

AFTERWORD

Federal Gun Industry Immunity Legislation

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On October 26, 2005, President Bush signed the Protection of Lawful Commerce in Arms Act (PLCAA), granting the gun industry immunity from civil suits involving the criminal misuse of firearms and ammunition.¹ The act mandates immediate dismissal of pending claims and prohibits future claims. Immediately following enactment, gun industry defendants around the country filed motions to dismiss that, as this book goes to press, remain unresolved. At this point, it is impossible to predict whether PLCAA will bring gun litigation to an end or merely shift its focus. Without attempting to foresee the future, this afterword examines the extent of gun industry protection under PLCAA and possible challenges to its constitutionality.

It is difficult to anticipate exactly what impact PLCAA will have on the future of gun litigation because its language leaves open important questions of statutory interpretation. The act attempts to limit gun industry liability for gun violence without eliminating it altogether. At first glance, the act appears to eliminate industry liability for injuries caused by criminal misuse of guns, while leaving unaffected industry liability for accidents caused by defective guns. Ambiguities in two of the act's key provisions, however, undermine this distinction and may lead courts to apply the act in ways that its supporters never intended.

In addition, PLCAA has already been attacked by plaintiffs on a number of constitutional grounds. PLCAA is not the first federal law to grant a particular industry immunity from tort liability, and other industry immunity laws have survived constitutional challenges. Examples

include the National Childhood Vaccine Injury Act of 1986, granting vaccine manufacturers immunity from tort liability, and the Air Transportation Safety and System Stabilization Act of 2001, granting the airline industry immunity from tort liability following the 9/11 terrorist attacks. But PLCAA is different. In the cases of vaccine manufacturer and airline industry immunity, Congress replaced tort liability with alternative compensation schemes. By contrast, PLCAA simply prohibits certain kinds of tort claims against the gun industry without providing plaintiffs any alternative means of pursuing their claims. It is too early to say whether this difference or other features of PLCAA render the act unconstitutional. The resolution of these constitutional issues may turn out to be among the important legacies of gun litigation.

The implications of PLCAA are likely to extend far beyond gun litigation. If the act succeeds in ending litigation against the gun industry, it may serve as a precedent for future efforts by other industries seeking statutory immunity from liability. If the act fails to protect the industry, it may reveal constitutional limits on using statutory immunity as a defense tactic in tort litigation.

The Extent of Industry Protection under PLCAA

PLCAA takes aim most directly at lawsuits against the gun industry based on common law negligent marketing and public nuisance theories. It prohibits claims in which the plaintiff's injury resulted from the "criminal or unlawful misuse" of a firearm by the plaintiff or a third party.² The act also specifically lists six types of claims that it does *not* prohibit: (1) lawsuits against a defendant who "knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence," brought by a victim "directly harmed" by the transfer; (2) lawsuits against sellers based on negligent entrustment or negligence per se; (3) lawsuits against manufacturers or sellers who "knowingly violated a State or Federal statute applicable to the sale or marketing of the product" where the violation was a "proximate cause" of the plaintiff's harm; (4) lawsuits against manufacturers and sellers for breach of contract or warranty; (5) lawsuits against manufacturers or sellers based on manufacturing or design defect in a gun "when used in a reasonably foreseeable manner, except where the discharge of the product was caused by a

volitional act that constituted a criminal offense”; and (6) proceedings brought by the U.S. attorney general to enforce federal firearms laws.³ These six types of cases are commonly referred to as exclusions, as they are excluded from the protection provided by the act.

