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VIOLATING THE INVIOABLE: FIREARM INDUSTRY RETROACTIVE EXEMPTIONS AND THE NEED FOR A NEW TEST FOR OVERREACHING FEDERAL PROHIBITIONS

JAMES L. DANIELS*

“It is our number one priority.”¹

- Lawrence Keane, VP and GC of the National Shooting Sports Foundation, on the reintroduction of the Protection of Legal Commerce in Arms Act in 2005.

I. INTRODUCTION

Imagine the following scenario: a TNT manufacturer receives a call from a shady munitions dealer, who says that he needs to fill an order for several tons of TNT immediately. When asked about the last shipment of explosives that was sent to him, the dealer explains that he “lost” it. Now he needs more. As the TNT manufacturer considers this, he checks his customer database and sees that more than half of the major terrorist acts committed in the last few years are somehow linked to the dealer. The manufacturer agrees to the deal, and ships off the TNT.

It requires no great leap of the imagination to picture the ensuing catastrophe. What *would* strain the imagination is the final outrage: that after the dust settles and the dead are taken away, the public discovers that the TNT manufacturer is completely immunized from all lawsuits due to a recently passed congressional act.

A. *Firearm Industry Retroactive Exemptions*

This scenario, though fictional, is anything but far-fetched. The irresponsible marketing procedures described above occur

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1. Sue Reisinger, *High Noon*, available at <http://www.law.com/jsp/article.jsp?id=1098891006017> (Oct. 29, 2004). See text accompanying *infra* note 63 (describing the differences between the old and new bills).

every day whenever gun manufacturers knowingly supply weapons to unreliable Federal Firearms Licensees, who then sell them to criminals and their agents.² Such transactions will soon be granted blanket immunity if the 109th Congress passes a firearm industry retroactive exemption such as 2004's unenacted Protection of Lawful Commerce in Arms Act ("PoLCAA").³

Retroactive firearm industry exemptions such as PoLCAA are something new under the sun. They are nationwide congressional prohibitions that would strip away vital and long-held state powers in order to protect the profits of a single industry, without replacing these powers with any augmented federal regulatory scheme.⁴

B. Comment Organization

Part II of this Comment will describe the favored status that the gun industry enjoys in our society, and will reveal the industry's irresponsible design and marketing practices. Three arguments follow, suggesting ways in which firearm industry retroactive exemptions might be found unconstitutional: first, in Part III.B, because acts like PoLCAA are procedurally unsound and are proposed with insufficient fact-finding; second, in Part III.C, because such acts purposefully commandeer state executive officers in defiance of established precedent; and third, in Part IV, because even if such acts are generally applicable to both private and public actors alike, they nevertheless excessively interfere with the functioning of state governments and therefore should trigger a balancing test suggested—but never yet applied—by the Supreme Court.

II. BACKGROUND

A. The Protected Status of the Gun Trade

The gun trade is the fortunate son of American industry.⁵ Due to the lobbying efforts of powerful special interest groups such as the National Rifle Association ("NRA"),⁶ gun manufacturers

2. Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & POLY 67, 108-10 (2002).

3. Rhonda McMillion, *ABA Opposes Gun Bill*, A.B.A. J., Sept. 2003, at 63.

4. Letter from Alan B. Morrison, Director, Public Citizen Litigation Group, to Orrin G. Hatch, Chairman, United States Senate Committee on the Judiciary (July 24, 2003), available at <http://www.publiccitizen.org/documents/Letter.pdf> [hereinafter Morrison Letter] (last visited May 24, 2005).

5. Bhowmik, *supra* note 2, at 68.

6. See PETER HARRY BROWN & DANIEL G. ABEL, *OUTGUNNED: UP AGAINST THE NRA* 31-48 (2003) (describing the structure, mission, and leadership of the NRA). The NRA has been described as "the most powerful organization in the

have been granted special exemptions from civil liability that practically no other industry has enjoyed.⁷ In 1972, Congress specifically excluded gun manufacturers from the Consumer Product Safety Act,⁸ so that not even guns with acknowledged defects need to be pulled off the market.⁹ Fourteen years later, the gun industry was further shielded by the McClure-Volkmer Firearms Owners Protection Act (“FOPA”),¹⁰ which did much to take the bite out of the Gun Control Act of 1968.¹¹

Even so, the gun industry frequently refers to itself as “friendless”¹² and “heavily regulated.”¹³ But federal regulations are minimal at best. For example, the Brady Handgun Violence Prevention Act of 1994¹⁴ requires only a five-day waiting period between firearms purchases,¹⁵ a background check to weed out inappropriate purchasers such as felons and juveniles,¹⁶ and a database of purchasers’ names.¹⁷

Federal oversight is otherwise very limited.¹⁸ The Bureau of

United States” by both *Forbes* and *Fortune* magazines. *Id.* at 19, 296-97. See also TOM DIAZ, MAKING A KILLING 65 (1999) (naming and describing other firearm advocacy organizations).

7. Bhowmik, *supra* note 2, at 68.

8. 15 U.S.C. § 2052 (a)(1)(B), (E) (2000).

9. Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 130 (2002). See also DIAZ, *supra* note 6, at 55 (describing, by way of example, a defective Ruger handgun).

