

## IS THERE A “SECOND AMENDMENT RIGHT TO BE NEGLIGENT”?

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### INTRODUCTION

Professor McClurg’s thesis is that courts and Congress have either ignored, misapplied, or overridden general tort principles of duty and proximate cause to insulate from civil liability those who negligently store firearms despite what he sees as the eminently foreseeable harm that occurs if those firearms are stolen and later used in crimes.<sup>1</sup> He argues that this “irrational . . . choice”<sup>2</sup> not to hold those gun owners liable is driven by an “unwarranted deference to expansive views of the Second Amendment”<sup>3</sup> and is tantamount to the recognition of a “right to be negligent.”<sup>4</sup> Only the First Amendment confers on private citizens a similar right in certain cases.<sup>5</sup>

In this brief commentary, I want to push back on his explicit premises, namely, that the Second Amendment is in the driver’s seat here, and that—assuming the Second Amendment *is* exerting some kind of gravitational pull on tort law—the unwillingness to hold gun owners liable for the criminal acts of others is irrational. Rather than framing the issue as one of judges and legislators willfully ignoring generally-accepted principles of civil liability, I would argue that courts and legislators have merely created an exception reflecting societal judgments about the value of private gun ownership and the possible consequences to gun owners were tort law permitted indirectly to do what the Second Amendment bars government from doing directly: make it difficult, if not impossible, for individuals to own guns for self-defense.<sup>6</sup>

Part I of this commentary examines the evidence Professor McClurg marshals in support of his Second Amendment right-to-be-negligent thesis. Part II highlights what I see as contradictions, or at least tensions, in his argument based on the evidence he cites. In Part III, I argue that if

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1. Andrew Jay McClurg, *The Second Amendment Right to be Negligent*, 68 FLA. L. REV. 1, 3–5 (2016).

2. *Id.* at 47.

3. *Id.* at 46.

4. *Id.* at 3.

5. *Id.* at 2–3.

6. See *McDonald v. Chicago*, 561 U.S. 742, 791 (2010); *Heller v. District of Columbia*, 554 U.S. 570, 636 (2008).

the Second Amendment is playing a role in the reluctance to impose civil liability on gun owners, such curbs are not only rational, given the Court's recognition of an individual right to keep and bear arms, but may be *required* as a necessary anti-evasion doctrine to prevent regulation by litigation. Indeed, the pre-*Heller v. District of Columbia*<sup>7</sup> passage of the Protection of Lawful Commerce in Arms Act<sup>8</sup> (PLCAA) by Congress in 2005 is suggestive that the legislative branch was alert to the dangers posed by civil litigation to the Second Amendment.<sup>9</sup> A brief conclusion follows.

### I. THE EVIDENCE

Several hundred thousand guns are stolen from private residences and from commercial dealers every year.<sup>10</sup> As Professor McClurg notes, “[b]y definition, all stolen guns go directly to criminals,”<sup>11</sup> and a number of them are later used in crimes.<sup>12</sup> Owners often resist securing their guns for fear that “a secured firearm will be unavailable for self-defense when needed,”<sup>13</sup> despite what he characterizes as a lack of hard data suggesting that large numbers of gun owners have been harmed when they were unable to access a secured weapon to defend themselves.<sup>14</sup> Professor McClurg includes an anecdote from one of his students who admitted leaving a loaded, unsecured pistol on his dresser in an apartment complex that experienced frequent break-ins.<sup>15</sup> And yet, courts are reluctant to hold gun owners liable for what Professor McClurg sees as the entirely foreseeable consequences of their carelessness. This reluctance results in what he terms the “right to be negligent.”

One dimension of the “right to be negligent” is what Professor McClurg terms the law’s “[i]mprimatur [t]hrough [i]naction,” meaning that legislatures at the federal and state level have failed “to affirmatively demand reasonable conduct via statutes or regulation” when it comes to securing firearms against theft.<sup>16</sup> While federal law “requires all gun makers and sellers to furnish ‘a secure gun storage or safety device’ with

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7. 554 U.S. 570 (2008).

8. Pub. L. 109-92, 119 Stat. 2095 (2005) (codified as amended at 15 U.S.C. §§ 7901-7903 (2012)).

9. 15 U.S.C. § 7901(a) (2012).