At first glance, PLCAA appears to prohibit only lawsuits in which the defendant’s sale of the gun was legal and the plaintiff was injured by his own or a third party’s criminal or unlawful misuse of the gun. The act appears to leave unaffected lawsuits involving illegal sales by defendants (exceptions (3) and (6)), negligent entrustment (exceptions (1) and (2)), and product liability claims (exceptions (4) and (5)). As one of PLCAA’s primary sponsors, Senator Larry Craig, explained during floor debate,

What this bill does not do is as important as what it does. This is not a gun industry immunity bill. . . . It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. It does not prevent them from being sued for their own misconduct. . . . This bill only stops one extremely narrow category of lawsuits: lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control.⁴

On this reading, PLCAA would put an end to negligent marketing and public nuisance claims like those pending in municipal suits brought by the City of New York and Gary, Indiana, as well as individual suits like *Ileto v. Glock*. The act would not, however, affect product liability suits where the plaintiff was injured in an accident caused by a defect in the gun.

More careful scrutiny of PLCAA raises questions about the extent of protection that it provides to the gun industry. On the one hand, PLCAA’s protection may be narrower than its sponsors anticipated. Exception (3) for lawsuits against manufacturers or sellers who “knowingly violated a State or Federal statute applicable to the sale or marketing of the product” may allow liability for legal gun sales that can be characterized as violating a public nuisance statute. In response to defense motions to dismiss based on PLCAA, plaintiffs in *City of Gary v. Smith & Wesson, Corp.* have invoked an Indiana statutory civil nuisance provision as the basis for their claims, and plaintiffs in *Ileto v. Glock* have invoked public nuisance provisions of the California Civil Code. Defendants have responded that these statutes are not specifically “applicable

to the sale or marketing” of firearms. This response was rejected by Federal District Court judge Jack B. Weinstein in *City of New York v. Beretta*, the first test case of exception (3).⁵ In that case, plaintiffs based their public nuisance claim on a New York State criminal nuisance statute. The New York statute provides that

A person is guilty of criminal nuisance in the second degree when . . . [b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons.⁶

Judge Weinstein held this statute “applicable to the sale or marketing” of the defendants’ weapons. If this interpretation of exception (3) survives appeal or is adopted by other courts, then PLCAA will not protect gun industry defendants from liability for otherwise legal sales that are judged unreasonable under statutory nuisance provisions.⁷

On the other hand, while PLCAA’s protection against liability for lawful sales may be narrower than anticipated, its impact on product liability claims may be broader than its sponsors suggested. Exception (5), which preserves manufacturing- or design-defect claims except where discharge of the gun “was caused by a volitional act that constituted a criminal offense,” may protect gun industry defendants for accidents caused by defective weapons where the accident involved an illegal use of the gun. For example, consider guns that maintain a dischargeable round of ammunition in the firing chamber even when the magazine is removed but are not equipped with a magazine disconnect safety feature that would prevent inadvertent firing of the round. Such guns have discharged accidentally when a person removed the magazine and—mistakenly believing the gun was thereby unloaded—in jest pointed the gun at another, pulled the trigger, and injured the other. According to common law, manufacturers may be subject to liability for such accidents under the theory that the failure to equip a gun with a magazine disconnect safety constitutes a design defect, provided that the horseplay was a reasonably foreseeable misuse of the gun.⁸ Under PLCAA such claims might be barred where, for example, the shooter is a minor, since pulling the trigger constitutes a “volitional act” and possession of a firearm by a minor is a criminal offense. The same might be true where the shooter lacks a required license to possess the gun or where transfer of the gun

did not conform to statutory requirements. PLCAA thus might provide protection against some product liability claims arising out of accidental shootings caused by a defect in the gun.

Constitutional Challenges to PLCAA

Constitutional challenges to PLCAA raise issues that have broad implications for the future of federal immunity legislation as a means of limiting state tort claims. Plaintiffs have asserted that the act violates their individual rights to pursue common law tort claims and exceeds the limits of Congress's regulatory powers. My aim here is merely to outline these complex challenges and to highlight their implications for the future of federal tort reform. Challenges to PLCAA provide an important test case for congressional efforts to grant statutory immunity to particular industries. I discuss first challenges asserting individual rights and then those involving the limits of congressional power.