10. Pub. L. No. 99-308, 100 Stat. 449 (1986).

11. Philip J. Cook et al., *The Illegal Supply of Firearms*, 2002 CRIME & JUST. 319, 321 (2002). FOPA repealed the ban on out-of-state purchases of rifles and shotguns instituted by the Gun Control Act of 1968. *Id.* It also prohibited the creation of a national registry of firearms, and gave licensed dealers the right to sell guns outside their shop premises and at gun shows. *Id.* at 322. It also allowed convicted felons to purchase firearms under certain circumstances, struck down the ATF’s quantitative, bright line rule that a dealer is one who sells more than five guns per year, and changed dealer record-keeping sanctions from felonies to misdemeanors. *Id.* at 322-24, 347. See also DIAZ, *supra* note 6, at 37, 47-48 (describing the Gun Control Act of 1968 and FOPA).

12. Bhowmik, *supra* note 2, at 91.

13. S. 659, 108th Cong. § 2 (2003). See also DIAZ, *supra* note 6, at 36, 193 (demystifying the NRA’s statistics).

14. 18 U.S.C. §§ 921-931. See also Eggen & Culhane, *supra* note 9, at 128-29 (stating that the Brady Handgun Violence Prevention Act, because of its limited scope, is unable to fill the gun trade’s “regulatory vacuum”).

15. Bhowmik, *supra* note 2, at 72. See also Cook et al., *supra* note 11, at 343-44 n.8 (revealing that the waiting period required by the Brady Handgun Violence Prevention Act was replaced by the inferior National Instant Check System, and also that the Brady Act’s effectiveness may be undermined generally by the pervasive and unmonitored “secondary market” in firearms).

16. Bhowmik, *supra* note 2, at 72.

17. *Id.*

18. Eggen & Culhane, *supra* note 9, at 130. See also DIAZ, *supra* note 6, at 12-13, 30, 42-43, 193-94, 199 (describing the current “anemic” enforcement of

Alcohol, Tobacco and Firearms ("ATF") may only perform one unannounced visit per year to Federal Firearms Licensees ("FFLs"),¹⁹ and has far too few resources to fully investigate the dealings of all FFLs and gun manufacturers.²⁰ When the ATF does discover violations, it takes on average five years to revoke a federal firearms license.²¹ Furthermore, firearms transactions between non-licensed dealers are completely unregulated.²²

Lastly, more than twenty states have granted gun manufacturers blanket immunity from civil liability;²³ twenty more have granted qualified immunity.²⁴ No other industry, save tobacco, has been so blessed,²⁵ and with the fall of the tobacco industry in the early 1990s, the gun trade stands alone as America's last untouchable industry.²⁶

B. *The High Toll of Guns, and Industry Culpability*

This regulatory vacuum is all the more amazing given the

federal firearm restrictions).

19. 18 U.S.C. § 923(g)(1)(B)(ii)(I).

20. Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 290 n.125 (1999) (quoting ATF Director Steve Higgins as saying that due to lack of manpower, the ATF is only able to cover a "minute percent" of gun shows). See also NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 501 (E.D.N.Y. 2003) ("ATF personnel are well trained and motivated, but inhibited by lack of resources and other limitations from fully enforcing the law . . . this is particularly true of prosecutions for . . . acts of corrupt dealers.").

21. See Kristin Loiacono, *Gun Bill Has Opponents up in Arms*, TRIAL, June 2003, at 11 (quoting John Vince, former chief of the Firearms Division of the ATF, as explaining the ATF's difficulty in revoking an FFL's license, and saying that "[i]f this bill passes a bloodbath will start").

22. See Brian J. Siebel, *The Case Against the Gun Industry*, 115 PUB. HEALTH. REP. 410, 413 (2000) (specifying that there are two ways that firearms are distributed: a primary market, which is any transaction involving a licensed actor, and the secondary market, which involves all transactions between unlicensed buyers and sellers). See also Eggen & Culhane, *supra* note 9, at 128 (stating that in 1994 primary transactions accounted for approximately sixty percent of firearms sales, and secondary transactions for forty percent). The Brady Act has no control over secondary transactions. Eggen & Culhane, *supra* note 9, at 129.

23. See Bhowmik, *supra* note 2, at 94 n.96 (listing the following states as granting some form of blanket immunity: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Missouri, and New Hampshire). See also Eggen & Culhane, *supra* note 9, at 128 ("[T]he patchwork of laws on the federal, state, and local levels fails to limit many of the acts and transactions that lead directly to gun violence."). See also H.R. REP. NO. 108-59, at 16 n.108 (2003) (listing state preemptions).

24. Bhowmik, *supra* note 2, at 94 n.96.

25. Eggen & Culhane, *supra* note 9, at 155-59.

26. Bhowmik, *supra* note 2, at 96.

pervasiveness of guns²⁷ and the heavy toll they take upon the nation each year. An average of 30,000 people die annually from gunshot wounds,²⁸ and between 60,000²⁹ and 84,000³⁰ more are injured. When a handgun is kept in the home, use of the handgun for suicide is eleven times more likely than use of the handgun to injure or kill in self defense.³¹ Further, firearm injuries and deaths cost the country about \$20 billion every year.³²

The gun industry has exacerbated the situation in recent years by designing and marketing weapons of ever-increasing lethality and ever-diminishing utility,³³ which are not fit for competition, sport,³⁴ or collection.³⁵ The gun industry has also neglected to design guns with appropriate safety features such as external, internal, or high-tech safety locks, which would make the guns useless if stolen by criminals or found by children.³⁶ Most

27. See Cook et al., *supra* note 11, at 319, 325 (reporting that there are 200 million privately owned guns in the United States, 70 million of which are handguns). Thirty-six percent of U.S. households contain an average of 4.4 guns. *Id.* at 325. Every year, as the number of firearms in the United States goes up, the number of firearms owners goes down. DIAZ, *supra* note 6, at 11, 183.