10. See Brian Freskos, *Up to 600,000 Guns are Stolen Every Year in the U.S.—That’s One Every Minute*, GUARDIAN (Sept. 21, 2016), <https://www.theguardian.com/us-news/2016/sep/21/gun-theft-us-firearm-survey>.

11. McClurg, *supra* note 1, at 13.

12. *See id.*

13. *Id.* at 14.

14. *See id.* at 14 & n.57.

15. *Id.* at 42–43.

16. *Id.* at 17.

the sale of any handgun,” nothing requires the buyer to use it.<sup>17</sup> Only about half the states make it a crime to negligently store weapons “in the event a child . . . gains access to the weapon and uses it to cause harm to herself or another.”<sup>18</sup> And “[o]nly nine states and the District of Columbia have laws imposing security restrictions on gun dealers.”<sup>19</sup>

A second dimension is “[i]mprimatur [t]hrough [a]ction,”<sup>20</sup> in which “the common law and statutory law have bolstered the right to be negligent in allowing guns to get into the hands of dangerous, unauthorized users.”<sup>21</sup> State courts routinely invoke proximate cause and duty to shield owners and sellers from liability for what Professor McClurg argues is negligent conduct were anyone else to engage in similar conduct with any other dangerous instrumentality—by leaving the keys in a car that is later stolen and involved in an accident, for example.<sup>22</sup> This insulation from liability exists despite tort law’s general recognition “that the magnitude of the danger presented by firearms requires one handling or caring for them to exercise the highest degree of care.”<sup>23</sup> Through decisions that owners owe no duty to victims of crimes committed with stolen guns or that the owners’ careless storage was not the proximate cause of a victim’s injury, moreover, the issue of liability is taken out of a jury’s hands and decided as a matter of law.

In addition, Congress passed the 2005 Protection of Lawful Commerce in Arms Act (PLCAA),<sup>24</sup> which included the Child Safety Lock Act. The latter, as noted above, required sellers of handguns to provide child safety locks with each gun sold, but did not mandate their use; but, if used, the law provided the owner with “absolute tort immunity in state and federal courts for criminal harm caused by an unauthorized user who gains access to the firearm.”<sup>25</sup> Professor McClurg, however, observes that merely childproofing a gun does little to ensure that it won’t be stolen.<sup>26</sup>

Among the PLCAA’s provisions is a categorical bar of “claims of negligent security against [Federal Firearms Licensees] for harm resulting from a stolen gun.”<sup>27</sup> The only exception to that immunity for commercial dealers is where the seller “‘knowingly violated a state or

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17. *Id.* at 18 (footnote omitted).

18. *Id.* at 18–19.

19. *Id.* at 20.

20. *Id.* at 21.

21. *Id.*

22. *Id.* at 21–37, 45 & n. 250.

23. *Id.* at 22.

24. For an extensive discussion of the PLCAA, the scope of its immunity, and the limited exceptions therefrom, see MCCLURG & DENNING, *supra* note \*, at 359–417.

25. McClurg, *supra* note 1, at 31.

26. *See id.*

27. *Id.* at 36.

federal statute applicable to the sale or marketing' of firearms and the violation was a proximate cause of the harm."<sup>28</sup> As noted above, only a handful of jurisdictions have statutes that would trigger that exception.<sup>29</sup>

Throughout the article, Professor McClurg insists that "unwarranted deference to expansive views of the Second Amendment" is responsible for this state of affairs.<sup>30</sup> The alleged right to be negligent is "directly shown by the PLCAA," which recites in its findings the need to protect the Second Amendment from regulation through litigation.<sup>31</sup> While that was undoubtedly at the forefront of the PLCAA's supporters concerns, he is equally adamant that the same concern for the Second Amendment explains the results in common law cases as well.<sup>32</sup> Professor McClurg cites a 1999 case in which a friend of the defendant's sixteen-year-old daughter stole an unsecured gun from the defendant's home.<sup>33</sup> The court dismissed the action, citing the debate over the private ownership and storage of guns.<sup>34</sup> Professor McClurg, however, concludes that reference "inescapably implicates the Second Amendment," despite its not being mentioned explicitly.<sup>35</sup>

Later, he discusses a Connecticut case in which (again) a male friend of the defendant's daughter stole the defendant's unsecured handgun and used it to commit murder.<sup>36</sup> The court found no liability because the defendant had no reason to think the friend was dangerous.<sup>37</sup> This is incorrect because the proper focus, argues Professor McClurg, ought to be whether it was foreseeable that an improperly stored gun creates the foreseeable risk it will be stolen and used in a crime.<sup>38</sup> Responding to that argument, which the plaintiff made, the court demurred, expressing doubt that society was likely to accept the imposition of civil liability on gun owners for criminal acts committed with their stolen guns.<sup>39</sup> For Professor McClurg, the reference to what society is likely to tolerate was

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28. *Id.* at 37.