Due Process

The Due Process Clause of the Fifth Amendment provides one basis for challenging the constitutionality of PLCAA. The Due Process Clause states that no person shall “be deprived of life, liberty, or property without due process of law.” Plaintiffs have argued that PLCAA violates the Due Process Clause by depriving them of their rights to sue in tort.

The meaning of the Due Process Clause—in particular, which rights are included in “life,” “liberty,” and “property” and what limits “due process of law” places on lawmaking—has historically been one of the most hotly contested areas of constitutional law. Since the late nineteenth century, the U.S. Supreme Court and the lower federal courts have taken a number of different approaches to deciding the question of whether the Due Process Clause protects individuals' rights to sue in tort and what limits, if any, the Due Process Clause places on the power of Congress to change tort law.⁹ I offer here a brief overview of the different possible approaches that courts might take in adjudicating due process challenges to PLCAA.

Constitutional doctrine in this area is built on a fundamental distinc-

tion between the power of a legislature to change the law and the protection of individual rights that have vested prior to the change. The U.S. Supreme Court first articulated this distinction in *Munn v. Illinois*, an 1876 case upholding the power of a state to enact a statute that displaced a common law rule:

A person has no property right, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at will, or even at the whim, of the legislature, unless prevented by constitutional limitations.¹⁰

The central distinction here is between a “rule of common law” and “rights of property which have been created by the common law.” Legislatures have wide latitude to change the common law, but they must respect individual property rights that have vested under the law prior to the change. Due process challenges to PLCAA fall into two general categories: those asserting that the act exceeds the legitimate power of Congress to change the common law and those asserting that it impermissibly infringes vested property rights.

The first category of due process challenges to PLCAA asserts that the act’s grant of immunity exceeds the legitimate power of Congress to change the common law. The act’s immunity provision is, in the language of the *Munn* holding quoted previously, “prevented by constitutional limitations.” Within this first category, there are four possible approaches that plaintiffs might use to define constitutional limitations on the power of Congress to change common law tort rules that PLCAA violates.

One approach employs a compelling government interest test. Under contemporary due process doctrine, legislative interference with fundamental rights is unconstitutional unless the government can prove that it serves a compelling government interest. Plaintiffs have argued that PLCAA interferes with a fundamental right to seek redress in the courts and that PLCAA serves no compelling government interest. The advantage of this approach is that it places a heavy, and in most cases an unsustainable, burden on the government to provide a compelling government interest. The disadvantage is that courts would have to find that the right to seek redress in the courts is a fundamental right, a considerable

challenge given the current Supreme Court majority's reluctance to extend constitutional protection to rights beyond those either mentioned explicitly in the Constitution or embedded in existing precedents.

A second approach employs a rational basis test. Under current doctrine, government infringement of even nonfundamental rights must be rationally related to a legitimate government interest. The advantage here is that courts already recognize common law rights to seek redress in the courts, and PLCAA's immunity provision clearly limits such rights. The disadvantage is that, plaintiffs' assertions to the contrary notwithstanding, courts are likely to find that PLCAA's stated purpose—to protect the domestic production and retail supply of firearms—satisfies this rationality test.

A third approach relies on a quid pro quo standard. In some cases the Supreme Court has suggested, in dicta, that where Congress limits rights to sue in tort, it must provide alternative remedies. For example, in the 1917 case *New York Central Railroad Co. v. White*, the Court upheld a state workers' compensation law that substituted a no-fault compensation scheme for employee rights to sue in tort.¹¹ The substitution was, according to the Court, a "just settlement of a difficult problem."¹² Without committing itself, the Court went on to suggest that

Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages.¹³

In more recent cases, the Supreme Court has continued to invoke this quid pro quo standard while refusing to endorse it as a requirement of the Due Process Clause. In the 1978 case *Duke Power Co. v. Carolina*