28. Siebel, *supra* note 22, at 410.

29. *Id.*

30. Linda Gunderson, *The Financial Costs of Gun Violence*, 131 ANNALS OF INTERNAL MED. 483, 483 (1999).

31. Siebel, *supra* note 22, at 416.

32. Bhowmik, *supra* note 2, at 72. See also Cook et al., *supra* note 11, at 347 (quoting one estimate that puts the damage at \$80 billion per year); DIAZ, *supra* note 6, at 10 (quoting an amazing \$112 billion estimate).

33. BROWN & ABEL, *supra* note 6, at 55. See also Eggen & Culhane, *supra* note 9, at 124-25 (using as an example the TEC-9, a military-style semi-automatic assault weapon that is "useless for hunting, other kinds of recreational shooting, or self-defense because of [its] inaccuracy and danger to the shooter"). One nationally recognized firearms expert described the TEC-9 as "mass produced mayhem." *Id.* at 125. See also BROWN & ABEL, *supra* note 6, at 272 (describing what made the TEC-9 the "assault weapon most preferred by criminals"); *id.* at 157 (listing the top ten crime guns in 1997); DIAZ, *supra* note 6, at 91-105, 134-40, 166, 183 (stating that ongoing innovations in lethality such as concealable "pocket rockets" or "black talon" bullets are the result of an increasingly static gun market).

34. BROWN & ABEL, *supra* note 6, at 157.

35. See 18 U.S.C. § 921(a)(13) (defining a federally licensed "collector" as one who deals in "firearms as curios or relics"). Such "collectors" are for all purposes indistinguishable from FFLs. DIAZ, *supra* note 6, at 47. See also BROWN & ABEL, *supra* note 6, at 96-97 (describing how one such "collector" sold a TEC-9 to Eric Harris and Dylan Klebold, who used it to commit the Columbine massacre).

36. Siebel, *supra* note 22, at 411-12. See also Cook et al., *supra* note 11, at 326 (stating that firearms thefts account for a large portion of illegal diversions, and that in 1995 there were 269,000 such incidents and over 500,000 guns stolen); Siebel, *supra* note 24, at 416 (stating that "approximately one child is killed, and thirteen more are injured, in unintentional shootings each day," and that "34% of handgun owners keep

guns also lack chamber indicators.³⁷ Furthermore, some manufacturers have built and advertised features which would only appeal to criminals: shallow serial numbers that can easily be filed off to prevent tracing,³⁸ fingerprint-proof handles,³⁹ and mail-order assembly kits meant to circumvent statutes that bar interstate transport of certain guns.⁴⁰

Lastly, many firearm manufacturers engage in irresponsible distribution practices such as market saturation,⁴¹ and undiscerningly supply weapons to scofflaw dealers⁴² who openly allow straw purchases,⁴³ multiple sales,⁴⁴ and frequent seepage⁴⁵ of

their guns loaded and unlocked”).

37. See Siebel, *supra* note 22, at 412 (stating that a simple device indicating whether a firearm was loaded could prevent hundreds of accidental shootings every year).

38. Bhowmik, *supra* note 2, at 111.

39. Siebel, *supra* note 22, at 416.

40. Eggen & Culhane, *supra* note 9, at 126-27. See also DIAZ, *supra* note 6, at 194 (describing how gun manufacturers intentionally market to criminals).

41. See *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 21 (Ill. App. Ct. 2003) (alleging that firearm manufacturers and distributors “knowingly oversupply or ‘saturate’ the market with their products in areas where gun control law[s] are less restrictive, knowing that persons will bring them into the jurisdictions where they are illegal and then illegally possess or resell them”). See also Siebel, *supra* note 22, at 414 (recounting how “the industry deliberately targets areas with lax gun control laws, knowing that guns purchased there will be trafficked into states and cities with tougher gun laws”); David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172-73 (2000) (stating that gun manufacturers target areas known for easy access to locales with stricter gun regulations, such as the I-95 corridor, which fuels the illicit gun trade in New York and New Jersey); BROWN & ABEL, *supra* note 6, at 52 (stating that ninety percent of crime guns recovered in New York are imported from southern states).

42. See Siebel, *supra* note 22, at 414 (describing a sting operation conducted by the City of Chicago to catch twelve such scofflaw dealers). In each case a two-person team of undercover agents entered the premises and requested to purchase a firearm, despite the fact that their identification showed that they resided in Chicago, where it has been illegal to own a handgun since 1982. *Id.* In each case the dealer sold firearms to the agents, one even advising them how to avoid federal paperwork, and another admitting that the sale was “highly illegal.” *Id.*

43. See Bhowmik, *supra* note 2, at 108 (defining straw purchasers as “non-prohibited purchasers who fill out the paperwork and complete a firearm sales transaction, then hand the weapon over to a prohibited purchaser, such as a felon or minor”). One gun trafficker testifying at a congressional hearing claimed that he would skirt federal multiple-purchase restrictions at gun shows by “basically point[ing] out the types of handguns that these straw purchasers would buy right in front of the gun dealers, and most of them didn’t even pay any attention to me.” *Id.* at 109. See also Cook et al., *supra* note 11, at 335-37 (stating that, in a survey of 1,530 investigations involving 84,000 guns, “[n]early half” of the investigations involved guns trafficked by straw purchasers). Such purchasers were often friends or relatives of the prohibited purchaser. *Id.* See also BROWN & ABEL, *supra* note 6, at 95-101,

product.⁴⁶

130-36 (describing the straw purchases that armed the Columbine killers and the perpetrators of two other high-profile massacres).