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

30. McClurg, *supra* note 1, at 46.

31. *Id.* at 8; *see also* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 312-13 (2016) ("Statutes like the PLCAA—accompanied as they are by Second Amendment justifications—tend to accentuate the public nature of state tort law, as opposed to the understanding of tort law as private ordering or restorative justice.") (footnote omitted).

32. McClurg, *supra* note 11, at 24 ("While . . . the cases do not directly invoke the Second Amendment, it is the most viable explanation underlying the refusal to evaluate the reasonableness of conduct leading to gun thefts.") (footnote omitted).

33. *See id.* at 29.

34. *See id.*

35. *Id.* at 29.

36. *See id.* at 30.

37. *See id.*

38. *See id.* at 30.

39. *See id.*

the tell: "When a court rejects tort liability in a gun case not because of principles of tort law but because of what the court believes society is prepared to accept, it is hard to escape the conclusion that the court is deferring to notions of perceived Second Amendment rights."<sup>40</sup> But again the Second Amendment was not explicitly referenced in the opinion and arguments that its principles were doing work rely on inference.

## II. QUESTIONING THE "RIGHT TO BE NEGLIGENT" THESIS

Two immediate questions arise about Professor McClurg's assertion that the Second Amendment is responsible for the "right to be negligent." The first has to do with the lack of direct evidence in the state court cases that the judges had the Second Amendment on their minds. The second concerns his characterization of the court decisions as having abandoned or misapplied traditional tort principles in deciding the cases the way they did.

Professor McClurg concedes that the Second Amendment is never mentioned in the common law cases directly, but says that is understandable, given it was only recognized to protect an individual right in the 2008 *Heller* decision and only extended to state and local governments in 2010.<sup>41</sup> But those facts seem to me to create a problem for his "right to be negligent" thesis. It was accepted wisdom among judges, pre-*Heller*, that the Second Amendment guaranteed no judicially-enforceable, individual right.<sup>42</sup> Given that, and the fact that courts never mention it explicitly in their opinions, it seems difficult to attribute to the Second Amendment the kind of effect on duty and causation that the First Amendment had on the state law of defamation that the Supreme Court recognized in *New York Times v. Sullivan*.<sup>43</sup> If "courts correctly assumed that the Second Amendment had no application to state tort law,"<sup>44</sup> then how can Professor McClurg confidently conclude that, in fact, it was *the Second Amendment* driving all of these decisions conferring immunity on gun owners for the criminal acts of third parties who misused their stolen guns?<sup>45</sup>

The second question I have concerns his repeated assertions that in relieving owners of liability for negligence when unsecured guns are

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40. *Id.*

41. *See id.* at 9 (noting that until 2010 "courts correctly assumed that the Second Amendment had no application to state tort law").

42. Federal courts—erroneously in my view—cited the U.S. Supreme Court's decision in *Miller v. United States*, 307 U.S. 174 (1939), as dictating this conclusion. *See generally* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996).

43. 376 U.S. 254 (1964).

44. McClurg, *supra* note 1, at 9.

45. Several of the cases he cites, moreover, were decided in jurisdictions—like Connecticut—that are not especially gun-friendly.

stolen and used in crimes, that courts “ignore[d] or mischaracterize[d] fundamental scope of liability principles”<sup>46</sup> like duty and proximate cause. Early in the article, Professor McClurg notes that “[b]oth duty and proximate cause are pure policy determinations and are two ways of asking the same question: as a matter of fairness and public policy, should the law extend tort liability in the particular circumstances at issue?”<sup>47</sup> If duty and proximate cause are, at bottom, labels we give policy determinations and not Platonic ideals, then the conclusion that he draws—that the courts had to distort the law to reach their decisions, resulting in a “right to be negligent”—seems puzzling. How *can* the courts distort principles whose content is dictated by judgments about where liability ought to lie when judges determine that liability does or does not exist based on implicit, if un- or under-articulated, policy judgments? That so few legislatures have stepped in to impose duties where courts have not suggests that the state courts have correctly intuited that the public prefers that even gun owners who carelessly store their guns at home should *not* be subject to possible tort liability when those guns are stolen and later used to commit crimes.

