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# The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms

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## I. INTRODUCTION: GUN CONTROL FROM PUBLIC TO PRIVATE

Consider three transactions: (1) federal legislation passed by Congress; (2) an order of judgment in a private lawsuit; and (3) a contractual arrangement between private parties. If one were asked to rank those transactions in order of the potential impact they *should*

have on public and social policy, they would probably appear in the order that they are listed. Intuition, experience, and plain common sense might likely lead to the conclusion that legislation has the greatest impact on public policy, private agreements the least,[1] and final judgments in litigation somewhere in between.[2] Democratic principles provide very good reasons for this ordering. On matters of public policy lawmaking, the legislative process is supposed to provide citizens with the participatory and representative clout guaranteed by the Constitution.[3] Slightly farther down the continuum, the outcome of litigation, while still a matter between private parties, is governed by laws publicly enacted and by judges who are bound to use and interpret those laws. Alternatively, private agreements have none of these restrictions. Although principles of contract law prevent agreements that baldly subvert existing laws or mores,[4] beyond the scope of that restriction, they represent a free-for-all. Parties will (and according to efficiency principles, should) bargain for the most advantageous agreement and tend to think little about the costs to society at large.[5]

If we are willing to use these assumptions as a starting point, gun control policy might help animate them. The discourse surrounding the way we use and regulate firearms is nothing if not

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1. In fact, some scholars have complained that settlements have too little impact on public policy and should be discouraged in the litigation setting because of the potential for the sublimation of the public good. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626 (1995) ("The point is simple: two parties trying to apportion a loss are most likely to reach agreement if they can find a way to shift the burden to a third party who is not present at the bargaining table.").

2. Interestingly, one might also be willing to assume that a ranking of (1) legislation, (2) judgment, and (3) settlement represents an inverse ranking of efficiency. Environmental regulation, occupying something of a "most favored nation" status among public choice scholars, demonstrates this phenomenon well. For instance, take the classic example of a factory emitting smoke that pollutes the neighboring community. Law and economics analysis suggests that the legal rules used to determine regulation of this problem could conform to efficiency principles, namely, the solution the parties would have reached independently. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11-12 (2d ed. 1989). Although beyond the scope of this Note, the fact that efficiency and public policy appear to be in tension with one another gives one reason for pause.

3. *See* U.S. CONST. art. I, § 2, cl. 1 (establishing a lawmaking House of Representatives composed of officials elected by "the People of the several States").

4. General principles of unconscionability permit a court to invalidate contracts that run counter to public policy. *See* U.C.C. § 2-302 cmt. (1989) (noting that one of the purposes of the provision is the "policing [of contracts] . . . contrary to public policy").

5. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised"); Luban, *supra* note 1, at 2648 (noting that "responsiveness [of settlement agreements] to third parties who they may affect is at best dubious").

public. Argued about by presidential candidates,[6] debated by scholars,[7] and trumpeted by a million marching moms,[8] there is little room to dispute the fact that gun control is an issue that concerns and affects many Americans. Moreover, the target of that discourse—violence allegedly caused by a lack of gun control restrictions—is not just public, but a public tragedy.[9] Accordingly, using the assumptions set forth above, Congress might be the best place to address public concern about gun control, the courtroom less preferable, and the bargaining table least preferable.

Given the magnitude of public concern about the problem, as well as the magnitude of the problem itself, the legislature would appear at first blush to be a good institution for resolving some of the most troubling aspects of gun control. And, despite public perception to the contrary, there has been interstitial progress on gun control legislation in Congress the last ten years.[10] The rhetoric might suggest otherwise, but federal legislative gun control efforts have made considerable progress[11] when compared with the period of virtually

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6. In a vague exchange, Vice President Al Gore commented that "common-sense gun safety measures are certainly needed," while then-Texas Governor George Bush commented, "We keep—somebody, you know, illegally using a gun, there needs to be a consequence." Third Presidential Debate, The Commission on Presidential Debates (Oct. 17, 2000), *available at* 2000 WL 1530401.

7. *See* JOHN R. LOTT JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 5 (1998) (arguing that the proliferation of firearms actually contributes to a *reduction* in crime by producing a strong deterrent effect); Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1249-51 (2000) (considering the strengths and weaknesses of the market, the courts, Congress, and administrative agencies as regulators of firearms); Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 63 (1992) (arguing that the ideas of legal scholars have yet to be included in the current debate on gun control).

8. Patterned after the "Million Man March," the "Million Mom March" was a protest conducted at Washington Mall in Washington, D.C. led by gun control advocates attempting to persuade Congress to adopt stricter firearm legislation. Sheryl Gay Stolberg, *On Eve of Million Mom March, Clinton Calls Mothers the Stronger Voice in Gun Debate*, N.Y. TIMES, May 14, 2000, § 1, at 16.

9. For instance, in 1987 alone, 32,000 people were killed with firearms, second only that year to auto accidents as the leading cause of injury-related deaths. According to this same study, firearm deaths will surpass auto accidents in the year 2003 as the leading cause of injury-related deaths. *See Deaths Resulting from Firearm and Motor-Vehicle-Related Injuries—United States, 1968-1991*, 43 MORBIDITY & MORTALITY WKLY. REP. 37 (1994).

10. For example, in 1994, Congress amended 18 U.S.C. § 926 so that federal agencies could promulgate regulations allowing them to store weapons obtained in crime-related seizures. Violent Crime Control Act, Pub. L. No. 103-322, 108 Stat. 2015 (1994).

11. At the forefront of this progress is the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Although the centerpiece of this legislation, federal background checks, is no longer good law, the remainder of the Act remains in force. Notably, the Attorney General and the Bureau of Alcohol, Tobacco, and Firearms ("BATF") are empowered to work towards a computerized instant background check system.

nonexistent restrictions, and even some anti-restrictions,[12] in the 1970s and 1980s. Thorny federalism questions notwithstanding,[13] federal legislative efforts towards gun control experienced something of a renaissance in the middle of the past decade.[14] Nevertheless, legislative efforts also remained characterized by intense lobbying, led by the National Rifle Association ("NRA").[15] One of the few political lobbies that is truly a household name, the NRA wields considerable power and influence on Capitol Hill and continues to be successful in blocking gun control legislation.[16] Countervailing lobbying efforts have emerged to challenge the NRA's supremacy, however, with increasing success.[17] Whether blame is placed at the doorstep of the NRA or the members of Congress themselves, public sentiment favoring firearm control cannot be completely squared with the actual output of legislation.[18] But, as explained in detail in Part II below, the last ten

12. The McClure-Volkmer Bill, passed into law as the Firearm Owners Protection Act in 1986, contained a variety of provisions limiting the ability of the federal government to control and monitor firearms. Among the Act's provisions were: (1) dropping the existing ban on the interstate sale of firearms; (2) allowing convicted felons to own firearms if their crimes only involved the regulation of business practices; (3) exempting dealers from record-keeping obligations for ammunition sales; (4) prohibiting the government from barring the importation of guns determined to be suitable for "sporting purposes"; and (5) requiring ATF agents to have "reasonable cause" before inspecting a gun dealer's records. *See* OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 57 (1998).

13. The Supreme Court, in *United States v. Lopez*, struck down the Gun-Free School Zones Act of 1990 as exceeding the power inherent in the Commerce Clause to regulate state activity. 514 U.S. 549, 567 (1995). Again, in 1997, the Court invalidated portions of the Brady Act requiring local police officials to comply with the federal background check provisions. *See* Printz v. United States, 521 U.S. 898, 933 (1997). Some have speculated that many local police will continue to perform the background checks regardless of the Court's insistence that they cannot be compelled to do so. *See* DAVIDSON, *supra* note 12, at 291.

14. *Id.* at 291-93.

15. The NRA maintains broad sway in Congress. It was recently named by *Fortune* magazine as the most powerful lobby in Washington, displacing a perennial powerhouse, the AARP. Jeffrey H. Birnbaum, *Fat & Happy in D.C.*, FORTUNE, May 28, 2001, at 94, 95.

16. *Id.*

17. Handgun Control, Inc. ("HCI"), led by Sarah Brady, has emerged as a measurable counterbalance to the NRA's lobbying influence. HCI is the lobbying group largely credited with the passage of the Brady Act, which is one of the most comprehensive firearm laws passed by Congress. *See* DAVIDSON, *supra* note 12, at 268-70 (describing the role of HCI in passage of the Brady Act in the Senate).

18. *See, e.g.*, Susan B. Sorenson, *Regulating Firearms as a Consumer Product*, 286 SCIENCE 1481, 1482 (1999) (indicating that nearly 88% of Americans polled support making firearms childproof); Stephen P. Teret et al., *Support for New Policies to Regulate Firearms*, 339 NEW ENG. J. MED. 813, 814 (1998) (indicating that 80% of gun owners support laws for childproofing and 59% support personalization of weapons); *Newsweek Poll: Gun Control*, NEWSWEEK, Aug. 16, 1999 (noting 93% of the public support mandatory waiting periods for all handgun purchases, 89% support mandatory trigger locks, 74% support a universal handgun registration system, and 68% support outright ban on assault weapons).

years have shown promise for gun control advocates, particularly when contrasted with earlier efforts.

The courtroom, once uncharted territory for considerations of gun control and firearm restrictions, has seen an increasing number of lawsuits filed with the intent of creating restrictions on the way that guns are bought and sold.[19] Beginning with the first lawsuit, filed by the City of Chicago in 1998,[20] these suits have spread to other cities and municipalities with viral efficiency.[21] Occasionally, individuals injured by firearms have brought these suits, but more often they have been filed by cities seeking injunctions and compensation for the health-care and other related costs of firearm-related injuries and fatalities.[22] These lawsuits have proceeded on two well-established theories of tort law: products liability and negligence. The products liability lawsuits allege that existing technology[23] could be added to firearms to make them safer and prevent accidents.[24] The negligence lawsuits proceed on a slightly more complex theory. Those suits allege that gun manufacturers negligently flood consumer markets with firearms and then distribute them in such a way that they are increasingly likely to end up in the hands of criminals.[25] One very

19. The Brady Center to Prevent Gun Violence lists at least twenty-eight pending lawsuits based on challenges to existing gun control laws and gun manufacturers. *See* Brady Center to Prevent Gun Violence, *Litigation Docket*, *at* http://www.gunlawsuits.com/ docket/index.asp (last visited April 15, 2002).

20. *Id.*

21. Of the twenty-eight suits the HCI referenced, fourteen have been filed against cities or municipalities. *See id.*

22. *Id.*

23. The sophistication of the technology runs from the mundane to the space age. "Smart gun" technology allows the manufacturer of firearms that contain scanners and microchips to recognize the unique fingerprints of their owners and prevent the gun from firing unless the authorized user is handling the weapon. Gun control advocates have long asked for measures considerably less complex, such as the distribution of trigger locks (not unlike locks on luggage and briefcases) or the simple increase of trigger tension (so that small children do not have the strength to pull the trigger). Prior to and during the initiation of these lawsuits, many gun manufacturers have claimed that these measures, particularly the "smart gun" technology, exceed the manufacturers' present scientific sophistication. This argument does little to address persuasively the calls for the decidedly nontechnological trigger locks and trigger tension increases. Nevertheless, firearms have incorporated advanced metallurgical technology since 1983, so that the barrel and handle of the weapon resist the deposit of fingerprints. This technology was eventually outlawed.

24. Private lawsuits have tended toward this theory. *See, e.g.*, Dix v. Beretta U.S.A. Corp., No. A093082, 2002 WL 187397, at *1 (Cal. Ct. App. Feb. 6, 2002). The *Dix* complaint was filed by the parents of a child killed by a firearm that the child believed was not loaded. *See id.* Although the gun did not have a clip inserted, one bullet remained in the chamber. The Dix family claimed that a chamber load indicator would have easily prevented the accident. The jury rejected their claim 9-3 in favor of Beretta. *Id.*

25. *See, e.g.*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999), *vacated sub. nom* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2d Cir. 2001).

significant judgment has emerged from these cases, handed down in *Hamilton v. Accu-Tek*,[26] a case whose impact will be discussed at some length later in this Note. For now, consider only that the case involved merely six plaintiffs and twenty-five defendant handgun manufacturers.[27]

Prior to the year 2000, it would have been difficult to point to a contractual arrangement that addressed gun control policy in any meaningful way. On March 17, 2000, that changed; the U.S. Department of Treasury, the U.S. Department of Housing and Urban Development ("HUD"), and representatives from thirteen states, counties, and cities entered into a settlement agreement (the "Agreement") with Smith & Wesson, the nation's largest manufacturers of handguns.[28] In exchange for "full and complete settlement of any and all claims that were raised or could have been raised"[29] by the signing cities and states, Smith & Wesson agreed to a comprehensive regulatory scheme that monitors the way that the guns are manufactured (addressing the products liability claims) and the way they are bought and sold (addressing the negligent distribution claims).[30] Any pending claims against Smith & Wesson were dismissed with prejudice, and Smith & Wesson embarked on a major overhaul of its business practices.[31] At the time the deal was brokered,[32] parties both in opposition to and in favor of the Agreement

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26. *See id.* As discussed *infra* Part III, the overruling of the district court in *Hamilton* does not necessarily alter the potential importance of the decision. Because of the limited questions certified to the state court, and the recognition of potential liability on different facts, the precedential value of *Hamilton* may still be considerable in other jurisdictions and in New York. *See* Allen Rostron, *Products Liability: Gunning for Justice*, TRIAL, Nov. 2001, at 26, 31 (arguing that the overruling by the Second Circuit in *Hamilton* was based on the sufficiency of the evidence, not on the merits of the legal rationale).

27. *Hamilton*, 62 F. Supp. 2d at 808.

28. Sports.Rec, *Settlement Agreement* (Mar. 17, 2000) [hereinafter "Agreement"], *at* http://communities.prodigy.net/sportsrec/gz-s&w-hud.html.

29. *Id.* pmbl.

30. *Id.* §§ I, II(A)(1).

31. *See* Agreement, *supra* note 28.

