomplish through litigation."[266] Indeed, in our view, that is precisely the point of the predicate exception. It requires states wishing to regulate the gun industry to do so through legislation rather than common law adjudication.[267]

Our interpretation of PLCAA demonstrates that it prohibits state courts from hearing common law tort claims that aim to hold gun

261. § 7903(7).
262. *Id.* § 7903(6).
263. *Id.* § 7903(9).
264. *Id.* § 7903(5)(B).
265. *Id.* § 7903(5)(C).
266. James Complaint, *supra* note 180, at 3.
267. For a refutation of the NSSF's argument that statutes imposing broad duties of care cannot serve as predicate statutes see generally Brief of Legal Scholars as Amici Curae, Nat'l Shooting Sports Found. v. Bonta, No. 3:23-cv-00945-AGS-KSC (S.D. Cal. June 7, 2023).

manufacturers liable for injuries arising out of the downstream criminal misuse of their weapons, while it allows state legislatures to create statutory private rights of action that would accomplish exactly the same goal. This interpretation of the PLCAA has prompted plaintiffs to argue that this arrangement violates state autonomy under the Tenth Amendment. Most courts have rejected this view.[268] A state appellate court in Pennsylvania, in a divided opinion currently on appeal, adopted this view.[269] While we take a strong stand on our interpretation of PLCAA's preemption of state common law in favor of statutory private rights of action—which we understand as reflecting a commitment to a particular conception of the separation of powers and federalism—we take no position here on the constitutionality of this scheme. We leave that question for a subsequent analysis.

2. The International Reach of PLCAA

Our account of the statutory scheme established by PLCAA also answers the question about the scope of PLCAA immunity raised by Mexico's lawsuit against U.S. gun makers. Recall that Mexico maintains that PLCAA does not immunize the industry from lawsuits arising out of criminal misuse of firearms under foreign law.[270] The international scholars supporting Mexico's claim argue that this is because, based on the presumption against extraterritoriality, the phrase "criminal or unlawful misuse" in PLCAA's definition of a qualified civil liability action should be read to include only criminal or unlawful misuse under U.S. law and, therefore, Mexico's claim is not barred by PLCAA.[271] They insist that "[e]xamining the context of PLCAA . . . it is clear that 'criminal or unlawful' refers only to U.S. federal and state law and not to foreign law."[272] However, in our view, the constitutional principles that animate the statutory scheme for gun industry regulation established by PLCAA explain why, contrary to the international scholars' interpretation, PLCAA immunity encompasses lawsuits arising out of

268. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 396–97 (2d Cir. 2008) (rejecting this argument on the grounds that "PLCAA 'does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them'") (quoting Connecticut v. Physicians Health Servs. Of Conn., Inc., 287 F.3d 110, 122 (2d Cir. 2002)); Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 380 (Alaska 2013); Delana v. CED Sales Inc., 486 S.W.3d 316, 316 (Mo. 2016); Travieso v. Glock, 526 F. Supp. 3d 533, 533 (D. Ariz. 2021).

269. Gustafson v. Springfield, Inc., 282 A.3d 739, 739 (Pa. Super. Ct. 2022). For an argument that PLCAA should be interpreted to allow common law claims in order to avoid this constitutional problem, see Higgins et al., *supra* note 16, at 83–84.

270. Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. 1:21-cv-11269, 2022 WL 4597526, at *11–*13 (D. Mass. Sept. 30, 2022).

271. *See supra* notes 196–99 and accompanying text.

272. Brief of Professors, *supra* note 202, at 4.

unlawful misuse of a firearm under foreign law. The international scholars offer three textual arguments, which we will address in turn.

First, the scholars point out that two of the exceptions to PLCAA immunity refer to the violation of federal or state laws applicable to the sale, marketing, or transfer of a firearm.[273] From the explicit mention of federal or state laws, the scholars infer that PLCAA immunity does not cover lawsuits arising out of criminal or unlawful misuse of a firearm under foreign law. As they explain, "[i]f Congress intended PLCAA [immunity] to apply to [injuries caused by] the misuse of guns that is criminal or unlawful under foreign law, [it seems likely that] Congress would have drafted these exceptions to refer to foreign law as well."[274] This inference assumes a formal symmetry between the scope of PLCAA's general rule of immunity and the scope of PLCAA's exceptions to the rule.

To us, the scholars' inference seems counterintuitive. According to their interpretation, PLCAA immunizes the gun industry from lawsuits arising out of the downstream illegal misuse of weapons under domestic common law, but it permits lawsuits arising out of downstream illegal misuse under the law of any foreign jurisdiction.[275] However, it seems implausible to us that PLCAA, which seeks to insulate the gun industry from regulation by U.S. common law liability, permits gun industry regulation by means of litigation seeking to enforce restrictions based on liability under foreign law—including foreign common law and firearms laws imposed by even the most autocratic regimes in other countries.[276]

In our view, the more logical inference is that PLCAA's general rule prohibits all lawsuits against gun manufacturers and sellers for injuries caused by the unlawful misuse of a firearm by a third party, while the exceptions provide narrow carveouts for manufacturers and sellers who violate U.S. federal or state laws. To put this in terms of statutory interpretation doctrine, a general provision (here, prohibiting lawsuits) is to be read broadly, while exceptions (here, permitting some lawsuits) are to be read narrowly.[277] Moreover, our view makes more sense in light of PLCAA's commitment to the constitutional principles of separation of powers and federalism, which afford state legislatures autonomy to engage in statutory regulation of the firearms industry. That is, these two

273. *See supra* note 206–08 and accompanying text.