If, as he suggests at one point, the objection is that judges are making these determinations as matters of law, without a jury passing judgment on the reasonableness of defendants’ conduct, a Minnesota case he mentions toward the end of the article suggests that judges have by and large correctly intuited what *juries* would do when presented with the question.<sup>48</sup> Professor McClurg discusses the case of *Gordon v. Hoffman*,<sup>49</sup> in which “the Minnesota Supreme Court refused to overturn

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46. *Id.* at 4–5; *see also id.* at 9 (describing the decisions as having “giv[en] a free pass to gun possessors to exercise unreasonable care in safeguarding the most dangerous product”); *id.* at 26 (criticizing the D.C. Circuit for having “misapplied fundamental scope of liability issues” in affirming a JNOV in *Romero v. Nat’l Rifle Ass’n of America, Inc.*, 749 F.2d 77 (D.C. Cir. 1984)); *id.* at 28 (criticizing the Montana Supreme Court in *Strever v. Cline*, 924 P.2d 666 (Mont. 1996), for having “erred in focusing on the foreseeability of the precise chain of events rather than the general foreseeable risk of leaving a loaded gun in an unlocked vehicle on a public street” where it was stolen by a group of boys, one of whom accidentally discharged it while trying to remove the magazine and killed an eleven-year old); *id.* at 30 (arguing that the court’s decision in *Holden v. Johnson*, No. CV010811660, 2005 WL 1153739 (Conn. Super. Ct. Apr. 15, 2005), which found no liability in the case of an unsecured gun stolen by male friend of defendant’s daughter who later used it to commit murder did so “not because of principles of tort law”); *id.* at 34 (arguing that courts refusing to hold liable commercial sellers for failure to safeguard inventories against theft do so either by “traveling down the same wrong scope of liability path described” in cases involving thefts from homes or “by distorting the nature and breadth of the duty entailed in practicing reasonable gun security”); *id.* at 35 (arguing that the Maryland Court of Appeals relieved gun store owner of liability by “exaggerating the nature of the burden and duty in negligent storage cases”).

47. *Id.* at 23–24 (footnote omitted).

48. *See id.* at 45.

49. 303 N.W.2d 250 (Minn. 1981).

a jury verdict that found no liability on the part of a gun owner who left an unsecured, loaded rifle in a house occupied only by his fifteen-year-old daughter and several unrelated younger children . . . for whom she was babysitting.”<sup>50</sup> The younger children scuffled over a gun, which discharged, killing the plaintiff’s five year old.<sup>51</sup>

The jury concluded that while “the defendant was negligent . . . the ‘negligence was not a direct cause’ of the injury.”<sup>52</sup> This jury verdict was left standing despite the fact that the law in Minnesota was that “foreseeable intervening causes, even criminal acts, do not break the chain of causation.”<sup>53</sup> The jury verdict, Professor McClurg speculates, reflected either an underestimation of probability on jurors’ part that unsecured guns will be stolen and misused or that they “did not care about it one way or another based on a belief that people should not bear responsibility to lock up their guns.”<sup>54</sup> The jury’s verdict suggests strongly that judges who find no duty or a lack of proximate cause aren’t out of step with juries whose members too display a similar reluctance to impose liability on gun owners. If either judges or juries were out of step with the *zeitgeist*, one might also expect to see legislatures impose duties that courts did not.

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It is certainly not wild speculation to think that American attitudes towards private gun ownership affect judges’ and jurors’ views regarding the duties of gun owners and the circumstances under which they should be liable when their guns are stolen and used to harm others. But I am skeptical that the Second Amendment drives the outcomes of the cases in the same way that the First Amendment curbed the operation of state defamation claims in *Sullivan*, especially since most of the cases he mentions pre-date *Heller* and *McDonald* when judges assumed uncritically that there was no constitutional dimension to the gun control debate. But perhaps I am reading Professor McClurg too literally and what he means is that our unique gun culture, which views private gun ownership favorably—a view shaped no doubt by the inclusion of a right to keep and bear arms in the Bill of Rights—exerts a particular pull on legislators and judges. To concede that, however, is only to acknowledge that law often expresses the norms and values of the culture that creates it.