Environmental Study Group, Inc., the Court upheld the Price-Anderson Act, which provided that, if liability from a nuclear accident exceeded the maximum amount of private commercial liability insurance available, the federal government would indemnify an industry defendant for up to \$500 million in additional damages.¹⁴ The act also placed a statutory ceiling on liability of \$560 million. In upholding the act, the Court stated that

Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces. . . . We view the congressional assurance of a \$560 million fund for recovery, accompanied by an express statutory commitment, to “take whatever action is deemed necessary and appropriate to protect the public from the consequences of” a nuclear accident, to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage.¹⁵

As both of these cases make clear, the doctrinal status of the quid pro quo standard is unclear. Plaintiffs would seem to be on solid factual ground in arguing that PLCAA grants the gun industry immunity from certain forms of liability without providing a “reasonably just substitute.” They may, however, turn out to be on shaky legal ground if their challenge forces the Supreme Court to decide whether the Due Process Clause requires this kind of quid pro quo.

A fourth approach, advocated by Vanderbilt law professor John Goldberg, would resuscitate pre–New Deal era substantive due process protections for core common law rights.¹⁶ He cites cases starting with *Munn* in 1876 through the late 1920s in which the Supreme Court employed “floors” below which legislatures could not reduce common law tort liability and “ceilings” above which they could not expand it. Legislation that, for example, extinguished an entire category of liability altogether was likely to violate the floor of permissible legislative changes to common law torts and, therefore, to be struck down. Legislation that imposed liability on parties with no causal relation to the harm

suffered was likely to violate the ceiling and to be struck down. In both cases, these types of statutes represent illegitimate wealth transfers and on that basis were considered deprivations of property without due process of law. One would imagine that, if anything falls below this conception of a floor, the immunity provisions of PLCAA do. While this may be true, it would take a considerable doctrinal shift for the current Supreme Court to embrace an approach based on the pre–New Deal jurisprudence of substantive due process protections for nonfundamental common law rights.

A second category of due process challenges to PLCAA asserts that it impermissibly infringes vested property rights. In a 1982 case, *Logan v. Zimmerman*, the Supreme Court held that Due Process Clause protection of property rights created by the common law includes rights to sue in tort:

[A] state tort claim is a species of “property” protected by the Due Process Clause. . . . This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, for example—where a plaintiff’s claim had been dismissed for failure to comply with a trial court’s order—the Court read the “property” component of the Fifth Amendment’s Due Process Clause to impose constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.¹⁷

Thus, once a plaintiff’s common law tort claim has vested, it is “a species of property,” and the plaintiff cannot be deprived of it without a “hearing on the merits of his cause.” Under state law in most states, common law tort claims vest at the time a person suffers injury. There is, as I shall discuss in a moment, some disagreement among the federal courts as to when common law tort claims vest for the purposes of due process analysis. Plaintiffs in pending cases have claimed that PLCAA deprives them of their vested property rights in common law tort claims without providing them a hearing on the merits.

Due process challenges to congressional grants of industry immunity based on vested rights have not fared well in the lower federal courts.

For example, in a 1987 case, *In re Consolidated United States Atmospheric Testing Litigation*, the Ninth Circuit Court of Appeals rejected a due process challenge to federal legislation that shielded military contractors from liability for injuries caused by nuclear weapons testing.¹⁸ The legislation substituted the federal government as the sole defendant in claims against contractors covered by the act and required plaintiffs to pursue their claims under the Federal Tort Claims Act (FTCA). The plaintiffs in the case had claims pending when the legislation was passed. Pursuant to the legislation, the district court substituted the government for the contractors as defendant and dismissed the plaintiffs' claims under several exceptions to governmental liability under the FTCA. The plaintiffs appealed on the ground that the legislation deprived them of their right to sue without due process. The Ninth Circuit Court of Appeals affirmed, holding that the dismissal did provide adequate due process:

The notion of due process relevant to causes of action is that deprivation . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. On notice of hearing, appellants were given the opportunity to present their claims before the district court. The requirements of procedural due process were thereby satisfied. The plaintiffs' claims were simply unavailing under the procedure pursued by them. Procedural due process, however, does not guarantee that a party will prevail.¹⁹

Thus, according to the appellate court, a district court hearing on dismissal of the plaintiffs' claims under the immunity provisions of the FTCA satisfied the Due Process Clause.