44. See Bhomik, *supra* note 2, at 106-07 (defining multiple sales as “any transaction involving more than one handgun to a single purchaser or several sales of guns to an individual purchaser over a five-day period”). Such transactions are legal, but require a form to be filled out and sent to the ATF. *Id.* at 107. See also Cook et al., *supra* note 11, at 334 (explaining that, despite their legality, ATF trace data reveals that firearms sold in multiple sales are much more likely to wind up in criminals’ hands); David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1183-84 (2000) (stating that the firearm industry “tries to avoid the significance of straw and multiple purchasers, the primary suppliers for the crime market, by labeling them ‘collectors’”).

45. See Siebel, *supra* note 22, at 414 (defining “seepage” as a willful fueling of the firearms black market by “thousands of unsupervised Federal Firearms Licensees”). The Bushmaster Rifle used by the Washington D.C. snipers was traced to Bull’s Eye Shooter Supply in Tacoma, Washington. Loiacono, *supra* note 21, at 11-12. The store had no explanation as to how it had been acquired by the snipers, and admitted that more than 200 more guns were missing as well. *Id.* See also Cook et al., *supra* note 11, at 336 (stating that while corrupt FFLs accounted for nine percent of ATF investigations, their transactions accounted for almost half the guns investigated). Common FFL violations include “off paper” sales, false entries in record books, transfers to prohibited persons, illegal out-of-state transfers, and obliterated serial numbers. *Id.* In 2000, an ATF compliance inspection of 1,012 licensed dealers revealed that 202 of them had gaps in their records amounting to 13,271 missing guns. *Id.* at 341. Of those 202 dealers, 16 had more than 200 missing firearms. *Id.* See also Kairys, *supra* note 41, at 1172 (stating that guns reported missing are “stolen less frequently than the industry would lead us to believe”).

46. See Loiacono, *supra* note 21, at 11 (quoting former gun industry lobbyist Robert Ricker as saying that “[o]nly 1 to 1.5 percent of dealers are bad apples. But they represent about 20 percent of the sales in the United States”). See also Kairys, *supra* note 41, at 1167 (citing ATF statistics that show that 1.2% of the gun dealers are responsible for 57% of the guns traced to crimes). Instead of investigating or regulating such dealers, the gun industry has disclaimed all responsibility, and by taking a “head-in-the-sand” approach, continues to supply guns indiscriminately. *Id.* at 1165. The manufacturers, moreover, are fully aware that certain dealers are feeding the criminal market because for every crime gun recovered by law enforcement, the ATF conducts a trace. *Id.* at 1166. The first step in such a trace is to contact the manufacturer of the gun and use the serial number to discover which dealer sold it, and to whom. *Id.* Between 1995 and 2000, the ATF conducted approximately 800,000 of these traces, an “extraordinary level of direct notice” to the gun industry of which dealers were fueling firearms into the illegal market. *Id.* The full scope of the trace data notice was revealed for the first time in the findings of *AcuSport, Inc.*, 271 F. Supp. 2d at 503, where the court ordered the ATF to divulge, under the aegis of a protective order, unexpunged trace data previously unavailable to the public. See also *Dep’t of the Treasury v. City of Chicago*, 287 F.3d 628, 637 (7th Cir. 2003) (affirming that the ATF must surrender its unexpunged trace data to the City of Chicago under the Freedom of Information Act, to assist in the City’s lawsuit against the gun industry); 5 U.S.C. § 522 (Appropriations Bill) (denying the ATF any funds it would need to comply with the FOIA disclosures ordered in the

C. *City Suits and the Emergence of the Public Nuisance Claim*

In 1998, New Orleans became the first city to bring suit against gun manufacturers for such abuses.⁴⁷ Over the next five years, thirty-two more cities and municipalities followed suit in a common attempt to recoup their financial losses and force the industry to adopt safer standards.⁴⁸ To achieve this end, various cities tried various traditional torts, with little success.⁴⁹

The City of Chicago, however, took a new approach⁵⁰ in November of 1998 by bringing a public nuisance⁵¹ claim against the gun industry.⁵² The city claimed that, by irresponsibly marketing and distributing their products, the industry had created and maintained an illegal market for gun trafficking in Chicago.⁵³ The claim was dismissed in circuit court. The appellate court reversed only to have the Illinois Supreme Court reverse

aforementioned case); DOJ v. City of Chicago, 537 U.S. 1229 (2003) (vacating the Seventh Circuit opinion and remanding the matter to be reconsidered at the lower court levels, in light of the last-minute appropriations bill); City of Chicago v. United States Dep't of Treasury, 384 F.3d 429, 435 (7th Cir. 2005) (holding that the appropriations bill created no repeal by implication, and that the ATF must divulge the data in question); City of Chicago v. United States Dep't of Treasury, 2004 U.S. App. Lexis 28002, No. 01-2167 (7th Cir. Dec. 21, 2004) (granting the ATF's petition for rehearing en banc, in light of the Consolidated Appropriations Act of 2005).

47. Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Lawsuits Against the Gun Industry*, 70 GEO. WASH. L. REV. 212, 213 (2002). See also BROWN & ABEL, *supra* note 6, at 1-6 (describing how the New Orleans suit was set into motion by the murder of gospel singer Raymond Miles).

48. Kao, *supra* note 47, at 213.

49. See Eggen & Culhane, *supra* note 9, at 136-41 (stating that plaintiffs bringing product liability suits argued that handguns were inherently defective, but the courts dismissed such claims, finding that weapons used in crimes operate exactly as intended). City plaintiffs brought strict liability suits as well, in which they argued that the manufacture and marketing of handguns is an abnormally dangerous activity. *Id.* at 150. These, too, were dismissed, because the courts found that the third party criminal use of the weapons was what made them abnormally dangerous, not the industry's manufacture and marketing practices. *Id.* at 150-54. Likewise, claims against manufacturers for negligent marketing and negligent entrustment foundered on the element of proximate cause, because the relationship between gun manufacturers and criminals was deemed too remote. *Id.* at 142-50.

50. Kao, *supra* note 47, at 214.

51. See RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979) (defining a public nuisance as "an unreasonable interference with a right common to the general public"). This interference must be of a continuing or long-lasting nature, and the actor must know or have reason to know of it. *Id.* See also Kao, *supra* note 47, at 214 (clarifying that the right implicated in the governmental lawsuits is the public's right to health and safety). The interference is the gun industry's irresponsible design, marketing, and distribution of firearms to the public. *Id.*

52. *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d at 20.

53. *Id.* at 20-21.

again and affirm the circuit court's original dismissal.⁵⁴

Despite this reversal, the public nuisance claim is in fact well-suited for the gun industry.⁵⁵ This tort, which is meant to be exercised by a government official,⁵⁶ seeks a remedy for conduct which, although legal, nonetheless endangers the health and welfare of the general public.⁵⁷ As such, it applies squarely to certain irresponsible marketing and distribution practices utilized by the gun industry, and has been adopted by all governmental suits against the gun industry since 1998.⁵⁸

Buttressed by persuasive statistics and the testimony of industry whistleblowers,⁵⁹ six public nuisance city suits have avoided dismissal on appellate review.⁶⁰ In addition, Smith & Wesson, the largest gun company in the industry, finally settled several suits by agreeing to amend its business practices.⁶¹ With such successes raising the specter of widespread industry settlement and tobacco-sized payouts, the gun industry has

54. *Id.* at 31; *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1126 (Ill. 2004).

55. Kairys, *supra* note 41, at 1173.

56. *Id.* See also Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 766 (2001) (explaining that a non-governmental individual may bring a public nuisance action if his or her injury is different in kind from the injury suffered by the public at large); *AcuSport, Inc.*, 271 F. Supp. 2d at 503 (holding that the gun industry had irresponsibly conducted business so as to endanger the New York public, but that the NAACP had failed to prove that the harm done to its members and potential members was different in kind to that suffered by New Yorkers at large).

57. Antolini, *supra* note 56, at 766.

58. Kao, *supra* note 47, at 214-15.

59. Bhowmik, *supra* note 2, at 120. The willful blindness of the industry has been confirmed by whistleblowers such as Robert Hass, ex-Senior Vice-President of Marketing and Sales for Smith & Wesson, who stated that "the black market in handguns is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal handgun licensees." *Id.*

60. Lawsuits brought by the cities of Chicago, Cincinnati, Newark, Camden, Jersey City, and Gary have all survived motions to dismiss at the appellate level. *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d at 35; *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *City of Newark v. Arms Tech.*, 820 A.2d 27 (N.J. 2003); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000); *City of Gary v. Smith & Wesson*, 801 N.E.2d 1222 (Ind. 2003). The City of Boston's suit survived an initial motion to dismiss, and the gun industry settled soon afterwards. *Boston v. Smith & Wesson*, No. 99-2590, 2002 WL 340183261, at *18 (Mass. Sup. Ct. 2000).

61. Siebel, *supra* note 22, at 415. See also Bhowmik, *supra* note 2, at 128-31 (describing the Smith & Wesson settlement, in which the manufacturer agreed to review distributor and dealer behavior for negligence, and devote two percent of its revenue to creating, within three years, personalization technology that would allow a firearm to recognize its owner and also describing Smith & Wesson's subsequent "pariah" status in the industry).

mobilized to achieve its one remaining hope—a congressional command absolving the industry of all civil liability.⁶² PoLCAA was the most recent result of that mobilization, and although it was defeated in the Senate in February of 2004, the Act will serve as a useful template for future firearm industry retroactive exemptions because of its success in the House of Representatives, and because the NRA has vowed to sponsor identical legislation in the future.⁶³

D. *The Protection of Lawful Commerce in Arms Act*

PoLCAA states that no civil action may be brought against gun or ammunition manufacturers, distributors, or dealers unless it is

1. an action brought against a transferor convicted under 18 U.S.C. § 924(h), or a comparable or identical state felony law, by a party directly harmed by the conduct of which the transferee is so convicted;⁶⁴
2. an action brought against a seller for negligent entrustment or negligence per se;⁶⁵
3. an action in which a manufacturer or seller of a qualified product knowingly and willfully violated a state or federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought;⁶⁶
4. an action for breach of contract or warranty in connection

62. See Loiacono, *supra* note 21, at 11 (“The language of the bill is designed specifically to eliminate lawsuits filed by cities and counties against the firearms industry.”).

