REVIVING PUBLIC NUISANCE AS A VEHICLE FOR REDUCING GUN VIOLENCE

JACKSON KUSHNER*

ABSTRACT

This Note defends the viability of state public nuisance statutes that seek to hold gun industry members liable for gun violence. This goal is based on a least cost avoider theory: gun industry members are in the best position to avoid the significant costs of gun violence; thus, subjecting them to liability is the best chance we have to effectively mitigate the problem (short of an outright ban, which, under the Court's Second Amendment jurisprudence, is unconstitutional).

Public Nuisance Firearm Laws ("PNFLs") face both a statutory and a constitutional challenge. The statutory challenge comes from the Protection of Lawful Commerce in Arms Act ("PLCAA"), which shields gun industry members from most "general" tort claims. However, the PLCAA expressly provides an exception for "predicate statutes"—that is, state statutes creating a cause of action that specifically targets gun industry members for the purpose of reducing gun violence. I argue that PNFLs count as predicate statutes under this exception, and thus they avoid the statutory challenge.

The second challenge is the Second Amendment, which, under the most recent Supreme Court decision in Bruen, requires states attempting to regulate firearms to show an analogue for their regulation in the historical tradition of American gun regulation. I make two arguments that PNFLs can withstand Second Amendment scrutiny. First and most importantly, the Supreme Court has unequivocally held that the Second Amendment protects an individual's right to keep and bear arms for purposes of self-defense, not any rights of gun industry members. Thus, at least under the current jurisprudence, the Second Amendment does not directly apply to PNFLs. My

* Executive Articles Editor, *Southern California Law Review*, Volume 98; J.D. Candidate 2025, University of Southern California Gould School of Law; M.A., Philosophy, 2019, Georgia State University; B.A., Philosophy, 2017, Georgetown University.

second argument is that, regardless of whether the Second Amendment applies, PNFLs can pass the historical analogue test because there is a long tradition of using public nuisance against the use, sale, and storage of firearms and firearm-related materials.

INTRODUCTION

The basic premise and motivation for this Note is that gun violence is a problem in the United States and that, regardless of one's individual stance on gun regulations, the Second Amendment, or other political issues, the desire for a solution is nearly universal. The debate about guns, at least in the sixteen years since the Supreme Court decided *District of Columbia v. Heller*,[1] has generally focused on the individual right to keep and bear arms for purposes of self-protection. On one side, stakeholders argue that the Second Amendment guarantees an unassailable right for law-abiding citizens to do just that.[2] The Supreme Court has repeatedly reinforced this understanding of the Second Amendment, most recently in 2022.[3] The opposing side argues that, although the Second Amendment offers limited protections, the right to bear arms is far from unassailable and generally less important than protecting Americans from gun violence.[4]

This is an enormous oversimplification of a complex and worthwhile policy debate, but this Note's purpose is neither to evaluate these arguments nor to take a side. Both sides have merit. The Second Amendment created certain rights for an important reason, and the jurisprudence protecting those rights has helped shape Americans' unique relationship with firearms—a positive relationship in almost every instance.[5] Still, the tiny minority of

1. District of Columbia v. Heller, 554 U.S. 570 (2008).

2. *See, e.g.*, CNN, *NRA CEO Wayne LaPierre Speaks at CPAC After School Shooting*, YOUTUBE at 34:10 (Feb. 22, 2018), https://www.youtube.com/watch?v=vvw3pHiWUfQ [https://perma.cc/V2US-Z5U4] ("There is no greater personal individual freedom than the right to keep and bear arms, the right to protect yourself, and the right to survive.").

3. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

4. *See, e.g.*, Michael Steinberger, *The Lawyer Trying to Hold Gunmakers Responsible for Mass Shootings*, N.Y. TIMES (Sept. 29, 2023), https://www.nytimes.com/2023/09/29/magazine/the-lawyer-trying-to-hold-gunmakers-responsible-for-mass-shootings.html [https://web.archive.org/web/20230929101707/https://www.nytimes.com/2023/09/29/magazine/the-lawyer-trying-to-hold-gunmakers-responsible-for-mass-shootings.html]; *see generally* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011) (outlining the arguments for and against gun control in the United States).

5. In 2017, three-in-ten American adults owned a firearm. KIM PARKER, JULIANA MENASCE HOROWITZ, RUTH IGIELNIK, J. BAXTER OLIPHANT & ANNA BROWN, PEW RSCH. CTR., *The Demographics of Gun Ownership*, *in* AMERICA'S COMPLEX RELATIONSHIP WITH GUNS 16, 16 (Jun. 22, 2017), https://www.pewresearch.org/wp-content/uploads/sites/20/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf [https://perma.cc/RW8G-WWTW]. That same year, there were just under 11,000 murders involving a firearm. FBI, *Crime in the United States 2017: Table 20: Murder by State, Types of Weapons, 2017*, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-20 [https://web.archive.org/web/20240928003123/https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-20]. Thus, even on a highly conservative (and unlikely) assumption

instances in which that relationship goes wrong create horrific displays of violence, and our representatives and judges can do more to protect us.

My goal, rather than taking a side, is to propose a solution that both sides can accept. This solution leverages the tort of public nuisance to impose liability for gun violence on the parties in the best position to avoid it: gun industry members—that is, the entities that manufacture, market, and distribute firearms. This creates a strong incentive for the people and companies with firearm expertise to do their part in reducing the problem without implicating the individual right that the Second Amendment protects.

This Note proceeds in four Sections. Section I briefly outlines the history of public nuisance, from its medieval origins to its role in winning enormous settlements against tobacco companies in the 1990s. Section II turns to the relatively short history of public nuisance as a cause of action against gun industry members, beginning with some limited success before abruptly ending when Congress passed the Protection of Lawful Commerce in Arms Act ("PLCAA"), immunizing gun industry members against many civil causes of action, including public nuisance.[6]

Section III describes a new approach to circumventing the PLCAA's protections. In the Act, Congress expressly provided for certain exceptions, one of which denies immunity when a state legislature passes a "predicate statute" outlawing one or more of the gun industry member's actions.[7] Certain states, led by New York in 2021, have begun passing laws that create a specific public nuisance cause of action against gun industry members when their actions contribute to gun violence. These Public Nuisance Firearm Laws ("PNFLs"), as I call them, are too new to have undergone much testing in court, but I argue that they count as predicate statutes and thus can legally circumvent PLCAA immunity.

Finally, Section IV turns to the more pressing question of constitutionality under the Second Amendment, which I answer in two parts. First, I argue that based on the Supreme Court's clear and repeated insistence that the Second Amendment protects an *individual* right to keep and bear arms *for purposes of self-protection*, PNFLs can be structured in ways that avoid significant Second Amendment issues. Second, I argue that even if the Second Amendment fully applied to PNFLs, they could still overcome the Court's most recent constitutional hurdle, the historical analogue test from

---

that each of these murders involved a different gun owner, over 99.98% of gun owners did *not* use their guns to commit murder that year. To be clear, this statistic is not meant to imply that gun *violence* is not a problem—it is. Rather, it is intended to show that gun *owners*, as a group, are overwhelmingly unlikely to commit murder.

6. *See* 15 U.S.C. § 7903(5)(A).

7. Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009); 15 U.S.C. § 7903(5)(A)(iii).

Bruen.[8]

I. A VERY BRIEF HISTORY OF PUBLIC NUISANCE

A. ANCIENT ORIGINS

The earliest precursors to the modern tort, including public nuisance itself as well as "common nuisance" and "public mischief," arose in medieval British courts to punish relatively minor criminal offenses.[9] The King's Bench (the English court system) used the theory to punish a wide variety of offenses—from blocking a highway to running a brothel—that were "damaging to the public welfare."[10] Public nuisance shares its common law history with many aspects of criminal law; the Crown was the only entity that could bring these actions until the sixteenth century, when English courts "first held that a private individual who had suffered particular damage differing from that sustained by the public at large might have a tort action to recover damages for the invasion of the public right."[11] Public nuisance traditionally targeted problems such as excessive noise, air pollution, and even "the shooting of fireworks in the public streets"—courts sometimes considered these interferences with public rights so unreasonable that people could recover damages for enduring them.[12] Still, this was rare. Traditional remedies for public nuisance were almost exclusively equitable: plaintiffs could seek abatement or injunction.

By the sixteenth century, British legislatures recognized the power of public nuisance and took it upon themselves to declare specific activities nuisances, thus giving courts jurisdiction to grant equitable remedies against those activities.[13] American colonial courts continued this trend, recognizing various public nuisances, some of which were statutorily defined.[14] Even through the American Revolution, courts continued to enforce public nuisance claims as defined in part by common law and in part by statute. Thus, when the United States abolished common law crimes, public nuisance moved squarely into civil court along with other common law tort claims.[15]

8. Bruen, 597 U.S. at 17.

9. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 56–66 (1989).

10. *Id.* at 61–62.

11. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979).

12. *Id.* at cmt. b. To recover damages, however, victims typically had to show a "special injury" rather than just a general encroachment upon a public right. Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DEPAUL L. REV. 431, 457–61 (2021).

13. Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J.L., ECON. & POL'Y 347, 355—56 (2022).

14. *Id.* at 357.

15. *See generally* United States v. Hudson & Goodwin, 11 U.S. 32 (1812) (holding that federal courts in the United States did not have jurisdiction to hear cases involving common law crimes).