32. The settlement was portrayed in tbe media as some kind of quasi-legislative action taken by President Clinton against gun manufacturers. *See A Breakthrough on Gun Control*, N.Y. TIMES, Mar. 18, 2000, at A14 (stating that Smith & Wesson agreed to the settlement in exchange for an agreement by President Clinton and other plaintiffs not to pursue a threatened lawsuit). The Clinton Administration did have some influence over the terms that were finally agreed to, but their deal is primarily a private arrangement; the federal government's role in the settlement was largely one of brokerage. Additionally, despite the fact that all private agreements are ultimately enforced by government intervention, the inclusion of the enforcement provisions in the Agreement provided the Administration with a convenient redundancy. In other words, the White House gets credit for enforcing an agreement that it would have been obligated to enforce regardless.

believed that it had the potential to shape public policy on gun control in unprecedented ways.[33]

Although it once appeared the Agreement might die of abuse,[34] it appears to have died instead of neglect.[35] With the change in Presidential administrations, the Agreement has been dismissed by HUD as a "memorandum of understanding," that will not be actively enforced by the current administration.[36] Meanwhile, Smith & Wesson has been sold to Saf-T-Hammer, a company that manufactures gun safety and security devices.[37] Executives of Saf-T-Hammer have refused to comment about any willingness to assume Smith & Wesson's obligations under the Agreement.[38] While a focus on the content of the Agreement remains important,[39] in light of its recent demise, particular focus should be made on the procedure that initially brought it to life. Moreover, to the extent that the Agreement has been discarded by executive whim, there is still potential that it could have renewed vitality if administration, or simple policy, begins to change.[40]

This Note argues that the Smith & Wesson Agreement represented a dangerous privatization[41] of law that created a private solution to a decidedly public problem. Accepting the pessimistic view

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33. HCI has called the Agreement "a significant step toward comprehensive reform of the gun industry." *See* Brady Center to Prevent Gun Violence, *Smith & Wesson Settlement*, *at* http://www.gunlawsuits.com/docket/smithandwesson.asp (last visited Apr. 2, 2002). The NRA, meanwhile, has heen significantly less charitahle. The NRA's chief lobbyist, on a web page entitled *The Smith & Wesson Sellout*, calls the deal a "futile act of craven self-interest . . . jeopardizing an entire U.S. industry and undermining a constitutionally guaranteed right." *See* NRA Institute for Legislative Action, *NRA Condemns Smith & Wesson Sell-Out* (Mar. 20, 2000), *at* http://www.nraila.org/newscenter.asp?FormMode= Detail&ID=74.

34. After Smith & Wesson entered the Agreement, the NRA called on its membership to boycott the already beleaguered company. That push was successful; company sales dropped nearly fifty percent in the year following the agreement. Bruce Butterfield, *Smith & Wesson Sold to Safety Devices Maker* BOSTON GLOBE, May 15, 2001, at E2.

35. *See* Gary Fields, *White House Retreats from Smith & Wesson Deal* WALL ST. J., Aug. 1, 2001, at A4 (stating that HUD is not enforcing the agreement).

36. *Id.*

37. Butterfield, *supra* note 34.

38. *See id.*

39. *See infra* Part III.A. (discussing specific details of the Agreement).

40. Susan Page, *The Changing Politics of Guns—Democrats Back off on Firearms*, USA TODAY, Aug. 13, 2001, at 1A. The newly-minted Bush Administration, in addition to disregarding the Smith & Wesson Agreement, has also rolled back HUD provisions funding local police departments in a program to buy back guns from their communities, and has directed the Justice Department to adopt an individualized interpretation of the Second Amendment. *Id.* These changes illustrate the flexibility of gun control policy that comes with changes in presidential administrations.

41. *See generally* Daniel A. Farber & Phillip P. Frickey, *The Jurisprudenee of Public Choice*, 65 TEX. L. REV. 873 (1987) (cautioning against unwarranted judicial intervention on public choice grounds).

that Congress is merely a proxy for private interests, the Smith & Wesson Agreement went one step further by removing the proxy: it implicitly undermined the ability of legislatures to make law on those topics covered in the Agreement, and explicitly prevented the courts from doing so.[42]

This Note proceeds in four parts. In Part II, this Note analyzes the recent history of federal legislative efforts at reform of firearms laws, examined through two competing public choice theories regarding the contours of federal statutory control.[43] In Part III, this Note explains the reasoning of the *Hamilton* decision, and why that reasoning was so critical to the adoption of the Smith & Wesson Agreement.[44] In particular, Part III offers the phenomenon of "precedential cascades" or "herding" as an explanatory principle that strongly suggests private regulation of gun control was, in part, attributable to a fear of the *Hamilton* court's potential precedential force. Part IV explains in detail the scope of the Smith & Wesson Agreement and its potential impact on future gun control legislation and litigation, as well as what the Agreement means for subsequent democratic participation in this issue. Part V explains and applies the Supreme Court's decision in *Ortiz v. Fibreboard*[45] to the Agreement, and argues that (notwithstanding executive neglect) courts may refuse to enforce the Agreement as violative of the policies of Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure.[46] *Ortiz* provides a legal rationale to vindicate the policy concerns raised in the preceding sections. Lastly, Part VI offers some concluding thoughts about the

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42. *See* Agreement, *supra* note 28.

43. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 267 (1990) (arguing that intense special interest group disputes, which threaten to damage a legislator's political influence, help explain the delegation of certain lawmaking to state and local governments); Maxwell L. Stearns, *The Public Choice Case Against the Line Item Veto*, 49 WASH. & LEE L. REV. 385, 402-06 (1992) (adapting models introduced by Michael T. Hayes and James Q. Wilson in developing a framework for understanding supply and demand in legislation).

44. As noted earlier, there is still cause to believe that there was serious interplay between the reasoning of *Hamilton* and the timing of the Smith & Wesson Agreement. Moreover, the Second Circuit and the New York Court of Appeals both acknowledged the potential for manufacturer liability given a more persuasive set of facts. *See* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 30 (2d Cir. 2001) (noting that the New York Court of Appeals decision touched on the "sufficiency of the evidence of causation"); Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 237 (2001) ("The negligent entrustment doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis.").

45. 527 U.S. 815 (1999).

46. FED. R. CIV. P. 23(b)(1)(B).

potential for redirecting gun control legislation and litigation away from the bargaining table and back into public fora.

## II. FEDERAL LEGISLATIVE EFFORTS AND CONFLICTING INTERESTS

### *A. Lobbying Efforts and Congressional Response*

Gun control lobbying without the influence of the NRA is like Corn Flakes™ without the milk. Certainly, the NRA has been hugely successful in blocking federal gun control laws over the last thirty years. The NRA's numerous victories of the 1970s, 1980s, and early 1990s include blocking the federal ban on assault weapons, maintaining the federal licensing fee for becoming a firearms dealer at ten dollars, preventing federal legislation to close the "gun show loophole," defeating regulation of firearms under ordinary consumer protection statutes, opposing a federal ban on "Saturday night specials," and whittling down certain provisions of the Brady Bill.[47] The NRA's influence had largely been in the form of a negative check: instead of marshalling a majority to propose and approve a bill, political persuasion was used to help block it.[48] With the assistance of several influential politicians in Congress, and considerable cooperation from the Reagan-Bush led executive branch,[49] the NRA maintained a seemingly insurmountable obstacle to meaningful firearm legislation throughout the 1980s.[50] Backed by a significant pool of resources for campaign contributions, vocal and visible leadership, and constitutional and patriotic rhetoric, the NRA had

47. *See* DAVIDSON, *supra* note 12, at 60-78, 85-96. The Brady Act, although primarily a multifaceted piece of legislation, requires, as a matter of federal law, that background checks be performed on citizens attempting to purchase a handgun. *See id.* at 291. The background check necessitates a five-day waiting period. *Id.* Davidson describes the NRA's role in the passage of the McClure-Volkmer Bill, legislation that essentially prevented the federal regulation of the sale of firearms. *See id.* at 60-78. The NRA had similar success in preventing the outlaw of armor-piercing ammunition, despite strong support for such legislation by the police unions. *See id.* at 85-96.

48. *See id.* at 128-41.

49. The specifics of executive participation in lawmaking are beyond the scope of this Note. Suffice it to say, however, that Presidents Reagan and Bush played an active role in the gun control legislative process simply through the exercise of the veto power. Between the two, Reagan and Bush vetoed seven acts of Congress designed to produce stricter gun control. *Id.* at 206-12.

50. *See id.* at 219-236.

long been the poster child of effective interest group lobbying.[51] It continues to have formidable influence.[52]

Until the early 1990s, there was an absence of an organized constituency to play ying to the NRA's yang. The rising tide of firearm violence, however, coupled with the NRA's public mishandling of key events, allowed for opponents of the NRA to demonize them and mobilize opposition.[53] Two series of events helped typify the changing tide of public support: the FBI raid on the Branch Davidian compound in Waco, Texas leading to the Oklahoma City bombing, and the Columbine High School shootings.[54] The sequence of events beginning with the federal raid on the Waco compound, and leading to the bombing of the federal building in Oklahoma City, caused significant damage to the NRA's public image, because it created a firm and factual association between the group and militant extremists.[55] Timothy McVeigh, an active member of the ultra right-wing "Michigan Militia," executed the bombing of the federal building in Oklahoma.[56] The NRA, in a disavowal later proven false, denied ties between itself and the Michigan Militia.[57] Former President Bush considered the NRA's official statements and mishandling of events following the Oklahoma City bombing so egregious that he publicly resigned his lifetime membership in the group.[58] If the Oklahoma City bombing can be said to have damaged the public's conception of the NRA's philosophy and associations, the reaction to the succession of mass

51. Most notable is, of course, NRA President Charlton Heston. An inexhaustihle repository for controversy, Heston's six-year tenure as president of the NRA has attracted considerable attention from both proponents and detractors.

52. *See supra* note 15.

53. DAVIDSON, *supra* note 12, at 293-95.

54. *Id.*

55. *Id.* at 293-98. Although opponents of the NRA had often characterized the group as "extremist," the NRA remained quite effective in combating this image by co-opting the role of constitutional defender. *See id.* This argument, however, was largely directed to the rhetoric and philosophy of the NRA, not their actions. *See id.* But, the Oklahoma City bombing gave this argument evidentiary bite, if only circumstantial. *See id.* The Branch Davidians were initially pursued for firearms violations; they had compiled a significant stockpile of weapons within their compound. The legality of this stockpile called into question the relative wisdom of the laws that allowed it. The Oklahoma City bombing, two years after the Waco raid, was eventually attributed to Timothy McVeigh. *Id.* at 293. McVeigh was tied to the Michigan Militia, an anti-government organization that supported the NRA, and had in fact conducted meetings with high-level NRA officers. *Id.* at 294-95.

56. *Id.*

57. *Id.*

58. In reaction to an NRA fundraising letter characterizing the BATF as "jackbooted thugs" and "Nazis," Bush castigated the group, seething "your broadside against federal agents deeply offends my own sense of decency and honor and it offends my concept of service to country . . . [and] I resign as a life member of NRA." Letter From George Bush to Thomas Washington, President, NRA (May 3, 1995).

gun attacks at Columbine High School did corollary damage to the public's conception of its policies.[59]

Using firearms bought legally by a straw purchaser, two high school students went on a rampage through Columbine High School on April 20, 1999, leaving thirteen people dead and twenty-three injured.[60] The ripple effect following the Columbine tragedy extended to a variety of public issues,[61] but none was more acute than gun control.[62] Once again, the NRA was at the center of the firestorm, issuing statements regarding the tragedy that were later proven false and refusing to cancel its annual meeting in Denver, scheduled only two weeks after the Columbine incident.[63] The opportunity to decry the NRA's handling of events post-Columbine created an opportunity for gun control advocacy groups, whose political clout had been rising prior to these incidents, to gain national attention. More importantly, it signaled to legislators that supporting or being perceived to support the NRA would have new-found political consequences.[64] By the end of the 1990s, with a charge led by Handgun Control, Inc., it was clear that anti-firearm lobbying efforts had forged a constituency in Congress that boded well for future gun control legislation.[65]

### *B. Application of Wilson-Hayes Model and Macey's Federalism*

Given the now existing competing interests for and against gun control legislation, public choice may provide some insights on what to expect from the legislative process on the federal level. Public choice analysis based on the Wilson-Hayes model of costs and benefits suggests an undersupply of legislation when both the costs and

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59. Columbine is perhaps the best-remembered and most discussed of the school massacres of 1999. *See Clinton Calls Summit on Youth Violence*, HERALD, May 1, 1999, at 16. But, shootings at schools in Springfield, Oregon and Jonesboro, Arkansas had already begun to stimulate public discourse regarding the current status of firearm laws.

60. Sam H. Verhovek, *2 Are Suspects; Delay Caused by Explosives*, N.Y. TIMES, Apr. 22, 1999, at A28.

61. In addition to changes on gun control policy, the events at Columbine High School have also had a noteworthy impact on the way that police respond to crisis and hostage situations.

62. *See* Allison Mitchell & Frank Bruni, *Suburban Districts Seen as Key in the Debate over Gun Control*, N.Y. TIMES, June 16, 1999, at A1 (describing the pronounced impact the shootings at Columbine were predicted to have on gun control legislation); Katharin A. Seelye, *Killings in Littleton Pierced Soul of Nation, Clinton Says*, N.Y. TIMES, May 21, 1999, at A23 (same).

63. The NRA eventually scaled back its meeting from three days to one, in a halfhearted attempt at diplomacy. Karen Lowe, *Shooting Victims to Protest Gun Lobby Convention*, ASSOCIATED PRESS, May 1, 1999.

64. Stolberg, *supra* note 8. The impetus of the Million Mom March, for example, was the perceived lack of congressional reaction in the wake of the Columbine shootings.