The *Atmospheric Testing* court based its decision on the assertion that a plaintiff's property right in a cause of action does not merit the same level of constitutional protection as other forms of property until the plaintiff obtains a final judgment. "A cause of action," explained the court, "is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definite or enforceable property right until reduced to final judgment."²⁰ That is, the court held that pending tort claims do not merit the same level of constitutional protection as other forms of property and that the due process rights of plaintiffs could be satisfied by a hearing that amounts to no more than a formal dismissal. In a 1986 case with similar

facts, *Hammond v. United States*, the First Circuit Court of Appeals went even further, holding that “[b]ecause rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting [legislation transferring liability to the government under FTCA] and retroactively abolishing her cause of action in tort.”²¹

These two federal appellate decisions reveal that, when it comes to legislative grants of statutory immunity applied to pending tort claims, there is an irreconcilable tension between the fundamental distinction in the Supreme Court’s due process jurisprudence that (1) there is no individual right to any particular rule of law and (2) persons with vested rights to sue in tort are entitled to a hearing on the merits of their claims. On the one hand, by holding that judicial dismissal of plaintiffs’ claims under the immunity statute satisfied due process, the *Atmospheric Testing* and *Hammond* courts, in essence, denied the plaintiffs a hearing on the merits of their claims. Summary dismissal pursuant to statutory immunity is hardly a hearing on the *merits* of claims that had vested under the law before the enactment of immunity, since the merits of these claims can only be judged in reference to the law that gave rise to them in the first place. On the other hand, if judicial dismissal of vested claims under an immunity statute like PLCAA does not satisfy the Due Process Clause, then it would appear that the plaintiffs are entitled to not only a hearing but also a rule of law that, should the allegations in their claim be proven and sufficient under the old rule, would support some form of recovery. That is, while they are not entitled to the old rule, they are entitled to a rule that is sufficiently similar to the old rule that it would support recovery. In a secondary sense, at least, they are entitled to the old rule insofar as determining what qualifies as a hearing on the merits requires that courts use the old rule as a benchmark. In the end, the courts must abandon either the principle that any person with a vested right to sue must receive a hearing on the merits or the principle that no one has a right to any rule of law.

Equal Protection

Plaintiffs have also brought equal protection challenges to PLCAA. The Equal Protection Guarantee of the Fifth Amendment prohibits any leg-

islative classification that impinges on fundamental rights in the absence of proof that the classification is necessary to accomplish a compelling government interest. Equal protection permits legislative classifications that impinge on other rights so long as they are rationally related to a legitimate government interest. Plaintiffs have argued that PLCAA unconstitutionally discriminates against gun violence victims as compared to other tort victims. Insofar as plaintiffs' equal protection challenges rest on either assertions of a fundamental right to redress in the courts or the lack of a rational basis for PLCAA, they will face the obstacles to due process challenges discussed previously.

Takings

Plaintiffs have challenged PLCAA based on the Takings Clause of the Fifth Amendment. Under the Takings Clause, the federal government may not deprive a person of private property unless the taking is for a public use and just compensation is paid. Plaintiffs have alleged that PLCAA's prohibition of their claims constitutes a taking of their property right in a tort cause of action without just compensation. There is a division of opinion in the federal courts about whether government interference with a right to sue in tort constitutes a taking. For example, in *In re Aircrash in Bali, Indonesia on April 22, 1974*, a jury awarded damages to the survivors of the victims of an air crash caused by the negligence of the defendant airline.²² When the appellate court reduced the damages pursuant to the Warsaw Convention, it suggested that the reduction constituted a compensable taking. "There is no question," the court explained, "that claims for compensation are property interests that cannot be taken for public use without compensation."²³ By contrast, in the *Hammond* case discussed earlier, the court held that "rights in tort do not vest until there is a final, unreviewable judgment . . . so it is very unlikely there could be a taking," where plaintiffs' pending claims were extinguished by congressional legislation designed to grant immunity for injuries caused by nuclear weapons testing.²⁴