63. *Id.*; Press Release, Brady Campaign to Prevent Gun Violence, Senate Votes down Immunity for Gun Industry (Mar. 2, 2004), <http://www.bradiycampaign.org/press/release.php?release=548> (last visited May 24, 2005); Dave Workman, *Senate Kills Amended Industry Lawsuit Bill*, <http://www.gunweek.com/2004/659-0320.html>. (Mar. 20, 2004).

64. S. 659, 108th Cong. § 4. The version of PoLCAA currently under consideration by the 109th Congress (House Bill 800 and Senate Bill 397) is nearly identical to last year’s version. See S. 659, 108th Cong., available at <http://thomas.loc.gov/cgi-bin/query/D?c109:1./temp/~c109Cf04hq::> (last visited May 30, 2005). Two phrases were cut and fifteen more were added, none of which affect the essential machinery of the bill. *Id.* This latest incarnation is in fact particularly well-suited to this Comment because of the new Act’s express invocation of the principles of federalism and the separation of powers. *Id.* § 2(a)(8), (b)(6). It also contains not one but two assertions that the Second Amendment bestows upon non-militia-members the constitutional right to bear arms. *Id.* § 2(a)(1)-(2). The most alarming addition, however, is the insertion of the phrase “or injunction” in the list of actions that a court may not henceforth take against the gun industry. *Id.* § 4(5)(A).

65. *Id.*

66. *Id.*

with the purchase of the product;⁶⁷ or

5. an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.⁶⁸

Of these five exceptions, four are moot: exceptions one and three only allow actions against industry actors that commit felonies, and exceptions four and five only allow actions for breach of warranty or manufacturing defects.⁶⁹ None of the exceptions pertain to the thirty-three negligence and public nuisance city suits brought against gun manufacturers, which focused mainly on irresponsible, though legal, industry behavior.

Then there is exception number two, which states that sellers may be held liable for negligent entrustment or negligence per se.⁷⁰ This is a safe concession on the gun industry's part, because such dealers (many of whom would be judgment proof⁷¹) could only be held liable if they directly sold firearms to the criminals themselves.⁷²

What exception number two does not say, however, is that *manufacturers* may be held liable for negligent entrustment as well as dealers. This is a key point, because the thrust of all city and municipal suits is that gun manufacturers are fully aware that a few "bad apple" dealers—one percent of all dealers nationwide—provide almost sixty percent of the weapons traced to crimes, and yet the industry does nothing to regulate them.⁷³ By

67. *Id.*

68. *Id.*

69. *Id.* See also H.R. REP. NO. 108-59, at 99-108 (providing a clause-by-clause analysis of PoLCAA's demerits).

70. S. 659, 108th Cong. § 4.

71. See Kairys, *supra* note 41, at 1169 (explaining that many FFLs are "kitchen-table" or "car-trunk" dealers: small time operators without stores who sell guns privately or at gun shows). See also Cook et al., *supra* note 11, at 324-25 (reporting that between 1975 and 1992, the number of FFLs increased from 161,927 to 284,117, an estimated forty-six percent of which "were not actively engaged in a firearms business"). A survey taken in 1998, when measures taken by the Clinton Administration had substantially reduced the number of FFLs, nonetheless revealed that thirty-one of licensed gun retailers had not sold a single firearm in the past twelve months. *Id.*

72. See Loiacono, *supra* note 21, at 11 (quoting John Conyers, House Judiciary Committee ranking member, as pointing out that the bill narrowly defines negligent entrustment so as to make sellers liable for primary transactions, but not secondary ones—thus exempting them from liability for all sales to gun traffickers).

73. One study found that 1.2% of dealers are responsible for 57% of crime-gun traces. Kairys, *supra* note 41, at 1167. The allegations in *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.* are typical:

[Defendants] continually use distribution channels that they know regularly yield criminal and underage end users in Camden County and throughout the nation. In many cases they have been specifically so

not acknowledging industry responsibility to reasonably design and market its products and monitor its distribution chains, PoLCAA would have not only retroactively killed all pending litigation currently in the courts,⁷⁴ but it also would have prevented any such city, state, or municipal actions from ever being brought again.⁷⁵

This is an enormous proposition. Unique in purpose, unprecedented in scope, such exemptions would effectively amputate a vital limb of state common law and set a dangerous precedent.⁷⁶

III. ANALYZING POLCAA'S PROCEDURAL AND SUBSTANTIVE MERITS

A. Introduction

PoLCAA was lacking both procedurally and substantively.⁷⁷ Its rushed congressional hearing, lopsided construction and utter disregard for precedent made it a uniquely dangerous act, which would have created a regulatory vacuum that excessively interfered with state regulatory powers.⁷⁸ The Act, and any future exemption like it, is thus defective, overreaching, and ultimately unconstitutional.⁷⁹

B. Procedural Defects: Lack of Congressional Fact-Finding

Within the last ten years, the Supreme Court has shown increasing willingness to strike down as unconstitutional acts which are not supported by sufficient fact-finding in the congressional record.⁸⁰ PoLCAA was a prime candidate for such

informed in connection with crime-gun trace efforts by the U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms ("ATF").

Kairys, *supra* note 44, at 1179 n.16. See also Cook et al., *supra* note 11, at 334-36 (quoting a survey of 1,530 cases involving 84,000 diverted guns, which revealed that half of all traces can be traced to just 0.4% of licensed dealers, and that such corrupt FFLs are "[a]mong the largest traffickers").