65. *See* DAVIDSON, *supra* note 12, at 291-92.

benefits of legislation are widely distributed.[66] Gun control, however, illustrates the one-dimensional nature of the Wilson-Hayes model; it does not account for the varying perspectives of the parties vying for legislation. In other words, deciding whether costs and benefits to legislation are wide or narrow may vary depending on whether you support or oppose the law at issue. To the proponents of gun control legislation, the benefits of the legislation are widely dispersed; namely, if gun control laws have their intended impact, everyone will benefit from a reduction in crime, less accidental shootings, and fewer tax dollars for related public health costs.[67] Moreover, to the gun control proponent, the costs can also be construed as widely dispersed; everyone agrees to submit to stricter regulation in exchange for greater safety.

Opponents may have very different interpretations of the exact same law. On one hand, the costs of such legislation may be characterized as narrow because the burden of compliance with new laws falls squarely and acutely on the shoulders of those persons who use firearms most often: hunters, recreational shooters, and those who purchase handguns for safety concerns. Here, however, we can also see that the model may break down based on the chronology of the legislative process. Before proposed restrictions on firearms are passed into law, NRA members may tend to characterize the costs of such legislation as widely dispersed, as we all suffer a vague constitutional harm.[68] Such a characterization not only accurately captures their

66. *See* Stearns, *supra* note 43, at 402-06 (arguing that the amount of legislation produced by Congress can be roughly estimated by considering the intensity and focus of the lobbying interests and the impact of the proposed legislation).

67. The U.S. General Accounting Office, in a report commissioned by the Senate, reported that simple safety devices in the firearm could have prevented an estimated thirty-one percent of unintentional firearm-related deaths. U.S. GENERAL ACCOUNTING OFFICE NO. GAO/PEMD-91-9, ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED (1991). Similarly, public health care costs associated with firearm violence are estimated to be in the hundreds of millions of dollars for large cities. Brady Campaign to Prevent Gun Violence, *Reforming the Gun Industry: The Chicago Lawsuit*, amended Complaint at 76-77 (estimating the costs of gun-related health care costs in the Chicago area to exceed $850 million), *at* http://www.handguncontrol.org/lap/cities/ chicago.html, (last visited Sept. 22, 2000). National costs may approach $126 billion a year. Ted R. Miller & Mark A. Cohen, *Costs of Gunshot and Cut/Stab Wounds*, 29 ACCIDENT ANALYSIS & PREVENTION 329, 336 (1997). Couple these numbers with those that suggest that many patients hospitalized with gunshot wounds are cared for out of the public fisc, and the benefits of cost reduction are clear. *See* Mary J. Vassar, *Hospitalizations for Firearm-Related Injuries*, 275 J. AM. MED. ASS'N 1734, 1736 (1996) (concluding that as many as eighty-one percent of those treated for gunshot wounds lacked private insurance).

68. Second Amendment freedoms are a favorite reference point for pro-firearm lobbyists, especially the NRA. *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); NRA Institute for Legislative Action (describing lobbying efforts as protecting our most "beloved

sentiments about the law; it also effectively draws into the fold a greater number of opponents. But, if the legislation is passed, NRA complainants may *then* suggest that the law is a narrow restriction on the rights of gun and sporting enthusiasts alike.[69]

On the benefits side, gun control opponents frequently argue that such legislation provides little or no protection to the citizenry because stricter gun control does not help curb crime or other societal ills caused by the proliferation of guns.[70] Thus, according to opponents of gun control, the benefits are extremely narrow in that they are either nonexistent or negative. Against the backdrop of these conflicting perspectives, it is difficult to use the Wilson-Hayes model effectively to capture the reasons for interstitial progress regarding gun control.

So, something besides the Wilson-Hayes model is needed to explain Congress's role accurately in providing federal restrictions on firearms. Jonathan R. Macey posits that principles of federalism and the economic theory of regulation can better help explain the output of federal legislation.[71] Macey builds his argument around a central assumption of the economic theory of regulation: politicians in Congress will supply legislation (or block it) for the group that can provide them with the greatest amount of political support.[72] He uses this assumption to support his thesis that because of this Congress will "franchise" legislation to state governments if one of three situations is present: (1) a state has developed a body of law that demonstrates its particular expertise in an area (corporate law in Delaware, for example); (2) voter preferences vary dramatically across regions (so that the legislation would foster great support from certain states, and great opposition from others); and (3) Congress can avoid "potentially damaging political opposition from special interest groups" by refusing to legislate on highly controversial issues.[73] Macey argues that gun control fits most accurately in the second category, of varying political preferences across regions.[74] Perhaps this

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freedoms" including those that NRA supporters believe are contained in the text of the Second Amendment), *at* http://nraila.org (last visited Feb. 21, 2001).

69. *See* DAVIDSON, *supra* note 12, at 37-81. In a chapter titled *One of the Great Religions of the World*, the author describes the NRA's sophisticated and successful lobbying strategies. *See id.*

70. In fact, some opponents of tighter restrictions on gun control argue that the widespread use and ownership of guns actually prevents crime, and that tighter restrictions will produce an attendant upswing in criminal behavior. *See, e.g.*, LOTT, *supra* note 7.

71. *See* Macey, *supra* note 43, at 281.

72. *Id.* at 284.

73. *Id.* at 268-69.

74. *Id.* at 281.

categorization was accurate in 1990 at the time that Macey's article was published. In the aftermath of Oklahoma City and Columbine, however, support for gun control has outgrown its rural roots.[75] Moreover, geographic disparity in gun control laws is often cited as a contributing factor in the trafficking of firearms—a compelling and independent basis to normalize restrictions on the purchase and sale of firearms across jurisdictions.[76]

Thus, neither the Wilson-Hayes model nor Macey's federalism-based argument fully explain or justify an abandonment of federal legislative efforts. Given the current atmosphere, Congress would seem a more appropriate venue now than in past years. In fact, Congress has recently produced a fair amount of federal legislation restricting firearms.[77] The Brady Bill has matured into the Brady Act, and despite certain provisions being struck down in *Printz v. United States*,[78] the majority of the act remains in force. A federal assault weapons ban was passed in 1994, closing previous loopholes that allowed buyers simply to purchase pieces of the weapons in circumvention of existing laws.[79] Nevertheless, the concentration of activity regarding gun control has not remained in the federal legislature, and seems to have drifted into its sister branch, the judiciary.

## III. GUN CONTROL LITIGATION—THE INTERMEDIARY STEP TO PRIVATIZATION

The loci of activity for gun control over the past three to four years have instead been the courtrooms. Urged on by the relative

75. *See* Page, *supra* note 40 (noting that support for gun control measures is viewed by legislators as an issue that has begun to transcend geographic boundaries).

76. Tracing of firearms used in crimes indicate that many were purchased legally, and connections have been made to show that guns often travel from jurisdictions where their purchase and sale are less restricted to jurisdictions where their purchase and sale are more restricted. *See* BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP'T OF THE TREASURY, THE YOUTH CRIME GUN INTERDICTION INITIATIVE: PERFORMANCE REPORT 13 (1998); *see also* Fox Butterfield, *New Data Point Blame at Gun Makers: Fewer Criminals Stole Their Weapons than Thought, Analysts Say*, N.Y. TIMES, Nov. 28, 1998, at A8.

77. DAVIDSON, *supra* note 12, at 291-93.

78. 521 U.S. 898, 935 (1997) (forbidding the use of police as "conscripts" in the enforcement of the Act's background check provisions). The Brady Act commandeered local law enforcement to perform the task of background searches for handgun sales. The Court held, per Justice Scalia, that Congress's enlisting of local law enforcement to execute a federal statute violated separation of powers and federalism principles of the Constitution. *Id.*

79. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1973 (codified at 18 U.S.C. § 924).

success of big tobacco litigation,[80] individuals,[81] cities,[82] and municipalities[83] have filed a variety of lawsuits alleging products liability and negligence claims against the manufacturers of firearms. As discussed earlier, the products liability lawsuits have been premised on the theory that gun manufacturers have refused to implement and use feasible existing technology that they know would make handguns safer.[84] These claims have thus far been met with little success, although there are many claims still pending that are premised on this theory.[85] The alternative theory maintains that gun manufacturers have negligently breached their general duty of care to the public by selling and distributing guns in such a way that the guns are very likely to end up in the hands of criminals.[86] This theory was briefly sustained in *Hamilton v. Accu-Tek*, a case that could still have important implications for the way that firearms are bought and sold.[87]

*Hamilton* was filed in the Eastern District of New York, and the court in *Hamilton* applied state law to the substantive claims asserted by the plaintiffs.[88] The plaintiffs in *Hamilton*[89] were six individuals who had either sustained serious injury due to gunshot

80. *See, e.g.*, Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 63-64 (1997); *see also* Roberto Suro, *Cities Plan Legal Assault on Makers of Handguns*, WASH. POST, Dec. 23, 1998, at A8 (discussing the similarity between the tobacco and planned firearm litigation).

81. *See supra* note 24 and accompanying text.

82. *See supra* note 19 and accompanying text.

83. *See supra* note 19 and accompanying text.

84. *See supra* notes 23-24 and accompanying text.

85. The products liability claim in *Hamilton* was dismissed against all manufacturers. 935 F. Supp. 1307, 1321-1324 (E.D.N.Y 1996). The appeal in Dix v. Beretta U.S.A. Corp. may ultimately prevail on this claim. *See* No. A093082, 2002 WL 187397 (Cal. Ct. App. Feb. 6, 2002).

86. *See supra* notes 26, 44.

87. *See supra* notes 26, 44.

88. *See* 62 F. Supp. 2d 802, 810-11 (E.D.N.Y. 1999); *supra* note 44.

89. As indicated, the *Hamilton* litigation proceeded in two parts. Initially, the plaintiffs asserted products liability claims against the defendants and also made the novel argument that the lobbying efforts of the defendant gun manufacturers constituted fraud. *See Hamilton*, 935 F. Supp. at 1314-15. Both of these claims were dismissed on defendant's motion for summary judgment. *Id.* at 1332. The fact that the plaintiffs even attempted to argue that the legislative efforts of the manufacturers (and by proxy, the NRA) amounted to fraud suggests the intensity of the lobbying efforts. The court noted: "Plaintiffs cite the role of the NRA in coordinating lobbying activity and the manufacturers' reliance on the NRA's efforts against gun distribution regulations." *Id.* at 1316. But, consistent with earlier assertions made in Part II, the court ultimately concluded that "federal firearm policy cuts a high profile in national debate . . . [and] groups on all sides pursue their interests with vigor in the political and regulatory arena." *Id.* at 1321 (applying the *Noerr-Pennington* doctrine which holds that lobbying alone cannot form the basis of liability).

wounds or were relatives of those killed by firearms.[90] The defendants, twenty-five handgun manufacturers, constituted the vast majority of firearm makers whose products are sold and distributed in the United States.[91] By relying upon well-established[92] notions of tort law, the *Hamilton* court issued a detailed fifty-one page opinion containing a three-part holding: (a) the manufacturers of firearms owe a duty of care to the general public to guard against the criminal misuse of their product by monitoring the sale and distribution of firearms; (b) the manufacturers' breach of that duty was the proximate cause of the plaintiffs' injuries; and (c) when the identity of the gun manufacturer is unknown, manufacturers of *all* firearms can be held responsible on a theory of collective liability.[93]

The defendants appealed the district court's decision to the Second Circuit,[94] and the court of appeals certified questions of state law to the New York Court of Appeals.[95] The New York court accepted and responded to two questions: "(1) [w]hether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture? [and] (2) [w]hether liability in this case may be apportioned on a market share basis, and if so, how?"[96] The New York Court of Appeals answered both questions in the negative,[97] and based on those state law conclusions, the Second Circuit reversed the district court.[98] The New York Court of Appeals focused its analysis on the lack of evidence of causation, which attenuated any link between the injured plaintiffs and the handgun

90. 62 F. Supp. 2d at 808-10.

91. *Id.*

92. The legal precedent relied upon by the court in reaching its decision reads like a torts greatest hits collection. The significant tort decisions cited by the court include the following: United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947) (creating risk/utility analytical framework); Sindell v. Abbott Labs., 26 Cal. 3d 588, 611 (1980) (establishing theory of enterprise liability predicated on market share); Summers v. Tice, 33 Cal. 2d 80, 88 (1948) (holding that when two or more actors are responsible for a negligent act, the burden rests with the defendants to disprove their culpability); Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 345 (1928) (describing limits of proximate cause); MacPherson v. Buick Motor Co., 217 N.Y. 382, 389 (1916) (establishing theory of duty for foreseeable injuries caused by manufacturer's negligence). The use of well-known precedents is important to the application of the theory of "precedential cascades" below.

93. 62 F. Supp. 2d at 824, 835, 846.

94. Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 39 (2d Cir. 2000).

95. Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 230-31 (2001).

96. *Id.*

97. *Id.* at 240, 242.

98. Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 32 (2d Cir. 2001).

manufacturers.[99] Similarly, the New York Court of Appeals was reluctant to adopt a theory of market share liability because of the potential for ballistics or other evidence to firmly link a particular manufacturer to the injuries of specific plaintiffs.[100] The court was very specific, however, in noting that the *legal* rationale for imposing a duty on handgun manufacturers was still an open question in New York and that it was the insufficiency of the factual rationale that undermined the claim for negligence in this case.[101] The reversal of *Hamilton*, of course, undermines its effect as binding law, but it may not necessarily undermine its persuasive authority.[102] Both the state and federal court opinions noted that there is still potential for the imposition of a legal duty on gun manufacturers, assuming that a plaintiff could produce evidence of greater causation.[103]

Because the reasoning of the *Hamilton* district court decision may still have potential merit,[104] a further analysis of that rationale is warranted. When the Smith & Wesson Agreement was signed, *Hamilton* was still good law.[105] Therefore, all three parts of the original *Hamilton* holding still contain implications for the application of the theory of "precedential cascades" and the outcome of the Smith

99. *Hamilton*, 96 N.Y.2d at 237-38 ("Without a showing that *specific* groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert" (emphasis added)).

100. *Id.* at 240-41 ("Unlike DES, guns are not identical, fungible products. Significantly, it is often possible to identify the caliber and manufacturer of the handgun that caused injury to a particular plaintiff.").

