States' Rights, Gun Violence Litigation, and Tort Immunity

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Introduction

On May 5, 2001, a 13-year-old boy found his father's Beretta handgun. He removed the magazine containing its ammunition and, like many gun users, believed he had unloaded the gun. However, a live round remained in the chamber. Because such errors are common, an inexpensive safety feature was developed over a century ago to prevent a gun from firing without a magazine.[1] But Beretta did not include this feature. As a result, when the boy pulled the trigger, the hidden bullet killed his 13-year-old friend, Joshua Adames.[2]

Under most states' products liability law, Beretta could be held liable to Joshua's family for selling an unreasonably dangerous product without feasible safety features. But when Joshua's parents sued Beretta, the Supreme Court of Illinois held that the federal Protection of Lawful Commerce in Arms Act (PLCAA) barred their case — even though, if Illinois had its own way, Beretta could be held liable.

Enacted in 2005, PLCAA provides unique protection from civil liability for the gun industry. PLCAA requires courts to dismiss certain lawsuits against gun companies,[3] with exceptions that permit some actions.[4] Tort law generally imposes liability on a wrongdoer even if others also caused the plaintiff's injury.[5] But PLCAA, according to many courts, shields firearm companies from liability for harm caused by some tortious conduct if another cause of harm was a third party's unlawful use of a gun.[6]

PLCAA can significantly restrict states from enforcing their tort law against negligent gun companies. This article explores the constitutionality of those restrictions, focusing on PLCAA's so-called "predicate exception," which allows otherwise-prohibited actions to be brought against gun companies who knowingly violate "a State or Federal statute applicable to the sale or marketing of the product" where "the violation was a proximate cause of the harm."[7] Several courts have held that this exception allows gun companies to be held liable for their negligence if they violate *statutory* law created by a legislature, while barring liability for the same conduct if it only violates a state's common law (judge-made law). For instance, if a statute mandated a life-saving safety feature that Beretta failed to include, courts could hear the Adames's case. But PLCAA can bar claims in many states that do not have such statutory mandates, though states generally allow plaintiffs to bring common law claims, like products liability and negligence, without a predicate statutory violation. As a result, PLCAA can deny many states the authority to enforce and apply their common law, and effectively serves as a federal command to states to use their legislatures, not their judiciaries, to regulate gun companies.

This article argues that this reading of PLCAA violates the Supreme Court's Tenth Amendment precedent concerning federalism — the balance of power between states and the federal government. PLCAA implicates significant constitutional concerns because it infringes on core areas of state authority: states have

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The Journal of Law, Medicine & Ethics, 48 S2 (2020): 83-89. © 2020 The Author(s)
DOI: 10.1177/1073110520979405

the right to make law however they choose, and must be free to exercise their "'traditional authority to provide tort remedies to their citizens as they see fit.'"[8]

While gun violence litigation is discussed in some literature,[9] how federalism jurisprudence impacts a constitutional analysis of PLCAA has not. This article fills this void by reconsidering PLCAA's bar in light of new federalism precedent. Part I of this article provides an overview of PLCAA's statutory provisions and legislative history. This Part also reviews how courts have interpreted PLCAA, focusing on the law's definition of "qualified civil liability actions" and the predicate exception. Part II explains how the Court applies federalism principles, demonstrating how the Court has aggressively interpreted statutes to protect state authority. Part III applies these principles to PLCAA, explaining how federalism counsels narrowly interpreting PLCAA to allow lawsuits where gun companies violate common law. We conclude that absent such a narrowing construction, PLCAA would violate the Tenth Amendment by impermissibly infringing on the states' sovereign rights to allocate lawmaking functions among their governmental branches and to shape tort law. Part IV addresses some complications and counterarguments.