274. Brief of Professors, *supra* note 202, at 5.

275. *Id.* at 4.

276. We do not mean to suggest that Mexico is governed by an autocratic regime. However, if Mexico's argument is correct, then it would apply with equal force to countries governed by autocratic regimes.

277. *See* LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 18 (2014).

principles support allowing state legislatures to direct U.S. firearms policy, but they do not support similar efforts by foreign governments.

Second, the scholars point to PLCAA's multiple references to the U.S. Constitution's Second Amendment right to keep and bear arms and PLCAA's stated purpose to "preserve a citizen's access" to firearms.[278] From PLCAA's explicit and repeated invocation of the Second Amendment, the scholars infer that "Congress was simply not concerned with providing access to guns for Mexican citizens in Mexico."[279] We believe that this inference relies on a non sequitur.

PLCAA's emphasis on the Second Amendment right to keep and bear arms reflects a concern that exposing the U.S. gun industry to civil liability for the criminal or unlawful misuse of their products would impose heavy costs on the industry, which would reduce the supply of firearms within the U.S. domestic market and, thereby, infringe the Second Amendment rights of U.S. citizens to keep and bear arms.[280] Lawsuits against U.S. companies arising out of unlawful misuse of firearms under foreign law prompt this concern no less than lawsuits arising out of unlawful misuse of firearms under domestic law. Liability exposure from legal firearms marketing and sales in the United States that results in downstream unlawful misuse of weapons in a foreign country poses the same type of threat to the viability of the U.S. gun industry as does liability exposure from downstream unlawful misuse in the United States.

Indeed, since foreign firearms laws are typically more restrictive than U.S. firearms laws and the reach of liability for foreign unlawful misuse is potentially much greater than for domestic unlawful misuse, there is some reason to think that claims based on unlawful misuse under foreign law would inflict a greater financial burden on the U.S. firearms industry and pose a greater threat to the Second Amendment rights of U.S. citizens than claims based on unlawful misuse under U.S. domestic law.[281] As an empirical matter, we take no position on whether liability exposure for the unlawful misuse of firearms would so burden the industry as to impinge on the right to keep and bear arms. Our point is that PLCAA's concern in this regard does not support the international law scholars' distinction between lawsuits arising out of unlawful misuse under domestic law and lawsuits arising out of unlawful misuse under foreign law.

---

278. *See* Brief of Professors, *supra* note 202, at 6.

279. *Id.* at 6.

280. 15 U.S.C. § 7901(a)(6).

281. Johnathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 10, 2022), https://www.cfr.org/backgrounder/us-gun-policy-global-comparisons [https://perma.cc/8YUN-9Z5Z].

Third, the scholars argue that the absence of any reference to foreign governments or liability based on foreign law in PLCAA's findings and purposes suggest that PLCAA does not confer immunity against lawsuits based on foreign law.[282] Here the scholars shift the object of their extraterritoriality analysis within PLCAA's definition of a qualified civil liability action from the cause of a plaintiff's damages (i.e., "criminal or unlawful misuse") to the nationality of the plaintiff and the nationality of the law undergirding their claims. They seem to suggest that PLCAA does not apply to tort claims arising out of criminal misuse of firearms under foreign law because it does not apply to claims filed by foreign entities or claims based on foreign law.

However, PLCAA's definition of a qualified civil liability action includes a claim brought by "any person,"[283] which PLCAA further defines to include "any governmental entity."[284] It seems to us, as it did to the court, that the term "any governmental entity" is at least ambiguous with regard to whether it includes foreign plaintiffs.[285] Moreover, on our reading, a central feature of PLCAA is to bar the use of common law litigation to restrict firearms manufacturing and sales, and we see no good reason to believe that Congress wished to bar U.S. entities from pursuing such litigation but permit foreign entities to do so. It seems equally implausible to us that PLCAA bars civil lawsuits based on U.S. common law theories of liability but not those based on foreign law theories of liability.

We believe that these counterarguments to the international scholars render the scope of the term "criminal or unlawful" at least ambiguous—if not clear—which would bring the analysis to step two. As the court implicitly found in its step-two analysis, the "focus" of PLCAA cannot be the criminal or unlawful misuse of third-party downstream users whose conduct gives rise to the plaintiff's harms because that misconduct is not the "*conduct* Congress wishes to prohibit, *effects* it wishes to prevent, or *transactions* it wishes to protect."[286] In enacting PLCAA, Congress did not seek to regulate the criminal or unlawful misuse of firearms by downstream users.[287] It sought to regulate the filing of civil lawsuits, which, as the court pointed out, are a domestic activity.[288] Thus,

282. Brief of Professors, *supra* note 202, at 8.

283. § 7903(5).

284. *Id.* § 7903(3).

285. Although we suspect that it will seem clear to many readers that "any governmental entity" includes foreign government entities, the court explained that, in this context, "it is well established that generic terms like 'any' . . . do not rebut the presumption against extraterritoriality." Mexico Memorandum, *supra* note 216, at 21–22 (citing Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 118 (2012)).