101. *Id.* at 240, 242 ("In sum, analysis of the State's longstanding precedents demonstrates that defendants—*given the evidence presentcd here*—did not owe plaintiffs the duty they claim . . . Whether, *in a different case, a duty may arise* remains a question for the future." (emphasis added)).

102. *See* Rostron, *supra* note 26, at 31 ("The New York Court of Appeals decision addressed only negligence claims and expressed no views about gun manufacturer liability on any other cause of action.").

103. *Hamilton*, 264 F.3d at 31 (rejecting plaintiffs' request for additional discovery to produce evidence to "cure the defect" in its case); Rostron, *supra* note 26, at 31.

104. *Hamilton*, 264 F.3d at 31; Rostron, *supra* note 26, at 31.

105. The Smith & Wesson Agreement was entered into on March 17, 2000. *See supra* note 28 and accompanying text. The district court in *Hamilton* issued its decision on June 3, 1999. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999). The certified questions were not answered in state court until April 26, 2001, over a year after the Smith & Wesson Agreement was finalized. *Hamilton*, 96 N.Y.2d at 222. The Second Circuit did not formally reverse *Hamilton* until August 31, 2001. 264 F.3d at 23. Coincidentally, news of the breakup of the Smith & Wesson Agreement under the Bush Administration occurred at roughly the same time as the Second Circuit overruled the district court's decision in *Hamilton*. *See supra* notes 34-35 and accompanying text.

& Wesson Agreement, and merit detailed analysis.[106] The following discussion focuses on the district court's legal rationale in *Hamilton*.[107]

### A. *Imposition of a Legal Duty*

The plaintiff's argument in support of imposing a duty was premised on expert testimony and empirical evidence that manufacturers of firearms pay little attention to the nature of the retailers that sell their products.[108] Although the channels of distribution of the firearms used by the manufacturers were formally legal, because of the laxity of the existing regime, nominally legal distribution was nonetheless tantamount to negligent distribution.[109] In establishing a duty by the manufacturers to the plaintiffs, the district court did not set forth novel principles. Rather, it relied on well-worn notions of the duty of care and applied practical reasoning.[110] Rejecting any argument that imposition of a duty would give rise to strict liability, or even excessive liability, the court noted that manufacturers could "reduce the risk of criminal misuse by ensuring that the first sale was by a responsible merchant to a responsible buyer."[111] More importantly, the district court went on to counsel that under a negligence scheme, gun manufacturers could satisfy their duty by "marketing and distributing their product responsibly."[112] The district court reasoned that the ordinary duty owed by a manufacturer in the sale and marketing of its product was heightened even further in the case of firearm manufacturers that distribute an intentionally lethal product.[113]

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106. *See infra* Part III.D.

107. 62 F. Supp. 2d at 802.

108. *See id.* at 829-33. Interestingly, some of the most damning testimony on this came from a Smith & Wesson executive. Smith & Wesson had been dismissed as a defendant earlier in the case based on a lack of personal jurisdiction. *See* Hamilton v. Accu-Tek, 32 F. Supp. 2d 47, 53, 82 (E.D.N.Y. 1998). In a deposition taken prior to Smith & Wesson's dismissal, Robert Hass, an executive with the company for eleven years, conceded that "the manufacturers could do more and their hands aren't clean if they ship totally legally to distributors. There's more that could be done." *Hamilton*, 62 F. Supp. 2d at 832.

109. Although superficially counterintuitive, the notion that compliance with existing laws may fall short of the duty of care is a well-established tort doctrine. *See* Jemmott v. Rockwell Mfg. Co., 216 A.D.2d 444, 445 (N.Y. App. Div. 1995). The *Hamilton* court acknowledged as much, noting that "[t]echnical compliance with all relevant laws and regulations is not dispositive." *Hamilton*, 62 F. Supp. 2d at 829.

110. *See id.* at 818-28.

111. *Id.* at 820.

112. *Id.*

113. *Id.* at 821 (noting the axiomatic proposition in *Palsgraf* that " 'the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation' " (quoting Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344 (1947))).

The duty created in *Hamilton* imposed liability on gun manufacturers for the first time. So, in that sense, the duty portion of the holding is novel. But, the district court remained very deliberate in grounding the duty in preexisting tort doctrines, giving the opinion the feel of a modest step forward, rather than a radical departure from existing doctrine.[114] Citation to previous cases that denied the existence of such a duty was used sparingly. Compounding this authority is the fact that the opinion was issued by a federal court seated in New York, and authored by Senior District Judge Jack Weinstein, the source of several important tort opinions and a jurisdiction and judge considered particularly sophisticated in the field of tort law generally.[115] Finally, while the duty imposed was quite general, the court gave future defendants a specific course of action to follow in order to avoid liability in future suits.[116] These moves helped to normalize an otherwise dramatic departure from existing doctrine.

### *B. Breach of Duty and Proximate Cause*

Over the defendant's demurrer, the district court assigned the determination of both the breach and causation to the jury, and the jury determined that both elements were satisfied.[117] The opinion placed a great emphasis on the amount of material evidence supporting the jury's finding. Particularly persuasive was expert testimony that traced a large number of handguns used in crimes to purchases made by licensed dealers.[118] Although the court would have

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114. Despite the complexity of the issues, Judge Weinstein characterized the plaintiffs' claims as a traditional tort action. *See Hamilton*, 62 F. Supp. 2d at 818 ("To prevail on a negligence claim, a plaintiff must estahlish the following elements under New York law: (1) that the defendant owed him or her a duty of care, (2) that the defendant breached this duty hy engaging in conduct posing an unreasonable risk of harm and (3) that the defendant's breach proximately resulted in damage to the plaintiff.").

115. Scholars have argued that, because New York City was a hirthplace of industry (and attendant injury), the emergence of authoritative tort doctrine from that jurisdiction was a logical consequence. The influence of Justice Cardozo, particularly in the area of tort law, also plays a large role in New York's legal preeminence in this field. *See* William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York: 1920-80*, 47 BUFF. L. REV. 117, 118, 133 (1999). Judge Weinstein himself was the subject of a 1997 Symposium in the *Columbia Law Review*, discussing his preeminence in the field of torts. *See* John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2035 (1997) (describing Judge Weinstein's contributions to the law as imparting "compassion and common sense into the proceedings before him"); *see also* David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2065-69 (1997) (describing the unique and invaluable contribution of Judge Weinstein as a judicial activist).

116. *See supra* note 112 and accompanying text.

117. *See Hamilton*, 62 F. Supp. 2d at 832-33.

118. The court cited testimony provided by Dr. Jeffrey Fagan, a professor at Columbia University's School of Public Health, who provided the results of an intensive study regarding

allowed the jury to find that the manufacturers had constructive knowledge of the negligent sales, that inference was not necessary. In fact, testimony from a trade association for the firearm industry supported the notion that gun manufacturers were aware that firearms purchased via "legal" sales were often being used illegally due to a lack of supervision at retail outlets.[119]

The court's analysis on this point focused less on existing precedent, as its only task was to conclude that the facts available to the jury were sufficient to leave their conclusions undisturbed. The court did, however, analogize the behavior of the gun manufacturer to that of large tobacco companies in helping to justify an otherwise uncommon extension of proximate cause.[120] Furthermore, the court did not credit the argument that the intervening cause of the criminal act severed the manufacturers' chain of causation.[121] Rather, the court reasoned that, based on existing doctrine, the failure to take steps to guard against a clearly foreseeable criminal act is negligence.[122] Again, the court's detailed analysis on this point, particularly when all that was required was a mere affirmation of the reasonability of the jury's conclusions, seems conscious and deliberate. Although civil rules do not require juries to make detailed explanations of the reasons for reaching their conclusions, the court seemed happy to take up the torch for them, either for the benefit of the parties, future litigants, or both.[123]

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the interplay between firearms and the escalation of violence. *Id.* at 836. Noting that gun-related violence tended to spread more rapidly than non-gun-related violence, Dr. Fagan likened the use of firearms to a deadly pathogen. *Id.* at 837. Joseph J. Vince, former chief of the Crime Gun Analysis Branch of the Bureau of Alcohol, Tobacco, and Firearms, corroborated this testimony and provided a causal link to the manufacturers by citing data that most guns used in crime " 'are not stolen firearms' " [and that] " 'the majority of the time we are seeing [criminals] getting them from retail sources.' " *Id.* at 830.

119. *Id.*

120. Quoting language from the leading New York mass tort tobacco case, the district court reasoned that the policies behind extension of proximate cause in that case were similar to the policies invoked by the court in *Hamilton*. *Id.* at 833. The court noted, "It is difficult to imagine a set of circumstances that would militate more strongly in favor of a finding of proximate cause . . . than the present one." *Id.* (citing Blue Cross & Blue Shield v. Phillip Morris, 36 F. Supp. 2d 560, 584-85 (E.D.N.Y. 1999)).

121. *See id.* at 833-34.

122. *See id.* at 834.

123. *See id.* at 828-35.

### C. *Collective Liability and Apportionment of Damages*

Although perhaps not initially obvious, firearms used in violent crimes often go unrecovered.[124] Even when an assailant is arrested, the weapon will likely already be disposed of, as it tends to be the most damning piece of evidence in a criminal prosecution.[125] The plaintiffs in *Hamilton* were faced with this difficult problem of proof. None of the weapons used against the six plaintiffs were ever found, leaving them with a serious evidentiary problem.[126] The defendant manufacturers argued that unless the weapon could be attributed to a specific manufacturer, no damages could be assigned.[127] The only clue guiding the plaintiffs and the court was the caliber of the weapon used; no other evidence existed to link the guns with the responsible manufacturers.[128]

Once more invoking bedrock tort precedents and policies,[129] the court adopted a modified version of collective liability to hold all potential manufacturers liable where attribution remained in question.[130] Citing moral grounds, deterrent effects, superior ability of defendants to absorb and minimize costs, and the need for evolving theories of recovery, the court set forth several alternative recovery schemes.[131] First, if neither party could attribute the gun to a particular maker, all firearm manufacturers would be responsible for damages at the rate of their share of the firearm market.[132] Second, if

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124. If the perpetrator of the violent act is not apprehended, of course, the gun will almost never be recovered. As of 1994, only sixty-four percent of murders are "cleared" (i.e., suspect caught, arrested, and convicted). One can therefore surmise that a substantial number of guns used in crimes are not found. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, NATIONAL CRIME DATA STATISTICS 1984-1994, (1998). These figures only included reported crimes, leaving one to suspect that the numbers are even more dramatic.

125. For a discussion of the importance of firearms as evidence of crime, see Robert Joling, *An Overview of Firearms Identification Evidence for Attorneys I: Salient Features of Firearms Evidence*, 26 J. FORENSIC SCI. 153, 154 (1981).

126. *Hamilton*, 62 F. Supp. 2d at 809-10.

127. *Id.* at 839-41.

128. *Id.* at 844 ("The caliber of such guns is often ascertainable from bullets in bodies and shell casings found at the scene of the shooting. Ballistics can help to further refine the universe of potential manufacturers.").

129. The court cited, most notably, Summers v. Tice, 33 Cal. 2d 80 (1948), and Sindell v. Abbott Laboratories, 26 Cal. 3d 588 (1980), both of which supported a notion that between an innocent plaintiff and many negligent defendants, the burden is justifiably placed on the defendants. *Hamilton*, 62 F. Supp. 2d at 839-41.

130. The court, however, did not adopt enterprise liability. That is, defendants could exculpate themselves by offering clear proof that they could not have manufactured the weapon used in the crimes asserted (if for instance, a firearm company only made .45 caliber handguns, and a .25 caliber weapon was used in the crime). *Id.* at 843-45.

131. *See id.* at 841-43.

132. *Id.* at 845.

it were proven that a specific manufacturer made the gun in question, that manufacturer would bear one hundred percent liability.[133] Third, if the class or caliber of gun used could be attributed to a group of manufacturers, they would share liability based on their market share for that class of weapons.[134] Note that the court was seemingly more moderate in the volatile damages arena. Under each of the court's three methods, defendants may still exculpate themselves and therefore avoid liability, even if their practices are negligent. Those manufacturers with the largest portion of the market, however, have the greatest risk of a judgment against them under any of the three methods.[135]

### *D. Principles of Herding as Applied to* Hamilton

The theory of precedential cascades, or herding, is based in culture, not the law. Commonly referred to as an "information cascade" outside legal circles, the theory asserts that actors may rationally decide to follow the actions of others based on the (sometimes incorrect) assumption that those previous actors had a more complete universe of information when they made their decision; thus, simply copying their actions is the most efficient way to act. In other words, "If everyone else is doing it, I should be doing it too." Used to explain a variety of cultural and economic phenomena, the theory of information cascades has great purchase in social science and economic literature.[136] As applied to the law, the theory uses

133. *Id.*

134. *Id.*

135. Smith & Wesson is hy far the largest gun manufacturer in the United States, with a market share varying between nineteen and forty percent of the total gun sales in the United States. Consumer reaction to the Agreement, however, has apparently begun to erode that dominance. *See* Editorial, *Smith & Wesson Misfires*, WASH. TIMES, Aug. 28, 2000, at A16.

136. *See generally* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (identifying an informational cascade as a situation when people with incomplete information hase their beliefs on the apparent beliefs of others); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (discussing applications of data showing the prevailing preference for the status quo in most "real decisions"); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465 (1990) (explaining that while herding may be inefficient in the context of corporate investment, the stock market, and decisionmaking within firms, it can be rational from the perspective of managers who are concerned with their reputations in the labor market). The theory may help explain shifting in the market caused by consumer indices, conforming to social trends such as recycling, and following even more basic trends such as fashion. It may even help to explain why five million people purchased the *second* Spice Girls record. *See* Edna Gundersen, *Bubblegum Stars Chew on Effects of Fleeting Fame*, USA TODAY, Nov. 14, 2000, at D5. Sadly, sales of their third record, *Forever*, have been lackluster. Only 39,000 units had sold in the U.S. as of November 16, 2000. Perhaps this suggests that all

precedent as the information exchanged, and acceptance of that precedent by future judges as following the herd.[137] Although the phenomenon has superficial efficiency in that it allows future judges to reach decisions without repeat deliberations, scholars applying the model to the law pessimistically conclude that the cascades will lead to inadequate judging as future decisions rely too heavily on precedent and ignore the differences of the case at bar.[138] The theory of herding may therefore have two important implications when applied to *Hamilton*. First, it may help to explain the *Hamilton* court's judicious use of precedent in crafting an opinion. Second, and more importantly, it may provide some predictive insights as to how future courts might treat *Hamilton*, despite the subsequent overruling by the Second Circuit, and the incentives that potential treatment may have provided to Smith & Wesson.