I also wonder about his framing the issue as “the right to be negligent.”

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50. McClurg, *supra* note 1, at 45.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

If I understand him—and tort law is not an area in which I claim any expertise—negligence elements like duty and proximate cause are largely policy constructs. If that’s true, then rather than a right to be negligent, the reluctance to impose civil liability even where gun owners were less than careful resulting in having their guns stolen, seems to reflect a policy judgment that we don’t hold them liable for the criminal acts of others in these cases. If that is a “right” to be negligent, then *any* finding that a defendant’s actions were not the proximate cause of the plaintiff’s injury or that the defendant owed the plaintiff no duty could be similarly characterized.

Professor McClurg views this “choice to confer near complete immunity from responsibility”<sup>55</sup> on even “grossly negligent defendants”<sup>56</sup> not only “simply unwise”<sup>57</sup> but “irrational”<sup>58</sup> because it does not impose duties “on the most efficient cost-avoider in the equation.”<sup>59</sup> In the next section, I suggest that there is nothing irrational about this choice and argue that even if the evidence Professor McClurg presents is thin, perhaps that we *ought* to explicitly consider Second Amendment principles when questions of civil liability for gun owners arise, especially now that the Second Amendment is part of what Professor Glenn Reynolds and I have termed “normal constitutional law.”<sup>60</sup>

### III. SHOULD CIVIL LIABILITY FOR GUN OWNERS BE LIMITED BY THE SECOND AMENDMENT?

Adopting a risk-utility model for negligence—a version of which was famously articulated by Judge Learned Hand in his celebrated *Carroll Towing Co.* decision<sup>61</sup>—Professor McClurg argues that exempting gun owners from civil liability for negligent storage is irrational because the burden on defendants to store guns safely is much less than the probability the gun will be stolen and used in a crime and the damage to life and limb that such crimes cause will occur.<sup>62</sup> As noted above, Professor McClurg attributes this reluctance to impose liability on an excessive regard for the right to keep and bear arms.

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55. *Id.* at 47.

56. *Id.* at 46.

57. *Id.* at 47.

58. *Id.*

59. *Id.*

60. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 274 (2011).

61. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *see also* DAN B. DOBBS, *THE LAW OF TORTS* 340–41 (2000).

62. Recall that under Hand’s formula, conduct was negligent if the burden of precaution (B) was less than the damage (L) multiplied by its probability (P). Thus the “Hand formula”:  $B < PL$ . *See* DOBBS, *supra* note 61, at 341.

Despite my skepticism, let's assume for the sake of argument that the Second Amendment broods omnipresently over these decisions. Why shouldn't it play a limiting role, just as the First Amendment famously limited the scope of defamation in *New York Times v. Sullivan*? Professor McClurg spies a "crucial distinction"<sup>63</sup> between the First and Second Amendments: "Most restrictions on speech run afoul of the First Amendment, but nothing in the history nor jurisprudence of the Second Amendment suggests, much less guarantees, a privilege by gun sellers and owners to act unreasonably in securing firearms from theft."<sup>64</sup> It's not entirely clear what he means by this statement; but I take it to mean that both historically and doctrinally the First Amendment offers more protection to speech than the Second Amendment offers to the right to keep and bear arms. Given that the Court's First Amendment jurisprudence is close to a century old and the Supreme Court began giving content to the Second Amendment only in 2008, his is not exactly an apples-to-apples comparison. Even so, Professor McClurg's characterization of the scope of the First Amendment is not quite accurate either as a matter of history or constitutional doctrine.

First, though this continues to be debated,<sup>65</sup> revisionist historians beginning with Leonard Levy have argued that the First Amendment likely intended to reach no further than prohibiting seditious libel.<sup>66</sup> However, by the time the Fourteenth Amendment was adopted, it is clear that "if the framers [of the Fourteenth Amendment] intended to protect any substantive rights at all, freedom of speech was probably one of them" given the antebellum controversies surrounding attempts to debate the issue of slavery.<sup>67</sup> Even so, whatever the intended reach of the First Amendment in either 1791 or 1868 beyond mere prohibition of seditious libel, as late as the 1950s the Court confidently listed "the libelous" among the "classes of speech" whose "prevention and punishment . . . have never been thought to raise any Constitutional problem."<sup>68</sup>

That changed in 1964 when the Supreme Court, in *New York Times v. Sullivan*, held at the urging of *Times* attorney and Columbia professor Herbert Wechsler that "libel can claim no talismanic immunity from constitutional limitations" and "must be measured by standards that

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63. McClurg, *supra* note 1, at 10.