But public nuisance did not lose its (partially) statutory basis. By the early twentieth century, over one-third of states had nuisance laws enabling attorneys general (and sometimes even private citizens) to seek equitable remedies from interferences with public health or morality.[16]

The defining feature of public nuisance is no different today than it has been throughout American history: "an unreasonable interference with a right common to the general public."[17] Donald Gifford notes that this definition limits public nuisance in two important ways: (1) it only applies to issues affecting the public (or large groups) *in general*—not specific harms to individuals; and (2) it only applies to those of the defendants' actions that are objectively *unreasonable*.[18] But even with these limitations, public nuisance remains notoriously ill-defined, and tort scholars and courts vary widely on what actions fall into the category.[19] Even statutory definitions tend to be vague and unhelpful in describing the metes and bounds of public nuisance.[20] However, this vagueness can benefit plaintiffs, some of whom used public nuisance theory to win breakthrough victories in the late twentieth century.

B. THE TOBACCO SETTLEMENT

Beginning in the 1970s, private plaintiffs began using public nuisance to address harms caused by consumer products such as tobacco, lead-based paint, and many others.[21] The theory was that public nuisance could allow courts to hold manufacturers and distributors responsible for harms that were not covered by the early twentieth century's expansion of product liability tort laws.[22] Public nuisance offered several advantages over other tort claims in consumer product litigation. First, as an action in equity, it offered the possibility of injunctive relief or abatement, both of which were especially valuable in cases where plaintiffs sought to end an environmental hazard.[23] Further, public nuisance allowed plaintiffs to complain of a "continuing nuisance" rather than a harm arising from a single occurrence or concentrated series of events, making it easier to overcome statute of limitations issues.[24]

16. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 330 (1993).
17. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).
18. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 776 (2003).
19. *Id.* at 774–78.
20. *Id.* at 775.
21. *Id.* at 749–64, 770.
22. *Id.* at 749–53; *see also* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 738–39 (2023) (arguing that public nuisance has covered consumer products since at least the seventeenth century).
23. Gifford, *supra* note 18, at 745–46.
24. *Id.* at 751.

But despite the theoretical benefits of public nuisance in consumer product litigation, courts from the 1950s through the early 1990s were reluctant to grant relief. The most notable public nuisance litigation in the last century, and arguably ever, was against the tobacco industry—but only after other litigation had failed. From the 1950s through the 1990s, as medical researchers began to discover the ill effects of smoking, lung cancer and emphysema victims began filing "hundreds of personal injury and wrongful death claims against the tobacco industry."[25] These attempts *universally* failed, largely because powerful tobacco companies vigorously fought every lawsuit, refusing to settle mostly for fear of opening the litigation floodgates.[26]

Tobacco companies had good reason to fear those floodgates. By the early 1990s, three things were clear: (1) plaintiffs needed a new theory, because product liability and wrongful death were not working; (2) the research linking smoking and poor health outcomes was undeniable; and (3) the tobacco industry had known about the problem for decades, yet it continued intentionally designing and marketing its products to addicted customers.[27] Finally, after a failed class action suit,[28] plaintiffs made a breakthrough in state court. They sued the tobacco industry not under a wrongful death or standard product liability theory, but to recoup damages that the *state's* medical system incurred in treating smoking-related illnesses.[29] This was a watershed moment in public nuisance history because it signaled that a government could seek a remedy from an entire industry for harms perpetrated over multiple decades. This state-versus-industry style of litigation did not even make it out of the trial court before dozens of similar suits followed in other state courts around the country.[30]

At the time, public nuisance litigation was the most successful tortious cause of action against the tobacco industry (or any industry) in U.S. history. After the discovery process revealed the tobacco industry's egregious improprieties—including that it "supported research designed to spread disinformation about the hazards of smoking, manipulated cigarettes' nicotine content, and specifically cultivated children, adolescents, and teens as 'replacement' smokers"—parties negotiated a master settlement involving each of the fifty states for over $240 billion, as well as annual payments to be made in perpetuity by the tobacco industry in order to abate the harms it

25. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 295 (2021).
26. *Id.* at 295–96; Gifford, *supra* note 18, at 754–57.
27. Engstrom & Rabin, *supra* note 25, at 295, 299–300.
28. Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).
29. Engstrom & Rabin, *supra* note 25, at 302–03.
30. *Id.* at 303.

had caused.[31]

This settlement signaled a new era for public nuisance. There was a real chance that government plaintiffs, including state attorneys general or state-funded healthcare systems, could use public nuisance to seek injunctive relief, abatement, and sometimes even damages against practices that harmed consumers.[32]

But even after this massive victory reshaped the tobacco industry, there was a significant downside for future litigators: because the parties settled, there was still no solid precedent. Indeed, although other public nuisances, especially lead paint and other environmental hazards, have enabled plaintiffs to recover sizeable settlements, examples of successful public nuisance actions against any product manufacturers or environmental polluters *in court* are relatively few and far between.[33] The one exception to this rule, at least during the late 1990s and early 2000s, was public nuisance litigation against the firearms industry.

II. PUBLIC NUISANCE AND FIREARMS

A. MIXED INITIAL RESULTS

Emboldened by success against the tobacco industry, some state attorneys general began suing the gun industry under a public nuisance theory.[34] This proved to be the most fruitful area of public nuisance precedent in the late 1990s and early 2000s: during that period, litigation against firearm manufacturers "yielded the vast majority of legal opinions addressing the legal viability of the public nuisance theory of recovery in the context of mass products liability."[35]

Yet, initial results varied. On the one hand, several plaintiffs managed to overcome motions to dismiss.[36] In *City of Cincinnati v. Beretta*, for

31. Engstrom & Rabin, *supra* note 25, at 304–05. Interestingly, though perhaps not surprisingly, many states do not use the perpetual tobacco company payments to abate tobacco-related harms. *Who Is Really Benefiting from the Tobacco Settlement Money?* AM. LUNG ASS'N (Feb. 2, 2016), https://www.lung.org/blog/who-benefit-tobacco-settlement [https://perma.cc/93S9-UXLA].

32. One other limitation to the use of public nuisance to protect consumers is noteworthy. The revelation of tobacco manufacturers' improprieties caused a significant shift in public opinion, and this was a major factor in the industry's decision to settle. Gifford, *supra* note 18, at 757–58. Thus, plaintiffs should *not* view public nuisance theory as a blank check or a magic bullet. Still, this Note seeks to evaluate the potential for applying a similar theory to the firearms industry, whose public image is far from pristine, so this limitation should not be overly burdensome for the purposes of this Note.

33. Gifford, *supra* note 18, at 745, 763–64.

34. *Id.* at 764–69.

35. *Id.* at 764.

36. *See, e.g.*, White v. Smith & Wesson Corp., 97 F. Supp. 2d 816, 830 (N.D. Ohio 2000); City of Boston v. Smith & Wesson Corp., No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *79; City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1150–51 (Ohio 2002).

example, the Ohio Supreme Court held that when the "design, manufacturing, marketing, or sale of [a] product unreasonably interferes with a right common to the general public," a plaintiff could win on a public nuisance theory.[37] Although several early public nuisance cases against firearm manufacturers survived on procedural grounds, even more did not.[38] And even when plaintiffs overcame this procedural hurdle, none could muster a successful public nuisance argument.

Donald Gifford notes four primary reasons that courts denied these early public nuisance claims against the gun industry: (1) the *lawful* sale of firearms did not interfere with a right common to the public; (2) gun industry members did not exercise sufficient control over the source of the alleged nuisance; (3) "product manufacturers and distributors simply [could not] be held liable on a public nuisance theory"; and (4) the alleged injuries were "too indirect or remote from the conduct complained of to allow recovery."[39] In short, public nuisance claims from this time period, in the absence of separate unlawful acts by gun manufacturers or support from state or federal legislatures, were almost universally unsuccessful. Still, despite plaintiffs' lack of success, Congress felt that there were too many civil suits filed against gun manufacturers and stepped in to put an end to the litigation.

B. CONGRESS STEPS IN

In 2006, Congress passed the Protection of Lawful Commerce in Arms Act ("PLCAA").[40] The PLCAA granted gun manufacturers and sellers immunity from any "qualified civil liability action."[41] The Act did not clearly define this term, nor did it mention any examples of such qualified actions; however, it did cite several causes of action that were *not* qualified civil liability actions (though public nuisance was not one of these).[42] Litigants soon took to the courts to find out whether public nuisance would count.

The answer was a resounding "yes," a major blow to public nuisance plaintiffs. However, not all hope was lost—at least not immediately. In one case, New York City sued a gun manufacturer for public nuisance, and the

37. *Beretta*, 768 N.E.2d at 1142.

38. *See, e.g.*, Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 542 (3d Cir. 2001); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 426 (3d Cir. 2002); Young v. Bryco Arms, 821 N.E.2d 1078, 1091 (Ill. 2004).

39. Gifford, *supra* note 18, at 766–68.

40. 15 U.S.C. §§ 7901–7903.

41. *Id.* at § 7903(5)(A)(ii).

42. Negligent entrustment and negligence per se, for instance, were both expressly excepted from PLCAA protection, *id.* at § 7903(5)(A), presumably because these causes of action require a plaintiff to prove negligence, a higher standard than a typical public nuisance standard. Negligent entrustment was one of the theories that eventually helped plaintiffs win a landmark case against the manufacturer of the guns used in the Sandy Hook school shooting. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 285 (Conn. 2019).

Eastern District of New York held that the PLCAA did *not* bar the action because defendants, in addition to allegedly causing a public nuisance, had broken state law, triggering an important exception in the statute.[43] This "predicate exception"[44] denies PLCAA protection to defendants who knowingly violate state (or sometimes federal) statutes when two conditions are met: (1) the statute is "applicable to the sale or marketing of [firearms]," and (2) the violation of the statute "was a proximate cause of the harm for which relief is sought."[45] In other words, if a gun industry member violates a predicate statute and this violation results in a public nuisance, PLCAA protection does not apply and plaintiffs can still seek either abatement (or, if they show a special injury, damages[46]) in a civil suit.