A fundamental principle of herding is that judges may wrongfully rely on precedent that is inapplicable to the case at bar.[139] Opponents of the *Hamilton* decision had ample ammunition to level that criticism against the opinion. Indeed, whenever existing doctrines are applied to new fact patterns, as in *Hamilton*, the opportunity to make that charge abounds. The manufacturer defendants in *Hamilton* argued,[140] ultimately successfully,[141] that the tort principles used were never meant to apply to the makers of firearms who sell a wholly legal product through lawful channels. Moreover, they contend that the applicability of the tobacco litigation as an analogy is questionable, both because gun manufacturers were at worst negligent, not fraudulent, and because gun manufacturers do not have the amount of cash resources needed to absorb liability and implement preventative

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cascades, even precedential ones, eventually reach the shore. *See* Cesar G. Soriano, *Spice Girls Hit Bland Note on Chart*, USA TODAY, Nov. 16, 2000, at D1.

137. *See* Eric Talley, *Precedential Cascades: An Appraisal*, 75 CAL. L. REV. 87, 90-92 (1999) (describing the phenomena of precedential cascades based on a theoretical model where succeeding judges will follow the decisions of prior judges in areas of law where they presume their predecessors have greater expertise); *see also* Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158 (1999) (applying the theory to a specific set of precedent culminating in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)).

138. Daughety & Reinganum, *supra* note 137, at 161; Talley, *supra* note 137, at 132-33.

139. Daughety & Reinganum, *supra* note 137, at 161; Talley, *supra* note 137, at 132-33.

140. In fact, a collective of gun manufacturers produced television spots for the presidential election, under the moniker "Vote Your Sport." Those ads claim that courts are inappropriately making inroads into regulation that exceed their scope of power. *See* http://www.voteyoursport.com (last visited Oct. 30, 2000) (showing a copy of the advertisement).

141. Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 32 (2d Cir. 2001) (overruling the district court as discussed).

monitoring strategies.[142] Thus, from the defendant's perspective, the principle of herding may help explain why the court reached its decision through an overreliance on inapplicable precedent. From the plaintiff's perspective, however, the ruling is more fairly described as a case of first impression, and thus, a consideration of its future value is needed.

The more valuable insight of herding is the predictive implications it has for the *Hamilton* decision, particularly because the case has yet to be considered by courts outside of New York. In theoretical models of the herding phenomena, the first judge ($J_1$) in a series of cases is ruling on a case of first impression.[143] A second judge ($J_2$) relies on that precedent, even when it is nonbinding persuasive precedent, based on the assumption that $J_1$ considered the relevant facts and made a reasoned decision. At this point, an additional assumption may be added to strengthen the model. Further assume that $J_2$ will rely on $J_1$'s decision to an even greater extent if $J_1$'s opinion relies on proven precedents and if $J_1$ is located in a jurisdiction that is considered to have some unique authority on the body of law invoked and the facts presented by the case. If $J_2$ is presented with a case similar to the one decided by $J_1$ and the two strengthening conditions are present, $J_2$ will quite likely apply the approach laid out by $J_1$. Moreover, all subsequent judges ($J_3$, $J_4$, $J_5$ etc.) will continue to follow the precedential path initially set out by $J_1$. As that path becomes more deeply entrenched, factual differences in the cases presented to $J_3$, $J_4$, and $J_5$ will be minimized in order to follow the established path.[144]

With this model in place, the implications of *Hamilton* become quite clear. Despite the manufacturer's contentions to the contrary, *Hamilton* is likely to be viewed as a case of first impression.[145] Furthermore, the strengthening assumptions in the following model are all present: (1) *Hamilton* is built around an existing body of established precedents; (2) the state of New York, and Judge

142. Estimates place the firearm industry's annual collective sales at approximately $2 billion; the costs to the tobacco industry simply to settle claims brought by the states are expected to exceed $100 billion. *See* Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1.

143. *See* Talley, *supra* note 137, at 94-95.

144. *See generally id.* (explaining that "[t]he principal task for each succeeding judge . . . is to announce a legal rule that shall govern a given class of cases in the jurisdiction during the coming period").

145. Even before the results of the *Hamilton* litigation were announced, gun manufacturers seemed intent on barring potentially harmful litigation. *See, e.g.*, Sharon Walsh, *NRA Moves to Block Gun Suits*, WASH. POST, Jan. 19, 1999, at A1 (describing NRA and gun manufacturer cooperation to block city lawsuits).

Weinstein in particular, are widely considered authorities on tort law;[146] and (3) the management of crime in New York City is a factual condition that gives further weight to the decision. The reputational bias[147] presented in herding literature further suggests that subsequent judges may be inclined to follow the *Hamilton* decision in future gun control litigation. Although the opportunity for reliance on *Hamilton* as binding precedent ended with the Second Circuit's reversal of the district court's holding, the rationale of that decision can still be used to form the basis of some duty in future gun control lawsuits.[148]

The most powerful evidence in support of herding is that Smith & Wesson, the nation's largest gun manufacturer, believed so strongly in the potential force of *Hamilton* that they were willing to try to contract out of its implications altogether.[149] The explanatory application of herding (explaining the gun makers' contentions that the court in *Hamilton* relied too much on inapplicable precedent, particularly in analogizing firearms to tobacco) and the predictive application of herding (predicting that future courts may use *Hamilton* as a guide in subsequent gun control litigation) are superficially in conflict but are actually quite reconcilable. Both applications rely on the premise that courts rely heavily on precedent to make decisions in cases of first impression and politically charged cases. Both applications also suggest a fear that the decision carried serious consequences for the firearms industry, especially Smith & Wesson, who entered into the Agreement on the heels of *Hamilton* and exited it contemporaneously when the Second Circuit overruled the lower court decision.[150]

## IV. PRIVATIZING PUBLIC POLICY—THE SMITH & WESSON AGREEMENT

Smith & Wesson was arguably the manufacturer with the most to lose through threatened enforcement of *Hamilton* because of the

146. *See supra* note 115 and accompanying text.

147. Subsequent judges may decide cases based on precedent even where those precedents conflict with a judge's individual inclinations. Reputational bias suggests that judges do so in order to avoid the appearance that their decisions are influenced by political or personal preferences, instead preferring to create the impression that existing law guides their decisions. *See* Talley, *supra* note 137, at 105-06. That bias may be particularly acute when the nature of the case is highly politically charged, as with gun control.

148. *See, e.g.*, Plaintiff's Complaint, Jefferson v. Rossi (Phila. County Ct. Com. Pl. 2001) (No. 002218) (seeking damages for child injured by defendant manufacturer's weapon, alleging negligent distribution of firearm through an illegal gun trafficker).

149. *See supra* note 105.

150. *See supra* note 105.

nature of the liability theories.[151] Facing the implications of judicial and legislative acceptance of *Hamilton*, most gun manufacturers took traditional routes by attempting to lobby for protection via prohibition of future lawsuits,[152] and actively fighting plaintiffs in pending lawsuits.[153] Smith & Wesson took the road less traveled; breaking ranks from its fellow manufacturers and refusing to tow the NRA's policy line,[154] it took a proactive approach by settling all claims pending against it and adopting a variety of self-imposed regulations that drew it within the bounds of the duty expressed in *Hamilton*.[155] Although the NRA has attempted to dismiss the settlement as the insignificant act of a corporate Benedict Arnold, the implications may run much deeper for both sides of the issue.[156]

### *A. Conditions of Surrender*

The Agreement that the parties reached places two basic obligations on Smith & Wesson: (1) terms dictating the safety and design of firearms; and (2) terms dictating the sales and distribution of firearms.[157] The Agreement also contains provisions for oversight by the Bureau of Alcohol, Tobacco & Firearms ("BATF") to monitor compliance with the Agreement, and it further provides that Smith & Wesson will support legislation that purports to reduce firearm misuse.[158] Although the primary consideration on the contract was the dismissal of pending and future litigation, subsequent events

151. As explained, at the time of the *Hamilton* decision, Smith & Wesson carried the largest market share of all handgun manufacturers. *See supra* note 135. A liability theory that allocated liability in proportion to market share would naturally implicate Smith & Wesson to the largest degree. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 840-41 (E.D.N.Y. 1999) (describing the applicability of market share liability to mass tort cases).

152. *See supra* note 145 and accompanying text.

153. Describing the costs of these suits to gun makers, the NRA has suggested that the suits' true purpose is to "bankrupt a lawful industry with exorbitant legal expenses." NRA Institute for Legislative Action, *Courts Reject Lawsuits Against Gun Makers* (Oct. 15, 2001), *at* http://www.nraila.org/FactSheets.asp/?FormMode=Details&ID=37 (on file with author).

154. Smith & Wesson has drawn considerable criticism from those camps for that course of action. *See* Dave Boyer, *NRA Aims Gun Range at Heart of New York Times Square*, WASH. TIMES, May 20, 2000, at A1 (describing NRA's decision not to include a Smith & Wesson exhibit in its new Planet Hollywood style restaurant and museum in Times Square).

155. *Hamilton*, 62 F. Supp. 2d at 819 (describing the scope of the duty as one that requires manufacturers to "market and distribute their product responsibly").

156. *See supra* note 33.

157. Agreement, *supra* note 28, §§ I-II.

158. *Id.* §§ IV-V.

suggested that Smith & Wesson received slightly more in the bargain.[159]

The terms requiring greater safety measures closely mirror the products liability claims asserted in numerous cases filed against handgun manufacturers.[160] Smith & Wesson agreed to incorporate technology that would make its guns safer when they leave the factory.[161] Among the measures that Smith & Wesson pledged to incorporate within the next three years were provision of external and internal locking devices, "smart gun" technology, chamber loading indicators, and rejection of large capacity magazines.[162] Although the terms of the contract provide a timeline for the implementation of specific measures, it conspicuously lacks provisions for enforcement upon breach.[163] Nevertheless, the terms agreed upon were considerably more stringent than those required by judicial or legislative proclamation.[164]

The sales and distribution provisions are similarly comprehensive. First, they require Smith & Wesson to monitor its retail outlets more closely, sell only through storefront operations,[165]

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159. Shortly after the agreement with Smith & Wesson was finalized, the White House issued a press statement that generated significantly less fanfare. In it, the White House pledged $600,000 in grants to Smith & Wesson to assist it in developing "smart gun" technology. *President Clinton Promotes Smart Gun Technology to Protect Children from Gun Violence, at* http://www.whitehouse.gov/textonly/WH/New/html/20000531_4.html (last visited May 12, 2000) (on file with author).

160. *See supra* note 24; *see also Hamilton*, 62 F. Supp. 2d 802, 843-46 (discussing the products liability claims later dropped from the complaint); Smith v. Bryco, 33 P.3d 638, 644 (N.M. Ct. App. 2001) (reversing summary judgment for gun manufacturer on design claims, noting potential liability based on "straightforward assertions that the handgun could have—and therefore should have—incorporated long-known design features which would have helped prevent this shooting and others like it").

161. Agreement, *supra* note 28, § I(1)(a) ("Safety and design . . . standards applicable to all handguns").

162. *Id.* § I(1)(a)-(e) & (2)(d)-(e).

163. *See id.* § VIII. The enforcement section of the Agreement has no discussion of provisions in the instance of breach, merely noting briefly that "[t]he Agreement will he entered and is enforceable as a Court order and as a contract." *Id.*

164. The lack of existing precedent perhaps explains the lenient terms in the safety provisions of the Agreement. Because Smith & Wesson was under no threat of outside enforcement of safety measures, self-regulation on a generous timeline without enforcement provisions may have been a considerably unthreatening approach. Given the subsequent provision of research dollars, the concession may have been more than just conservative—it may have been profitable.

165. The longstanding provision licensing firearm dealers issued a license for a ten dollar annual fee. DAVIDSON, *supra* note 12, at 291. As a result, the overwhelming number of firearm sellers are "kitchen table" dealers. *Id.* Although licensed, they sell weapons in small quantities and in informal settings where background checks, serial number registration, and other monitoring procedures are rarely used. *See id.* In 1993, President Clinton signed an Executive

and not to distribute at gun sbows.[166] Second, Smitb & Wesson also agreed generally to turn over its records of future sales to the BATF for tracking purposes.[167] Finally, Smith & Wesson agreed to track sales through its retailers and to discontinue distribution upon a showing that the retailer may be engaging in sales that violate the Agreement.[168] To enforce that provision, distributors of Smith & Wesson firearms must adhere to a "code of ethics" that essentially prevents them from selling weapons when they suspect they are being purchased for criminal purposes.[169] The timing of the Agreement, however, provides a two-year window before all the sales and distribution terms are enforced.[170] Gun manufacturers and the NRA have, of course, decried the Agreement as a threat to constitutional freedom.[171] Proponents of gun control have welcomed the Agreement as real progress, tempered with some hesitant skepticism. But there are reasons for parties on all sides, and especially nonparties, to be concerned not just about the content of the Agreement, but the process that produced it.

### *B. Behind Closed Doors—Implications of the Process*

Regardless of where one falls on the political spectrum, whether a supporter or opponent of gun control, public choice theory counsels that the Agreement reached may leave everyone worse off in the long term. The potential harm to gun manufacturers is obvious; some have already conceded that they are under pressure to agree to similar terms.[172] But, there are more serious consequences. When

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Order, increasing the licensing fee to $200. *Id.* Within five years of the change, the number of federally licensed firearm retailers was reduced from 286,531 to roughly 90,000. *Id.*

166. Agreement, *supra* note 28, § II(A)(1)(d) ("Make no sales at gun shows unless all sales by any seller at the gun show are conducted only upon completion of a background check.").

