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INTRODUCTION

In late October 2005, while most political and legal observers concentrated on a flurry of headline-grabbing news from the Iraq War, the aftermath of Hurricane Katrina, and the replacement of two Justices of the Supreme Court, a landmark piece of tort reform legislation was passed by Congress and signed into law by President Bush.[2] The law, known as the Protection of Lawful Commerce in Arms Act ("PLCAA"),[3] prohibits "qualified civil liability actions" against firearms manufacturers in state or federal courts.[4] Congressional supporters, the White House, and firearms manufacturers hailed the passage of the Act as an important step in the elimination of frivolous lawsuits aimed at holding firearms manufacturers liable when their weapons were used in the commission of criminal acts.[5] Opponents of the firearms industry were as forceful in their criticism of the bill as supporters were in offering praise, claiming the law would deprive municipalities and gun violence victims of a necessary remedy for the injuries inflicted by the violent use of firearms.[6] Adding urgency to the controversy was a provision of the Act requiring immediate dismissal of pending suits against gun makers in state and federal courts.[7] Defendant firearms manufacturers in these

1 J.D. expected 2007, University of Kentucky College of Law; B.A. 2004, Western Kentucky University. The author wishes to thank Stephanie and his parents for their constant love and encouragement.

2 Press Release, White House, Statement on S. 397, the "Protection of Lawful Commerce in Arms" Act (Oct. 26, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/10/20051026-1.html [hereinafter Press Release, S. 397].

3 Protection of Lawful Commerce in Arms Act, 15 U.S.C.A. §§ 7901–03 (West Supp. 2006).

4 *Id.*

5 *See* Bill Sargent, *Shooting Interests Praise Act*, FLA. TODAY, Oct. 28, 2005, at D2; Charlene Carter & Seth Stern, *S397—Protection of Lawful Commerce in Arms Act*, CONG. Q. BILLANALYSIS (2005), 2005 WLNR 17714782; Press Release, S. 397.

6 *See* Lisa Friedman, *Families Blast Gun-Act Vote: Kin of '99 Shooting Victims Say Makers Shouldn't Be Shielded*, DAILY NEWS OF L.A., Oct. 21, 2005, at N4; Timothy D. Lytton, *Gun Bill a Messy Mix of Law, Politics*, ALB. TIMES UNION, Oct. 27, 2005, at A13.

7 15 U.S.C.A. § 7902(b) (West Supp. 2006).

suits immediately began moving for dismissal.[8] Faced with the potential loss of pending claims, plaintiffs and gun control groups began formulating various challenges to the law.

Opponents of the Act alleged that it was unconstitutional in that it violates separation of powers between the legislature and the judiciary and contradicts federalism principles governing the relationship between the states and the federal government.[9] Specifically, section 7902(b) of the Act, calling for the immediate dismissal of pending suits, was viewed as an encroachment on the power of the judiciary to decide cases. Furthermore, the bill as a whole was viewed as contrary to principles of federalism by providing manufacturers with immunity under tort law, traditionally an area of state concern.

This Note will focus on the challenges to the Act that are based on separation of powers principles.[10] Part I provides a brief history of litigation against the firearms industry, focusing primarily on the municipal and crime-victim litigation that was the major impetus for the Act's passage, and offers an overview of the provisions of the Act that have led to the questioning of its constitutionality.[11] Part II will examine the separation of powers issue between the judiciary and the legislature that is implicated by the law's requirement that courts dismiss pending suits.[12] Part III will focus on the issue of whether the law is a valid exercise of congressional power under the Commerce Clause.[13] Part III will also emphasize the importance of court composition, both in the context of a case addressing the PLCAA's constitutionality and on the Supreme Court, where the principal architects of the "new federalism" jurisprudence have been replaced by newcomers. Parts II and III will pay particular attention to two recent decisions which examine the constitutionality of the PLCAA. These cases, *City of New York*

8 *See* William Freebairn, *Gunmaker Seek Suit Dismissal*, REPUBLICAN (Springfield, Mass.), Oct. 29, 2005, at C7.

9 Peter Geier, *Gun Bill is Law, But Will it Last? Critics Say Lawsuit Shield Will Not Stand Up in Court*, NAT'L L.J., Oct. 31, 2005, at 4 (noting potential Fifth and Fourteenth Amendment due process challenges).

10 While there are other controversies surrounding the law, most notably which particular civil actions are covered by its grant of immunity, they are beyond the scope of this Note, which will focus exclusively on the law's constitutionality in light of separation of powers concerns. For a discussion of other possible constitutional challenges to the Act, see *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005). *See also* Patricia Foster, Comment, *Good Guns (And Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry From Civil Liability is Unconstitutional*, 72 U. CIN. L. REV. 1739 (2004).

11 *See infra* notes 17–45 and accompanying text.

12 *See infra* notes 46–88 and accompanying text.

13 *See infra* notes 89–158 and accompanying text.

v. Beretta USA Corp.[14] and *District of Columbia v. Beretta U.S.A. Corp*,[15] support the position of this Note that the law is constitutional. Part IV will focus on the applicability of the PLCAA to potential future efforts at federal tort reform.[16]

I. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

A. Background

As firearms have been involved in an extraordinary amount of violence and crime in America,[17] it is only natural that some would come to view them as a threat to society that must be controlled or eradicated. However, given that firearms require a user with some violent intent to actually inflict any harm, coupled with the fact that gun ownership is a vibrant tradition enshrined in the Constitution,[18] measures to control the use of firearms or impose liability upon their manufacturers are particularly controversial. There is certainly no doubt that the issue of how to deal with firearms has "spawned a morass of litigation and debate."[19]

Attempts to recover for the costs of firearm-inflicted violence first emerged in the 1970s and 1980s.[20] During this time, plaintiffs had little success with claims seeking to hold manufacturers liable under traditional strict products liability principles.[21] However, in recent years courts have become more receptive to other arguments, most notably those alleging that manufacturers were liable for negligent marketing, or that particular firearms constituted a public nuisance.[22]

In the 1990s, municipalities initiated litigation against the firearms industry, primarily by alleging that the distribution of handguns in their

14 City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244 (E.D.N.Y. 2005).

15 District of Columbia v. Beretta U.S.A. Corp., No. 2000 CA 000428 B, 2006 WL 1892023 (D.C. Super. Ct. May 22, 2006).

16 *See infra* notes 159–69 and accompanying text.

17 Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 3 (2000).

18 U.S. CONST. amend. II.

19 David G. Owen, *Inherent Product Hazards*, 93 KY. L.J. 377, 403 n.121 (2004) (cataloging the extensive scholarly literature on the issue).

20 *See id.* at 404 (providing history of injury victim litigation against the firearm industry).

21 Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1209 n.5 (N.D. Tex. 1985) (citing numerous cases rejecting use of traditional strict products liability principles).