286. Dodge & Wuerth, *supra* note 199 (emphasis added).

287. *Id.*

288. *Id.*

as the court explained, Mexico's lawsuit involves a domestic application of PLCAA, so the presumption against extraterritoriality does not apply.[289]

There may be additional reasons that the presumption against extraterritoriality does not apply to Mexico's claim. The presumption against extraterritoriality is one among many substantive canons of statutory interpretation.[290] These canons are judicially crafted rules designed to protect important principles embedded in American law and tradition.[291] In determining whether a substantive canon should apply to the interpretation of a particular statutory provision, courts consider whether applying the canon will further the underlying principle.[292] If applying the canon would contradict the underlying principle, then courts will not apply it.

As Dodge explains in his Harvard Law Review article, the presumption against extraterritoriality is designed to protect the principle of international comity—that is, mutual respect among nations.[293] According to this principle, each country ought to respect the sovereignty and laws of other states by limiting the reach of its own laws into others' affairs.[294] In this way, the principle of comity shields foreign states and their citizens from meddling caused by the application of U.S. law, and it shields actors in the United States from foreign intrusions. To be sure, Congress can and frequently does extend U.S. laws into other countries, but the presumption against territoriality provides that if a statute is unclear, then the underlying principle of comity prevails.[295] In light of the underlying principle of comity, Mexico's argument seems ironic, at least. Mexico attempts to leverage a canon of statutory interpretation formulated to protect a country's citizens from incursions from foreign law as a way to deny U.S. companies protection otherwise afforded by U.S. law. In our view, the underlying value of comity is better served by rejecting application of the presumption against territoriality in this case.

IV. GUN INDUSTRY LITIGATION IN THE SHADOW OF *BRUEN*

For more than thirty years, scholars have questioned whether, and to what extent, the Second Amendment provides the firearms industry

289. Mexico Memorandum, *supra* note 216, at 25.

290. *See generally* EIG, *supra* note 277 (delineating the numerous judicial canons of interpretation that the Supreme Court has adopted to construe statutes in particular cases and controversies).

291. *See id.* at 19–22; James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Natural Reasoning*, 58 VAND. L. REV. 1, 7–15 (2005).

292. *See* Brudney, *supra* note 291, at 13. Example: rule of lenity (malum in se vs. malum prohibitum). *See* EIG, *supra* note 277, at 32.

293. *See* Dodge, *supra* note 198, at 1591.

294. *Id.*

295. *Id.* at 1585.

immunity from civil lawsuits.[296] Gun makers have frequently raised the Second Amendment as a defense to tort claims, but, so far, courts have either declined to recognize this defense[297] or avoided confronting it by deciding claims on other grounds.[298] Most analyses of this question are based on the doctrinal test for determining the scope of Second Amendment protection established by the Supreme Court's landmark decision in *District of Columbia v. Heller* and subsequent elaboration of that test by lower federal courts. The Supreme Court's recent decision in *New York State Rifle and Pistol Association v. Bruen* introduces a radically new methodology for determining the scope of Second Amendment protection, and it raises new, previously unaddressed, questions about the gun industry's constitutional immunity from civil lawsuits.

In this Part, we first review the pre-*Bruen* literature. We focus initially on the cases and scholarship that address whether the gun industry enjoys Second Amendment protection from direct government regulation, and we identify three distinct approaches to the question. We then review the pre-*Bruen* literature concerning the Second Amendment's implications, specifically for civil lawsuits against the gun industry. Next, we demonstrate how the novel Second Amendment methodology established by *Bruen* raises new, unanswered questions relevant to these debates—hard questions that courts must, eventually, confront. In the end, we suggest that courts should not interpret Second Amendment protection of the firearms industry to displace PLCAA immunity. Instead, we recommend that courts preserve PLCAA's approach to protecting the industry by honoring the constitutional principles of separation of powers and federalism alongside the Second Amendment. Our analysis here remains tentative, with the aim of highlighting areas for additional research and reflection.

A. *The Second Amendment and Gun Litigation Pre*-Bruen

In *Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual's right to keep and bear arms for traditionally lawful purposes, such as self-defense.[299] Following *Heller*, and before *Bruen*, federal courts of appeals generally applied a two-step test to determine whether a law that restricted individuals' access to or

296. *See supra* note 23 and accompanying text.

297. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 293 (E.D.N.Y. 2005), *rev'd in part on other grounds*, 524 F.3d 384 (2d Cir. 2008).

298. *See, e.g.*, Hamilton v. Accu-tek, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996).

299. District of Columbia v. Heller, 554 U.S. 570, 595 (2008). The U.S. Supreme Court extended *Heller*'s recognition of an individual right against federal government restrictions on keeping and bearing arms to state government restrictions in *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

use of firearms violates the Second Amendment.[300] First, if an individual's conduct falls outside of the scope of the Second Amendment as originally understood, then that conduct is categorically unprotected.[301] Second, if the conduct falls within the core of those rights protected by the Second Amendment, then any law regulating it is subject to strict scrutiny (i.e., whether the government can prove that the law is narrowly tailored to achieve a compelling governmental interest); otherwise, any law regulating it is subject to intermediate scrutiny (i.e., whether the government can show that the regulation is substantially related to an important governmental interest).[302] Courts and scholars have debated the implications of this doctrinal framework for gun industry regulation. Specifically, they have addressed whether the Second Amendment grants gun manufacturers and sellers rights that limit government regulation of the industry.