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I. The Protection of Lawful Commerce in Arms Act

A. Background

PLCAA protects firearm and ammunition businesses, including manufacturers, distributors, dealers, importers, and trade associations, from some civil liability.[10] The Act bars "qualified civil liability actions" from being brought in State or Federal court, and directs courts to dismiss these actions.[11] PLCAA defines a qualified civil liability action as:

> [A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.[12]

The Act exempts six categories of cases from the general definition of prohibited qualified civil liability actions.[13] For instance, exceptions allow certain cases involving a design or manufacture defect[14] and negligent entrustment or negligence per se claims against firearm sellers.[15]

PLCAA's "predicate exception" allows lawsuits against gun companies whose violation of a "[s]tate or Federal statute applicable to the sale or marketing of [firearms]" was "a proximate cause of the harm for which relief is sought."[16] Courts have held that the predicate exception allows all common law claims against gun companies to proceed if the defendant commits a "predicate violation" of a statutory law (or related implementing regulations).[17]

B. Legislative and Statutory History of PLCAA

PLCAA was drafted by Congress out of concern that "novel" legal claims could impose sweeping liability against the firearms industry.[18] Lawsuits had sought to impose liability on some manufacturers and dealers for criminal shootings using "Saturday Night Specials," simply because those guns posed (in plaintiffs' view) too great a risk of unlawful use,[19] and one was upheld.[20]

PLCAA's enacted findings reflect Congress's intent to bar such suits, decrying lawsuits "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States" that, if sustained by "a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States."[21]

Another finding indicates PLCAA's narrow scope, referencing "[t]he possibility of imposing liability on an entire industry for harm that is *solely caused* by others,"[22] as does its first stated purpose to "prohibit" actions against gun companies "for the harm *solely caused* by the criminal or unlawful misuse of firearm products or ammunition products by others."[23] The addition of "solely" to the first purpose was one of the few changes made to an earlier version of PLCAA that failed to pass.[24] As Justice Scalia has explained,

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amendments that appear key to the legislation's ultimate passage can reflect legislative intent.[25]

Senator Larry Craig, PLCAA's lead Senate sponsor, noted that "[t]he only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle."[26] Senator Craig affirmed that gun companies could still be liable if they "break the law or commit negligence," declaring that "this is not a gun industry immunity bill."[27] Other PLCAA co-sponsors agreed,[28] expressing a desire to bar liability for companies that did nothing wrong but sell a legal product that was later misused.[29]

This history and language points to a congressional intent to allow traditional negligence claims so long as the harm was not "solely caused" by the criminal misuse of a gun. Such cases would include claims against dealers that made negligent sales, or against manufacturers that carelessly distributed or negligently designed a firearm.

C. Judicial Interpretation and Application of PLCAA

The aforementioned text and legislative history has left courts to grapple with the ambiguity presented by a statute that (1) is intended to only bar gun industry liability where harm was "solely caused" by unlawful actors, while preserving negligence actions against gun companies;[30] yet (2) only expressly exempts certain common law actions from its broad definition of prohibited actions; but (3) allows all common law actions if defendant knowingly commits a statutory "predicate" violation.[31]

PLCAA's distinction between judge-made and statutory law is inconsistent with the Supreme Court's foundational understanding of federalism. In the landmark case *Erie Railroad Co. v. Tompkins*, the Court firmly established that common law and statutory law are equally authoritative expressions of law, and "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[32] How states choose to allocate lawmaking power between the branches of state governments is a core prerogative of the states as sovereign entities, over which the federal government has no authority to interfere.[33]

Yet under courts' reading of PLCAA's predicate exception, in some cases Congress only allows gun industry liability if the state expresses gun industry liability law via statute instead of common law.[34] For instance, in *Williams v. Beemiller, Inc.*, the Appellate Division of New York allowed claims that gun companies negligently sold and distributed guns where the plaintiff alleged predicate violations of statutory firearms laws by the defendants.[35] But in *Kim v. Coxe*, the Alaska Supreme Court found that PLCAA barred holding a gun dealer liable for negligence (for enabling a supposed theft), but that the dealer could be held liable if it violated statutory law.[36]

II. The Supreme Court's Federalism Jurisprudence

The Court consistently touts the importance of interpreting federal statutes in light of federalism principles.[37] The Tenth Amendment specifically protects state authority: "[t]he 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."[38] The Court has read the Tenth Amendment to preserve states' substantial sovereign authority, including preventing the federal government from compelling states to "enact and enforce a federal regulatory program,"[39] from regulating conduct that does not have an interstate economic effect,[40] and from conscripting state officers to "address particular programs" or execute federal laws.[41]

States traditionally exert control in areas like criminal, family, public health, election administration, and corporate law" without federal government interference.[42] While the lines of division between the powers of the federal government and states are continually debated and redrawn, federalism only retains its meaning if courts maintain "reservoir[s] of state power."[43]

The Court has applied federalism principles in two primary ways: by striking down as unconstitutional laws that infringe on state authority, and by interpreting statutes to protect federalism principles. Starting in the 1980s, the Court began to favor the latter approach, pressing "super-strong clear statement rules" for federalism-based canons, while abandoning "constitutional activism on federalism issues."[44] Two seminal cases, *Gregory v. Ashcroft*[45] and *Bond v. U.S.*,[46] affirm the Court's desire to engage in statutory interpretation to protect federalism.