22 *See* Ileto v. Glock, Inc., 349 F.3d 1191 (9th Cir. 2003) (allowing claim of negligence and public nuisance), *cert. denied sub nom.* China North Indus. Corp. v. Ileto, 543 U.S. 1050 (2005); *see also* Johnson v. Bryco Arms, 304 F. Supp. 2d 383 (E.D.N.Y. 2004) (Weinstein, J.) (allowing negligence and public nuisance claims).

cities constituted a public nuisance. The basic premise is similar to that adopted by the states in their claims against the tobacco industry: when an industry's products inflict large social costs, governments should be able to recoup some portion of the increased cost of social services from the industry.[23] While many municipalities have been unsuccessful in these suits,[24] some claims have withstood appeal.[25]

B. Legislative Response

As litigation over firearms increased, legislatures responded to the issue. Some states began to limit the liability that could be imposed upon firearms manufacturers, while in at least one locality, the ability of plaintiffs to recover against manufacturers was aided by legislation.[26] Two bordering governments passed laws displaying the divergence of legislative opinion concerning lawsuits against gun makers. Virginia limited the ability of local governments to bring suits against the gun industry, while retaining the authority to do so in the commonwealth.[27] Legislation in the District of Columbia imposed absolute liability on gun manufacturers for injuries caused by certain firearms. The D.C. assault weapons law[28] held manufacturers of certain guns[29] "strictly liable in tort, without regard to fault or proof of defect" for injuries proximately caused by a defined list of weapons.[30] While the D.C. law nominally imposed "strict liability," allowing manufacturer defendants the same defenses available in traditional strict liability actions,[31] the law effectively imposed "absolute liability," as it required no showing of product defect. While the statute seems to violate the basic principle that product liability requires some proof of defectiveness,[32] the D.C. Circuit nonetheless upheld the law on appeal.[33] With various local

23 Owen, *supra* note 19, at 407 n.140 (citing cases where municipalities have instigated claims against gun manufacturers and dealers to recoup municipal costs associated with guns).

24 *Id.*

25 *Id.* at 407 n.141.

26 *See* D.C. CODE ANN. § 7-2551.02 (LexisNexis 2006).

27 *See* VA. CODE ANN. § 15.2-915.1 (West 2006).

28 *See* D.C. CODE ANN. §§ 7-2551.01–.03 (LexisNexis 2006).

29 The "assault weapons" were described by manufacturer and model in the statute at section 7-2551.01, but could generally be described as "machine guns" or "assault weapons." Included were guns known popularly as MAC 10's, Uzis, and Kalishnikovs, among others.

30 D.C. CODE ANN. § 7-2551.02.

31 *Id.* § 7-2551.03.

32 *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (2004); David G. Owen, *Proof of Product Defect*, 93 KY. L.J. 1 (2004) ("Defectiveness lies at the center of products liability law.").

33 District of Columbia v. Beretta U.S.A. Corp., 872 A.2d 633 (D.C. Cir.) (en banc), *cert. denied*, 126 S. Ct. 399 (2005).

and state legislatures in disagreement over the issue, and the potential for massive liability looming over manufacturers should other cities decide to take the path pursued by the District of Columbia and endorsed by the D.C. Circuit, Congress took action on the issue of civil liability for firearms manufacturers.

C. Provisions of the Protection of Lawful Commerce in Arms Act

The Protection of Lawful Commerce in Arms Act begins with a list of Congress's findings,[34] which support both the necessity of limiting liability against firearm manufacturers[35] and the constitutional authority of Congress to pass such legislation.[36] Congress claims that its authority to pass the law is based on the Second Amendment[37] and the Commerce Clause.[38] Congress also notes in the findings section that liability actions against the gun industry threaten both that industry and others closely related thereto.[39]

The substantive "immunity" provision of the Act declares that "[a] qualified civil liability action may not be brought in any Federal or State court."[40] Any "qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending."[41] A "qualified civil liability action" is defined as:

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34 15 U.S.C.A. § 7901(a) (West Supp. 2006).

35 *Id.* § 7901(a)(3), (5)–(8).

36 *Id.* § 7901(a)(1)–(2), (4).

37 It is arguable whether Congress is actually basing its authority to pass the law on the Second Amendment, or whether its discussion of the Amendment was inserted into the bill to show support for the principle of gun ownership. The discussion of the Second Amendment within the Act is found in section 7901(a)(1) ("The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed."), *id.* § 7901(a)(1), and section 7901(a)(2) ("The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms."), *id.* § 7901(a)(2).

38 Commerce Clause authority for the legislation is more clearly explained in the findings. *See id.* § 7901(a)(5) ("Businesses in the United States that are engaged in *interstate and foreign commerce* through the lawful design, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have *been shipped or transported in interstate or foreign commerce* are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.") (emphasis added); *see also id.* § 7901(a)(6) ("The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system . . . invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an *unreasonable burden on interstate and foreign commerce* of the United States.") (emphasis added).

39 *Id.* § 7901(a)(5)-(6).

40 *Id.* § 7902(a).

41 *Id.* § 7902(b).

> [A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .[42]

The immunity of the gun industry under the provisions of the statute is limited only to those suits in which the plaintiff's injury was caused by some misuse of firearms. Therefore, many traditional claims against manufacturers remain available.[43] Senator Larry Craig, the sponsor of the Senate's version of the Act, noted that the actions barred were limited in scope and that the law did not excuse the gun industry from liability for negligent or criminal conduct or from traditional products liability claims.[44] Defining what constitutes a "qualified civil liability action" under the Act remains the job of the courts, and, to this point, the courts are conflicted as to which actions are barred by the Act.[45] The battle over the scope of the statute will continue to be a source of ongoing debate and litigation. However, at this early stage, opponents of the statute will also continue to challenge the statute's constitutionality. The provisions of the statute most relevant to these constitutional challenges are section 7902(b), which directs the outcome of pending actions, and the findings in section 7901, which support Congress's power to legislate in the area of tort law.

II. JUDICIAL-LEGISLATIVE SEPARATION OF POWERS CHALLENGE

As noted above, section 7902(b) extends the reach of the statute's immunity provisions to cover pending lawsuits. This section's order to all courts to dismiss any action currently pending has been criticized as an encroach-

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42 *Id.* § 7903(5)(A).

43 *Id.* § 7903(5)(A)(i)–(vi) (outlining the actions still available, which include those for negligent entrustment, any action alleging a knowing violation of federal or state law by the defendant, warranty actions, and traditional products liability actions based on negligence or defectiveness in design or manufacture).

44 "It is not the gun industry immunity bill. It is important that we say that and say it again because it does not protect firearms or ammunitions manufacturers . . . from any lawsuits based on their own negligence or criminal conduct. This bill gives specific examples of lawsuits not prohibited. Let me repeat, not prohibited: Product liability . . . negligence or negligent entrustment, breach of contract, lawsuits based on a violation of State and Federal law . . . we think it is very clear." 151 CONG. REC. S9065 (daily ed. July 27, 2005) (statement of Sen. Craig).

45 *Compare* New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244 (E.D.N.Y. 2005) (holding that New York City's suit against gun manufacturers may proceed despite the Act because the city's claim for abatement of a public nuisance was not a "qualified civil immunity action" under the Act), *with* Ileto v. Glock, Inc., 421 F. Supp. 2d 1274 (C.D. Cal. 2006) (finding that claims of negligent marketing and public nuisance are barred by the PLCAA).

ment on the power of the judiciary.[46] However, a proper understanding of the separation of powers between Congress and the judiciary will demonstrate that section 7902(b)'s call for immediate dismissal is constitutional.