1. The Second Amendment and Direct Industry Regulation

Roughly speaking, a spectrum of three views has emerged in response to this question. At one extreme are those who argue that the Second Amendment's protections apply without distinction to gun manufacturers, sellers, and possessors. Under this approach, many, though not all, industry regulations are unconstitutional. Professor David Kopel forcefully articulated this view in the Harvard Law Review's Online Forum.[303] After canvassing the post-*Heller* (and pre-*Bruen*) lower court splits on the question, Kopel argued that "[i]n terms of the original meaning of the Second Amendment, the right to engage in firearms commerce is clear."[304] According to Kopel, not all gun industry regulations are unconstitutional, but they are subject to the same form of scrutiny that would apply to gun ownership restrictions.[305] At the time of his writing, the lower courts and legal scholars assumed that some form of heightened scrutiny would apply to laws that implicated the Second Amendment, though they disagreed on the proper test.[306] Kopel's point was that whatever test applies to laws regulating gun owners applies with equal force to laws regulating the gun industry.

---

300. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022).

301. *Id.*

302. *Id.*

303. *See* Kopel, *supra* note 23, at 230. Professor Josh Blackman has also argued that at least *some* manufacturing of guns—namely by an individual for personal use—is fully protected by the Second Amendment, though he does not directly address gun manufacturing for the commercial market. *See* Blackman, *supra* note 23, at 496.

304. Kopel, *supra* note 23, at 234.

305. *Id.* at 236.

306. For a review of the lower court splits concerning which test should apply and how, see David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 274–314 (2017).

At the other extreme are those who argue that, in contrast to individual citizens, the gun industry is entirely unprotected by the Second Amendment. Under this view, laws that regulate the gun industry are, at least as far as the Second Amendment is concerned, constitutional. At least two district courts have adopted this view.[307] Further, in an unpublished *per curium* opinion, the U.S. Court of Appeals for the Fourth Circuit found no authority "that remotely suggests" that the Second Amendment "protect[s] an individual's right to sell a firearm."[308] Consequently, the Second Amendment did not protect a criminal defendant who knowingly sold a firearm to an unlawful drug user.[309] Under this view, a law that banned the manufacture or sale of all firearms would be constitutional, even though it would presumably have a negative impact on those who wish to exercise their Second Amendment right to keep and bear arms by purchasing one.[310]

In between these two extremes is a third view. This more moderate view maintains that the gun industry enjoys some Second Amendment protection, but that this protection is derivative of—and less robust than—the protection offered to gun owners. According to this third approach, gun manufacturers and sellers do not possess an "independent" or "freestanding" Second Amendment right.[311] Instead, the industry enjoys only those protections that are necessary to protect the primary rights-holder—namely the citizen who wishes to acquire firearms in order to "keep and bear" them. A majority in the Ninth Circuit's *en banc* decision in *Texeira v. Cnty of Alameda*[312] endorsed this view.[313] In that case the plaintiff challenged Alameda County's zoning laws, which prevented him from opening a gun shop anywhere in the county.[314] In rejecting this claim, the court held that "the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor

307. *See, e.g.*, United States v. Porter, No. CR 3:22-00055, 2023 WL 113739, at *3 (S.D. W. Va. Jan. 5, 2023); Bauer v. Harris, 94 F. Supp. 3d 1149, 1154 (E.D. Cal. 2015), *aff'd sub nom.* Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017).

308. United States v. Chafin, 423 F. App'x 342, 344 (4th Cir. 2011) (unpublished table decision) (per curiam) (emphasis omitted).

309. *Id.*

310. *See* Cory Allen Heidelberger, *Read Second Amendment Literally: Ban Making and Selling Guns*, DAKOTA FREE PRESS (Dec. 30, 2022), https://dakotafreepress.com/2022/12/30/read-second-amendment-literally-ban-manufacture-and-sale-of-guns/ [https://perma.cc/T2UW-SSNR]; Erin A. Catlett, *Banks and Guns: Social Activism Following the Parkland, Florida Shooting*, 23 N.C. BANKING INST. 507, 513 (2019) (asserting that gun manufacturers and sellers are not protected by the Second Amendment). *But see* David Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 450 (2014) (arguing that government restrictions would nullify the right to keep and bear arms and violate the Second Amendment).

311. *See* Teixeira v. Cnty. of Alameda, 873 F.3d 670, 682 (9th Cir. 2017) (en banc).

312. 873 F.3d 670, 682 (9th Cir. 2017) (en banc).

313. *Id.* at 682.