64. *Id.*

65. A nice summary of the emergence of the First Amendment as a special concern of the judiciary can be found in DANIEL A. FARBER, *THE FIRST AMENDMENT* 10–15 (4th ed. 2014).

66. *See generally, e.g.*, LEONARD W. LEVY, *LEGACY OF SUPPRESSION* (1960). It should be noted, however, that Dean Levy later argued that the intent was for broader protection for speech and the press. *See generally* LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

67. FARBER, *supra* note 65, at 13.

68. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *see also* *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (observing that "[l]ibelous utterances [are not] within the area of constitutionally protected speech").

satisfy the First Amendment.”<sup>69</sup> Thus did defamation cease to be the exclusive province of torts and was ushered into that “Valhalla of the law school curriculum,” constitutional law.<sup>70</sup> “In one stroke, the Supreme Court turned the previously unprotected domain of libel into an area of core First Amendment concern, federalizing an entire field of state tort law,”<sup>71</sup> ignoring 400 years of libel law including the Court’s own 170 year track record of holding that “libelous utterances were not within the protection of the First Amendment.”<sup>72</sup> Henceforth, for better or for worse, public officials and, later, “public figures”<sup>73</sup> had to demonstrate actual malice to recover for alleged reputational damage.<sup>74</sup>

Only by *ignoring* history, then, did the *Sullivan* Court ensure that civil liability posed no threat to criticism of public officials and that debate on public issues would remain “uninhibited, robust, and wide-open” including, possibly, “vehement, caustic, and . . . unpleasantly sharp attacks on government and public officials.”<sup>75</sup> If there is a reason to differentiate between the First and Second Amendments when it comes to the existence of a “right to be negligent,” that difference cannot be laid at history’s doorstep.

Nor does doctrine compel differential treatment either. It is inaccurate to say that “most” restrictions on speech “run afoul of” the First Amendment.<sup>76</sup> There are still classes of speech—incitement,<sup>77</sup> true threats,<sup>78</sup> obscenity,<sup>79</sup> child pornography,<sup>80</sup> fighting words,<sup>81</sup> and untrue or misleading commercial speech<sup>82</sup>—that receive no First Amendment protection whatever.<sup>83</sup> Even content-based regulations of speech are permissible if the government can demonstrate that the regulation is

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69. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

70. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 192.

71. FARBER, *supra* note 65, at 93.

72. David A. Anderson, *Wechsler’s Triumph*, 66 ALA. L. REV. 229, 232 (2014).

73. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967).

74. For a summary of *Sullivan* and its progeny, see FARBER, *supra* note 65, at 89–105. For an argument that the Court got it wrong, see Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

75. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

76. McClurg, *supra* note 1, at 10.

77. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

78. See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

79. See *Miller v. California*, 413 U.S. 15, 36 (1973).

80. See *New York v. Ferber*, 458 U.S. 747, 774 (1982).

81. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

82. See *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

83. See *Blocher & Miller*, *supra* note 31, at 325–26 (making the same observation).

narrowly tailored to a compelling governmental interest.<sup>84</sup> As noted, moreover, defamation was among those classes not covered, until the Supreme Court held that it was.

At bottom then, Professor McClurg's claim is a normative one (as opposed to one compelled by history or doctrine): that insulating gun owners from civil liability when they do not secure their guns and those guns are stolen lacks rationality given that gun owners are, by the lights of the risk-utility school of tort theory, the least cost avoiders. I would offer two related arguments in favor of a Second Amendment right to be negligent.