74. Loiacono, *supra* note 21, at 11.

75. *Id.*

76. See Morrison Letter, *supra* note 4, at 3 ("[I]f Congress could preempt state common law in this instance, it would seem to have no impediment to eliminating any aspect of state tort law . . . without providing a federal program or remedy to replace it.").

77. See *supra* notes 69-76 and accompanying text. See also *infra* note 129 and accompanying text.

78. See *infra* Part III.C.3 through Part IV.A.

79. See *infra* Part IV.B.

80. A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "on the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 329-30 (2001). See also United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zone Act was unconstitutional, partly because nowhere in the legislative history of the

treatment because of its brief, contentious hearing⁸¹ and the far-fetched House Report that followed.⁸²

1. *The Hearing*

PoLCAA's congressional record is both scanty and suspect.⁸³ Despite its far-reaching implications and novel scope, PoLCAA, in its House incarnation as House Bill 1037, was given only a single legislative hearing before the Subcommittee on Commercial and Administrative Law on April 2, 2003, one day before its markup in the Full Committee on the Judiciary.⁸⁴ There were only five speakers.⁸⁵ Two were late, and one submitted his testimony less than an hour before the hearing began.⁸⁶

The proceedings of the Full Committee markup on the following day were even more questionable. On April 3, 2003, after several ranking members had spoken for and against the bill, and after a majority member's amendment had been withdrawn,⁸⁷ ranking minority member Mr. Watts asked that his suggested amendment,⁸⁸ which ran a little over one page,⁸⁹ be read in its

Act was there enough evidence to support the contention that the possession of guns in the vicinity of school grounds substantially affected interstate commerce); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (ruling that legislative record of the Age Discrimination in Employment Act failed to persuasively show a widespread pattern of state age discrimination); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 623, 636 (1994) (ruling as unconstitutional the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, while dismissing three years of congressional dictate as "mere conjecture" of "supposed harms"); *United States v. Morrison*, 529 U.S. 598, 629 (2000) (Souter, J., dissenting) (stating that the majority, in striking down the Violence Against Women Act of 1994, was dismissing four years of hearings and eight separate reports); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 377-78 (2001) (Breyer, J., dissenting) (stating that, by ruling that the congressional findings did not demonstrate a pattern of disability discrimination on behalf of the states, the majority dismissed a "vast legislative record" presented in thirteen congressional hearings, collected by a special task force that held "hearings in every State, attended by more than 30,000 people").

81. H.R. REP. NO. 108-59, at 97-98.

82. *Id.*

83. *See supra* Parts III.A to III.B.

84. H.R. REP. NO. 108-59, at 97.

85. *Id.*

86. *Id.*

87. *Id.* at 58-60 (statement of Mr. John Conyers, Jr., ranking member, House Committee on the Judiciary) (suggesting, facetiously, that House Bill 1036 be amended so as to exempt all *users* of firearms, in addition to manufacturers). Mr. Conyers was later ruled out of order for soliciting the advice—on the record—of NRA leader Chuck Cunningham, who was apparently present at the proceedings. *Id.* at 59.

88. *Id.* at 60. Mr. Watts's amendment would have allowed for civil actions against distributors, dealers and importers of firearms. *Id.* at 63-64. Ranking member Mr. Cannon referred to the reading of the minority proposals as a

entirety to the committee.⁹⁰ Mr. Sensenbrenner, the Chairman, was "apparently angered" at the request.⁹¹ After the amendment was voted down he cut short the proposal of a second minority amendment,⁹² and nearly a dozen more that were pending, by prematurely moving for the previous question concerning the adoption of House Bill 1036.⁹³ The ayes carried it,⁹⁴ and the hearing thereafter degenerated into a heated exchange that was finally cut short by Mr. Sensenbrenner's snide dismissal.⁹⁵

This superficial treatment of PoLCAA is all the more remarkable given the weight of the accusations leveled against the bill by the members of the minority.⁹⁶ Mr. Watts expressed deep concern over the inadequacy⁹⁷ of the hearings, and made unrefuted accusations that the bill was being "pushed and rushed"⁹⁸ through markup for political reasons—namely, to pass the legislation before the NRA's national convention, which was to take place in three weeks' time.⁹⁹ He found particularly questionable PoLCAA's first finding of fact: "Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms."¹⁰⁰ Mr. Watts reminded the subcommittee that the Supreme Court¹⁰¹ had ruled against this interpretation.¹⁰² He characterized his majority colleagues as living in a "political dream world"¹⁰³ in which, to service the interests of the NRA, they were rushing to pass sweeping legislation, regardless of its substantive merits, without sufficient thought or research.¹⁰⁴ This lack of meritorious research and debate brings the validity of PoLCAA into question.

2. The House Report

The highly partisan nature of House Bill 1036's hearing is reflected in the official house report, which is a collage of trivia,

"charade". *Id.* at 61.

89. *Id.* at 98.

90. *Id.* at 97-98.

91. *Id.*

92. *Id.* at 98. The amendment was sponsored by minority member Jackson Lee. *Id.* at 98 n.2.

93. *Id.* at 95.

94. *Id.* at 96. The vote count was twenty-one to eleven. *Id.*

95. *Id.* Chairman Sensenbrenner cut off Ms. Jackson Lee's repeated accusation that the committee was a "disgrace" with a suggestion that she hand in her resignation if she wished to resign. *Id.* at 95-96.