314. *Id.* at 676.

to sell them."[315] As a result, restrictions on firearms commerce that "have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms" do not violate the Constitution.[316]

Comparison with the First Amendment provides a constitutional analogue to demonstrate this "derivative rights" view of gun industry protections under the Second Amendment.[317] Consider how recognition of the freedom of association has developed. This right is not mentioned in the First Amendment or elsewhere in the Constitution. Rather, the Court has conceived of it as derivative of rights explicitly granted by the Constitution, especially the rights to speech, petition, and assembly explicitly granted by the First Amendment. For example, in protecting certain rights of a labor union under the right to associate, the Court reasoned that "the First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights."[318]

However, because the freedom of association is derivative rather than "freestanding" or "independent," in the language of the Ninth Circuit's *Texeira* opinion,[319] the Court has held that it only operates to the extent that it protects and advances an underlying right. For example, because the Court understood the Boy Scouts to be an expressive association whose message would be undermined if it were required to retain an openly gay assistant scoutmaster, its right to associate—and the corollary right not to associate—allowed it to discriminate on the basis of sexual orientation.[320] In contrast, where an association is not organized to promote a message or advance some other underlying right, or where the exclusion of a protected class of people from the group would not undermine its message, the right to associate does not exempt it from anti-discrimination laws.[321] Likewise, in holding that a state may restrict admission to certain licensed dance halls to certain age groups, the Court declared that there is no "generalized right of 'social association' that includes chance encounters in dance halls."[322]

---

315. *Id.* at 682.

316. *Id.* at 687.

317. Second Amendment scholars have long interpreted the scope of its protections by comparison to the First Amendment. *See, e.g.*, Kopel & Gardner, *supra* note 23, at 737; Kopel, *supra* note 23, at 418; Noah, *supra* note 23; Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 379 (2009); Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 L. & CONTEMP. PROBS. 149, 150 (2017).

318. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 578–79 (1971).

319. *Teixeira*, 873 F.3d at 682.

320. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000).

321. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 621 (1984).

322. *See* Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

This analysis of associational freedoms is cursory, but it suggests that the explicit provision of some rights to some people by the Constitution sometimes requires the recognition of additional protections.[323] In the speech context, this means conferring certain protections on non-speech activities like associating with others. In the Second Amendment context, it means protecting other people who provide the means to realize the explicit rights-holders' constitutional freedoms. In each of these cases, the bounds of these derivative rights are limited by the degree to which they are necessary to serve rights explicitly conferred by the Constitution.[324]

2. The Second Amendment and Civil Lawsuits

Thus far, we have focused on pre-*Bruen* views concerning the degree to which the Second Amendment may protect the firearms industry from direct government regulation. We now turn to the question of whether the Second Amendment shields the firearms industry specifically from regulation through litigation. The central question here is whether private tort claims qualify as state action subject to constitutional challenge.

Once again, comparison to the First Amendment is instructive. In the context of the First Amendment, the Supreme Court has held that civil lawsuits involve sufficient state action to trigger constitutional scrutiny. In the landmark case of *Sullivan v. New York Times*,[325] the Court held that the First Amendment limits the degree to which publishers may be held liable for defamation claims brought by public figures.[326] Rejecting the plaintiff's argument that a civil lawsuit is not a form of government regulation, the Court wrote, "Although this is a civil lawsuit between private parties . . . [t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[327] The analogy between defamation claims against media outlets and negligence or nuisance claims against gun manufacturers is not difficult to draw.[328] The characterization of civil lawsuits as a form of state action may be even more compelling when applied to lawsuits against firearm manufacturers seeking injunctive relief that would impose design, marketing, and sales restrictions on gun makers or public

323. *See* Kopel, *supra* note 23, at 450.

324. For a similar argument regarding the rights of contraceptive manufacturers under the Fourteenth Amendment, see Lars Noah, *Does the U.S. Constitution Constrain State Products Liability Doctrine?*, 92 TEMP. L. REV. 189, 216 (2019). For a comparison between the right of booksellers under the First Amendment to implicit rights in the Second Amendment, see Kopel, *supra* note 23, at 449.

325. 376 U.S. 254 (1964).

326. *Id.* at 292.

327. *Id.* at 265.

328. *See* Kopel & Gardner, *supra* note 23, at 752.

nuisance claims based on the violation of statutory guidelines governing these practices.[329] And it may be more compelling still when the plaintiff in such suits is a government entity.[330] However, the Supreme Court has not consistently extended the characterization of tort claims as a form of state action to other rights contexts.[331] Doing so would have far-reaching implications for tort and other forms of private law, raising the prospect of routine constitutional challenges to the assertion of private claims seeking to vindicate legal rights.[332]

Post-*Heller* and pre-*Bruen*, Professors Joseph Blocher and Darrell Miller carefully analyzed the applicability of the Second Amendment to indirect regulation of the gun industry, including by civil lawsuits.[333] Their article illuminates the way in which the Court's opinion in *Heller* raises a host of questions about the Second Amendment's relationship to other legal doctrines that might place incidental burdens on firearms rights. For example, one might read the Second Amendment to trump private property rights such that a private landowner could not exclude weapons from his property.[334] The courts have rejected this reading and concluded that property law was understood to be the "background" upon which the right to keep and bear arms was grafted.[335] Blocher and Miller demonstrate that a similar question arises with respect to tort law: does the Second Amendment *displace* pre-existing tort law, or does tort law remain active in the "background?" To address this and similar questions, they propose four factors that courts should consider when addressing the issue.[336] These are (1) the text of the Second Amendment as originally understood; (2) the significance of the burden placed on the right to keep and bear arms; (3) the broader legal and institutional implications of extending constitutional protections; and (4) whether the incidental burden operates like gun control.[337] Although they offer few definitive answers, their analysis suggests that the Second Amendment does not broadly immunize the gun industry from tort lawsuits.[338] However, they conclude that, in some cases—depending on the balance of factors—it may offer some protection.[339]

---

329. *See supra* notes 35–44 and accompanying text.