A discussion of the limits on Congress's power to infringe upon the power of the judiciary must begin with the Reconstruction-era case of *United States v. Klein*,[47] which has become synonymous with limitations on Congress's power relative to the judiciary. While the facts of the case are complicated, they are essentially as follows: during the Civil War, Congress passed a law requiring that any property captured or abandoned as Union forces advanced into the South be sold and the proceeds paid to the U.S. government.[48] The Confiscation Act also provided that any southerner who had his property seized and sold pursuant to the Act could recover the proceeds in an action in the Federal Court of Claims upon a showing of loyalty to the Union.[49] The Supreme Court subsequently held in the case of *United States v. Padelford*[50] that a presidential pardon was sufficient proof of loyalty to allow for recovery of confiscated property under the Act. Congress then passed a law explicitly overruling the holding in *Padelford* and directing courts to no longer accept presidential pardons as proof of loyalty.[51] This new law went even further, by declaring that a pardon would actually become proof of *disloyalty* to the union, and be cause for immediate dismissal of an action in which a pardon was presented as evidence.[52] In addition to directing the result of cases in the Court of Claims, the statute stripped the Supreme Court of the jurisdiction to hear appeals in these cases.[53]

This statute was held unconstitutional in *Klein*. The Supreme Court held that Congress had encroached upon the power of the judiciary to decide cases by dictating how the court must decide and interpret evidence presented to it.[54] While acknowledging that Congress had authority to control the jurisdiction of federal courts, the *Klein* Court noted that once this

46 *See* Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J.L. REFORM 1, 45 (2004); Ryan VanGrack, Recent Development, *The Protection of Lawful Commerce in Arms Act*, 41 HARV. J. ON LEGIS. 541, 541–42 (2004) (both discussing PLCAA bill that was not passed in 2004).

47 United States v. Klein, 80 U.S. 128 (1871).

48 Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863) (hereinafter referred to as the Confiscation Act).

49 *Id.*

50 United States v. Padelford, 76 U.S. 531 (1869), *superseded by statute*, Act of July 12, 1870, 16 Stat. 230, 235, *as recognized in* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179 (Ariz. 1999)

51 Ch. 251, 16 Stat. at 235.

52 *Id.*

53 *Id.*

54 United States v. Klein, 80 U.S. 128, 146–47 (1869).

jurisdiction was given, Congress could not attempt to control the outcome of particular cases.[55]

Perhaps due to its "excessively broad and ambiguous statements," *Klein* has been "viewed as nearly all things to all men."[56] Invoked in nearly every decision delineating the limits of congressional control over the judiciary, *Klein* is rarely held to be directly controlling.[57] Interpretations of this foundational case are diverse.[58] Given the archaic and ambiguous language of the *Klein* holding,[59] determining the controlling principles of judicial-congressional separation of powers is best accomplished through a review of more recent cases interpreting the *Klein* holding and outlining its contours. An examination of recent Supreme Court cases on the subject demonstrates that the *Klein* holding is reserved for instances of egregious overreaching by Congress, and not for laws which simply direct courts to take certain actions, especially when underlying law is changed in connection with the order to the courts, as is the case with the Protection of Lawful Commerce in Arms Act.

Robertson v. Seattle Audubon Society held that *Klein* was inapplicable in cases where Congress had changed the underlying substantive law.[60] In *Robertson*, environmental groups had filed lawsuits challenging logging in national parks that were the habitat of the endangered spotted owl.[61] Attempting to settle the dispute between environmental and logging interests, Congress amended certain environmental statutes to allow harvesting in certain areas but preventing it in others.[62] This "Northwest Timber Compromise" changed laws governing the legality of timber sales in certain affected areas.[63] Specifically, it amended certain sections in each of the laws to conform with the demands of the environmentalists in lawsuits pending against the Forest Service.[64] Then, Congress included a provision

55 *Id.* at 146.

56 Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1195 (1981).

57 Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998) ("*Klein* typically is invoked as good law but not applicable to the case before the Court.").

58 *See* Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After* Robertson v. Seattle Audubon Society *and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1046 (1993); Young, *supra* note 56, at 1218–19, 1221.

59 For a discussion of the difficulty of interpreting the *Klein* holding, see Sager, *supra* note 57; *see also* Nat'l Coal. To Save Our Mall v. Norton, 269 F.3d 1092, 1096 (D.C. Cir. 2001) ("*Klein*'s exact meaning is far from clear.").

60 Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

61 *Id.* at 431–32.

62 *Id.* at 432.

63 *Id.* at 433.

64 *Id.* at 434–35.

declaring that the changes in the law were adequate consideration to satisfy the requirements of these lawsuits.[65] While this section spoke in terms of directing particular outcomes in pending cases, a unanimous Supreme Court found that it did not violate the principle of *Klein* because Congress had changed substantive law, and had not directed the courts to find a particular result under existing law.[66]

Robertson thus stands for the proposition that no *Klein* violation will be found when Congress changes underlying law. This is perhaps the most settled understanding of the *Klein* Rule.[67] Congress is free to direct certain outcomes if, in doing so, it merely requires courts to interpret newly applicable law rather than old.[68] This was the case in *Robertson*, where Congress simply provided the courts with a change in statute and specified that these new provisions were to be followed. When Congress makes changes to underlying law and directs the courts to follow, even when speaking in terms which suggest some encroachment on the judiciary by "directing" outcomes of pending cases, it does not violate the separation of powers principles articulated in *Klein*. Congress begins encroaching on judicial power when it attempts to control how courts interpret laws, rather than just changing the law.[69] This was noted in *Robertson*, where the Court found no interference with judicial fact-finding or statutory interpretation.[70]

The case of *Miller v. French* is another example of an unsuccessful *Klein* challenge.[71] In *Miller*, the Prison Litigation Reform Act of 1995[72] was challenged as directing courts to reach a particular outcome because it allowed states to petition for immediate termination of prospective injunctions that had arisen in civil actions challenging prison conditions. Of particular concern was a provision in the Act requiring that all such injunctive relief be narrowly tailored.[73] If the injunctions did not meet this new legal standard, immediate relief could be sought.[74] The Court found no violation of the *Klein* Rule because the underlying law—the standard to be used in the granting of an injunction—was changed.[75] As the Court noted, "[r]ather

65 *Id.* at 435.

66 *Id.* at 441.

67 *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law.'" (citing *Robertson*, 503 U.S. at 441)).

68 *See* Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 446 (2000).

69 *See* United States v. Klein, 80 U.S. 128, 146 (1869).

70 *Robertson*, 503 U.S. at 439.

71 *See generally* Miller v. French, 530 U.S. 327 (2000).

72 Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (2000).

73 *Id.* § 3626(b)(2).

74 *Id.* § 3626(b)(2); *see also* Benjamin v. Jacobson, 124 F.3d 162, 166 (2d Cir. 1997), *vacated on reh'g*, 172 F.3d 144 (2d Cir. 1999) (en banc).