Gregory considered whether a Missouri constitutional provision, requiring that judges retire at seventy, violated the federal Age Discrimination in Employment Act of 1967 (ADEA).[47] Although the ADEA prohibits age discrimination, and its exceptions do not expressly exempt judges,[48] the Court upheld Missouri's provision.[49] *Gregory* noted that Missouri had authority to create qualifications for its own officers and that federal involvement in this decision-making "upset[s] the usual constitutional balance of federal and state powers."[50]

The Court recognized that its reading was not straightforward, especially in light of the Act's other

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exceptions and since Congress could have excluded judges explicitly.[51] Nonetheless, the Court "[would] not read [the federal law] to cover state judges unless Congress ha[d] made it clear that judges [we]re *included*" in the law's coverage.[52] *Gregory* creates a "new, super-strong clear statement rule"[53] for statutes that "intrude on state governmental functions"[54] — Congress must make its intention to intrude on state sovereignty "unmistakably clear in the language of the statute."[55]

Bond concerned a prosecution under the federal Chemical Weapons Convention Implementation Act of 1998 (CWCIA) of a woman who attempted to injure her husband's paramour with chemicals. The CWCIA's plain language criminalized such attacks with prohibited chemicals, without relevant exceptions. However, the Court, per Chief Justice Roberts, found no indication that Congress intended the CWCIA to reach local criminal acts like the defendant's, and held that the Act could not be enforced against such a crime.[56] The Court reasoned that because states generally exercise police power authority over local crimes, applying the Act to this offense would undermine federalism.[57] The Court rejected the statute's plain reading because its breadth "would 'alter sensitive federal-state relationships.'"[58]

III. Federalism and the Predicate Exception

The way that PLCAA has been interpreted by most courts contravenes federalism principles, by: (1) requiring states to use legislatures, rather than courts, to make laws that hold negligent gun companies liable, and (2) interfering with states' traditional control over tort law.

A. A Broad Reading of PLCAA Improperly Interferes with States' Lawmaking Function

The dominant, broad reading of PLCAA interferes with states' authority to decide how to allocate their lawmaking power. Most states choose to enforce tort law through common law, including public nuisance and negligence claims. Under PLCAA's predicate exception, however, Congress restricts states from applying their common law in many such cases unless gun companies also violate an applicable statute.[59] With PLCAA, then, Congress often requires states to make liability law through Congress's favored government branch (i.e., legislatures, not courts).

In so doing, PLCAA intrudes on traditional areas of state authority, including dictating to states which branch of government should make liability laws, how to structure their governments, and how to define their "laws."[60] However, the Constitution does not permit Congress to so intrude on state sovereignty, or to so manipulate the functions of state government. PLCAA also contravenes *Erie's* rule that whether state laws are declared by a state's legislature or its highest court "is not a matter of federal concern."[61] The law also violates *Gregory*'s pronouncement that states have a "constitutional responsibility for the establishment and operation" of their government,[62] as well as over a century of precedent affirming state authority over its governmental functions[63] — and that "[s]tates are free to allocate the lawmaking function to whatever branch of state government they may choose."[64]

PLCAA impermissibly subverts state judiciaries to state legislatures, preventing states from using their courts to redress wrongs.

B. A Broad Reading of PLCAA Improperly Interferes with States' Traditional Control over Tort Law

States have a special interest in "'exercising judicial jurisdiction over those who commit torts within its territory.'"[65] Indeed, protecting the health and safety of citizens is "primarily, and historically [a] matter[] of local concern,"[66] and "[i]n our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit."[67] As the Court has explained:

> the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.[69]

Since PLCAA intrudes on states' authority to make and apply their tort law, the federalism principles of *Bond* and *Gregory* apply with special force.