330. *See supra* notes 92–99 and accompanying text.

331. *See* Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117, 1137–38 (2015) ("The Court took a markedly different approach to defining state action in [*Sullivan*] . . . .").

332. *See* Noah, *supra* note 324, at 191.

333. Blocher & Miller, *supra* note 23, at 296–97.

334. *Id.* at 313.

335. *Id.* at 336.

336. *Id.* at 331.

337. *Id.* at 331–45.

338. *Id.* at 346.

339. *Id.* at 333.

By contrast to Blocher and Miller, Professor Cody Jacobs offers a more determinate answer to this question. Drawing on the analogy to *Sullivan* and other cases that raise similar questions, he proposes what he calls a Core Rights Theory for applying constitutional protections to limit private civil lawsuits.[340] Jacobs observes that

> [c]ourts have shown the most willingness to place constitutional limitations on private law when (1) the application of private law would undermine the core of the right at issue, (2) placing constitutional limitations on private law would not unduly threaten the constitutional rights of the parties seeking the private law remedy, and (3) the parties seeking constitutional protection did not consent to the private law limitation on their conduct.[341]

Applying his Core Rights Theory to lawsuits against the gun industry, Jacobs suggests that lawsuits brought under a public nuisance theory are likely not prohibited by the Second Amendment if the underlying claim is that a gun retailer or manufacturer has "either deliberately or negligently allowed guns to fall into the hands of people who are prohibited from owning them, such as juveniles and felons."[342] This is because such lawsuits "do[] not target conduct at the core of the Second Amendment right," since possession of weapons by criminals or minors is not at the core of the Second Amendment.[343] By contrast, according to Jacobs, private nuisance suits—such as claims against firing ranges concerning the noise they produce—may be prohibited by the Second Amendment because they potentially threaten the core right of citizens to keep and bear arms.[344]

In sum, both analyses suggest that, pre-*Bruen*, the Second Amendment would not generally immunize the gun industry from tort lawsuits but that in specific cases, or with respect to specific causes of action, it may offer some protection. *Bruen* requires that we rethink this analysis.

---

340. Jacobs, *supra* note 23, at 982.

341. *Id.* at 968.

342. *Id.* at 989–90.

343. *Id.* at 990.

344. *Id.* at 990–91. Jacob's theory relies heavily on how he characterizes the Second Amendment interests in question. For example, in his analysis of the permissibility of public nuisance claims based on negligent distribution, he characterizes the Second Amendment interest as possession of weapons by criminals and minors, which falls outside of the core right of citizens to keep and bear arms. *Id.* at 990. However, recharacterizing this interest as minimal regulation of access to firearms on the civilian market, the interest is more likely to fall within the core right. Similarly, one might recharacterize the interest in target practice, which falls within the core, as operating a firing range in a residential neighborhood instead of a nearby commercial zone, which falls outside the core, thereby reversing the analysis.

B. Bruen*'s Disruptions*

The Supreme Court's *Bruen* decision has overturned the doctrinal framework that has, to date, informed attempts to determine whether and to what extent the Second Amendment affords gun manufacturers constitutional protection and, more specifically for our purposes, immunity from civil lawsuits. As noted above, following *Heller* and before *Bruen*, courts generally adopted some version of a two-step test when scrutinizing gun laws.[345] First, they considered whether the law interfered with the right to keep and bear arms, as that was understood at the time of the Framing.[346] If so, they moved to step two and applied some form of means-ends test, typically within a tiered scrutiny framework.[347] To determine what level of scrutiny to apply, they considered whether the law regulated behavior at the core of the Second Amendment, in which case strict scrutiny would apply, or rather at its periphery, in which case intermediate scrutiny applied.[348] Although courts developed different and sometimes quite divergent variants of these tests, judges and scholars all worked within this framework when considering how the Second Amendment might apply to the gun industry.

Under *Heller* then, and before *Bruen*, the first question to consider in assessing the applicability of the Second Amendment to direct regulation of the firearms industry or to tort litigation against the industry was, "at the time of its adoption, was the Second Amendment understood to protect the industry from this type of regulation?" Thus, Kopel pointed to Colonial-era opposition to British laws limiting firearm manufacturers or sellers and argued from this that the Second Amendment protects the industry to some degree.[349] He also argued that protection of the right to keep and bear arms presupposes the right to access them, which implies at least some protection for those who make and sell them.[350] The analysis could then proceed to the next step, wherein some level of heightened scrutiny is applied.[351] Likewise, with respect to the relationship between the Second Amendment and tort litigation, Blocher and Miller suggest that, like property law, the tort system may have been understood to remain active in the background (rather than supplanted).[352] However, the Supreme Court's *Bruen* decision overturned this doctrinal framework, and the new test it introduced requires new analysis.[353]

345. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022).
346. *Id.*
347. *Id.*
348. *See* Kopel, *supra* note 310, at 436; *Bruen*, 142 S. Ct. at 2126.
349. Kopel, *supra* note 23, at 234–35.
350. *Id.* at 230.
351. *Bruen*, 142 S. Ct. at 2126.
352. Blocher & Miller, *supra* note 23, at 312.
353. *Bruen*, 142 S. Ct. at 2126.