167. *Id.* § III(B) ("To the extent consistent with law and the effective accomplishment of its law enforcement responsibilities, ATF will work with the manufacturer parties to the Agreement and the Oversight Commission to assist them in meeting their obligations under the Agreement.").

168. *Id.* § II(E) ("If ATF or the Oversight Commission informs the manufacturer parties to this Agreement that a disproportionate number of crime guns have been traced to a dealer or distributor within three years of the gun's sale, the manufacturer(s) that have authorized the dealer or distributor to sell guns will either immediately terminate sales to the dealer or take [administrative] actions.").

169. *Id.* § II(C)(2) (agreeing "[n]ot to engage in sales that the dealer knows or has reason to know are being made to straw purchasers").

170. *Id.* § II(A)(1)(e) ("Within 24 months of the date of execution of this Agreement, maintain an inventory tracking plan for the products of the manufacturer parties to this Agreement . . . .").

171. *See supra* note 34.

172. Beretta's General Counsel Jeff Reh claims that Beretta was pressured to enter into a similar agreement by the withholding of sales to law enforcement, a large portion of their

public policy matters are taken private, four concerns arise: (1) restrictions are placed on who is at the bargaining table; (2) the free-rider problem is exacerbated, as individual actors further solidify their rational assumption that their participation is unnecessary; (3) the expressive function of the law is diminished; and (4) the entities, both the regulators and the regulated, that sign such agreements are exculpated.

Assigning the label "public policy" begs the question: issues bearing that moniker are intended for resolution through public means. The efficiencies of the Smith & Wesson Agreement are beyond question. Its terms were reached more rapidly and with exponentially less deliberation than a similar agreement produced via legislation or even litigation.[173] The Agreement was reached, however, only after a process that excluded input from a wide variety of sources. Among the voices left out of deliberation: strict Second Amendment adherents, like the NRA; lobbying groups in favor of restriction, such as the Center for the Prevention of Handgun Violence; and individuals directly harmed by firearms, like the plaintiffs in *Hamilton*. Although the inclusion of these voices may be less efficient, it is more democratic. Regardless of the fact that the Agreement may be more toothless than it now appears, it fails to carry the weight of consensus formed by the nature of the legislative process. As argued in Part II, the atmosphere is now particularly conducive to federal legislation, but future efforts along the lines of the Smith & Wesson Agreement may already be co-opted.[174] The explicit terms of the Agreement, of course, make it highly unlikely that any court will ever be able to pass judgment on the negligence of Smith & Wesson. The language of the Agreement placed against the language of *Hamilton* provides a shield against future litigation that is unlikely to be pierced.[175] Moreover, the Agreement was given judicial sanction by the courts of the cities that are party to the deal. Given the market share theory suggested in

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business. *See* Jeff Reh, *Beretta Statement on the S&W Agreement*, *at* http://www.nraila.org/FactSheets.asp?FormMode=Details&ID=111 (Sept. 5, 2000).

173. The Brady Bill, a cornerstone of federal regulations, took eleven years to become the Brady Act. Its exact contours are still being developed. *See* DAVIDSON, *supra* note 12, at 269-70. The *Hamilton* litigation lasted over four years from the date of the filing of the complaint until the issuance of the governing opinion. (The complaint was filed in January 1995. The standing opinion was issued in June 1999.) That decision may yet be appealed.

174. *See supra* Part II.

175. The *Hamilton* court plainly noted that "manufacturers can avoid liability by marketing and distributing their product responsibly." 62 F. Supp. 2d 802, 820 (E.D.N.Y. 1999). Nothing in the Second Circuit's decision would seem to upset the ability to guard against liability with such measures. Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 27 (2d Cir. 2001) (noting that the New York Court of Appeals had discretion to address any question of state law touched on in the *Hamilton* opinion).

*Hamilton*, and Smith & Wesson's large market share, future litigants may have been deprived of a major source of recovery.

Privatization of this type of public policy does little to help the existing free-rider problem, which in turn contributes to political apathy. Many people already refuse to participate in the political process based on the rational assumption that their voices will either not be heard or their concerns will be voiced by other parties. A primary outlet for combating that apathy is lobbying and participation in groups that seek to implement their desired vision of legislative policy. Although the NRA could be subject to a variety of criticisms, it is difficult to say they foster apathy. But, when the voices of these participants are silenced or ignored, incentive to participate is diminished even further.

This silencing leads to a more philosophical, but no less serious, basis for viewing this and similar agreements with skepticism. In addition to the practical and obvious function of law as a mechanism for regulating behavior, law has what has been labeled an "expressive function."[176] This function assumes that law takes on meaning because it embodies a series of preferences and values.[177] Private agreements rob the law of that value; they embody nothing more than the compromise desired by the parties to the agreement. Public proclamation on gun control policy takes on specific importance, if only because of the intense preferences on either side. Legislation is also, arguably, a barometer of the majority's present constitutional values. At the very least, it provides us with a road map or signal as to what expression is predominating. Those functions are rendered impotent when private agreements take the place of public law.

More seriously, the implementation of private regulatory schemes exculpates both the regulator and the regulated. Legislators do not just have an option to create public policy; they have an obligation to create it. Similarly, when a case is brought before a judge, the court is obligated to make a ruling. Private agreements frustrate these objectives. At best, the Smith & Wesson Agreement provides legislators with a twelve-month to three-year window to defer consideration of legislation that might accomplish the objectives of the

176. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 91 (1997) ("A unifying theme for the discussion *is the expressive function of law*. When evaluating a legal rule, we might ask whether the rule expresses an appropriate valuation of an event, person, group, or practice.").

177. *Id.* (arguing that the expressive function of law matters both in "the effects of law on social attitudes and in the use of law to decide what sorts of consequences matter for legal purposes").

Agreement.[178] At worst, it provides legislators with an indefinite delegation of the problem to parties whose failures cannot and will not be traced back to Congress. It also precludes a uniform system of regulation designed to combat the trafficking ills noted by the *Hamilton* court and numerous gun control policy scholars.[179] As discussed earlier, there is little doubt that the Agreement had the potential to protect Smith & Wesson against future judgments, given the potential scope of liability at the time of the district court's ruling in *Hamilton*. Smith & Wesson, aside from the direct benefits,[180] was transformed from pariah to sacred cow in the stroke of a pen (at least in the eyes of the Clinton administration). By adopting "voluntary" measures[181] (that it suspected were looming), it took on the appearance of compassionate corporate saint, without fear of reprisal from future legislation or litigation if it failed to satisfy the terms of the Agreement.[182] Potential agency problems also abound when the unitary branch of government attempts to act in a lawmaking capacity on behalf of a citizenry that is supposed to be represented by a legislature.[183] The potential binding effect of the Agreement on parties not present during bargaining provides an important analytical link between the Agreement and *Ortiz v. Fibreboard*.[184] The rationale of

178. The various enforcement provisions of the Agreement did not take force until twelve to thirty-six months after its execution. *See* Agreement, *supra* note 28.

179. In approving the jury's finding of causation, the *Hamilton* court observed that:

> The jury could also have credited the extensive documentary and oral evidence presented with regard to the flow of guns—particularly from the states of the southeast, where, experts testified, it is relatively easy to purchase a gun, to the states of the northeast, where it is relatively difficult to obtain one—and the high proportion of New York crime guns traceable to out of state.

62 F. Supp. 2d at 830.

180. *See infra* note 247.

181. The motivations for Smith & Wesson to accept the terms of the Agreement, although complex, probably included the threat of verdicts and regulation. *See* Mike France & William C. Symonds, *Can Gunmakers Disarm Their Attackers?*, BUS. WK., Nov. 10, 1997, at 94, 94 (quoting Richard Feldman of the American Shooting Sports Council that the support of gun manufacturers for child safety locks is "because it puts the manufacturers in a better position in front of a jury" because "[w]e could never take the kind of hit tobacco could take and survive" (internal quotation marks omitted)); Leslie Wayne, *Gun Makers Learn from Tobacco Fight*, N.Y. TIMES, Dec, 18, 1997, at A18 (stating that voluntary provision of child safety locks was "smart politics in the face of what would have happened" because "[i]n just a few years, Congress would have required it").

182. In fact, the Agreement goes one step further by providing two-tiered protection: under the Agreement, individual retailers will be first held accountable in breach. Agreement, *supra* note 28, § II (B)-(E).

183. *See* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1259-60 (1984) (arguing that extension of vicarious liability is based on misapplication of agency principles that lead to economic inefficiency).

184. 527 U.S. 815 (1999); *see supra* note 33 and accompanying text.

*Ortiz* mirrors the foregoing criticism of the Smith & Wesson Agreement: private parties were able to make contractual arrangements binding upon entities absent from the bargaining table.[185]

## V. *ORTIZ* AND RULE 23(B)(1)(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Within months of the execution of the Agreement, alarms were sounding as to its legality.[186] Most of the arguments offered against the Agreement focused on potential constitutional violations, particularly potential Second Amendment[187] violations.[188] The arguments that focus on treatment of the Agreement as law contain a simple yet important error. The Agreement is not a statute; it is a settlement. Thus, the proper basis for attack must be precedent that defines the acceptable limitations of settlements, not precedent that defines the limitations of law.[189] Legal deconstruction of the

185. The *Ortiz* Court noted that "[t]he legal rights of class members ... are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." 527 U.S. at 847.

186. Notably, the Agreement has been attacked as illegal under application of antitrust laws and contrary to the Contracts Clause of the U.S. Constitution. *See* James H. Warner, *Municipal Anti-Gun Lawsuits: How Questionable Litigation Substitutes for Legislation*, 10 SETON HALL CONST. L.J. 775, 787-90 (2000) (making the aforementioned antitrust and Contracts Clause claims). While not intending to discredit Mr. Warner's legal analysis, it seems worthwhile to note that he is Assistant General Counsel for the NRA. *Id.* at 775.

187. The oft-quoted Second Amendment provides, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed." U.S. CONST., amend. II. The amount of scholarly discourse surrounding the precise meaning of the Second Amendment would fill many volumes of law reviews. A Westlaw search turned up thirty-five articles with "Second Amendment" in their titles in 1998 and 1999 alone. There is no Supreme Court case that points directly to the scope of the Second Amendment as a defense to tort claims. *See generally* Jerry J. Phillips, *The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States*, 32 CONN. L. REV. 1337 (2000) (attempting to define the proper role of the Second Amendment in tort lawsuits). While beyond the scope of this Note, it seems safe to assert that there is not a consensus among scholars or courts that would shed definitive light on the potential constitutionality of the Agreement.

188. *See* Warner, *supra* note 186, at 784.

189. A common attack on settlements generally builds on this point. Because settlements do not create rules of law that legally bind future parties, they lack the public good provided by adjudication. Future litigants gain the benefit of the rules created by their courtroom predecessors, without having to contribute their own resources to the creation of those rules. *See* Fiss, *supra* note 5, at 1080-81 ("The authority of judgment arises from the law, not from the statements or actions of the putative representatives, and thus we allow judgment to bind persons not directly involved in the litigation *even when we are reluctant to have settlement do so*." (emphasis added)); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 240 (1979) (arguing that state controlled adjudication is needed to prevent the underproduction of rules and precedents caused by an overuse of private dispute resolution);

Agreement requires reliance on an analogous settlement that has been specifically repudiated by the courts. *Ortiz v. Fibreboard* provides the analogous settlement and the precedent needed to confront the Agreement on legal grounds.

### *A.* Ortiz v. Fibreboard *and Judicial Scrutiny of Settlement Agreements*

*Ortiz v. Fibreboard* was the second in a line of cases closely examining mandatory settlements of class actions under Rule 23 of the Federal Rules of Civil Procedure.[190] The *Ortiz* Court focused almost exclusively, however, on the "limited fund" provision of Rule 23(b)(1)(B).[191] The defendant, Fibreboard Corporation, faced billions of

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Luban, *supra* note 1, at 2623 ("[A]djudication may often prove superior to settlement for securing peace because the former, unlike the latter, creates rules and precedents.").

190. 527 U.S. at 821. Only two years earlier, the Supreme Court reviewed another class action settlement of asbestos claims in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) ("*Amchem*"). The Court's analysis in *Amchem* took under review subsections 23(a), (e) and 23(b)(3). *Id.* at 597. In order to proceed with a class action, a reviewing court must "certify" the class to ensure that the requirements of Rule 23(a) are met. FED. R. CIV. P. 23(a). Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate representation are meant to protect members of the class who are not present in the litigation but will be bound or affected by its outcome. Those four requirements ensure that: the number of members in the class are so great that requiring individual actions would be too burdensome; the factual and legal basis of the class members claims are sufficiently in common so that they can all be adjudicated in the same proceeding; the claims of the present class members are typical of the claims of those members not present; and that counsel representing the class can do so without significant conflicts of interest between present and absent class members. FED. R. CIV. P. 23 advisory committee's notes (a)-(b)(1). A judicial hearing is required under Rule 23(e) to approve a settlement of a class action. Called a "fairness hearing," Rule 23(e) requires that the court carefully consider the impact that the proposed settlement will have on *all* affected claimants and decide if the settlement is "fair, reasonable and adequate." Bronson v. Bd. of Educ., 604 F. Supp. 68, 70 (S.D. Ohio 1984).

Rule 23(b)(3) is the provision of Rule 23 allowing a limited number of class members to "opt out" of the class. Class members exercising their opt-out rights sacrifice any stake in the judgment or settlement of the class action litigation in exchange for the opportunity to bring their own individual action against the same defendant at a later time. FED. R. CIV. P. 23 advisory committee's note (b)(3).

The *Amchem* Court rejected both the certification and settlement of the class, holding that the interests of present and future claimants injured by asbestos were too disparate to resolve in a unified proceeding. 521 U.S. at 622-28. The Court took care to note that settlements which do not treat all potential claimants fairly would be unlikely to receive judicial approval. *Id.* at 627 ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.").