Thus, potential Second Amendment issues notwithstanding,[47] the predicate exception seemed to provide states with two possible strategies to continue using public nuisance to rein in gun violence. First, a state could charge a firearm manufacturer or seller with a common law public nuisance violation in addition to a separate statutory violation.[48] Second, if a state had already codified public nuisance through legislation, it could simply use that legislation as a predicate statute.[49]

However, despite this limited initial success for plaintiffs in state court, federal courts soon undermined both strategies.[50] New York City attempted the first strategy in 2008, but the Second Circuit held that "the predicate exception was meant to apply only to statutes that actually regulate the firearms industry"—namely, statutes that: (1) "expressly regulate firearms"; (2) "courts have applied to the sale and marketing of firearms"; or (3) "do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms."[51] The law in question, New York's criminal nuisance statute, fit into none of these categories; thus, the predicate exception did not apply, and the court dismissed the case.[52] Likewise, in

43. City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237, 241 (E.D.N.Y. 2008).

44. *See, e.g.*, Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009).

45. 15 U.S.C. § 7903(5)(A)(iii).

46. *See* Sharkey, *supra* note 12, at 457–61.

47. *See infra* Section IV. for an in-depth discussion of these Second Amendment issues.

48. This is precisely what happened in *City of New York v. Beretta*—although, as explained below, that suit was unsuccessful. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2d Cir. 2008).

49. This second strategy worked in at least one case, wherein the Indiana Court of Appeals held that Indiana's public nuisance statute was applicable to the sale or marketing of firearms, and thus it triggered the predicate exception. Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007).

50. *See, e.g.*, *Beretta*, 524 F.3d at 390; Ileto v. Glock, Inc., 565 F.3d 1126, 1146 (9th Cir. 2009). Importantly, both of these decisions, in addition to denying the applicability of the predicate exception, also upheld the constitutionality of the PLCAA—another significant win for gun industry members seeking to avoid potential liability.

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

52. *Id.*

2009, the Ninth Circuit denied the second strategy, reasoning that Congress intended the PLCAA to preempt "general tort law claims," including public nuisance.[53] Even though the statute in question had codified public nuisance as a civil cause of action, it could not count as a predicate statute because it was not *specifically* related to guns.[54] In short, courts declined to apply the predicate exception to general, common law-style causes of action, regardless of whether they had been codified in statutes. And, unfortunately for plaintiffs, public nuisance fit squarely into this category. Thus, states and other plaintiffs almost entirely ceased relying on public nuisance to sue gun manufacturers and sellers.

This is not to say that making meaningful use of the predicate exception is impossible, and some plaintiffs have recently had limited success with this strategy in state courts. The most significant success came in 2019 when the Supreme Court of Connecticut held that general negligent entrustment and unfair trade practice laws counted as predicate statutes in a suit against the manufacturer of firearms involved in the Sandy Hook school shooting.[55] The theory in that suit centered on the idea that Remington, a major firearms manufacturer, employed wrongful marketing practices (as defined by the statute) that increased the risk that its products could be used to harm the public—a claim with striking similarities to the tobacco litigation discussed above.[56] Similarly, an Indiana appellate court held in 2019 that neither the PLCAA nor a similar state law protected a firearms manufacturer from liability for violating general public nuisance statutes.[57]

Still, although state courts have occasionally counted general tort statutes (that is, statutes that do not specifically target the gun industry) as predicate statutes, no federal court has done so as of the writing of this Note. And while shifting precedent is far from impossible, it seems unlikely that federal courts will stray from the Second and Ninth Circuits' strong protection of gun industry members. As far as the *general* tort of public nuisance is concerned, it is probably not worth plaintiffs' time, money, and effort to bring federal lawsuits with such a limited chance of success. In short, as long as the PLCAA protects gun industry members, states will need a new strategy to reduce gun violence under a public nuisance theory.

III. A NEW TYPE OF STATUTE

On July 6, 2021, New York Governor Andrew Cuomo signed into law an act creating a cause of action for public nuisance against "gun industry

53. *Ileto*, 565 F.3d at 1138.
54. *Id.*
55. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 324–25 (Conn. 2019).
56. *Id.* at 295–96.
57. City of Gary v. Smith & Wesson Corp., 126 N.E.3d 813, 819 (Ind. Ct. App. 2019).

member[s]" who "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 qualified product"—that is, a firearm.[58] In short, this statute subjects firearm manufacturers and sellers to public nuisance liability for the harm that their guns cause to the people of New York.

This novel approach is catching on. New Jersey, Washington State, and Hawaii have all since passed similar statutes authorizing state attorneys general—and, in some cases, private citizens—to seek damages or equitable remedies for public nuisance that results from gun violence.[59] (California and Illinois have also recently enacted similar "Firearm Industry Responsibility Act[s]," which create civil causes of action against gun industry members but not specifically for public nuisance.[60]) The success of these public nuisance firearm laws (I will call them "PNFLs") depends upon their ability to overcome three primary legal challenges: the PLCAA, pre-PLCAA precedent, and the Second Amendment.[61] This Section focuses on the first two challenges, while Section IV covers the Second Amendment.

First, PNFLs have a strong chance to overcome the issues that caused laws to fail muster as predicate statutes in *Beretta*, *Ileto*, and other PLCAA cases. The crucial difference is that PNFLs, presumably in an effort to trigger the PLCAA's predicate exception, are directed specifically toward the firearm industry. This means that they are *not* "general tort law claims"[62] like the law in *Ileto*; rather, they are specifically "applicable to the sale or marketing of [firearms]."[63] Thus, at least based on the plain text of the PLCAA, PNFLs seem to count as predicate statutes—and it is not clear what

58. N.Y. GEN. BUS. LAW §§ 898-b–898-c (McKinney 2021).

59. N.J. STAT. ANN. §§ 2C:58-33–58-36 (West 2022); WASH. REV. CODE ANN. § 7.48.330 (West 2023); REV. STAT. ANN. §§ 134-101–104 (West 2023).

60. A.B. 1594, 2021–2022 Legis.,. Reg. Sess. (Cal. 2022); *Gov. Pritzker Takes Action to Hold Gun Manufacturers Accountable*, ILLINOIS.GOV (Aug. 12, 2023), https://www.illinois.gov/news/press-release.26881.html [https://perma.cc/83DJ-ML8D].

61. Of course, this list only represents the three *primary* challenges; it is not exhaustive. For instance, there is a potential issue of further legislation attempting to prevent public nuisance litigation. This has occurred before on the state level; before the PLCAA was enacted, "the gun industry persuaded thirty-two states to provide the industry with statutory immunity against most litigation." 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, 1838 n.6 (2008). There is nothing stopping the industry from attempting to get similar legislation passed now. However, this strategy seems very unlikely to succeed in states where legislatures are friendly enough to anti-gun violence plaintiffs to enact PNFLs. Moreover, this is to say nothing of *non-legal* questions—most importantly the question of whether PNFLs (assuming they can be used as intended) stand a real chance of reducing gun violence. This question is beyond the scope of this Note; however, my theoretical premise is that gun industry members are the cheapest cost avoiders for gun violence. *See infra* Conclusion.

62. Ileto v. Glock, Inc., 565 F.3d 1126, 1138 (9th Cir. 2009).

63. 15 U.S.C. § 7903(5)(A)(iii).

arguments defendants might make to say otherwise.

Because PNFLs are so new, they have been the subject of very little litigation. However, the most significant decision so far, *National Shooting Sports Foundation v. James*, shows their immense promise: there, the Northern District of New York, using the standard set forth in *Beretta*, held that New York's PNFL qualified as a predicate statute under the PLCAA.[64]

Still, even if PNFLs qualify as predicate statutes for PLCAA purposes, this does not necessarily mean they are sufficient to establish nuisance liability under pre-PLCAA precedent, which, though it has remained dormant in federal courts for nearly two decades, is still good law. If PNFLs are to succeed, new plaintiffs must distinguish their cases to avoid succumbing to the same pitfalls as their predecessors. Recall the four primary hurdles that courts imposed on plaintiffs attempting to hold gun industry members liable in pre-PLCAA cases: (1) the *lawful* sale of firearms did not interfere with a right common to the public; (2) gun industry members did not exercise sufficient control over the source of the alleged nuisance; (3) "product manufacturers and distributors simply [could not] be held liable on a public nuisance theory"; and (4) the alleged injuries were "too indirect or remote from the conduct complained of to allow recovery."[65]

Based on the text of PNFLs, the top concern for state legislatures was overcoming the PLCAA; precedent from the early 2000s likely did not factor into their drafting. However, even without being specifically crafted to do so, PNFLs can still overcome each hurdle. Hurdle (1) was a precursor to the PLCAA's predicate exception: in addition to immunizing gun industry members who participate in lawful sales of firearms, it implies that those who participate in *unlawful* sales will not receive the same protection. Thus, for the same reason that PNFLs can take advantage of the predicate exception, they can also overcome hurdle (1). Overcoming hurdles (2) and (3) is similarly simple. Even if traditional common law public nuisance required a particular amount of control and did not cover product manufacturers or distributors,[66] legislatures remain free to alter the common law as they see fit (within constitutional limitations, discussed in detail below). In short, statutes can claim a democratic legitimacy that common law simply cannot. Since legislatures in certain states have declared that manufacturers and distributors of a certain product, guns, are committing a

64. Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48, 59–60 (N.D.N.Y. 2022).