At issue in *Bruen* was the constitutionality of a 1913 New York state law requiring applicants for a concealed carry permit to establish "a special need for self-protection distinguishable from that of the general community."[354] Two individuals who were denied permits under this standard challenged the law as a violation of their constitutional rights to keep and bear arms under the Second Amendment.[355] The U.S. Supreme Court struck down the law.[356]

In arriving at this conclusion, the Court explicitly rejected the tiered-scrutiny approach and the core/periphery analysis.[357] Instead, it announced a new two-part test.[358] First, if the plain text of the Second Amendment covers an individual's conduct, then any government restriction on that conduct is presumptively unconstitutional.[359] Second, this presumption can only be overcome if the government can justify the restriction by demonstrating that it is consistent with the nation's tradition of firearms regulation.[360] This second step requires the government to identify an analogous form of regulation prevalent between the Founding Era and Reconstruction that a court would not characterize as idiosyncratic.[361] The Court offered two "metrics" for judging whether modern restrictions are sufficiently analogous to historical regulations: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense," and "whether that burden is comparably justified."[362]

In applying step one of this test to New York's concealed carry permit law, the Court held that the Second Amendment's reference to the right to "bear" arms covers the right to carry a concealed weapon in public for self-defense.[363] In its step-two analysis, the Court concluded that "apart from a handful of late-19th-century jurisdictions, the historical record" at

354. *Id.* at 2123 (quoting *In re* Klenosky, 428 N.Y.S. 2d 256, 257 (N.Y. App. Div. 1980).

355. *Id.* at 2125.

356. *Id.* at 2122.

357. *Id.* at 2125–26.

358. *Id.* at 2126.

359. *Id.*

360. *Id.*

361. The Court left unresolved the question of whether courts should look to the Founding era, when the Second Amendment was adopted, or Reconstruction, when the Fourteenth Amendment—which provides the basis for applying the Second Amendment to state governments—was adopted. *Id.* at 2138. For a critical analysis of the *Bruen* Court's historical methodology, see Jake Charles, *Bruen, Analogies, and the Quest for Goldilocks History*, SECOND THOUGHTS BLOG (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/ [https://perma.cc/WL47-Q3FL]. For a more general critical analysis of the historical claims of originalism, see David Sehat, *On Legal Fundamentalism*, *in* AMERICAN LABYRINTH: INTELLECTUAL HISTORY FOR COMPLICATED TIMES 21, 21–37 (Raymond Haberski, Jr. & Andrew Hartman eds., 21st ed. 2018).

362. *Bruen*, 142 S. Ct. at 2133.

363. *Id.* at 2134–35.

issue in the case "does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense" nor "any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."[364] In the wake of *Bruen*, whether other regulations—such as large-capacity magazine bans, universal background checks, and red flag laws—will pass constitutional muster remains to be seen. Both steps of this new test raise thorny questions when thinking about whether the Second Amendment protects the industry from regulation generally and civil lawsuits in particular.

In step one, *Bruen*'s emphasis on the "plain language" in contrast to the original meaning of the Second Amendment appears to shift the analysis from the historical understanding of the scope of the right or its necessary implications to an analysis of the semantic meaning of the words alone. The words "keep" and "bear" most naturally mean something like "own" and "carry." They may arguably *imply* a right to "make" and "sell," but that would not be within their "plain meaning." If this understanding of *Bruen*'s test is correct, then one could reasonably conclude that gun manufacturers and sellers are wholly unprotected by the Second Amendment. Indeed, at least one district court has adopted this view.[365] Alternatively, the gun industry may have as yet undefined derivative rights under the Second Amendment, perhaps along the lines of the Ninth Circuit's opinion in *Texeira*.[366] However, recognizing such derivative rights would raise a host of questions about how courts could justify, delineate, and assess the strength of those rights without resurrecting the type of core/periphery and interest-balancing tests that the *Bruen* decision renounced. *Bruen*'s novel step-two analysis also raises thorny questions when applied to gun industry regulation and civil lawsuits against gun makers. Were a court to somehow find that the plain text of the Second Amendment did cover the manufacture and sale of firearms[367]—that is, that the text's implications are part of its "plain

364. *Id.* at 2138.

365. *See* Def. Distributed v. Bonta, No. CV 22-6200, 2022 WL 15524977, at *4 (C.D. Cal. Oct. 21, 2022) *adopted by* No. CV 22-6200, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022) ("[D]oes the 'Second Amendment's plain text' cover the issue here? No, it plainly does not. [A government regulation of the gun industry] has nothing to do with 'keep[ing]' or 'bear[ing]' arms.").

366. *See* Teixeira v. Cnty. of Alameda, 873 F.3d 670, 678 (9th Cir. 2017).