75 *Miller*, 530 U.S. at 349.

than prescribing a rule of decision, § 3626(e)(2) simply imposes the consequences of the court's application of the new legal standard."[76]

Under the statutes at issue in *Robertson* and *Miller*, the courts were still given the power to decide cases. Courts retain a similar power under section 7902(b) of the Protection of Lawful Commerce in Arms Act (PLCAA). Courts are ordered only to dismiss "qualified civil liability actions,"[77] but retain the power to determine what a "qualified civil liability action" is. Courts are not required to dismiss every suit with a gun-maker as defendant, but only those which fall within section 7903's definition of "qualified civil liability actions." As courts under the Act are left with their power to interpret the statute and decide cases accordingly, section 7092(b) "simply imposes the consequences of the court's application of the new legal standard."[78] In this way, it is little more than a rhetorical flourish on the statute, adding emphasis to Congress's point that it is not fond of frivolous lawsuits against the gun industry.[79] A court following the remainder of the statute would proceed in exactly the same manner whether section 7902(b) existed or not. It would examine the civil action before it, determine if it met the terms of section 7903, and if it did, the case would be dismissed. As the statute clearly states that "a qualified civil immunity action may not be brought,"[80] the court would only be left with the possibility of dismissing the suit. Therefore, section 7902(b) is perhaps an unnecessary provision, but certainly not fatal to the law's constitutionality.

To date, the decisions interpreting the constitutionality of the Act in light of a *Klein* challenge support this analysis. In *City of New York v. Beretta USA Corp.*, the defendant gun manufacturers moved for immediate dismissal of the City's action against them, arguing that the case represented the type of action which the Act was intended to cover.[81] While the court eventually found that the City's lawsuit against the defendant was not within the scope of the Act,[82] it nonetheless held that the Act was constitutional.[83] The court was entirely unpersuaded by the plaintiff's argument that the PLCAA was unconstitutional as a violation of the *Klein* rule because it "direct[ed] the ultimate decision in pending cases."[84] Citing

76 *Id.*

77 15 U.S.C.A. § 7902(b) (West Supp. 2006).

78 *Miller*, 530 U.S. at 349.

79 151 CONG. REC. S9065 (daily ed. July 27, 2005) (statement of Sen. Craig).

80 § 7902.

81 City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 258 (E.D.N.Y. 2005) (Weinstein, J.).

82 *Id.* at 271 (holding that the claim against the defendant manufacturers fell within the PLCAA's exception for actions involving a claim that the manufacturer knowingly violated a federal or state law).

83 *Id.* at 280.

84 *Id.* at 292.

Miller v. French, the court held that the PLCAA "imposes a 'new legal standard' that is not restricted to pending cases."[85] The court also noted that the PLCAA, in marked contrast to *Klein*, left the courts the power to perform their traditional roles of fact-finding and statutory interpretation.[86] While the final outcome of the New York municipal gun litigation is uncertain,[87] and a final resolution of this issue of constitutionality most likely awaits the determination of the Second Circuit and possibly the Supreme Court, *Beretta* persuasively supports the position that the law does not violate the separation of powers between Congress and the judiciary and therefore supports the constitutionality of the PLCAA.[88]

III. FEDERALISM CHALLENGES

A. Commerce Clause

1. Background—Recent Commerce Clause Cases.—All congressional legislation must be founded on some grant of power contained in the Constitution. One constitutional provision frequently used to support congressional regulation is the Commerce Clause.[89] The Commerce Clause was used through much of the mid- to late-twentieth century to provide a constitutional basis for congressional regulation in a wide array of areas.[90] The findings in the PLCAA demonstrate that the Commerce Clause was relied upon as a source of congressional power to enact that legislation.[91] Prior to 1995, the fact that a statute was premised upon Congress's commerce power would have virtually assured that the federal legislature had acted within the proper scope of its power.[92] However, the Supreme Court's holding in

85 *Id* at 293.

86 *Id.*

87 *Id.* at 298 ("[S]ince the Act, is said by defendants to affect suits pending across the nation, and its interpretation is an issue of first impression, raising possible constitutional questions, a temporary discretionary stay is granted."). *But see* City of New York v. Beretta U.S.A. Corp., 413 F. Supp. 2d 180, 182 (E.D.N.Y. 2006) (withdrawing stay while trial court considers new motion to dismiss the case based on legislation passed prior to issuance of court's original decision but not brought to court's attention until after stay was granted).

88 The constitutionality of the statute was also upheld against a *Klein* challenge in *District of Columbia v. Beretta U.S.A. Corp.*, No. 2000 CA 000428 B, 2006 WL 1892023, at *13 (D.C. Super. Ct. May 22, 2006). There, the court cited to *City of New York v. Beretta U.S.A. Corp.* as well as *Miller* and *Robertson* in holding that the statute was not an encroachment on the judiciary. *Id.*

89 U.S. CONST. art. I, § 8, cl. 3.

90 *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964) (upholding Title II of the Civil Rights Act on Commerce Clause grounds); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (upholding law regulating personal cultivation and consumption of wheat as properly premised on Commerce Clause authority).

91 15 U.S.C.A. § 7901(a) (West Supp. 2006).

92 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.5

United States v. Lopez required a reconsideration of the extent of Congress's power under the Commerce Clause.[93]

The Supreme Court found the Gun-Free Schools Act at issue in *Lopez*[94] to be an unconstitutional exercise of congressional power under the Commerce Clause. The Court found the Act deficient in several respects. First, the Court found that the statute had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[95] Next, the Court criticized the absence of any specific findings in the statute or legislative history indicating that gun possession in a school zone affected interstate commerce.[96] Finally, the Court, in full display of the federalism principles underlying its decision, noted that if the government's justification for federal regulation in the area of gun possession in a school zone was upheld, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[97] The holding in *Lopez* essentially established three major requirements for legislation passed pursuant to Commerce Clause authority: that the subject of the legislation be "economic" in nature, that Congress provide specific evidence of an effect on interstate commerce, and that the legislation not interfere in an area of traditional state authority.

In 2000, the Court was faced with another congressional attempt to regulate criminal behavior. In *United State v. Morrison*,[98] the Court responded in much the same way it had in *Lopez*, invalidating the law on Commerce Clause grounds.[99] Concerned with the result in *Lopez*, and hoping to bolster the connection between the law and interstate commerce,[100] Congress

(1997) ("Between 1936 and April 26, 1995, the Supreme Court did not find one federal law unconstitutional as exceeding the scope of Congress's commerce power.").

93 United States v. Lopez, 514 U.S. 549, 561 (1995).

94 The Gun-Free Schools Act, 104 Stat. 4844 (previously codified at 18 U.S.C. § 922(q) (1988)), *invalidated by* Lopez, 514 U.S 549. This law made illegal the possession of a firearm "in or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.* § 921(a)(25).

95 *Lopez*, 514 U.S. at 561.

96 *Id.* at 562.

97 *Id.* at 564.