David Luban foreshadowed the rejection of the settlement reached in *Amchem* nearly two years earlier in his discussion of settlement agreements generally. Luban, *supra* note 1, at 2660. Referring to the *Amchem* settlement, Luban noted somewhat prophetically that "[t]he self-dealing process by which this particular sausage emerged from the grinder is exceptionally unappetizing and graphically illustrates the way settling parties can achieve mutual satisfaction at the expense of those not at the bargaining table." *Id.*

191. *Ortiz*, 527 U.S. at 832 (discussing the true scope of review as limited to Rule 23(b)(1)(B)).

dollars of potential liability for injuries caused by asbestos contained in its products used for industrial applications.[192] Although the litigants hotly contested the value of Fibreboard as a corporate entity, both the plaintiff and defendant agreed that the value of the corporation fell far short of the liability that the corporation faced.[193] Thus, Fibreboard assets, taken alone, satisfied the critical requirement of a limited fund class action under 23(b)(1)(B); they were too small to pay out all of the potential claimants.[194] If claimants were allowed to proceed against Fibreboard in piecemeal fashion, those litigants who prevailed first would dry up the assets and prevent relief for those plaintiffs whose injuries had not yet materialized.[195]

If the assets of Fibreboard Corporation were the only ones available to compensate plaintiffs during the litigation, limited fund certification may have been obtained. But that was not the case. Fibreboard, in addition to its own assets, had a pool of liability coverage from two insurers, Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific").[196] Continental and Pacific had both provided Fibreboard with general liability coverage between 1956 and March 1959 under policies that

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192. *Id.* at 822.

193. The district court had placed the value of Fibreboard at approximately $235 million, based on an estimate of likely purchase value. *Id.* at 850-51. The company was acquired in 1997, however, for $515 million, with an additional $85 million of assumed debt. *Id.* at 851 n.28. Nevertheless, the value of the settlement agreement reached between Fibreboard, its insurers, and the class plaintiffs exceeded $2 billion. *Id.* at 850. Other commentators have placed some emphasis on the role the disputed valuation had in reaching settlement of the class. *See* George M. Cohen, *The "Fair" Is the Enemy of the Good:* Ortiz v. Fibreboard Corporation *and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23, 40 (2000) (discussing the valuation of the company as a factor in determining potential liability); Matthew C. Stiegler, Note, *The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After* Ortiz v. Fibreboard Corp., 78 N.C. L. REV. 856, 864 (2000) (noting that Fibreboard Corporation's relatively small pool of assets had at one time helped it to avoid ongoing entanglements with asbestos litigation).

194. The Advisory Committee Notes for Rule 23 describe limited fund conditions:

> In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case where claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

FED. R. CIV. P. 23(b)(3) advisory committee's notes.

195. One of the difficulties of asbestos litigation, discussed in *Amchem*, is that many potential plaintiffs who have been exposed to asbestos have not yet become diagnosable. 521 U.S. at 602-03. Thus, without the class action mechanisms, litigation would simply pay out those who became symptomatic first.

196. *Ortiz*, 527 U.S. at 822-23.

had no ceiling on aggregate liability.[197] Reluctant to assume the massive potential liability of future payouts, Continental and Pacific challenged their liability under those policies.[198] A California state court, however, held that the insurance companies were liable for any injuries caused by exposure to Fibreboard's asbestos products prior to 1959.[199] The insurers appealed those decisions and, fearing the fallout of a possible reversal, Fibreboard and its insurers moved to the bargaining table.[200]

As a result of these negotiations, two agreements were reached. First, the plaintiff class and Fibreboard entered into the "Global Settlement Agreement," with a total pool of assets of $1.535 billion dollars.[201] Of that amount, $1.525 billion came from the insurers; although Fibreboard was required to pay the remaining $10 million, only $500,000 of that amount came out of its own coffers.[202] As a precondition to the "Global Settlement," the parties also entered into a "Trilateral Settlement Agreement."[203] The "Trilateral Settlement" was entered into based on the fear that the "Global Settlement" would not obtain or be consented to by all parties.[204] Under the "Trilateral Settlement," Continental and Pacific agreed to commit a maximum of $2 billion to defend against and pay out all asbestos claims.[205] Based on the basic terms reached in the "Trilateral Settlement," the parties sought class certification and settlement approval in the U.S. District

197. Both policies had payouts of $1 million per occurrence, $500,000 per claim, but no other limitations. *Id.*

198. *Id.*

199. *Id.* at 822; *see also In re* Asbestos Litig., 90 F.3d 963, 969 (5th Cir. 1996). The pre-1959 exposure claimants made up the bulk of the potential liability against Fibreboard. *Ortiz*, 527 U.S. at 823 n.2.

200. *Ortiz*, 527 U.S. at 823-24. The timing of the negotiations between Fibrehoard and its insurers made clear that the threat of reversal was a considerable incentive. The oral argument in the California appeals court insurance case was scheduled for August 27, 1993. *Id.* at 824. Conditional settlement was reached between Fibreboard, its insurers, and the plaintiffs on August 26, 1993. *Id.*

201. *Id.*

202. Fibreboard had additional insurance policies, outside of those provided by Continental and Pacific, that paid $9.5 million of its $10 million in liability. *Id.* at 824-25.

203. *Id.* at 825.

204. *Id.*

205. The "Trilateral Agreement" essentially gave Pacific and Continental the option to walk away from the asbestos litigation altogether, at a $2 billion price tag. The "Trilateral Agreement" required Continental and Pacific to contribute $475 million more than the "Global Settlement" required. *Id.* But it ended the insurers' involvement in the litigation, and in the event the "Global Settlement" failed and the California appeals court affirmed their liability, their potential exposure might have been as high as $5 billion, making the additional $475 million a rational investment ($475 million is less than ten percent of the total liability the insurers might have faced in the worst case scenario mentioned above). *See* Cohen, *supra* note 193, at 46-47 (discussing the mathematics of Fibreboard's potential liability).

Court for the Eastern District of Texas.[206] The district court approved both the certification and the $1.535 "Global Settlement" as "fair, adequate and reasonable" under Rule 23(e), and a "limited fund" under Rule 23(b)(1)(B).[207] The Fifth Circuit affirmed, relying, in part, on expert testimony that suggested the costs to Fibreboard and its insurers to defend against all of the potential asbestos claims would deplete all available funds within five to nine years.[208]

The Supreme Court rejected the "Global Settlement" on the grounds that the assets of Fibreboard and its insurers were not a "limited fund" under a proper reading of Rule 23(b)(1)(B).[209] Using a historical analysis of Rule 23(b)(1)(B), as well as practical considerations, the Court held that three requirements must be satisfied in order to invoke the Rule.[210] First, and arguably most importantly, the Court held that "insufficiency" was required to sustain a 23(b)(1)(B) certification.[211] To determine insufficiency, the claims of all potential claimants and the fund available to pay those claimants are totaled.[212] If the value of the claims exceeds the value of the funds, insufficiency is satisfied.[213] Second, the Court held that the entire fund available must be distributed to the claimants and that a

206. *Ortiz*, 527 U.S. at 825.

207. Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 527 (E.D. Tex. 1995).

208. *In re* Asbestos Litigation, 90 F.3d 963, 982 (5th Cir. 1996) ("The district court credited the testimony of these experts and found that Fibreboard is a limited fund [under Rule 23(b)(1)(B)].").

209. *Ortiz*, 527 U.S. at 848.

210. *Id.* at 838-39.

211. *Id.* at 838.

212. *Id.*

213. *Id.* A simplified example migbt help emphasize the point. Assume that a truck strikes a van carrying ten people. All ten persons inside sustain the same injury—a broken arm and a broken leg. The compensatory damages for each claimant are valued at $10,000, or $100,000 for all ten claimants. Assume that the truck driver was not insured and only has $20,000 in assets to pay the claimants. Under a 23(b)(1)(B) limited fund theory, all ten claimants would receive $2,000. Although this amount is substantially less tban the true value of their claims, a greater equity is served by this distribution than by allowing the first two successful plaintiffs to deplete the fund (2 x $10,000 = $20,000), and thereby deny recovery to the remaining eight injured persons. *See* Nat'l Sur. Co. v. Graves, 211 Ala. 533, 534 (1924) ("The primary equity of the bill is the adjustment of claims and the equitable apportionment of a fund provided by law, which is insufficient to pay the claimants in full.").

This example also helps illustrate the real world contrasts, as valuation of the varying asbestos claimants (known and unknown) and the total value of Fibreboard's own assets and its insurance assets poses in itself a formidable judicial task. *Ortiz*, 527 U.S. at 850 ("We have already alluded to the difficulties facing limited fund treatment of huge numbers of actions for unliquidated damages arising from mass torts, the first such hurdle being a computation of the total claims."). *But see id.* at 877-78 (Breyer, J., dissenting) ("A perfect valuation, requiring lengthy study by independent experts, is not feasible in the context of such an unusual limited fund . . . . I would accept the valuation findings made by the District Court and affirmed by the Court of Appeals as legally sufficient.").

defendant cannot withhold funds from the claimants in order to give itself a better deal.[214] Third, in a point closely related to Rule 23(a) certification, the claimants asserting a common theory of liability must be treated "equitably among themselves."[215] Once plaintiffs with a common claim are unified within a class, they are entitled to a fair and equitable pro rata share of the fund.[216] The Court found that the "Global Settlement" reached by the parties failed to satisfy any of these three criteria.[217]

In application of the insufficiency criteria, the Court focused its attention on the failure to demonstrate true and identifiable limits of the fund as the Rule requires.[218] The Court noted that while the "fund" was comprised of both Fibreboard's own assets as well as the value of the Continental and Pacific insurance policies, no real valuation was ever made regarding the upper limits of the insurance coverage.[219] The Court questioned the district court's and court of appeals' willingness to accept the $2 billion value set on the insurance in the "Trilateral Agreement" as the maximum value of the insurance funds without "findings independent of the agreement of defendants and conflicted class counsel."[220] Although the Court did not go so far as to reject *any* valuation reached during settlement as improperly collusive, judicial acceptance of settlement value must be conditioned on "parties of equal knowledge and negotiating skill [who] agreed upon the figure through arms-length bargaining."[221]

The Court also condemned the settlement as failing the requirement of equity.[222] They noted with displeasure the significant number of potential plaintiffs excluded from the agreement.[223] The problems created by exclusion of certain claimants were compounded by a strong inference that those claimants were intentionally excluded

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214. *Ortiz*, 527 U.S. at 839.

215. *Id.*

216. *Id.* at 840-41.

217. *Id.* at 848. This Note will refer to these requirements in subsequent analysis as *insufficiency* (the fund must be insufficient to compensate all claimants fully), *entirety* (the entire available fund must go to the class plaintiffs), and *equity* (the fund must be distributed equitably among the claimants).

218. *Id.*

219. *Id.* at 850.

220. *Id.* at 853.

221. *Id.* at 852.

222. *Id.* at 854.

223. *Id.* (commenting on the exclusion of plaintiffs who had previously reached conditional settlements with Fibreboard, but reserved the right to reassert claims "upon development of an asbestos related malignancy," and plaintiffs with claims still pending against Fibreboard at the time the settlement was reached).

in order to facilitate the brokerage of the settlement agreements.[224] Furthermore, the "Global Settlement" lumped together those claimants whose exposure to the asbestos occurred prior to 1959 with those claimants whose exposure occurred after that date,[225] despite the fact that the potential value of these two claims was dramatically different.[226] Reemphasizing concerns addressed in *Amchem Products, Inc. v. Windsor*,[227] the Court went on to reject the argument that the desire by plaintiffs to reach a settlement could be used as a unifying characteristic of the class to smooth over inequities otherwise contained in the settlement.[228] In order for a settlement with such a far-reaching effect to pass judicial scrutiny, it must be equitable to all those affected by its terms.[229]

Third, the "Global Settlement" also failed the requirement of entirety—the full potential of the fund to pay the claimants was not going to be distributed to them under the terms of the settlement.[230] The Court reasoned that the difference between the estimated value of Fibreboard (conservatively placed at $235 million), and the amount Fibreboard was contributing from its *own* assets (only $500,000), was a disparity in values that was "irreconcilable" with a limited fund claim.[231] The Court implied that although settlement will always result in the savings of transaction costs spent in defense of numerous repeated tort claims, those savings should not be used as a bargaining chip to pressure individual claimants into settlement or to support the argument that a defendant's own contribution should be discounted by those savings.[232]

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224. *Id.* at 855.

225. *Id.* at 857.

226. *See supra* note 193 and accompanying text.

227. *See* 521 U.S. 591, 625-28 (1997) (rejecting claims of a common desire to reach settlement as a factor properly reserved for legislative, not judicial, consideration).

228. *Ortiz*, 527 U.S. at 858 ("The current position is just as unavailing as its predecessor in *Amchem*. . . . [W]e gave the argument no weight . . . .").

229. *Id.*

230. *Id.* at 860.

231. *Id.* In another question left unanswered by the Court, no definitive statement was given as to how much of its own assets a company must contribute to a settlement fund, short of insolvency. It did note, however, that "if limited fund certification is allowed . . . where a company provides only a *de minimis* contribution to the ultimate settlement fund, the incentives . . . would provide . . . companies [the opportunity] to engineer settlements similar to the one negotiated in this case [and] would . . . undermine the protections for creditors built into the Bankruptcy Code." *Id.* at 860 n.34.

232. *Id.* at 861. The majority was unwilling to subscribe to the dissent's contention that the settlement should be approved because the savings in transaction costs would grant the plaintiffs "more money available than any other effort would likely have done." *Id.* at 863.