65. Gifford, *supra* note 18, at 766–68.

66. Still, there is some doubt about even this claim—for example, Leslie Kendrick argues that public nuisance has protected consumers of products for centuries. Kendrick, *supra* note 22, at 739. Regardless, the expansion of public nuisance to cover the tobacco industry in the late twentieth century certainly shows that (at least now) it covers manufacturers and distributors. *See* Gifford, *supra* note 18, at 745.

public nuisance regardless of their level of control, courts in those states must follow suit.

Hurdle (4) presents the most significant challenge as PNFLs do not (and arguably cannot) eliminate public nuisance's causation element. In other words, it is an indispensable requirement that plaintiffs show that a defendant's actions *caused* the public nuisance in order to hold them liable for it. But the good news for plaintiffs is that courts applying public nuisance doctrine have historically taken an expansive view of causation. The traditional test for causation in public nuisance is not proximate, as it would be in a standard negligence action. Rather, as long as a plaintiff is seeking the traditional public nuisance remedy of abatement, courts ask whether the defendant *contributed to a condition* that interferes with a right common to the public.[67] This is a much lower standard for plaintiffs to meet and, again, the fact that legislatures have set aside a statutory cause of action for this particular type of plaintiff clearly signals to courts that they should allow these actions to proceed with a more relaxed conception of causation.

Although this conception of causation is not exactly standard in tort law, neither is it an outlier, particularly in gun industry litigation. For example, plaintiffs have established causation in wrongful marketing claims against gun industry members simply by showing that their "marketing efforts create a new market among individuals known to be likely to engage in criminal activity who, but for the defendant's efforts, would be less likely to purchase a weapon."[68] Indeed, "[p]erhaps it would even be enough to allege that the defendants merely play an essential role in sustaining such a market."[69] Given this lower bar for establishing causation, plaintiffs should be able to overcome hurdle (4) with relative ease.

IV. PUBLIC NUISANCE FIREARM LAWS AND THE SECOND AMENDMENT

Following the past fifteen years of Supreme Court Second Amendment jurisprudence, particularly the Court's 2022 decision in *New York State Rifle & Pistol Association v. Bruen*, the most important question for any statute even remotely concerning the right to bear arms is whether it is constitutional.[70] *Bruen* set forth a historical analogue test under which any gun regulation must be consistent with "[the] Nation's historical tradition of firearm regulation."[71] This is a high bar, but not high enough to exclude

67. David Bullock, *Public Nuisance Is a Tort*, 15 J. TORT L. 137, 168 (2022).

68. Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOKLYN L. REV. 681, 706 (1998).

69. *Id.*

70. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

71. *Id.* at 8.

PNFLs. This Section outlines two independent reasons that PNFLs pass constitutional muster: (1) because PNFLs do not directly limit the individual right to bear arms for purposes of self-protection, the Second Amendment does not directly implicate them; and (2) even if the Second Amendment did apply, PNFLs can pass *Bruen*'s historical analogue test.[72]

A. DOES THE SECOND AMENDMENT APPLY?

In *James*, the Northern District of New York tackled more than just the predicate exception; it also noted that New York's PNFL was unlikely to face significant constitutional challenges: "the ability for gun industry members to sell, manufacture, import, and market firearms in the manner they desire, only has an attenuated impact on Second Amendment rights, if any."[73] The court's main reason for this claim was that the PNFL in question did not seek to enforce any restrictions on individuals; rather, it created potential civil liability for *manufacturers and sellers* of firearms.[74] Since PNFLs are so new, federal precedent on this issue is scarce,[75] but some state court judges have written opinions along similar lines to *James*. In *Soto*, for example, Judge Robinson of the Connecticut Supreme Court wrote in his dissenting opinion that "the legislative history and statutory text [of the PLCAA do] not indicate any intent by Congress to identify predicate statutes by examining various nuances of second amendment law."[76]

This Section defends these courts' view that the PLCAA and the Second Amendment protect different rights: the PLCAA protects gun industry members, while the Second Amendment protects individuals. At the outset of this argument, it is important to note that these are not completely separate categories, and my argument does not rely on showing that they are. Nor do I argue that gun industry members have no Second Amendment rights whatsoever; again, this is not the case. Rather, I intend to show that, although gun industry members serve an important purpose in ensuring the individual right to bear arms, the Second Amendment does not completely protect them from liability under PNFLs.

1. The PLCAA Protects Gun Industry Members

Perhaps the most convincing evidence that the Second Amendment

72. *Id.* at 17.
73. Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48, 67 (N.D.N.Y. 2022).
74. *Id.*
75. Federal precedent is coming soon, however. The National Shooting Sports Foundation, a group that works to protect gun industry members from liability (among other gun-related projects), filed a Second Amendment-based complaint against Hawaii's PNFL. Complaint at 2, Nat'l Shooting Sports Found. v. Lopez, 730 F. Supp. 3d 1073 (D. Haw.) (No.No. 1:23-cv-00287-DKW-RT).
76. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 347 n.24 (Conn. 2019) (Robinson, J., dissenting).

does not implicate PNFLs—or, for that matter, other statutes creating civil causes of action against gun industry members—is the existence of the PLCAA itself. If the Second Amendment already barred states from bringing these causes of action (statutorily created or otherwise), why would Congress need to protect gun industry members from them? The extensive litigation surrounding the PLCAA focuses mainly on interpreting the statute, not the Second Amendment; thus, it seems as though the constitutionality of PNFLs should not be a significant issue.

Critics of this argument might respond by pointing out that the doctrine of constitutional avoidance directs courts not to answer Second Amendment questions, especially when the PLCAA already offers clear protections to the firearm industry. This argument seeks to reverse my rhetorical question from the previous paragraph, instead asking the following: if the PLCAA already protects gun manufacturers, why get into the constitutional issues? Indeed, this is precisely what occurred in both *Beretta* and *Ileto*: those courts resolved the question on PLCAA grounds, so there was no need to invoke the Constitution.

There are two problems with this constitutional avoidance argument. First, it only works when gun industry members win these cases—that is, when they can take advantage of the PLCAA to avoid liability—but they do not always win outright. In *Bob Moates' Sport Shop*, for instance, the court followed *Heller* and directly addressed the constitutional question, holding that "localities retain power to regulate the ownership and control of weapons," including the power to pass statutes that seek to regulate firearms "in a rational way by use of civil and criminal police authority."[77] Thus, even if the Second Amendment comes up somewhat rarely in PLCAA cases, it is not unheard of, and courts that do tackle the Second Amendment issue tend to recognize that it is limited in its application to non-individual entities.

A second problem with the constitutional avoidance argument is that even if it is correct, it only shows that the question of constitutionality is unsettled; it is *not* evidence that PNFLs and similar statutes are unconstitutional. Evidence of constitutionality comes, rather, from the Court's relatively limited Second Amendment jurisprudence. Federal litigation concerning the Second Amendment was almost completely unheard of until the end of the nineteenth century; and even after that, when the Supreme Court heard a rare Second Amendment case, it tended to defer to the regulatory power of both Congress and state legislatures, rather than upholding a specific individual right.[78] Throughout the twentieth century, the

77. City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237, 242 (E.D.N.Y. 2008).

78. *See, e.g.*, Miller v. Texas, 153 U.S. 535, 538 (1894) (holding that "the restrictions of [the Second Amendment] operate[s] only upon the Federal power, and [has] no reference whatever to

Court had not yet decided whether the Second Amendment protected an individual right to bear arms or the right of states to maintain militias "free from federal interference."[79] The Court's silence on the issue left it open for scholars to debate.[80] That changed in 2008.

2. The Second Amendment Protects Individuals

In 2008, the Court struck down the District of Columbia's blanket handgun ban and emphatically settled the debate about what type of right the Second Amendment protected: "the *individual* right to possess and carry weapons in case of confrontation."[81] *Heller* went against the so-called "militia theory," which the Supreme Court had never fully endorsed but which had lurked in the background of its Second Amendment jurisprudence for almost a century.[82] The militia theory holds that the Second Amendment protects not individual citizens, but rather *state militias* against disarmament by the federal government.[83] The *Heller* court aligned more closely with what most Americans thought at the time: the purpose of the Second Amendment was "to protect the right of individuals to own guns."[84] And although *Heller* allowed room for exceptions (it focused on "law-abiding, responsible citizens,"[85] implying that people who fall outside of this category may not enjoy such protections), it was clear that blanket gun bans were unconstitutional. The Court unequivocally reaffirmed this emphasis on protecting individual rights in both 2010[86] and 2016.[87]

Bruen also bolstered this focus on individual rights. One indication of the Court's focus on individuals is the factual background of the case: the plaintiffs, two individuals, sued the state of New York over a statute requiring them to demonstrate "a special need for self-defense" in order to carry handguns outside their homes.[88] The law, which the Court struck down

proceedings in state courts"); Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897) (holding that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons"); United States v. Miller, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not guarantee an individual right to own a shotgun in the absence of "some reasonable relationship to the preservation or efficiency of a well regulated militia").

79. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1365 (1998).

80. *See id.*

81. District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (emphasis added).

82. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 24 (2011).

83. *Id.*

84. *Id.* at 23.

85. *Heller*, 554 U.S. at 635 (emphasis added).

86. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (holding that individual self-defense is "the central component" of the Second Amendment right.).

87. Caetano v. Massachusetts, 577 U.S. 411, 413 (2016) ("It is settled that the Second Amendment protects an individual right to keep and bear arms . . . .") (Alito, J., concurring).

88. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8–11 (2022).

as unconstitutional, directly targeted and affected individuals, but nowhere in the majority, concurring, or dissenting opinions do any of the justices discuss whether that law affected gun industry members; given the facts of the case, there was simply no reason to do so.

Even more importantly, the majority repeatedly went beyond the facts of the case to emphasize that the Second Amendment generally focuses on an individual right. Restating a line from both *Heller* and *McDonald*, the Court emphasized that "individual self-defense is 'the *central component*' of the Second Amendment right."[89] If that were not clear enough, the majority's articulation of the now-famous historical analogue test outright says that the Second Amendment protects individuals: "When the Second Amendment's plain text covers an *individual's* conduct, the Constitution presumptively protects that conduct. The government must *then* justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[90]

The *Bruen* majority opinion mentioned the phrase "individual right" a dozen times, but made no mention of the phrases "manufacturer," "maker," "seller," "distributor," "industry," "company," or, for that matter, "civil liability."[91] Justice Alito's concurrence reiterated this same point: "All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional."[92] In short, the Court, in its most recent articulation of Second Amendment jurisprudence, could not have been more clear: *Bruen* was consistent with *Heller* and *McDonald* in that it protected the individual right to own and carry handguns for purposes of self-protection, and it did *not* expand protection to any parties other than law-abiding individuals.[93]

3. PNFLs can be Structured to Avoid Infringing Individual Rights

Thus, the primary Second Amendment question that PNFLs must answer is whether they implicate the individual right to keep and bear arms for purposes of self-protection. Recall the first part of the *Bruen* test: whether

89. *Id.* at 29 (emphasis in original); *Heller*, 554 U.S. at 599; *McDonald*, 561 U.S. at 767.
90. *Bruen*, 597 U.S. at 24 (emphasis added).
91. *See generally id.* (there is no mention of these phrases in the case).
92. *Id.* at 76 (Alito, J., concurring).
93. Importantly, in 2024, the Court held that "[w]hen a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect." United States v. Rahimi, 602 U.S. 680, 690 (2024). But although *Rahimi* was the first time the Court upheld a statute facing a Second Amendment challenge in decades, it is unlikely to change the Court's stance with respect to law-abiding individuals or gun industry members.

the plain text of the Second Amendment presumptively protects a certain type of individual conduct.[94] But what individual conduct? By design, PNFLs do not in any way attempt or purport to regulate the individual right to bear arms. They do not subject individuals to any risk of liability, even when those individuals use guns in unlawful ways. Rather, PNFLs target the *source* of these weapons: firearm manufacturers and sellers, who, as the Court has made clear time and time again, do not enjoy the same Second Amendment protections as individuals.[95]

However, the argument does not end here. Another point a critic might raise is that even if the Second Amendment focuses on individuals, gun industry members still enjoy its protections, just as U.S. citizens do. Thus, restricting these gun industry members in the name of reducing gun violence may still violate the Second Amendment. There are two specific versions of this argument. The first version notes that corporations are protected by the First Amendment; thus, there is no clear reason why they should be denied Second Amendment protection as well.[96] This version of the argument is weak. The Second Amendment protects the right to *keep and bear* arms, not (at least directly) the right to *make and sell* arms. A corporation might be able to claim this sort of protection to defend its *using* guns for purposes of self-protection, perhaps by hiring armed security officers to guard its headquarters, but not (again, directly) to defend its business of *selling* guns. Further, the Court's focus on individuals presents an additional problem for gun industry members: regardless of whether a corporation counts as a person for purposes of free speech, it does not count as an *individual*.[97]

To make a strong claim for Second Amendment protection, a gun industry member must show how a government action—in this case, a PNFL—restricts not the corporation itself, but rather the individual right that the Court has been so careful to protect. This is where the second, stronger version of the argument comes in. This version goes roughly as follows: (1) individuals have a strong Second Amendment right to own, carry, and use guns for self-protection; (2) if that right is to mean anything, individuals must have at least some minimal form of access to fully operational guns and ammunition; (3) the only entities that currently provide such access are gun industry members; (4) subjecting gun industry members to massive public nuisance liability risks depriving or severely limiting that access by bankrupting them; thus, (5) PNFLs violate the Second Amendment by *indirectly* disrupting individuals' right to keep and bear arms.

94. *Bruen*, 597 U.S. at 22–24.

95. *See supra* Section IV.A.2.

96. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010) (holding that certain non-individual entities can claim some constitutional rights, including First Amendment rights).

97. *Id.*

This argument finds some basis in constitutional jurisprudence. The Supreme Court has often struck down state actions that indirectly disrupt certain individual rights,[98] and at least initially, it seems as though a PNFL might fall into a similar category. But in examining the goals and intended effects of PNFLs, it becomes clear that they are different. PNFLs are not intended to impose massive liability on gun industry members, nor do they seek to regulate the industry out of business. Rather, they intend to incentivize gun industry members to avoid liability by adopting internal controls that reduce the risk of gun violence—and these internal controls, although they are responsive to a state action, are not in themselves state actions. This marks a fundamental difference between PNFLs and the law in *Yick Wo*. And the Second Amendment, like the Fourteenth, applies to state actions. So at least under this theory, it seems the best a gun manufacturer could hope for is a Supreme Court ruling that courts cannot enforce any actions that might infringe on Second Amendment rights—though this seems rather unlikely.

But even if there were a strong basis for enforcing the Second Amendment against a non-state action, the main issue with this argument comes in its fourth prong. Namely, there is no guarantee—or even likelihood—that PNFLs would subject gun industry members to a level of liability capable of bankrupting them. Consider, once again, the parallel example of public nuisance litigation against tobacco companies in the late 1990s. The tobacco industry paid the largest civil settlement in the history of the United States (at the time); yet individuals continued to access tobacco products at similar rates to what they consumed before the settlement.[99] Part of the reason that the tobacco industry was able to survive the blow and continue providing products to consumers (even despite ever-declining demand) was the structure of the settlement. Rather than paying a lump sum that surely would have bankrupted many companies in the industry, the parties structured the agreement to allow for ongoing payments, which tobacco companies continue to make.[100]

---

98. Perhaps the best example of this is the Supreme Court's Fourteenth Amendment jurisprudence. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that although a law was not discriminatory on its face, its application led to discriminatory results).

99. The percentage of adults in the United States who said they had smoked a cigarette within the last week dropped by 5% in the year following the settlement agreement, but strongly rebounded during the following year and reattained pre-settlement levels within three years. *Tobacco and Smoking*, GALLUP: IN DEPTH: TOPICS A TO Z, https://news.gallup.com/poll/1717/tobacco-smoking.aspx [https://perma.cc/FC8K-SADK]. Also, it is not clear that the settlement itself was the reason for this initial decline. Other factors, such as negative press treatment of the tobacco industry, may have contributed as well. And despite the massive cost, many tobacco companies affected by the settlement remain in business today. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, PARTICIPATING MANUFACTURERS UNDER THE MASTER SETTLEMENT AGREEMENT AS OF APRIL 06, 2022, https://www.naag.org/wp-content/uploads/2020/09/2022-04-06-PM-List-.pdf.

100. *The Master Settlement Agreement*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/our-

The point of this comparison to tobacco is not to argue that the situation is completely analogous. There are important differences between the gun and tobacco industries, so of course there is no guarantee that public nuisance liability would play out in the same way here as it did there. But the comparison underscores the creativity and flexibility that parties might use in structuring settlements to avoid bankrupting the entire firearms industry and thus triggering a potential constitutional problem. Moreover, courts can apply the same level of creativity simply by relying on a traditional nuisance analysis. Courts deciding nuisance cases have a long-established tradition of considering the utility of the defendant's activity when determining liability or calculating damages. Therefore, insofar as a gun industry member's activity protects a basic constitutional right—which of course is extremely valuable—that activity may be entitled to a certain level of judicial protection.

For example, under one classic approach from the Second Restatement of Torts, plaintiffs can only establish liability when the gravity of the harm outweighs the utility of the defendant's conduct.[101] Thus, if the damages in a nuisance suit are large enough to put individuals' Second Amendment rights at stake, a court using this test could simply avoid the constitutional issue by denying liability based on that consideration alone. Of course, the downside of this approach is denying any recovery whatsoever to the victims of gun violence (or whatever type of nuisance is in question in the case). This is why the Restatement offers an alternative test: to take the utility of the defendant's conduct into account not while determining liability, but while calculating damages.[102] This way, a court could provide victims with some recovery and deter gun industry members from engaging in behavior that might lead to public nuisance without bankrupting defendants with massive damages.[103] This too could help PNFLs avoid Second Amendment issues.[104]

work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement [https://perma.cc/YZ9XYZ9X-QP2N].

101. RESTATEMENT (SECOND) OF TORTS § 826(a) (AM. L. INST. 1979).

102. *Id.* at § 826(b).

103. Admittedly, these two tests traditionally apply to determining liability or calculating damages for *intentional private nuisance*, which is distinct from public nuisance. *Id.* at § 821A. The right to bring a private nuisance suit is traditionally based on land ownership, while public nuisance, as noted earlier, invokes a right common to the public. *Id.* at §§ 821B, 821D. However, aside from sharing the word nuisance, these separate causes of action also share a common element: they both require plaintiffs to show that the defendant's actions were *unreasonable*. *Id.* at §§ 821B(1), 822. And, crucially, courts traditionally apply the same analysis of unreasonableness to both private and public nuisance. *Id.* at § 821B. Thus, at least according to the Restatement, courts can account for the utility of the defendant's activity in a public nuisance case, just as they can in private nuisance cases.