While the *Aircrash in Bali* court indicated that federal statutory interference with tort claims is a compensable taking, and the *Hammond* court did not rule it out, it is unclear how successful Takings Clause challenges to PLCAA would proceed. Both courts explained that any takings claim

by plaintiffs must be brought in the U.S. Court of Federal Claims, which has exclusive jurisdiction over claims exceeding ten thousand dollars against the federal government for just compensation under the Takings Clause. The *Aircrash in Bali* case involved an easily measurable reduction in damages awarded by a jury at trial. By contrast, takings challenges to PLCAA, if successful, would require the Court of Federal Claims to place a value on pending tort claims that have not yet reached trial or, in some cases, vested rights to sue prior to the filing of a complaint. In theory, the value of such claims would be the value of the plaintiffs' damages discounted by the probability of their obtaining a judgment upheld on appeal. It is unclear how the Court of Federal Claims could make this calculation. The largely untested duty and causal theories offered by plaintiffs and the uncertainty of their success at trial and on appeal would make it difficult to calculate the extent of plaintiffs' injuries caused by the defendants and the probability of their success. Accepted methods of valuing property for the purposes of calculating just compensation based on fair market value at the time of the taking seem inadequate to deal with the high level of speculation needed to appraise rights to sue. In addition, it is worth noting that any takings claim would depend on the success of an underlying due process claim: the plaintiff's right to sue has value only if, in the wake of the legislative change, he or she has a right to a hearing on the merits.

Retroactivity

Plaintiffs have challenged PLCAA as an impermissibly retroactive law. While retroactive legislation affecting criminal rights is unconstitutional under the Ex Post Facto Clause of Article I, Section 9, retroactive legislation affecting civil rights has been allowed where there is a strong public interest in retroactivity.²⁵ Plaintiffs have argued that PLCAA retroactively deprives them of their vested rights to sue in the absence of any strong public interest in retroactivity. While the Supreme Court has, since the New Deal, shied away from striking down retroactive legislation, it has recently signaled a possible revival of constitutional limits on retroactive statutes. In *Eastern Enterprises v. Apfel*, the Court considered a 1992 statute making a coal mining company that left the industry in 1965 liable for the current health-care costs of its retired miners.²⁶ A

majority of five justices held the act unconstitutional and enjoined its application to the defendant, offering a variety of reasons. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, found the liability provision a taking without just compensation. Justice Kennedy concurred but argued that the liability provision was an unconstitutional retroactive law, not a taking. Justice Thomas wrote separately that he considered all retroactive laws a violation of the Ex Post Facto Clause and advocated overruling *Calder v. Bull*, the 1798 case that limited application of the clause to criminal laws.

The application of *Eastern Enterprises* to plaintiffs' retroactivity claims involves a number of unsettled questions. First, it is unclear whether the holding in *Eastern Enterprises*, which applied to a retroactive increase in liability, applies to retroactive immunity from liability. Second, if the plurality's takings analysis is applied, then retroactivity challenges to PLCAA are really reducible to takings claims, with all of the valuation difficulties discussed previously. Third, recent changes in the makeup of the Court—the replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito—leave open the possibility that the retroactivity approach proposed by Justices Kennedy and Thomas could gain more support.