First, I think that risk utility balancing fails to give sufficient weight to the constitutional right at issue<sup>85</sup> and might even be foreclosed by the choices made by the Court in *Heller* itself. Second, I think that insulating gun owners from civil liability at least where there are third party criminals involved functions as a valuable anti-evasion doctrine that could prevent indirect forms of gun control imposed by the tort system.<sup>86</sup>

Doctrinally, Second Amendment case law has developed along lines parallel to First Amendment doctrine. Certain classes of firearms regulation (bans on possession by felons, for example) are presumed to be constitutional, just as certain types of speech regulation are thought to present no particular Second Amendment problem; those regulations that strike at the core of the right recognized in *Heller* and *McDonald* receive intermediate scrutiny.<sup>87</sup>

Lower courts' adoption of intermediate scrutiny occurred largely because the Court, though it did not explicitly adopt a standard of review in Second Amendment cases in *Heller* or *McDonald*, signaled that neither rational basis review nor interest balancing was appropriate, because both under-enforced the right to keep and bear arms.

In *Heller*, Justice Breyer argued that the rights of gun owners ought to be weighed against the interests of government in preventing gun crime. "[W]here a law significantly implicates competing constitutionally protected interests in complex ways," he argued, the proper question was "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."<sup>88</sup> In response, Justice Scalia wrote

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84. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010). Content neutral restrictions on speech are subject to the more deferential "intermediate scrutiny" standard of review. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

85. See Blocher & Miller, *supra* note 31, at 348 ("As with free speech, the right to keep and bear arms could have some kind of intrinsic value—one that is rooted in an individual right to personal autonomy.").

86. For a discussion of indirect burdens on the right to keep arms, see generally Blocher & Miller, *supra* note 31.

87. See MCCLURG & DENNING, *supra* note \*, at 130–83.

88. *District of Columbia v. Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

that there existed “no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>89</sup> Interest-balancing, in other words, gave insufficient weight to the right to keep and bear arms *qua* right; rather it treated the individual right as merely one interest that could be traded off against other competing interests, like the prevention of crime.

This rejection of balancing in Second Amendment cases is reminiscent of a similar reaction against the clear-and-present-danger test when judicial protection of free speech just coming into its own. In *Dennis v. United States*,<sup>90</sup> the Court upheld the convictions of the Communist Party U.S.A.’s leadership under the federal Smith Act, which, inter alia, made it a crime to advocate the overthrow of the government by force.<sup>91</sup> Relying on a lower court opinion by Learned Hand, whose formulation of the clear-and-present danger test echoed Hand’s *Carroll Towing* decision, Chief Justice Vinson held that in the context of the case, “clear and present danger” meant that “[i]n each case (courts) must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>92</sup> The Court concluded that the danger posed by communism was serious enough that, though a successful attempt to overthrow the U.S. government was unlikely, the defendants could be punished for their advocacy. “If the ingredients of the reaction are present,” the Court wrote, “we cannot bind the Government to wait until the catalyst is added.”<sup>93</sup>

*Smith*’s version of the clear-and-present danger test was roundly criticized. Generally, the balancing endemic to whatever version of the clear-and-present danger test was employed (but especially Hand’s version) gave “government or courts the power to weigh the governmental interest or the social value of speech against the liberties of the speaker or the audience” thus shrinking “the First Amendment’s aegis

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89. *Id.* at 634. He also rejected rational basis as an appropriate standard of review, agreeing with Justice Breyer that the law at issue “like almost all laws, would pass rational-basis scrutiny,” but observing that “[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” *Id.* at 628 n.27.

90. 341 U.S. 494 (1951).

91. *See id.* at 496, 517.

92. *Id.* at 510, 513.

93. *Id.* at 511; *see also id.* at 509 (“Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited.”).

for free thought.”<sup>94</sup> In so doing, it “reduced discourse from a right to a conditional privilege.”<sup>95</sup> One commentator observed that under balancing “no facet of speech, press, or assembly is protected if the intensity of the governmental interest is deemed ‘on balance’ to override the private values in opposition.”<sup>96</sup> The *Dennis* version of the clear-and-present danger was relaxed after 1951,<sup>97</sup> and eventually interred in all but name two decades later *Brandenburg v. Ohio*.<sup>98</sup>

The risk-utility standard that Professor McClurg argues might result in the imposition of liability on some gun owners if cases made it to a jury resembles the sort of interest balancing that the *Heller* Court rejected when it comes to direct governmental regulation of gun ownership. Insofar as risk-utility balancing a la *Carroll Towing* reflects a similar balancing of interests, as it surely does, it is open to a similar critique. The formula accords no special weight for burdens placed on constitutional rights and assume that the right itself is simply one interest among many to be considered against the costs its exercise generates for society at large. As Justice Scalia observed, however, the enumeration of a right, and the regard we have for rights as trumps, signal a willingness to endure a certain level of social costs associated with the exercise of that right.<sup>99</sup>