C. How Courts Should Interpret PLCAA Going Forward

The Supreme Court's federalism precedent counsels that courts construing PLCAA either: (1) interpret the definition of PLCAA's prohibited qualified civil liability actions to bar only actions arising *solely* from the unlawful misuse of a firearm by a third party; (2) read the predicate exception to allow actions involving knowing violations of common law; or (3) strike down PLCAA as unconstitutional. The first solution stays true to PLCAA's intended meaning, and the Court's call to do the "least violence to the text,"[69] while protecting federalism principles.

Reading PLCAA to allow common laws claims is consistent with *Gregory* and *Bond* since PLCAA does not expressly bar these claims. Instead, PLCAA's

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definition of "qualified civil liability action" bars (unexempted) actions against gun companies "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party."[70] As PLCAA does not define the phrase "resulting from," federalism principles demand that it be read narrowly, to preserve state authority to apply and enforce liability laws. This can be done by construing "resulting from" consistently with "solely caused by," thereby allowing claims where the harm resulted, at least in part, from gun company negligence.

This reading also furthers Congress's intent to not prohibit negligence claims and furthers the Act's Purposes and Findings, which state an intent to only bar actions "*solely caused by*" the criminal or unlawful misuse of a product. Hence, PLCAA should not bar claims against a negligent gun company if a plaintiff's harm "result[ed] from" both a gun company's negligence *and* a criminal shooter.[71] This reading cures the federalism concerns raised by PLCAA.

Some courts have rejected this reading because PLCAA specifically excepts some subsets of negligence — negligent entrustment and negligence per se — but does not specifically except general negligence claims. A narrowing construction of "qualified civil liability actions," they suggest, renders the exceptions superfluous.[72] However, the "preference for avoiding surplusage constructions is not absolute,"[73] and the presumption can be overcome in the face of competing contextual concerns.[74] And *Bond* and *Gregory* require a narrowing construction to cure PLCAA's serious federalism problems.

Indeed, the Supreme Court rejected that approach in *Gregory* when it held that age limits on state judges were exempt from the ADEA, even though Congress had chosen to exempt other functions, because federalism concerns would be raised by a broader (albeit more straightforward) reading. To protect state authority, the Court would not hold the law included state judges "unless Congress ha[d] made it clear [they] [we]re *included*."[75]

Reading PLCAA to allow common law claims is less drastic than *Gregory*'s interpretation. Allowing common law claims is arguably permitted by PLCAA's general definition and is consistent with PLCAA's stated Purposes, Findings, and legislative history. A narrow reading of PLCAA is also more supportable than *Bond*'s statutory interpretation, where the Court read an exception for local crimes into the law to avoid federalism issues, even though none existed.

The principle of constitutional avoidance — where courts "interpret ambiguous, but potentially unconstitutional, statutes in ways that avoid the constitutional problem"[76] — also favors this reading.[77] Nor can courts simply strike down the predicate exception, as it was a critical part of the congressional compromise needed to enact PLCAA. Congress intended to create only narrow protection for gun companies, and repeatedly stated that companies remain liable for unlawful conduct.[78] Eliminating the predicate exception would immunize law-breaking companies from statutory violations, contrary to Congress's purpose. Removing the predicate exception also exacerbates federalism issues, leaving states even less recourse against gun companies. Courts favor reading statutes to fix federalism problems in ways that are both constitutional and respect the intent of Congress by doing the "least violence to the text."[79] Both eliminating the predicate exception or reading it to encompass violations of common law do more violence to the text than interpreting "resulting from" to mean "solely caused by" — courts should thereby do the latter.

Courts may be awakening to PLCAA's fatal federalism issues: a Pennsylvania appellate court recently became the first to hold PLCAA unconstitutional based on its usurpation of state common law — "a police power reserved for the several States under the Tenth Amendment."[80]

IV. Complications and Counterarguments

A. Laws of General vs. Firearm-Specific Applicability

Federalism principles also aid resolution of the most commonly litigated issue relating to the predicate exception — whether "predicate" statutes can be generally applicable or must specifically mention firearms or ammunition[81] — favoring reading the predicate exception to include all relevant laws, specific or general.

B. Express Preemption

Gun companies have argued that federalism principles are inapplicable to PLCAA because it involves "express" preemption, wherein Congress has explicitly stated its intent to override state law, leaving no ambiguity for interpretation.