104. As we will see in the following Section, it is possible that the Second Amendment does protect the rights of gun industry members, and thus, in order to pass the Supreme Court's constitutionality test, PNFLs must have a historical analogue. *See infra* Section IV.B. But if this is the case, the potential severity of public nuisance remedies should not be held against PNFLs, as historical analogues were just as harsh, if not harsher. As William Novak points out, "[d]eclaring an activity or establishment a nuisance

Again, the arguments in this Section do not intend to show that gun industry members have no rights under the Second Amendment. To the contrary, it is important to recognize that firearm manufacturers and sellers play a crucial role in giving Americans access to firearms and thus protecting their constitutional rights. It is also important to note that this role entitles them to some, perhaps limited, Second Amendment protections. My argument here is that PNFLs, if structured and implemented properly, can work effectively within those limitations. And to do this, courts need not look beyond long-established principles that limit either liability or damages for defendants whose activity performs an important societal function.

Of course, the judicial test for unreasonableness in nuisance actions may not be the only long-established principle that matters here.

B. PNFLS CAN PASS THE *BRUEN* HISTORICAL ANALOGUE TEST

If my argument above is correct and the Second Amendment does not implicate (carefully crafted and implemented) PNFLs, then there is no constitutional issue here. However, if the preceding arguments fail and the Second Amendment does apply, then PNFLs will need to pass the test set forth in *Bruen*, which requires states to show that their attempt to regulate firearms has a historical analogue in "[the] Nation's historical tradition of firearm regulation."[105] In the time since *Bruen* was decided, district and circuit courts have split on how (and how strictly) to apply this test.[106] So far, the only consistent point of agreement among lower courts seems to be that the historical analogue test sets a high bar.

As Justice Thomas made clear in his majority opinion, even a historical statute bearing great similarities to its modern analogue might still fail the test for one or both of two reasons.[107] First, it might be an outlier—i.e., a historical analogue that does not represent the general historical tradition of firearm regulation in America.[108] Second, it might be from the wrong time.

---

in the nineteenth century unleashed the full power and authority of the state. Perhaps under no other circumstances (short of martial law) could private property and liberty be so quickly and completely restrained or destroyed." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 62 (1996).

105. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

106. Until recently, for example, the most highly contested issue in lower courts was whether *Bruen* protected the right of people under felony indictment to transport firearms across state lines. MATTHEW D. TROUT, CONG. RSCH. SERV., LSB11072, THIRD CIRCUIT HOLDS THAT APPLICATION OF FELON-IN-POSSESSION BAN VIOLATES THE SECOND AMENDMENT, CREATING CIRCUIT SPLIT (2023); *see also* Jacob Charles, *The Most Disputed Federal Law Post-Bruen*, DUKE CTR. FOR FIREARMS L. (May 3, 2023), https://firearmslaw.duke.edu/2023/05/the-most-disputed-federal-law-post-bruen [https://perma.cc/D5HX-UYEH]. However, the *Rahimi* Court appears to have at least partially resolved this dispute by following *Heller* in holding that bans on felons possessing firearms are "presumptively lawful." United States v. Rahimi, 602 U.S. 680, 699 (2024).

107. *Bruen*, 597 U.S. at 1–3.

108. *Id.* at 19.

If the analogue in question is from a few decades before or after the time that matters (either the ratification of the Bill of Rights in 1791 or the ratification of the Fourteenth Amendment in 1866), it is less likely to be relevant.[109] As the Court put it, "[a] long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice."[110] In the remainder of this Section, I will argue that PNFLs have relevantly similar, non-outlier analogues from near the right time, and thus that they can pass this stringent *Bruen* test.

1. Historical Courts and Legislatures Used Public Nuisance Theory to Protect Public Health and Safety

Admittedly, it may initially seem unlikely that such an analogue exists. Although public nuisance as a common-law cause of action has been around for nearly a millennium, plaintiffs only began using it against product manufacturers in the 1970s—and with very limited success until the late 1990s—far outside the acceptable window for a *Bruen* historical analogue.[111] However, general nuisance (as a common law cause of action) was extremely common at the time the Bill of Rights was ratified.[112] In fact, public nuisance was perhaps the most widespread form of judicially-enforced governmental regulation in the late eighteenth and early nineteenth centuries, covering everything from hog-sties to water drainage systems, and more.[113] At the time, public nuisance was a catch-all theory—a way for states to manage relatively minor infractions that, whether illegal by statute or not, interfered with held-in-common rights such as health and safety.

Moreover, public nuisance in the eighteenth century (and earlier) was not exclusively governed by common law. British legislatures have a long history of declaring specific activities to be public nuisances in order to compel courts to enforce against them—just as states are doing today by enacting PNFLs.[114] These legislature-established public nuisance actions carried over to colonial and early post-revolution America, whose courts adopted the English version of public nuisance "without significant change."[115] Indeed, the tradition of legislature involvement continued after the turn of the century: following the abolition of common law crimes in

109. *Id.* at 33–38. *See infra* Section IV.B.2 for discussion of which time period matters more for purposes of Second Amendment analysis.
110. *Bruen*, 597 U.S. at 35.
111. Gifford, *supra* note 18, at 745.
112. NOVAK, *supra* note 104, at 61–62.
113. *Id.*
114. Merrill, *supra* note 13, at 356–57.
115. Gifford, *supra* note 18, at 800.

1812,[116] nearly every state passed its own public nuisance statute, most of which were designed (at least in part) to mitigate any condition "which injures or endangers the public health, safety, or welfare."[117]

In short, early American courts and legislatures alike adopted the British tradition of using public nuisance to prevent or abate certain risks to the public. But did that purview include firearms? Although data on firearm regulation is sparse, given how widespread public nuisance actions were, it seems likely that in at least some instances, firearms fell into this category. Of course, this alone is not enough to withstand *Bruen* scrutiny. The *Bruen* court emphasized that historical analogues must be similar not in general, but specifically as they relate to the individual use of firearms for self-defense.[118] The mere fact that public nuisance laws were widespread at the time of the Bill of Rights—and that they *probably* regulated firearm usage in some instances—does not establish this.

However, there are at least two specific historical applications of public nuisance that singled out either the use of firearms or the distribution of materials needed to operate them.

2. Historical Nuisance Actions Against Firearm Users

A defender of the gun industry might argue that in order for PNFLs to pass the *Bruen* test, states would have to show that, at the time of the Bill of Rights, plaintiffs invoked public nuisance to regulate not just the purchase and sale of guns, but also their use by individuals. Several such laws existed in early America. In 1824, for example, Pennsylvania adopted an ordinance for the suppression of nuisances that banned (among other things) the discharge of any firearm "without permission from the President of the board of commissioners."[119] The penalty for violating this statute was harsh: not only did offenders have to pay a fine, they also had to forfeit their weapon.[120]

Similar laws cropped up throughout the rest of the nineteenth century. An 1855 ordinance in the City of Jeffersonville, Indiana, for example, declared it "a nuisance and unlawful" to discharge a firearm without a

116. *See generally* United States v. Hudson & Goodwin, 11 U.S. 32 (1812) (eliminating common law crimes).

117. Merrill, *supra* note 13, at 358.

118. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 1–3 (2022).

119. Northern Liberties, Pa., Ordinance for the Suppression of Nuisances, and for the Regulation of Drivers of Carriages and Horses, in and Through the Streets, Lanes and Alleys, Within the Incorporated Part of the Township of the Northern Liberties, and for Enforcing Useful Regulations Therein, *in* AN ACT OF INCORPORATION FOR THAT PART OF THE NORTHERN LIBERTIES, LYING BETWEEN THE MIDDLE OF SIXTH STREET AND THE RIVER DELAWARE, AND BETWEEN VINE STREET AND COHOCKSINK CREEK, WITH ORDINANCES FOR THE IMPROVEMENT OF THE SAME 48, 51 (1824), THE MAKING OF MODERN LAW: PRIMARY SOURCES, PART II, 1763–1970.

120. *Id.*

license.[121] However, unlike the Pennsylvania statute, this one did not specify an enforcement mechanism; rather, much like modern PNFLs, it allowed courts to determine enforcement based on existing nuisance law.[122] The City of Charlotte, North Carolina followed suit eleven years later, passing a law that included "the firing of fire-arms" in a long list of actionable nuisances.[123] This statute gave the City Board the exceptionally broad power "to prohibit all trades or occupations, which are a nuisance."[124]

In determining whether these laws are suitable historical analogues for PNFLs, it is crucial to understand the way in which nineteenth century people, courts, and legislatures understood the word "nuisance." Our modern understanding of the word mostly covers mild annoyances; but at the time, the term was understood to also include serious threats to public safety. Early American courts enforced nuisance actions to mitigate threats like contagious disease and (as we will see below) fire, either of which could wreak havoc on nineteenth century communities.[125] It is telling that historical local legislatures considered gunfire to occupy this same category: these laws were not only meant to protect the public from the mere *annoyance* of gunfire, but, just like PNFLs, from the deadly risks associated with it.