### *B. Application of* Ortiz *to the Smith & Wesson Agreement*

As previously discussed, the *Hamilton* decision was a moderate step forward in articulating a possible theory for individual tort claimants to gain compensation from firearm manufacturers for injuries caused by their products.[233] Moreover, application of the theory of precedential cascades suggests a judicial willingness to follow that case in subsequent tort claims.[234] The intervention of the Agreement skews those prospective outcomes, however, by providing a serious barrier to individual tort claimants seeking compensatory damages against Smith & Wesson.[235] Much like defendant Fibreboard, a clear motivator for Smith & Wesson to enter the Agreement was to fend off tort claims that it could not defend or pay without significantly jeopardizing its assets.[236] The federal and local governments, on the other hand, sought regulatory measures that it

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233. *See supra* Part III.A-C; notes 108-135 and accompanying text. The New York courts and the Second Circuit remain in agreement that the theory is still viable in a case with more conclusive evidence than *Hamilton v. Accu-Tek,* 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999).

234. *See supra* Part III.D; notes 136-152 and accompanying text.

235. *See supra* Part IV.

236. Smith & Wesson, at the time of the Agreement, was a wholly-owned subsidiary of Tomkins PLC, a very large, wealthy British industrial conglomerate. TOMKINS PLC, ANNUAL REPORT ON FORM 20-F, 3 (2000), *available at* http://www.tomkins.co.uk/investors/ 20F2001.pdf (on file with author). Smith & Wesson was part of Tomkins's "[p]rofessional, garden & leisure products" division, a group that brought in an operating profit of £20.2 million in the year 2000 (approximately $31.51 million U.S.). *Id.* at 11. Tomkins's overall profit that same year was £515.4 million; therefore, Smith & Wesson's division accounted for only about 3.8% of tbe company's total profits. *Id.* at 66. The company's net worth that year was estimated at $6.09 billion. *Id.*

Tomkins's potential exposure in tort liability was not lost on the company, or on plaintiffs, who often name it as defendant in negligence lawsuits. In assessing the company's "Contingencies" the Annual Report noted:

> Smith & Wesson has been named as a defendant in some twenty-two cases brought by various municipal authorities in the United States. In these cases, . . . the plaintiffs are seeking to show that the defendants are liable under a variety of legal theories . . . . Tomkins PLC has been named as a defendant [although] it has not been served with process. . . . Smith & Wesson Corp. has entered into an agreement with an agency of the Federal Government of the United States of America and various of the municipal plaintiffs . . . [upon agreement] not to sue Smith & Wesson Corp.

*Id.*

Although no official reports confirm it, it is not difficult to believe that Tomkins may have pressured Smith & Wesson to enter the Agreement to deflect potential liability. Nevertheless, Tomkins apparently still had lingering doubts about its potential tort exposure. It actively sought buyers for Smith & Wesson. *See Tomkins Feels Pinch of Slowdown in U.S. Economy,* WALL ST. J. EUR., (Jan. 17, 2001), at 6 (quoting Tomkins Chairman David Newlands as reiterating "a commitment to sell its U.S. handgun business Smith & Wesson . . . that [doesn't] fit into the group's strategy"), 2001 WL-WSJE 2840818.

had tried and failed to achieve through legislative means.[237] Those governments sought a political indemnity quite similar to the financial indemnity sought by Fibreboard's insurers.[238]

Further analysis of the Agreement is predicated on a discussion of two important factors from *Ortiz* superficially absent here: class action certification and judicial scrutiny. First, the litigation settled by the Agreement was not class action litigation.[239] That difference, however, is not as dispositive as it first appears. The Agreement, if applied by courts as a defense to subsequent lawsuits, is likely to have the same prohibitive effect against future individual tort claimants. The Agreement simultaneously allows Smith & Wesson to disclaim any negligence for past acts,[240] while the remaining regulatory commitments in sections I and II prevent future claimants from substantiating claims of negligence.[241] When these points are taken together, it becomes increasingly likely that a court could apply the Agreement as a shield against liability for claims by individuals residing in the municipalities that have consented to the terms. Second, the Agreement was not subject to judicial scrutiny, and no court has passed upon its legality. The concluding provision of the Agreement, however, call[s] for its enforcement as "a Court order and as a contract."[242] Relying on this provision, Smith & Wesson might call

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237. State legislatures in both Colorado and California tried and failed to pass laws allowing tort products liability actions against firearms manufacturers. The California bill died in committee. A.B. 988, 1997-1998 Leg., Reg. Sess. (Cal. 1997). The Colorado bill was ultimately vetoed by the state's governor. S.B. 99-205, 62d Gen. Assem., 1st Reg. Sess. (Colo. 1999).

238. Then-HUD Secretary Andrew Cuomo vigorously applauded the bill as a major step forward. He maintained that the Agreement was an important part of "HUD's efforts to reduce gun violence." Press Release, Cuomo, Gephardt and Other Congress Members Criticize Proposals to Halt HUD's Gun Safety Efforts and Reduce Budget Request (June 20, 2000) *at* http://www.hud.gov.80/library/bookshelf18/pressrel/pr00-141.html (on file with author).

239. As discussed above, multiple cities were parties to the Agreement. *See supra* Part III.D. Although none of those cities sougbt or obtained certification of tbeir cases as class actions prior to the witbdrawal of their claims, some commentators have argued that municipal firearm lawsuits are similar to mass torts, in terms of the representative nature of the action. *See* Lytton, *supra* note 7, at 63 ("Tort suits against gun manufacturers also invite comparison to toxic tort litigation."). Indeed, the *Hamilton* plaintiffs invoked this comparison. The plaintiffs there compared negligent manufacture and distribution of firearms to "a pathogen leading to latent injuries and the deaths of many thousands of people, much like claims associated with asbestos, agent orange, the dalkon shield, and silicone gel breast implants." Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1313 (E.D.N.Y. 1996).

240. The preamble to the Agreement emphasizes that it is a "full and complete settlement of any and all claims that were raised or could have been raised in the subject litigation." Agreement, *supra* note 28, pmbl. ¶ 4. It further states that "[n]othing in this Agreement . . . shall be construed as an admission by the manufacturer parties to the Agreement that practices they engaged in prior to the execution of this Agreement were negligent." *Id.*

241. *See supra* Part III.D.

242. Agreement, *supra* note 28, § VIII.

on this Agreement in subsequent litigation when presented with negligence claims that parallel the Agreement itself. If later courts decide sua sponte that they are not bound by the Agreement in adjudicating negligence claims against Smith & Wesson, then the reference to *Ortiz* becomes moot. But where courts choose to apply its terms against future plaintiffs, legal arguments built around *Ortiz* could provide plaintiffs with much-needed defense of the Agreement's terms.

The Agreement appears to violate the entirety, equity, and insufficiency principles of *Ortiz*.[243] The facts leading up to the Agreement appear to indicate clearly that it violates the "entirety" element from *Ortiz*.[244] Smith & Wesson executives made it clear that their own assets would be insufficient to defend against numerous lawsuits, let alone satisfy the judgments generated by them.[245] The precise value of Smith & Wesson is difficult to estimate because it is a foreign-owned, privately held company.[246] But, individual litigants received no compensation from the Agreement whatsoever.[247] The "equity" principle may also be violated by the Agreement. Under the Agreement, both products liability and negligent distribution claims are dismissed.[248] But, as discussed in *Hamilton*, the basis for those claims is independent, and could form the basis for independent classes.[249] Forging those classes together under the same agreement without any attempt to address the "conflicting interests" violates the *Ortiz* Court's construction of Rule 23.[250] Finally, nothing in the Agreement supports the contention that any attempt was made to calculate the value of the claims, or Smith & Wesson's ability to pay them. The *Ortiz* Court condemned the use of spotty evidence to

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243. *See supra* part III(D).

244. *See supra* note 214 and accompanying text.

245. *See supra* notes 223-229 and accompanying text.

246. *See supra* note 236.

247. Smith & Wesson was in fact the party that received compensation for its commitment to self-regulate. Although not specifically listed in the Agreement, upon signing, Smith & Wesson became a member of the "Communities for Safer Guns Coalition." Member cities of the coalition pledge to buy weapons from Smith & Wesson for its police forces, so long as Smith & Wesson is a signatory of the Agreement. To date, 190 communities have joined the coalition, contributing to an already sizeable monopoly on provision of law enforcement firearms. *See* Press Release, Cuomo and Schumer Announce Safer Guns Coalition Nearly Triples in Size to 190 Communities (April 27, 2000) (on file with author), *at* http://www.hud.gov/library/bookshelf18/pressrel/pr00-87.html.

248. *See* Agreement, *supra* note 28, §§ I-II.

249. The *Hamilton* plaintiffs ultimately prevailed only on their negligent distribution claims, but the case originally alleged products liability as well. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 843-46 (E.D.N.Y. 1999).

250. *See supra* Part V.A.

demonstrate insufficiency; the firearm Agreement failed to offer any evidence whatsoever to support such a claim.[251]

## VI. CONCLUSION—FUTURE DIRECTIONS

The effects of the Smith & Wesson Agreement on future law are being felt now. Already, the State of Maryland, using the purchasing power of buying firearms for police officers, has begun to pressure manufacturers to sign onto the Agreement brokered by Smith & Wesson, or to adopt a similar agreement.[252] Less than one month after the Agreement was signed, nearly seventy cities and municipalities had signed on to a "Pledge for Communities for Safer Guns," predicating future weapons purchases on manufacturers becoming party to the Smith & Wesson Agreement.[253] These initial steps suggested that the ultimate impact of the Agreement could be widespread. Perhaps the present demise of the Agreement in the Bush Administration ultimately suggests that it was a tool of policy, not law, from the very beginning.[254] Nevertheless, there is no reason to think that the more general discussion regarding the direction of gun control policy will end anytime soon.[255]

The use of the tort system as a response to injuries caused by negligent firearms manufacturers is still in nascent form.[256] Tort suits provide a primary channel of compensation for harms; regulation of firearms, while admirable, does not pay for hospital expenses, relieve pain and suffering, and may not even deter future conduct. Smith & Wesson may have considered self-regulation preferable to defense of

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251. The Agreement itself contained no references to the potential liability of gun manufacturers, noting only that the government agreed to "dismiss the manufacturer parties to the Agreement with prejudice from the lawsuits specified in Appendix A." Agreement, *supra* note 28, pmbl. ¶ 1.

252. Michael Dresser, *Maryland to Become First State to Require Internal Firearm Locks*, BALT. SUN, Mar. 25, 2000, at 1A. This troubling development suggests that the principles of herding may apply to the Agreement itself. The comparison is particularly apt, as smaller gun manufacturers may not bave the resources to comply with the terms of the Agreement in earnest. Thus, under the herding principle, an agreement meant to apply to the special factual considerations of Smith & Wesson, may be forced onto manufacturers whose capabilities vary greatly.

253. Purchases of weapons for police forces represent a sizeable percentage of gun manufacturers' total sales, and one of their few sources of legitimate repeat business. Police agencies are, of course, exempt from any restrictions barring the sale of multiple weapons to a single buyer. *See* Timothy McNulty, *Councilmen to Urge City to Join Gun Safety Pledge*, PITTSBURGH POST-GAZETTE, Apr. 24, 2000, at C2.

254. *See* Fields, *supra* note 35.

255. *See* Page, *supra* note 40.

256. *See* Lytton, *supra* note 7, at 10-32 (discussing progress and status of firearm negligence lawsuits).

individual suits, but that preference offers little comfort to those living with injuries caused in part by Smith & Wesson's negligence. Its sizeable portion of the market share[257] and the increasing judicial acceptance of individual tort suits[258] against gun makers make Smith & Wesson's capitulation to the Agreement a questionable attempt to sidestep liability. Using the principles implied in *Ortiz* and Rule 23 of the Federal Rules of Civil Procedure, courts should refuse to apply the Agreement against individual claimants. The Agreement reached between the government and Smith & Wesson should be considered an ill-advised attempt to bind settlement members absent from litigation.

The arguments against the Agreement, drawn from *Ortiz*, may simply be matters of policy, not law, now that the Agreement is a dead letter. The subsequent failure of the Agreement to remain in force may negate the need for a specific legal rationale to avoid enforcement. But the specific manner in which the Agreement died nevertheless speaks volumes about the shortcomings of private arrangements as a legislative tool, particularly when set into place by ever-changing presidential administrations. If passed as legislation, a subsequent administration could not have dismissed the Agreement as a "memorandum of understanding" not binding on the parties.[259] Perhaps the Agreement could have served some purpose if challenged to enforcement. Genuine efforts by Smith & Wesson to comply with its obligations might have suggested the feasibility of such measures in future legislation.

In light of these failures, it is important that the next step in the process of gun control policy is one that moves away from the negotiating table and back into a public forum. Democracy's core value is not efficiency; it is the right to participate in the way the laws shape and govern our lives. Privatization of public law impedes that goal. Existing public choice theory suggests that legislation and litigation can continue to be fruitful avenues for future discourse and resolution of these issues; *Ortiz* keeps at least one of those avenues open by providing the judicial tools to set aside the Agreement, if ever pushed to enforcement, as justice dictates.[260]

The lobbying climate suggests that previous obstacles to meaningful legislation are no longer as steadfastly in place. The still viable rationale from *Hamilton*, as animated by the theory of herding,

257. More recent reports place Smith & Wesson's market share at approximately nineteen percent. Editorial, *Crack in the Gun Wall*, L.A. TIMES, Mar. 21, 2000, at B6.

258. *See supra* note 24 and accompanying text.

259. *See supra* note 35 and accompanying text.

260. *See supra* Part V.

provides a positive prediction for the continued role of the judiciary in the debate.[261] As long as these troubling public issues remain on the table, they should be debated and resolved in public institutions. Although private agreements can provide a fast track to change, that change takes place without the deliberation and safeguards contained in the legislative process. Privatization legitimizes the choice to ignore important outside voices, especially those that the negotiating parties consider unpleasant or simply too costly to listen to. It can serve as a signal for future roads to take, but it should not do so at the expense of closing down others.

*Charles C. Sipos*[*]

261. The legal rationales from *Hamilton* appear still to be in use, albeit sparsely. Most recently, an appellate court in Illinois sustained a public nuisance cause of action by plaintiff families whose relatives were killed by firearms manufactured by the various defendants. *See* Young v. Bryco Arms, No. 98 L 6684, 2001 WL 1665427, at *14 (Ill. App. Ct. 2001). Smith & Wesson was among the named defendants. *Id.*

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