98 United States v. Morrison, 529 U.S. 598, 613 (2000).

99 Congressional authority to pass the law at issue in *Morrison* was also based on Congress's enforcement power under section five of the Fourteenth Amendment, which has also been put forth as a potential ground for congressional authority to enact the PLCAA. However, the case for the PLCAA's constitutionality under the Commerce Clause is so strong that reliance on section five as grounds for congressional authority is unnecessary. Congressional authority for the PLCAA under section five was discussed in *New York v. Beretta U.S.A. Corp.*, where the court found that section five was likely an unconstitutional basis for congressional authority in passing the PLCAA but was unnecessary in light of the Commerce Clause power.

100 *Morrison*, 529 U.S. at 614 ("In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that

prepared a more detailed record of findings in passing the law at issue in *Morrison*.[101] However, the Court once again found the connection between the regulated activity and interstate commerce too attenuated.[102] The decision in *Morrison* also emphasized that the activity being regulated must be economic in nature if Congress expected the Court to show deference to its decision to regulate under the Commerce Clause. This reasoning led the Court to hold that activities of traditional state concern, such as criminal law enforcement, cannot become subject to federal regulation simply because they have an "aggregate affect" on interstate commerce.[103]

The most recent Commerce Clause decision signaled a retreat from *Lopez* and *Morrison* by showing more deference to congressional power. *Gonzalez v. Raich*[104] upheld the constitutionality of the Controlled Substances Act (CSA)[105] against a challenge alleging that the law was unconstitutional as applied to users of medical marijuana. But rather than changing substantially the holdings in *Lopez* and *Morrison*, *Gonzalez* was distinguished from those cases on its facts. First, the challenge in *Gonzalez* was only that the CSA was unconstitutional when applied to a select group, not that Congress lacked authority to regulate illegal drugs.[106]Additionally, the Court distinguished the statutes in *Morrison* and *Lopez* because they regulated purely non-economic activity. The statute in *Gonzalez* regulated a commodity for which there is a known, albeit illegal, market that is national in character.[107]

2. Applying the Court's Commerce Clause Precedent to the PLCAA.—In light of these recent federalism cases, the PLCAA must follow one of two paths to be considered a valid exercise of congressional Commerce Clause power. First, the PLCAA could be viewed as a statute similar to the CSA upheld in *Gonzalez*—that is, a law regulating a commodity that is bought and sold in interstate commerce. This would allow the more deferential "aggregate ef-

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gender-motivated violence has on victims and their families.").

101 Violence Against Women Act, 42 U.S.C. § 13981 (2000) (providing a civil remedy in federal court for victims of gender-motivated violence).

102 *Morrison*, 529 U.S. at 615.

103 *Id.* at 617–18 ("We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.").

104 Gonzalez v. Raich, 545 U.S. 1 (2005).

105 Controlled Substances Act, 84 Stat. 1242 (1970) (codified in numerous sections of 21 U.S.C. beginning at § 801).

106 *Raich*, 545 U.S. at 15.

107 *Id.* at 25–26 ("Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.... The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.").

fect" test used in *Gonzalez* to be applied to the findings Congress presented to justify the regulation of civil liability actions against firearms manufacturers, and likely lead to the PLCAA being upheld. However, such an approach is unlikely, as the PLCAA does not regulate *firearms* as a commodity, but instead regulates *lawsuits* that concern firearms.

While the deferential standard of review of congressional regulation of commodities and instrumentalities of commerce is likely not available for the PLCAA, the law does regulate an activity that is economic in nature. Civil liability actions appear to be "economic" in nature, as they either involve money damages or at least affect the economic condition of any defendants found liable. It is clear from the language of the statute that Congress intended for the PLCAA to be an "economic" regulation. The findings section of the statute notes that the regulated lawsuits "seek money damages,"[108] and threaten to "destabiliz[e] . . . industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitute an unreasonable burden on the interstate and foreign commerce of the United States."[109] These findings support the contention that the activity regulated by the PLCAA is economic in nature, and thus Congress's authority to pass the statute should be given deference under recent Commerce Clause decisions.

In addition to being concerned with an economic activity, the rigorous and federalism-oriented approach to the Commerce Clause articulated by the Court in *Morrison* and *Lopez* requires that Commerce Clause legislation apply only to *interstate* activity. The lack of such a limitation doomed the law at issue in *Lopez* to failure.[110] The PLCAA limits its scope to only those actions against defendants who are engaged in interstate or international commerce.[111]

The Court in *Lopez* and *Morrison* also emphasized the importance of congressional findings to support the connection between the legislation and interstate commerce.[112] The text of the PLCAA and its legislative history are replete with specific findings that the lawsuits regulated by the

108 15 U.S.C.A. § 7901(a)(3) (West Supp. 2006).

109 *Id.* § 7901(a)(6).

110 United States v. Lopez, 514 U.S. 549, 561 (1995) ("§922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

111 *See id.* § 7903(4) (defining a "qualified product" for the purposes of the act as "a firearm . . . that has been shipped or transported in interstate or foreign commerce"); *see also* § 7903(2) (defining the "manufacturer" of a "qualified product" as "a person who is engaged in the business of manufacturing the product in interstate or foreign commerce . . . .").

112 *See Lopez*, 514 U.S. at 563 ("To the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."); *see also* United States v. Morrison, 529 U.S. 598, 614–15 (2000) (discussing the importance of congressional findings in Commerce Clause legislation).

PLCAA have an effect on interstate commerce.[113] While "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation,"[114] the PLCAA does contain findings supporting the legislation, thus making it superior to the legislation involved in *Lopez*.

Furthermore, the causal connection between the activity regulated by the PLCAA and interstate commerce is direct. The current municipality litigation puts the firearm industry at risk for massive financial liability. Therefore, the activity regulated has a direct effect on the economic conditions of an industry; if the lawsuits succeed, firearms manufacturers *will* be financially harmed. The findings in *Morrison* relied on a more complicated chain of events to make the connection between gender-motivated violence and interstate commerce.[115] The distinction between the causal chain in *Morrison* and the more direct connection between the regulation of lawsuits against gun makers and interstate commerce was noted in the *Beretta* court's discussion of the Commerce Clause's application to the PLCAA.[116]

Finally, the constitutionality of Congress's exercise of the Commerce Clause power by Congress in enacting the PLCAA is supported by the "national" character of the activity it seeks to regulate. A recurrent theme in the recent Commerce Clause decisions is that limitations on Congress's power to legislate under the Commerce Clause are necessary in order to preserve the balance of power in the federal system.[117] By limiting Congress's power to regulate only in matters that are "truly national," while reserving to the states those powers which are "truly local," the Court has certainly sought to preserve state autonomy and sovereignty in the federal system.[118] Under this local-national dichotomy, the extent to which federal legislation regulating the civil justice system, such as the PLCAA, will be upheld as constitutional depends in large part on whether the subject of regulation is perceived to be primarily local or national in nature.

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113 *See* § 7901(6); *see also* 151 CONG. REC. S9087, 9107 (daily ed. July 27, 2005) (statement of Sen. Baucus) ("[T]he time, expense, and effort that goes into defending these nuisance suits is a significant drain on the firearms industry, costing jobs and millions of dollars, increasing business operating costs . . . and threatening to put dealers and manufacturers out of business.").