The issue of which time period matters for *Bruen* analysis becomes important here. The Court was clear that analogues from too far after the relevant time might not be convincing. However, the Court chose not to address the question of which specific time period matters for establishing a historical analogue; instead, it named two options: 1791, when the Second Amendment was adopted, but only applied to the federal government; or 1868, when the Fourteenth Amendment was adopted and "individual rights enumerated in the Bill of Rights [were] made applicable against the States."[126] In *Bruen*, there was no reason to settle this question because "the public understanding of the right to keep and bear arms in 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."[127]

We have yet to show that the same is true here. The 1824 Pennsylvania statute is, at best, on the outer edge of relevance to the general consensus on firearms law in 1791. However, the fact that similar statutes continued to

121. W.G. ARMSTRONG, D. WILEY & G. W. TWOMEY, THE ORDINANCES AND CHARTER OF THE CITY OF JEFFERSONVILLE 15–17 (1855), The Making of Modern Law: Primary Sources, Part II, 1763–1970.

122. *Id.*

123. An Act to Incorporate the Mayor and Board of Aldermen of the City of Charlotte, *in* PRIVATE LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1866 53, 69–70.

124. *Id.*

125. NOVAK, *supra* note 104, at 62.

126. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 37–38 (2022).

127. *Id.*

proliferate through the 1870s and beyond is excellent evidence that people and legislatures in 1868 considered public nuisance a lawful form of enforcement against improper firearm usage. Thus, if the relevant time period is the adoption of the Fourteenth Amendment, these laws are strong historical analogues.

But even if the Court were to decide that relevant time is 1791 (the adoption of the Second Amendment), these nineteenth century laws might still be relevant. According to Thomas Merrill, it is possible to view historical public nuisance statutes not as creating new categories, but simply "as a codification of the customary law of public nuisance."[128] Now, Merrill's overall argument here may be somewhat weak: public nuisance doctrine between its early origins in Britain and its codification in the nineteenth century certainly was not a monolith, so it would have been difficult for legislatures to simply codify it as such. But for our purposes here, there is no need to show that the common law remained the same (or even similar) for that entire time. Rather, what we can take from Merrill is that the specific features of public nuisance that affected the people's use of firearms changed very little in the short time between 1791 and the early nineteenth century. (This is far less of a leap than Merrill's more general claim that the *entire* history of public nuisance could simply be "codified" by a legislature.) Thus, the nineteenth century legislatures that used public nuisance to enforce against firearm usage were, as Merrill said, simply codifying an already-recognized category. This is true across the board: as noted above, American legislatures did not begin systematically codifying public nuisance until about 1812,[129] but of course this does not mean that 1812 was the first time these actions were recognized. The fact that nineteenth century legislatures used public nuisance to prohibit certain uses of firearms is, in fact, evidence that early courts did the same.

3. Historical Nuisance Actions Against Gunpowder Storage and Transportation

Of course, even if early uses of public nuisance placed certain restrictions on the use of guns, a gun industry member might argue that this is a poor analogue for PNFLs, which seek to enforce against the *suppliers* of guns (and their necessary components) rather than gun users themselves. In other words, since PNFLs only indirectly regulate gun use, perhaps their historical analogues should do the same. Fair enough—but such analogues do indeed exist.

---

128. Merrill, *supra* note 13, at 359.

129. *See generally* United States v. Hudson & Goodwin, 11 U.S. 32 (1812) (eliminating common law crimes).

In 1804, the Sands brothers of Brooklyn, New York were indicted on public nuisance charges after they stored and transported gunpowder in a way that posed serious risk of a disastrous and deadly explosion—that is, a significant danger to their fellow Brooklyn residents.[130] The brothers did not intend to harm anyone, but the state government felt that handling a product as powerful and dangerous as gunpowder required extra care.[131] The New York court's holding that unsafe storage of gunpowder could be a public nuisance[132] was far from an isolated instance; American courts continued expanding their view of public nuisance to cover gunpowder storage and transportation throughout the following century, with the goal of public safety in mind.[133]

Here, unlike above, there is clear evidence that public nuisance was widely recognized as a way to minimize the risk of gunpowder explosion before the ratification of the Bill of Rights in 1791 (although this recognition continued to expand throughout the nineteenth century).[134] Although *Sands* was decided fifteen years following the adoption of the Bill of Rights, common law courts had been regulating gunpowder storage through public nuisance for decades. Blackstone's massively influential 1769 account of public nuisance counted the *storage, making, and selling* of explosives, including gunpowder, as one of the six core activities regulated by common law public nuisance.[135] In fact, courts found gunpowder storage, when it occurred in a place that could pose a danger to nearby people, to be a public nuisance as early as 1700.[136] Legislatures followed suit in the nineteenth century, following a similar pattern as their use of public nuisance to regulate gun use itself (discussed above).[137]

130. People v. Sands, 1 Johns. 78, 78 (N.Y. Sup. Ct. 1806).

131. *Id.* at 80–81.

132. To be clear, the court held that unsafe gunpowder storage was not a nuisance *per se* and remanded the case to determine whether this specific instance constituted a nuisance; however, the important holding here is that unsafe gunpowder storage could constitute a public nuisance in the very early nineteenth century. People v. Sands, 1 Johns. 78, 88–90 (N.Y. Sup. Ct. 1806); NOVAK, *supra* note 104, at 64.

133. NOVAK, *supra* note 104, at 63–66.

134. *Id.* at 64–65.

135. Merrill, *supra* note 13, at 357–58; Kendrick, *supra* note 22, at 717–18.

136. NOVAK, *supra* note 104, at 63.

137. *See, e.g.*, THE REVISED STATUTES OF THE STATE OF MAINE PASSED OCTOBER 22, 1840 TO WHICH ARE PREFIXED THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF MAINE, AND TO WHICH ARE SUBJOINED THE OTHER PUBLIC LAWS OF 1840 AND 1841 697 (1841), The Making of Modern Law: Primary Sources, Part I: 1620–1926; W.G. ARMSTRONG, D. WILEY & G. W. TWOMEY, THE ORDINANCES AND CHARTER OF THE CITY OF JEFFERSONVILLE 15–17 (1855), The Making of Modern Law: Primary Sources, Part II, 1763–1970; An Act to Incorporate the Mayor and Board of Aldermen of the City of Charlotte, *in* PRIVATE LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1866 53, 69–70; WM. H. BRIDGES, DIGEST OF THE CHARTERS AND ORDINANCES OF THE CITY OF MEMPHIS, FROM 1826 TO 1867, INCLUSIVE, TOGETHER WITH THE ACTS OF THE LEGISLATURE RELATING TO THE CITY, WITH AN APPENDIX 52 (1867), The Making of Modern Law: Primary Sources, Part II: 1763–1970.

Even outside the realm of public nuisance, colonial and early American legislatures extensively regulated gunpowder storage. For instance, a Massachusetts law from 1792—just one year after the Second Amendment was ratified—strictly regulated both the transport and storage of gunpowder in Boston.[138] A 1783 Pennsylvania act[139] and a 1784 New York act[140] did the same. Thus *Sands*, rather than initiating a new tradition in American public nuisance law, only slightly expanded on a robust existing tradition.

But even if public nuisance actions against gunpowder storage were so widespread in the late eighteenth century and throughout the nineteenth century, are they good analogues for PNFLs? This Note is not the first to bring up early gunpowder laws as potential analogues for modern gun regulations. Justice Breyer, in his *Heller* dissent, discussed gunpowder laws from the time of the Bill of Rights at some length.[141] His argument was that since gunpowder was "a necessary component of an operational firearm," restrictions on its storage and use were a burden to citizens who wanted to use it for self-defense; thus, it was an analogue for modern laws seeking to do the same.[142] Justice Breyer's argument failed to convince the majority because historical gunpowder laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns."[143] The *Heller* majority was correct: gunpowder regulations are poor analogues for outright firearm bans simply because they regulate different things.

However, there is an important difference between the ban in *Heller* and PNFLs. PNFLs are far more similar to these historical gunpowder regulations than an outright ban, so the *Heller* majority's argument does not apply. The most obvious similarity is that both PNFLs and historical gunpowder regulations regulate the use of guns only *indirectly*. Gunpowder was necessary to operate a firearm at the time of the Second Amendment; thus, widespread regulations on its storage, making, *and* selling (recall

138. An Act in Addition to the Several Acts Now in Force Which Respect the Carting & Transporting Gunpowder Through the Streets of the Town of Boston & the Storage Thereof in the Same Town, *reprinted in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 21–22 (1895).

139. An Act for the Better Securing the City of Philadelphia and Its Liberties from Danger of Gunpowder, *in* The Statutes at Large of Pennsylvania from 1682 to 1801 209–13 (vol. 11, 1906).

140. An Act to Prevent the Danger Arising from the Pernicious Practice of Lodging Gunpowder in Dwelling Houses, Stores, or Other Places Within Certain Parts of the City of New York, or on Board of Vessels Within the Harbour Thereof, *reprinted in* LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1777, 1778, 1779, 1780, 1781, 1782, 1783, AND 1784, INCLUSIVE, BEING THE FIRST SEVEN SESSIONS 627–69 (vol. 1, 1886).

141. District of Columbia v. Heller, 554 U.S. 570, 684–87 (2008) (Breyer, J., dissenting).

142. *Id.* at 685. *See also* Transcript of Oral Argument at 6, United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), cert. granted, 143 S. Ct. 2688 (2023) (No. 22-915) (citing laws that punished "those who had improperly stored gunpowder and caused the risk of explosions" as potential historical analogues for a modern law restricting the ability of individuals convicted of domestic violence to possess a firearm).

143. *Heller*, 554 U.S. 570, 632 (2008).

Blackstone's three categories[144]) ran the risk of severely restricting the ability of individuals to keep and bear arms. The purpose of this restriction, admittedly, was not strictly the prevention of gun violence. However, the goal *was* to protect the public from an equally pernicious threat to their health and safety, and this apparently justified the result of potentially restricting access to (working) firearms. Likewise, PNFLs seek to reduce a serious threat to public safety without expressly limiting any individual Second Amendment rights. These similarities—the shared goal of reducing public risk[145] and the shared effect of potentially limiting firearm usage—make historical public nuisance laws regulating gunpowder storage strong historical analogues for PNFLs.