The Court, however, has never stated that "implied" preemption or ambiguity are preconditions for applying federalism principles.[82] On the contrary, *Gregory* involved explicit preemption, and in *Bond* the Court found that ambiguity arose, not from ambiguous statutory language, but from the "improbably broad reach of [a] key statutory definition[;] ... the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose."[83] And even if some preemption is express, as in *Gregory*,

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federalism principles apply to determine the scope of preemption, and to protect a state's right to structure and balance its own government, on which PLCAA infringes.

Further, the conflict between PLCAA's "solely caused by" and "resulting from" language creates, at least, ambiguity as to whether Congress intended to bar common law claims in the general definition of "qualified civil liability action."

C. Anti-Commandeering

A handful of courts have mistakenly held that PLCAA does not violate the Tenth Amendment because it does not "commandeer" state officials.[84] But the Tenth Amendment does not state it is limited to "commandeering," nor has the Supreme Court held that it is.

For example, in *Murphy v. NCAA* the Court recently held that a federal statute violated the Tenth Amendment by prohibiting states from authorizing private sports gambling.[85] This statute, like PLCAA, achieved its objectives by requiring states to *refrain* from acting, without commanding "affirmative" action of state officials. But "[t]he basic principle — that Congress cannot issue direct orders to state legislatures — applies in either event."[86] *Murphy* supports the argument that a broad reading of PLCAA violates the Tenth Amendment.[87]

Conclusion

For more than a decade, PLCAA has shielded the gun industry from the civil accountability to which every other industry is subjected, due to a judicial interpretation that is unduly broad, and violates federalism principles. Reading PLCAA to bar many common law claims unless there is a statutory violation unconstitutionally interferes with traditional state authority, dictating to states how to make their laws, and how to apply their tort law. The federalism principles developed by the Supreme Court requires that PLCAA's bar on gun industry liability be narrowed, or done away with.

Note

This article builds in part upon a theory devised by Robert S. Peck in challenging PLCAA several years ago. It does not purport to speak for him or how he would currently articulate this argument.

The authors do not have any conflicts of interest to disclose.

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68. *Martinez v. California*, 444 U.S. 277, 282 (1980). See also *Otchkov v. Everett*, 12-CV-02042-PHX-JAT, 2013 WL 4774645, at *8 (D. Ariz. Sept. 5, 2013), *aff'd*, 678 Fed. Appx. 476 (9th Cir. 2017) (unpublished); *Stoianoff v. Commr. of Motor Vehicles*, 107 F. Supp. 2d 439, 448 (S.D.N.Y. 2000), *aff'd sub nom. Stoianoff v. Commr. of Dept. of Motor Vehicles*, 12 Fed. Appx. 33 (2d Cir. 2001) (unpublished).
69. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 529 (1989).
70. 15 U.S.C. § 7902 (2018).
71. *Id.* (emphasis added).
72. See *Corley v. U.S.*, 556 U.S. 303, 314 (2009).
73. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).
74. See, e.g., *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007).
75. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991).
76. W.N. Eskridge, A.R. Gluck, and V.F. Nourse, *Statutes, Regulations, and Interpretations: Legislation and Administration in the Republic of Statutes* (West Academic Publishing, 2014): at 512. See also, P.P. Frickey, "Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court," *California Law Review* 93 (2005): 397-464, at 397.
77. See *Clark v. Suarez Martinez*, 543 U.S. 371, 381-82 (2005).
78. See *supra* Part I.B.
79. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 529 (1989).
80. *Gustafson v. Springfield, Inc.*, No. 207-WDA-2019, slip op. at 57, (Pa. Super. Ct. Sept. 28, 2020).
81. See *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 432 (Ind. Ct. App. 2007).
82. See, e.g., *Skilling v. U.S.*, 561 U.S. 358 (2010); *Bond v. U.S.*, 572 U.S. 844 (2014); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
83. 572 U.S. 844, 860 (2014).
84. See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-7 (2d Cir. 2008); *Adames v. Sheahan*, 909 N.E.2d 742, 764-65 (Ill. 2009); *Estate of Kim v. Coxe*, 295 P.3d 380, 388-92 (Alaska 2013); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 323-24 (Mo. 2016).
85. *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018).
86. *Id.*, at 1478.
87. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981).

The Journal of Law, Medicine & Ethics, 48 S2 (2020): 83-89. © 2020 The Author(s)