114 *Morrison*, 529 U.S. at 614.

115 *Id.* at 615 (The connection, in the Court's words, has only an "attenuated effect upon interstate commerce." Because gender-aimed crime is a subset of crime in general, if it is deemed sufficient to invoke Congress's commerce power, any crime, in theory, would be sufficient.).

116 *See* City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 285–86 (E.D.N.Y. 2005).

117 *See Lopez*, 514 U.S. at 552 ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991))); *see also Morrison*, 529 U.S. at 620–22.

118 *See Lopez*, 514 U.S. at 552.

Critics of federal regulation of the tort system will argue that laws such as the PLCAA interfere with an area of the law traditionally reserved to the states. Whether tort law is in fact an area of exclusive state concern depends on how one views the purpose of tort law.[119] If torts are exclusively a form of "corrective justice," more akin to criminal law and similar "moral" legislation, then they are state and local concerns; whereas, if torts are simply an economic issue, the case for federalization becomes stronger.[120] Of course, most torts are not obviously moral or economic in nature, but an amalgamation of the two approaches, seeking both to increase social economic efficiency and redress past wrongs. Therefore, classifying a law such as the PLCAA as a tort reform measure does not automatically implicate an area of traditional state concern, nor does it remove it from such scrutiny.[121] Instead, the law will be treated as any other piece of legislation predicated on Commerce Clause authority. The Court will engage in a typical federalism analysis, looking to ensure that the law regulates an economic activity that significantly affects interstate commerce.

Under most of the new federalism decisions, the Court has examined both the purposes and effects of federal laws to determine if the activity regulated is truly "national" and "economic" in nature.[122] For example, in *Morrison*, the Court determined that the purpose of the law at issue was to deter violence against women and compensate victims of such violence, not to regulate interstate commerce.[123] The underlying purpose of the law, therefore, was the punishment of immoral and violent activity, closely akin to criminal or "moral" legislation. Such law has traditionally been the exclusive realm of the states.[124] In contrast, the PLCAA intends to support the gun industry against what Congress perceives as potentially ruinous liability. The PLCAA's findings and legislative history support the conclusion

119 Whether laws such as the PLCAA that provide immunity from suit for certain industries are in fact "tort reform" or just economic protection for particular industries is far from clear. Since torts are of a decidedly less national character than the industries these reform measures support, the case for their constitutionality as tort reform measures makes the case for their constitutionality as regulations of an industry even stronger.

120 Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 535–36 (2002) (proposing a sliding-scale approach for evaluating federal tort reform measures, which would afford the federal government a greater role in those tort laws based primarily on economics and give states more authority in dealing with those torts that are "moral" in nature).

121 *See id.* at 526 (discussing the use of the Commerce Clause as a basis for federal tort reform legislation and noting that such legislation has never been declared unconstitutional under the Clause, but also noting that there has never been a serious challenge to federal tort reform under the Court's "new federalism jurisprudence").

122 *Id.* at 529–30.

123 United States v. Morrison, 529 U.S. 598 (2000).

124 *See id.* at 618 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

that it was the financial stability of the firearms industry that propelled the legislation forward.[125] The lawsuits that the Act bans are concerned with recouping economic damages to fund the perceived financial effects of gun violence.[126] There is no moral issue involved, thus the realm of traditional state power is not implicated. The economic purposes and effects of the PLCAA and the fact that it affects an industry that is inherently national supports the conclusion that it is a valid exercise of Commerce Clause power.

B. Tenth Amendment

In two prominent cases from the 1990s, the Supreme Court began to use the Tenth Amendment[127] to create an area of exclusive state sovereignty upon which the federal government could not encroach.[128] This approach has been controversial, as many scholars believe the Tenth Amendment is simply a "reminder that Congress only may legislate if it has authority under the Constitution."[129] While the debate over the precise meaning of the provision continues,[130] what is clear is that the impact of the Supreme Court's decisions creates the issue of potential constitutional infirmity when Congress intrudes on an area traditionally of state concern. While the discussion above[131] has already concluded that the PLCAA does not intrude on an area of state concern, at least as far as that concept has been explained in the Commerce Clause cases, opponents of the law could still point to the Tenth Amendment as a possible challenge to the law's constitutionality.[132] However, a quick examination of the relevant precedent will show that the Tenth Amendment does not provide a proper basis for challenging this particular law.

The revival of the use of the Tenth Amendment to invalidate federal legislation began in *New York v. United States*.[133] The facts of *New York* are somewhat complicated,[134] but its holding is relatively straightforward: Con-

125 *See supra* notes 34–39.

126 *See* 15 U.S.C.A. § 7901(5)–(6) (West Supp. 2006).

127 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

128 *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 149 (1992).

129 CHEMERINSKY, *supra* note 92, § 3.8.

130 *See id.*

131 *See supra* notes 89–158.

132 *See generally* CHEMERINSKY, *supra* note 92, § 3.8.

133 New York v. United States, 505 U.S. 144.

134 *New York v. United States* concerned a challenge to the Low-Level Radioactive Waste Policy Act. Under the Act, states which failed to provide for disposal of radioactive wastes were required to "take title" to those wastes. The Court reasoned that the "take title" pro-

gress cannot force states to legislate when Congress can deal with the subject of the legislation through its own power.[135] Forcing the states to act is known as "commandeering" the states, and is an encroachment on their power as sovereign entities under the federal system.[136]

Similar to *New York v. United States*, *Printz v. United States*[137] concerned the "commandeering" of state government to carry out a federal program. *Printz* invalidated portions of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to perform background checks on potential gun purchasers.[138] The Brady Act requirement that the state executive officers carry out a federal program was viewed as commandeering the state government in violation of the Tenth Amendment.[139]

The commandeering cases outlined above present the most aggressive use of the Tenth Amendment to invalidate otherwise sound congressional legislation as an unconstitutional encroachment upon state sovereignty. The Court's ability to strike down congressional action under the Tenth Amendment is likely limited to those cases closely analogous to *New York* and *Printz*, specifically those in which Congress "commandeers" the legislative or executive functions of the state government.

The PLCAA does not involve any commandeering of the state governments. It does not require that any branch of any state government take any action. It merely requires that the states refrain from entertaining certain lawsuits. While the Act may preclude state courts from entertaining lawsuits that could otherwise be brought in state courts, it does not intrude on state sovereignty. Rather, the Act requires that federal legislation be given preeminence over state law, a position consistent with existing federal authority under the Supremacy Clause.[140] Therefore, the Tenth Amendment likely presents no significant barrier to the Act's constitutionality. This was the view adopted in *City of New York v. Beretta USA Corp.* Discussing potential federalism challenges under both the Tenth and Eleventh[141] Amend-

visions of the Act forced state legislatures to pass certain laws, therefore "commandeering" the state legislative process to achieve federal goals. This "commandeering" intruded on the states' sovereign power to legislate. Under this approach, Congress was free to pass legislation penalizing states for failure to dispose of radioactive wastes, or to pass federal law dealing with radioactive waste disposal, but it could not force states to address the problem through their own laws. *See id.* at 175–77.