State Autonomy

Plaintiffs have challenged PLCAA as exceeding Congress's regulatory powers over state courts, arguing that PLCAA violates the concept of state autonomy reflected in the Tenth Amendment. The U.S. Supreme Court has held that the concept of state autonomy prohibits the federal government from using state legislatures and executive officers to carry out federal regulatory programs. In *New York v. United States*, the Court held that "Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program," and in *Printz v. United States*, the Court held that the federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."²⁷ Plaintiffs have argued that, in ordering state courts to "immediately dismiss" pending claims, PLCAA runs afoul of state autonomy by commandeering state judicial officials.

State autonomy challenges to PLCAA are likely to face an uphill bat-

tle in the courts. To begin with, the Supremacy Clause specifically states that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”²⁸ In *Testa v. Katt*, the Supreme Court, based on the Supremacy Clause, held that state courts cannot refuse to apply federal law.²⁹ Moreover, Justice Scalia, writing for the Court in the *Printz* case, acknowledged that numerous statutes in the early years of the Republic establish “that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions,” and he cited *Testa* to suggest that the Constitution’s prohibition on commandeering state officials does not apply to state judges required to enforce federal law. Finally, in *City of New York v. Beretta*, Judge Weinstein dismissed out of hand the plaintiffs’ state autonomy challenge, holding that “Congress is not commandeering the states by means of the Act.”³⁰

Separation of Powers

Plaintiffs have challenged PLCAA as an attempt by Congress to direct the outcome of pending litigation in federal courts, in violation of the separation of powers. The U.S. Supreme Court has struck down congressional legislation that attempts to direct the outcome of particular cases by removing jurisdiction or instructing a court to rule in a particular way.³¹ At the same time, it has upheld the power of Congress to change the law in ways that influence the outcome of pending litigation.³² Plaintiffs have asserted that PLCAA’s requirement that courts “immediately dismiss” pending claims instructs judges to rule in a particular way in violation of the separation of powers. In *City of New York v. Beretta*, Judge Weinstein rejected this argument as well. He held that PLCAA did not instruct judges to rule in any particular way but merely “impose[d] a new legal standard that is not restricted to pending cases,” leaving judges to adjudicate its applicability in the cases before them.³³ The *Atmospheric Testing* court took a similar view in upholding the application of legislation granting military contractors immunity to pending claims. In response to a separation of powers challenge to the legislation, the court explained that

Congressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III. The instant cases, however, do not fall within

that prohibition. . . . [The act] substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination.³⁴

According to both courts, as long as Congress does not direct particular findings of fact or mandate specific judicial orders, it may, without violating the separation of powers, pass a law designed to benefit specific defendants in pending litigation.

Immunity legislation aimed at benefiting a particular group of defendants draws into question the distinction between directing the outcome of particular cases and changing the law applicable to pending litigation. While it is true that PLCAA does not order judges to rule in a particular way, it does craft the relevant legal standard in a way that leads unavoidably to dismissal of specific pending claims. While there may be a formal distinction between a statute that orders a judge to make a particular ruling and a statute that sets forth a rule leaving the judge no option but to rule in a particular way as long as he determines that the statute is applicable, there is little practical difference. If legislation like PLCAA does not formally violate the separation of powers, it nonetheless functionally circumvents it. Separation of powers challenges to industry-specific statutory immunity applicable to pending litigation highlight the difficulty of maintaining both legislative freedom to change the law and judicial independence to adjudicate cases.

Conclusion

PLCAA represents a new tactic for industry defendants fighting tort litigation. If PLCAA is successful in putting a stop to negligent marketing and public nuisance claims against the gun industry, there is no reason to think that other powerful industries—such as the pharmaceutical, automobile, and health-care industries—will not seek statutory immunity tailored for their protection. Whether this would be a good or a bad development depends upon one's sense of the value of tort litigation. It depends also on whether one believes that limits on tort litigation should be set by courts or legislatures. Placing these important issues prominently on the national domestic policy agenda may be the most significant legacy of gun litigation.