One minor point of difference between PNFLs and gunpowder public nuisance statutes is the identity of the plaintiff. In British common law, and throughout the nineteenth century in America, the party authorized to bring public nuisance claims was the state, *not* private citizens. Some modern PNFLs are the same: the New Jersey statute, for example, limits enforcement power to the attorney general. However, other statutes are less clear. New York's PNFL is silent as to who can enforce, and there is no obvious statutory reason why a private citizen could not bring a suit.[146] So far, no private citizen has invoked a PNFL to sue a gun industry member, and it seems unlikely that one would.[147] Indeed, until this occurs, it seems a court probably would not entertain an argument that this creates a significant enough *dis*analogy between the historical and modern laws to sustain a Second Amendment challenge. But in the unlikely event that a private plaintiff uses a PNFL to sue a gun industry member, admittedly, this appears to be a constitutional weak spot. However, the good news for PNFLs is that this weak spot is far from fatal, for two reasons. First, a court ruling on the constitutional issue might say that PNFLs are unconstitutional only insofar as they confer a private cause of action, and not when they are enforced by the state. This would leave plenty of meat on the bone, so to speak, for states to enforce against gun industry members. Second, states can avoid this issue by simply limiting enforcement power to attorneys general or other officials,

144. Merrill, *supra* note 13, at 357–58.

145. *Id.* at 347.

146. For comparison, California's "Firearm Industry Responsibility Act" (which is *not* a PNFL), is intended to create "a pathway for Californians who have been harmed by gun violence to hold appropriate bad actors—including gun manufacturers and distributors—accountable." Press Release, State of California Department of Justice, Attorney General Bonta Joins Multistate Amicus Brief Supporting Accountability for Gun Industry (Jan. 17, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-joins-multistate-amicus-brief-supporting-accountability[https://perma.cc/8G7C-2LAV]. Although this statute does not specifically create a cause of action for public nuisance, it was signed into law in 2023 and shares many goals with PNFLs, making it a good point of comparison. *Id.*

147. The reason for this is that, at least historically, public nuisance has been enforced primarily by government entities. *See* Spencer, *supra* note 9, at 66–72.

thus remaining aligned with historical analogues.[148]

Critics of my argument may highlight my point that PNFLs indirectly restrict gun ownership and point out that although they do not directly violate the Second Amendment, PNFLs may create incentives for gun industry members to impose their own restrictions on gun ownership. And if these restrictions resemble laws that would be unconstitutional under the Court's Second Amendment jurisprudence, perhaps PNFLs are themselves unconstitutional. In other words, the argument goes, PNFLs encourage unconstitutional restrictions on gun ownership by using gun industry members as state agents.[149]

There are two issues with this line of reasoning. First, as I said above, even if this were true, historical laws regulating gunpowder did the same thing. Thus, because there is ample precedent for this sort of action within the American tradition of firearm regulation, PNFLs can still pass the historical analogue test. Second, as Justice Kavanaugh noted in his concurrence, the *Bruen* decision only implicated discretionary "may-issue" regulatory schemes in a minority of jurisdictions, not "shall-issue" schemes that grant no discretion to firearm licensing officials.[150] The constitutional problem in *Bruen*, in other words, was the broad discretion that state officials had to deny licenses, not the licensing requirements themselves. *Bruen* did not limit the ability of states to restrict certain people from using firearms; in fact, the Court reiterated its point from *Heller* that restrictions on certain groups, including felons, remain legal.[151] *Bruen* only requires that once an individual meets the qualifications imposed by the licensing scheme, the state must grant the license.

Thus, even if the Second Amendment did apply to gun industry

148. It is noteworthy that the type of remedy available in a public nuisance case may vary based on the identity of the plaintiff: private plaintiffs may seek damages when they can show special injury, while governmental plaintiffs can typically only seek abatement or injunction. Sharkey, *supra* note 12, at 457–61; Kendrick, *supra* note 22, at 715, 747–49. However, if the government shows a "special injury" different not just in degree but in *kind* from the injuries of the general public, it may be able to seek damages as well. Sharkey, *supra* note 12, at 459–60. But even if the government seeks only abatement and not damages, if it wins, the court may require the defendant to cover the often significant cost of abating the problem, so the tort can be effective as a deterrent either way. *Id.* at 458–59. There is ample historical precedent for local governments recovering the cost of abatement from public nuisances caused by firearms or gunpowder. *See, e.g.*, An Act to Incorporate the Mayor and Board of Aldermen of the City of Charlotte, *in* PRIVATE LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1866 53, 69–70.

149. *See supra* note 95 for discussion of indirect regulation and constitutionality.

150. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 79–80 (2022) (Kavanaugh, J., concurring).

151. *Id.* at 80–81; District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008); United States v. Rahimi, 602 U.S. 680, 699–700 (2024). Interestingly, Justice Thomas, the author of the *Bruen* decision, dissented from the *Rahimi* majority, dismissing the relevant discussion of felons in *Heller* as "a passing reference" and "dicta." *Rahimi*, 602 U.S. at 756 n.7 (Thomas, J., dissenting).

members, it is far from clear that whatever actions they might take to restrict gun ownership among particularly risky groups would violate the Constitution.

CONCLUSION

This Note advances three main arguments. First, that PNFLs are sufficiently specific to the firearm industry to count as predicate statutes under the PLCAA. Second, that PNFLs can be enforced in such a way that they do not directly threaten the individual right to keep and bear arms, and thus that it would be difficult for gun industry members to claim Second Amendment protection from them. And third, that even if the Second Amendment did apply, PNFLs have numerous historical analogues, and thus they are consistent with the tradition of firearm regulation in America, as *Bruen* requires.

But even if these arguments hold, at least one important question remains: *are PNFLs good policy?* I do not intend this Conclusion to develop a full policy defense of PNFLs; that is a separate (but worthy) project that would require empirical research beyond the scope of this Note. Rather, I will conclude by highlighting one policy argument that I hope will appeal to liberals and conservatives alike.

The United States has had a gun violence problem for decades, and every measure aimed at mitigating the issue by directly regulating guns or their use has failed—either legally or simply by failing to stop violence. Violence, and the fear of violence, continues to plague American society despite our best efforts to prevent it. Further, the Supreme Court's jurisprudence in the past fifteen years has made it clear that, regardless of the problem, the individual right to bear arms is crucial to American life, and that states should exercise extreme caution in attempting to regulate this right. This Note makes no attempt to change or argue against this jurisprudence. Both America's firearm tradition and the constitutional amendment that protects it are important and worthwhile.

Rather, this Note takes issue with the fact that individual victims and their families—people with little if any power to prevent gun violence—are left to bear its substantial costs alone. PNFLs seek to change this not by fighting the Second Amendment to regulate the individual right to bear arms, but to shift the burden of avoiding the cost of gun violence to the gun industry, which has more power and resources to do so than individuals. In short, gun industry members are the cheapest cost avoiders of gun violence, and this is a powerful reason to shift the burden of doing so to them.[152]

152. *See generally* Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. CIN. L. REV. 1017 (2018) (outlining the cheapest cost avoider concept

Tied up in this question of whether PNFLs are good policy is the question of how, specifically, gun industry members might change their practices to avoid liability without treading on Second Amendment rights. There may be more than one answer here, but one important strategy is to change marketing practices. We have already seen courts, including the Connecticut Supreme Court in *Soto*, impose on gun industry members a requirement to refrain from marketing firearms in ways that are likely to increase risk of irresponsible use.[153]

Likewise, public nuisance may be an excellent way to encourage more responsible marketing practices in the gun industry—not by simply banning or regulating the practice, but by imposing the significant costs of abating its consequences on the entities doing the marketing. This argument has two distinct advantages with respect to passing Second Amendment muster. First, simply changing the way that companies market their firearms does little if anything to restrict individual access to weapons. Thus, by avoiding irresponsible marketing practices like the ones that led to the Sandy Hook massacre and the *Soto* litigation, companies do not risk treading on the fundamental right of the people to bear arms.

Second, importantly for *Bruen* purposes, this cheapest cost avoider argument is nothing new. Thomas Merrill points out that in early public nuisance cases in the United States, "[t]he reason to single out the defendant was because the defendant was in a position to correct the threatening condition." [154] Note Merrill's use of the word *condition* here: in order to establish public nuisance liability, historical plaintiffs did not need to establish proximate causation; all they needed to show was that the defendant *contributed* to a condition that infringed upon a right common to the public.[155] Likewise, it might be sufficient for modern plaintiffs to show that irresponsible marketing practices (for instance) contributed to the likelihood of gun violence, even if the marketing was not a proximate cause. Of course, none of this is to suggest that merely changing marketing practices is sufficient to solve the gun violence crisis in America. But it is one example, that has already withstood judicial scrutiny, of how gun industry members might alter their practices to reduce risk without implicating the Second Amendment right.

Ultimately, the elegance of PNFLs is that they do not require *any* state infringement on the individual right to bear arms, nor do they assign general blame for gun violence. Rather, just as public nuisance helped shift

---

as it relates to public nuisance).

153. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 324–25 (Conn. 2019).

154. Merrill, *supra* note 13, at 351.

155. *Id.*

environmental burdens to polluters and smoking-related health issues to tobacco companies, PNFLs can help reduce gun violence by shifting the burden of avoiding it to gun industry members.