367. *See* United States v. Stambaugh, No. CR-22-00218, 2022 WL 16936043, at *3 (W.D. Okla. Nov. 14, 2022) ("The United States does not dispute that the Second Amendment's plain text covers receiving a firearm—receipt is the condition precedent to keeping and bearing arms."); United States v. Holden, No. 3:22-CR-30, 2022 WL 17103509, at *3 (N.D. Ind. Oct. 31, 2022) (holding that receiving a firearm is "presumptively protected by the Second Amendment"); *see also* Rigby v. Jennings, No. CV 21-1523, 2022 WL 4448220, at *8 (D. Del. Sept. 23, 2022)

meaning"—then industry regulations would be presumptively unconstitutional. This presumption could only be overcome by sufficiently analogous historical analogues to the regulation in question. Moreover, civil lawsuits against the firearms industry would also be presumptively unconstitutional if civil lawsuits are a form of state action. If so, the only way that plaintiffs in such lawsuits could overcome the presumption, under *Bruen*, would be to identify an historical analogue between the Founding Era and Reconstruction for regulation through litigation. We suspect that identifying such an analogue would be a difficult challenge for plaintiffs, although it remains an open question whether old causes of action, such as strict liability for accidental discharge of a firearm might suffice.[368] Assuming that plaintiffs could not identify an acceptable analogue, the effect of *Bruen* would be to confer broad constitutional immunity on the gun industry from civil lawsuits, perhaps far broader than that provided by PLCAA to the point of displacing PLCAA altogether. Note that this analysis would go much further in protecting the industry than even Kopel or Jacobs would have argued for prior to *Bruen*, because *Bruen* dispensed with any form of tiered scrutiny. And, as our analysis of PLCAA has demonstrated, such a broad reading of the Second Amendment right to keep and bear arms would come at the expense of the constitutional principles of separation of powers and federalism.

C. *Open Questions in* Bruen*'s Aftermath*

In the wake of *Bruen*, then, we identify the following four questions that must be answered to determine whether and to what degree the Second Amendment offers the gun industry immunity that may exceed PLCAA.

("[T]he right to keep and bear arms implies a corresponding right to manufacture arms. Indeed, the right to keep and bear arms would be meaningless if no individual or entity could manufacture a firearm.").

368. *See* Nat'l Ass'n for Gun Rts. v. City of San Jose, 618 F. Supp. 3d 901, 917 (N.D. Cal. 2022) ("[T]he Court notes that the history of reallocating costs of firearm-related accidents—from which the Insurance Requirement descends—can be traced back to the early American practice of imposing strict liability for such accidents."). Public nuisance claims against firearm manufacturers do not appear to predate lawsuits in the 1990s. *See* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 713–27 (2023) (tracing the history of public nuisance claims). According to one account, negligent entrustment claims against the owner of a firearm date back to an 1816 English case, but its application to firearms sellers appears to be a twentieth-century innovation. *See* Jefferson Fisher, Comment, *So How Do You Hold This Thing Again?: Why the Texas Supreme Court Should Turn the Safety off the Negligent Entrustment of a Firearm Cause of Action*, 46 TEX. TECH. L. REV. 489, 492, 510–11 (2014) (tracing the history of negligent entrustment claims). *See also* Benjamin Cavataro, *Regulating Guns as Products*, 92 GEO. WASH. L. REV. 53–56 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418326 [https://perma.cc/S63A-57TS] (discussing the early history of Anglo-American regulation of firearm manufacturers).

1. Does the "plain language" of the Second Amendment cover the manufacture and sale of firearms?

2. If the plain language of the Second Amendment does not cover the manufacture and sale of firearms, does that mean the industry is not entitled to any constitutional protection at all, or might it enjoy at least some rights under a derivative theory of constitutional rights?

3. If the plain language of the Second Amendment does cover the manufacture and sale of firearms, does the Court's treatment of tort litigation in the First Amendment context as a form of state action extend to the Second Amendment context, such that the firearms industry is presumptively immune from civil lawsuits?

4. If litigation against the firearms industry is a form of state action, are there sufficient historical analogues that would overcome the presumption of unconstitutionality?

Given the potential stakes, we caution courts against adopting the view that the Second Amendment displaces PLCAA without very careful attention to each of these questions. We take no firm position on these questions at this point, but we tentatively suggest that the derivative rights approach offers an attractive option for maintaining PLCAA's balance between the right to keep and bear arms, the separation of powers, and federalism.

CONCLUSION

PLCAA does more than merely shield the gun industry from unwanted litigation. In addition, it establishes a statutory scheme for regulating the gun industry that seeks to preserve access to firearms on the civilian market while allowing Congress and state legislatures to impose restrictions on the design, marketing, and distribution of weapons. PLCAA's predicate exception explicitly allows state legislatures to create private rights of action as a means of enforcing such restrictions through civil remedies such as damage awards and injunctions. This regulatory framework reflects a commitment to the constitutional principles of separation of powers, federalism, and the right to keep and bear arms. It also has several virtues. It places firearms policy squarely in the hands of elected legislators. It gives states the opportunity to regulate the gun industry in ways that reflect regional differences in attitudes about how best to reduce firearms-related violence. And it safeguards the Constitutional right to own and carry firearms for self-defense and other lawful uses.

The Supreme Court's *Bruen* decision casts a shadow of uncertainty over PLCAA's carefully balanced statutory scheme for firearms industry regulation. We hope that our analysis of PLCAA will give courts pause before they adopt an expansive view of the Second Amendment that

would push aside PLCAA in favor of broad constitutional immunity. Doing so would elevate the right to keep and bear arms at the expense of other constitutional values, such as the separation of powers and federalism.