135 *Id.* at 166.

136 *Id.* at 174.

137 Printz v. United States, 521 U.S. 898 (1997).

138 *Id.* at 933.

139 *Id.* at 924.

140 U.S. CONST. art. VI, § 1, cl. 2.

141 U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

ments, the *Beretta* court stated simply that the amendments were not "applicable to the present case, and do not determine the constitutionality of the Act."[142] The absence of any commandeering of the states by the Act was specifically cited as the reason the Act did not implicate the Tenth Amendment.[143]

This review of recent Commerce Clause and Tenth Amendment precedent as applied to the PLCAA demonstrates that the Act does not run afoul of the Supreme Court's federalism jurisprudence. The subject of the legislation is national and economic in character. Similarly, it does not run afoul of the "commandeering" proscribed by the Tenth Amendment cases.

C. The Importance of Court Composition

The decision in *City of New York v. Beretta USA Corp.* is significant not only because it is the first case to address the constitutionality of the PLCAA, but also because it was authored by an expert on mass tort cases, Judge Jack Weinstein. Having written on the subject of mass torts and the need to federalize the tort system[144] and having presided over important torts cases,[145] Weinstein's opinion is certainly authoritative. Bringing his expertise in the area to bear on the decision, *Beretta* is incredibly lengthy and detailed, building an immense factual background of the Act and the history of firearm litigation over its nearly 100 pages. This is significant in two respects. Judge Weinstein has been criticized as being overly solicitous of claims against the gun industry[146] and has in at least one case entertained novel claims against the industry.[147] With a perceived opponent of the gun

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This Note does not discuss the Eleventh Amendment because the Amendment is only implicated when a law purports to abrogate a state's sovereign immunity from suit. As the PLCAA does not involve sovereign immunity, discussion of the Eleventh Amendment is unnecessary.

142 City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 294 (E.D.N.Y. 2005).

143 *Id.*

144 *See* Jack B. Weinstein, *Notes For a Discussion of Mass Tort Cases and Class Actions*, 63 BROOK. L. REV. 581 (1997); *see also* Jack B. Weinstein & Eilenn Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269 (1991); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1993).

145 *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y.), *claim dismissed*, 611 F. Supp. 1221 (E.D.N.Y. 1985), *and aff'd*, 818 F.2d 187 (2d Cir. 1987); *In re* Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710 (E.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

146 *See* Shawn Zeller, *Judge Takes a Shot at Gun Suit Ban*, CONG. Q. WEEKLY, Dec. 10, 2005, 2005 WLNR 20363373.

147 Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (Weinstein J.) (allowing plaintiff to assert claims of negligent marketing and market-share liability against gun manufacturers), *vacated sub nom.* Hamilton v. Beretta USA Corp., 264 F.3d 21 (2d Cir. 2001). Weinstein also upheld New York City's lawsuit in the *Beretta* case in what could be described as a rather strained reading of the PLCAA.

industry supporting the constitutionality of the PLCAA, the case for the law's standing on firm constitutional grounds is strengthened. However, Weinstein's unique views on the proper role of the federal government in dealing with torts probably puts him outside the mainstream on the issue.[148] Thus, Judge Weinstein's approval of the Act's constitutionality does not settle the issue, but his analysis of the PLCAA, at least on the federalism and judicial-congressional separations of powers issues, is persuasive. The extensive treatment he provided the issue should be helpful on review.

Recent developments on the Supreme Court also point toward the conclusion of constitutionality. Chief Justice Rehnquist and Justice O'Connor, considered leaders in the move to increase the importance of the states in the federal system, are no longer on the Supreme Court. These two justices authored the opinions in *Morrison*, *Lopez*, and *New York*;[149] and Rehnquist authored the opinion in *National League of Cities v. Usery*,[150] the case cited as beginning the move toward a larger role for the states in the federal system.[151] These justices were in the majority in nearly every other major federalism decision that found in favor of limiting congressional power.[152] Their absence could lead to a Court that is more deferential to congressional action that infringes upon state power.

Rehnquist and O'Connor have been replaced by Chief Justice John Roberts and Justice Samuel Alito respectively. The current Roberts Court, with Alito as a member, has yet to face a significant federalism decision. In January of 2006, the Roberts Court, with O'Connor still a member, issued two opinions on the federalism issue.[153] However, these two cases

148 *See* Charles T. Kimmett, *Rethinking Mass Tort Law*, 105 YALE L.J. 1713 (1996) (reviewing JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995)) (noting the high rate at which appellate courts tend to reverse Weinstein's opinions).

149 United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

150 Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruled in part*, Seminole Tribe of Fl. v. Florida, 517 U.S. 44 (1996), *as stated in* Palotai v. Univ. of Md. Coll. Park, 959 F. Supp. 714 (D. Md. 1997), *and superseded by statute*, Fair Labor Standards Act of 1985, 99 Stat. 787, *as recognized in* Franklin v. City of Kettering, 246 F.3d 531 (6th Cir. 2001).

151 *Usery* involved a challenge to the federal minimum wage law, in which the Court held that determining the amount to pay state employees was a traditional state function that was protected by the Tenth Amendment from federal regulation. Thus, states were not required to pay the minimum wage. *See Usery*, 426 U.S. at 845. The holding in *Usery* was specifically overturned in *Garcia*, 469 U.S. at 557.

152 *See* Printz v. United States, 521 U.S. 898 (1997).

153 *See* United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II of the Americans with Disabilities Act validly abrogates state Eleventh Amendment sovereign immunity when an actual violation of the Fourteenth Amendment is asserted); Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006) (holding that a bankruptcy trustee's proceeding to set aside the debtor's preferential transfers to state agencies is not barred by sovereign immunity).

only dealt with an Eleventh Amendment challenge, not the Commerce Clause or Tenth Amendment. As the PLCAA does not implicate the Eleventh Amendment, these decisions do not provide any real guidance as to how the Supreme Court might rule on a challenge to the PLCAA.

It appears that Justice Alito's position on the federalism issue will not differ considerably from that of Rehnquist and O'Connor. While he was questioned briefly on the issue at his confirmation hearings, his answers did not reveal how he would approach the issue as a Supreme Court Justice.[154] However, one opinion authored by Alito while he was a member of the Third Circuit reveals that he is willing to subject congressional action under the Commerce Clause to scrutiny. In that case, *United States v. Rybar*,[155] Alito dissented from a decision upholding a federal prohibition on machine gun possession. Citing *Lopez*, he noted that the law at issue in *Rybar* attempted to regulate an activity without providing a method for determining whether the particular gun had traveled in interstate commerce.[156] Noting the close similarity between the laws in *Rybar* and *Lopez*, Alito wrote that by failing to adhere to the Supreme Court's guidance, the *Rybar* court had relegated *Lopez* to the status of a "constitutional freak."[157]

Alito could be a crucial fifth vote on federalism cases, as the Court has been deeply divided on one of the federalism decisions it has made to date.[158] Whatever his particular approach to the issue may be, the PLCAA remains likely to survive scrutiny, as it appears constitutional even under the most aggressively pro-state federalism decisions of the Rehnquist Court.