In addition to undervaluing the right *qua* right, I think that Professor McClurg only incompletely calculates the “burden” side of the equation, or at least discounts it heavily. All things being equal, he argues, the gun owner is the least cost avoider because guns can be secured at relatively little cost compared with the chance that they’ll be stolen and used to harm others.<sup>100</sup> He dismisses arguments that gun owners who fear that securing their guns when not in their actual possession and control might result in those guns being unavailable for self-defense should the need arise.<sup>101</sup> But if the threat of civil liability leaves gun owners no choice but to secure their guns, what of the psychic costs to gun owners who are thereby left feeling vulnerable? Is that not an additional burden that

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94. 12 WILLIAM M. WIECEK, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 164 (2006).

95. *Id.*

96. Frank R. Strong, *Fifty Years of “Clear and Present Danger”*: *From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 58.

97. FARBER, *supra* note 65, at 73–74.

98. 395 U.S. 444 (1969) (per curiam); RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 51 (2nd ed. 2013) (observing that *Brandenburg* “effectively swept away” the clear-and-present danger test).

99. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

100. McClurg, *supra* note 1, at 35–36.

101. *See supra* note 14 and accompanying text.

should be accounted for? Moreover, if costs are calculated across the entire population, shouldn't the collective burdens associated with disarming whatever portion of gun owners who would be deterred by the prospect of civil liability from even owning guns also be considered in the equation?

Second, I think that the reluctance to impose civil liability—which could result in a kind of regulation through litigation—is akin to “anti-evasion doctrines” that courts construct to frustrate formal compliance with constitutional principles which undermine the spirit of those principles.<sup>102</sup> The Congress that enacted the PLCAA recognized that the danger posed by municipal marketing and distribution litigation to gun manufacturers and retailers indirectly threatened individuals’ Second Amendment rights.<sup>103</sup> The right to keep and bear arms would face a similar indirect threat if gun owners were regularly subjected to liability for misdeeds committed with their stolen guns.<sup>104</sup> One could easily imagine a determined campaign by gun control advocates to search far and wide for sympathetic plaintiffs whose cases—were they able to get the question before juries—might gradually expand the scope of liability for gun owners. Just as the NAACP brought a series of cases that built towards the argument that separate could never be equal,<sup>105</sup> it is not inconceivable that gun control activists would seek rulings in state courts that because theft of weapons was a persistent threat, gun owners should be strictly liable for possessing weapons in the home, however well they might seem to be secured.

## CONCLUSION

Professor McClurg performs a valuable service by highlighting the way that private and public law norms interact. His article is a useful

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102. See Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1776; see also Brannon P. Denning, *Anti-Evasion Doctrines and the Second Amendment*, 81 TENN. L. REV. 551, 553 (2014).

103. Professor McClurg implies that there is something illegitimate or aberrant about the PLCAA’s passage. But enacting statutes to reverse courts’ common law decisions is hardly unknown. A number of jurisdictions, for example, enacted medical malpractice statutes out of concern that tort verdicts were increasing insurance premiums, causing doctors to cease practice, and contributing to a rise in “defensive medicine.”

104. Blocher & Miller, *supra* note 31, at 321, observe that “‘private gun control,’ enforced through civil suits rather than through criminal sanctions, raises novel and important issues for the Second Amendment and for the gun debate more generally.” They go on to note that such incidental burdens on ownership that accompany regulation through the tort system “are likely to be especially important in jurisdictions where courts and legislatures have eliminated traditional gun control. The rollback of state gun control laws magnifies the significance of private ordering, as individuals fill the regulatory void by negotiating with one another regarding guns and their use.” *Id.*

105. See generally RICHARD KLUGER, *SIMPLE JUSTICE* (1975) (detailing the history of the litigation leading up to *Brown v. Board of Education*).

reminder that the exercise of constitutional rights entail the incursion of social costs. Even if legislators, judges, and juries are considering the Second Amendment when making determinations of civil liability—and I'm skeptical based on the evidence he presents—that is no more irrational than it was for the *Sullivan* Court to consider the effects of defamation on the exercise of First Amendment rights.