IV. THE PLCAA AS A MODEL FOR FUTURE FEDERAL TORT REFORM

Congress is likely to continue its attempts to increase federal control over the area of tort law. Various tort reform measures have been enacted in the past decade,[159] and several more are pending.[160] As long as perceptions of

154 Tony Mauro, *Alito's Vague Testimony Contains Reaganesque Overtones*, LEGAL INTELLIGENCER, Jan. 18, 2006, at 4, *available at* Westlaw 1/18/2006 TLI 4 (recounting an exchange at the confirmation hearings in which Judge Alito was questioned about advice he gave as a lawyer at the Justice Department advocating a policy of federalism).

155 United States v. Rybar, 103 F.3d 273 (3d Cir. 1996).

156 *Id.* at 287 (Alito, J., dissenting).

157 *Id.* at 286.

158 *Katz*, 126 S. Ct. at 990 (5-4 decision); *see also* Linda Greenhouse, *Justices Curb States' Immunity From Suit*, N.Y. TIMES, Jan. 24, 2006, at A16 (discussing the continued division of the Court on federalism issues and the potential influence of Alito on those decisions).

159 *See* Grey, *supra* note 120, at n.2 (cataloging the recent federal tort legislation).

160 Among the more controversial are likely to be laws similar to the following from 2005: the Lawsuit Abuse Reduction Act (LARA), H.R. 420, 109th Cong. (2005), and the Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005) (commonly known as the "Cheeseburger Bill"). LARA is an attempt to reduce "forum shopping" by plaintiff

unfairness and inefficiency in the tort system persist, pressure to continue its federalization is unlikely to decrease. Particularly, certain interests will seek either general protection from lawsuits, or a cap on certain types of damages. This movement toward federalization is likely to be met with increasing opposition from those that view it as an interference with the traditional power of the states.

Advocates of federalizing the tort system should take note of the features of the PLCAA that support its constitutionality against federalism challenges. One crucial feature is the development of a record demonstrating that the industry benefiting from the legislation is national in character and actively involved in interstate commerce, as recent Commerce Clause cases have emphasized the importance of such evidence.[161] The necessity for reform of the civil justice system to protect the industry must also be a primary motivation. In this way, the law will limit itself to regulating in the economic, rather than the normative or moral, sphere and thus not intrude on state power.[162] This was certainly the case for the PLCAA. The findings and legislative history of the Act display a preeminent concern for the industry's ongoing viability.[163]

Concern with the economic fate of an industry is clearly a proper motivation for federal tort reform. However, the means by which industries are protected from liability will be crucial in determining whether future tort reform laws run afoul of federalism principles. In the rush to protect industries, a tempting solution is to simply enact caps on punitive damages. This solution is dangerous because caps implicate an area of traditional state concern to a greater extent than do measures such as the PLCAA. As Professor Betsy J. Grey has noted, punitive damages are based on notions of normative disapproval and deterrence of future inappropriate behavior.[164] In this way, she argues, punitive damages are more akin to sentencing in the criminal process.[165] Since recent federalism decisions have consistently held the criminal law, and those areas of the law dealing with moral issues, to be almost the exclusive realm of the states, it is obvious how damage caps could create potential federalism problems.

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attorneys who file suit in venues with only a tenuous connection to the litigation. LARA purports to control both federal and state proceedings, and it could therefore create some federalism concerns. These concerns may possibly be allayed by a provision in the bill that limits its applicability to suits in which the subject matter involves interstate commerce. The Cheeseburger Bill would prevent any civil liability action in which the injury alleged was the plaintiff's obesity or weight gain caused by food consumption. Its structure is very similar to that of the PLCAA. Both bills have been passed by large margins in the House and are currently awaiting action in the Senate.

161 *See supra* notes 110–18 and accompanying text.

162 *See supra* notes 122–26 and accompanying text.

163 *See supra* notes 34–39 and accompanying text.

164 Grey, *supra* note 120, at 533.

165 *Id.*

The PLCAA, along with efforts to aid aircraft manufacturers,[166] the airline industry generally,[167] and the vaccine industry,[168] provides future proponents of federal tort reform with models for success. In addition to focusing on the economic and interstate nature of the legislation and developing a detailed record, future legislation should avoid dealing with damage caps. These caps implicate areas of traditional state sovereignty to the extent that the unconstitutionality of the legislation becomes a distinct possibility.[169] Focusing on the protection of industry is crucial to the success of these tort reform measures, as this places the emphasis on Congress's function in regulating interstate commerce rather than on its disapproval with the existing tort law of the states. If these recommendations are followed, future efforts at federal tort reform will stand on firm constitutional footing.

CONCLUSION

The case for the constitutionality of the PLCAA in light of separation of powers and federalism is strong. While directing courts to take specific action and dismiss pending lawsuits, it does not represent an encroachment on the judiciary by Congress. The law certainly increases the relative power of Congress to regulate the tort system. However, as the purposes and effects of the law are national and economic in nature, it does not run afoul of recent federalism jurisprudence. Such a conclusion is supported by the rulings of two lower federal courts, which have upheld the PLCAA against constitutional challenges.[170] But given the level of hostility the Act has cre-

166 General Aviation Revitalization Act of 1994 (GARA), 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 (2000)). This Act was passed in order to protect manufacturers of small aircraft from potentially ruinous liability. It essentially created a statute of repose for the industry, barring all claims against it for a certain number of years. GARA, along with the statutes cited in notes 145 and 146 *supra*, were cited approvingly by the court in *City of New York v. Beretta USA Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005). For further discussion of GARA, including a defense of its constitutionality under many of the same challenges faced by the PLCAA, see Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269 (2002); *see also* James F. Rodriguez, Note, *Tort Reform & GARA: Is Repose Incompatible With Safety?*, 47 ARIZ. L. REV. 577 (2005).

167 Air Transportation Safety and System Stabilization Act of 2001, 115 Stat. 230 (codified at 49 U.S.C.A. § 40101, 44302–06 (West Supp. 2006)). This law created a strict liability cause of action for all claims arising from the September 11, 2001 terrorist attacks and limited airline liability. Like the PLCAA and GARA, this act emphasized the importance of the industry to the national economy and the potentially ruinous effect of liability.

168 National Vaccine Program, 42 U.S.C.A. §§ 300aa-1 to -6 (West Supp. 2006).

169 It is not the position of this Note that damage caps are unconstitutional. Instead, it only raises the issue that damage caps, especially those involving punitive damages, appear to intrude on the traditional realm of state sovereignty.

170 *See supra* note 45.

ated among supporters of gun control and advocates of firearm victims, the constitutionality of the Act is likely to continue to come under fire. The next important word on the Act's constitutionality will likely come from the Courts of Appeal.

If, as this Note predicts, the higher courts find the law a valid exercise of congressional power, the PLCAA will serve as a helpful model for proper reform of the civil justice system. The bill effectively accomplishes its goal of protecting a key national industry without disrupting core constitutional principles of state sovereignty or judicial independence. It demonstrates how Congress can act decisively on an important issue, while staying within the bounds of the constitutional limitations on its power.