96. See *supra* notes 77-95 and accompanying text.

97. H.R. REP. NO. 108-59, at 57.

98. *Id.*

99. *Id.*

100. *Id.*; S. 659, 108th Cong. § 2; U.S. CONST. amend. II.

101. *United States v. Miller*, 307 U.S. 174, 178-82 (1939).

102. H.R. REP. NO. 108-59, at 57.

103. *Id.*

104. *Id.* at 58.

half-truths,¹⁰⁵ and unsupported conclusions.¹⁰⁶ To begin with, the entire document is a hand-me-down from previous incarnations of House Bill 1036,¹⁰⁷ some of which were substantially different from the bill in its final form.¹⁰⁸ Most notably, it is padded with statistics to the affect that guns save millions of citizens from crimes every year, minorities being particularly fortunate in this regard.¹⁰⁹ These statistics are taken directly from studies conducted by John R. Lott, Jr., Gary Kleck, and Marc Gertz,¹¹⁰ and are often quoted by the gun lobby.¹¹¹ Re-examination of these authors' various studies by researchers, however, has proven them to be tainted by substantial flaws,¹¹² yielding results that are "dubious at best"¹¹³ and at times "grossly over-estimated."¹¹⁴

The house report buttresses its conclusions with multiple references to citizens' Second Amendment rights,¹¹⁵ disregarding both the Supreme Court's contrary decision in *United States v. Miller*¹¹⁶ and *Miller's* progeny.¹¹⁷

The report also touts the fact that most state legislatures and courts have found the relationship between manufacturers and

105. See *infra* note 183 (noting the inaccurate comparison of PoLCAA to the airline industry immunity granted under The Federal Aviation Act).

106. H.R. REP. NO. 108-59, at 10. The report claims that city suits "invite courts to dramatically break from bedrock principles of tort law . . ." *Id.* But the public nuisance suit is centuries old, and is commonly brought by cities against industries which endanger the public by entirely legal activities. Antolini, *supra* note 56, at 767-71. An argument that that PoLCAA itself is the true "break from bedrock principles of tort law" can be found at The Brady Center to Prevent Gun Violence, H.R. 1036/S. 659 Is Dangerous to Our Nation's Health, at <http://www.gunlawsuits.org/immunity/hr1036.php> (last visited May 24, 2005).

107. See H.R. 123, 107th Cong. (2001); H.R. 1966, 107th Cong. (2001); H.R. 2037, 107th Cong. (2001) (all being prior firearm industry exemption incarnations). House Bill 2037 was scuttled after the sniper killings in Washington, D.C. in 2003. H.R. REP. NO. 108-59, at 98. See generally H.R. REP. NO. 108-59; H.R. REP. NO. 107-727 (2002), (revealing the nearly identical contents of H.R. 2037 House Report).

108. Chairman Sensenbrenner referred to House Bill 2037 as a "bureaucratic Rube Goldberg device". H.R. REP. NO. 107-727, pt. 2, at 50.

109. H.R. REP. NO. 108-59, at 26-27.

110. *Id.* at 26 nn.176-77.

111. See Bhowmik, *supra* note 2, at 75-81 (debunking the statistics promoted by the NRA).

112. *Id.* at 78.

113. *Id.* at 79.

114. See *id.* at 80-81 (explaining how one such self-reporting survey claimed improbably that twice as many assailants were wounded in 1992 as the entire number of people treated at hospitals for gunshot wounds in 1994). See also DIAZ, *supra* note 6, at 160-62 (explaining away the "self-defense mirage").

115. Bhowmik, *supra* note 2, at 83-88.

116. 307 U.S. at 178-182; H.R. REP. NO. 108-59, at 27-28, 102. The Court recently reaffirmed *Miller* by refusing to disturb a similar Ninth Circuit ruling in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

117. Bhowmik, *supra* note 2, at 82-90.

criminals' acts too remote to incur liability.¹¹⁸ This is a particularly strange inclusion, given that the overall thrust of the report is that the state legislatures and courts are incapable of rationally addressing the issue of gun industry liability, and must therefore be preempted.¹¹⁹

Lastly, the report supplies an unlikely doomsday scenario wherein courts find themselves "hurdling [sic] down the slippery slope"¹²⁰ toward a well-nigh universal liability, in which the manufacturers of properly-functioning goods like automobiles and knives are held liable for unforeseeable misuse of their products.¹²¹ This prediction fails on two levels. First, it again assumes that state judiciaries are either blind to the dangers of unchecked liability, or are incapable of limiting such excesses. Second, it blithely ignores the fact that neither automobile nor knife manufacturers—unlike gun manufacturers—are statutorily exempt from negligent entrustment claims.¹²²

Taken as a whole, the legislative fact-finding supporting House Bill 1036 is remarkably thin. The hearing was rushed,¹²³ the markup was abridged,¹²⁴ and the ensuing report is a crazy-quilt of NRA propaganda and contradictory claims which give the impression that state courts are at once both highly discerning and utterly helpless,¹²⁵ that no one benefits from loose gun regulations so much as poor minorities,¹²⁶ and that the only way to preserve the separation of powers is to preempt the common law of all fifty states.¹²⁷ This mish-mash of bad data and opaque reasoning has yielded a "political dream world"¹²⁸ if there ever was one, and one which the House did its best to make a reality.

118. H.R. REP. NO. 108-59, at 5, 8-9. *See also id.* at 16 n.108 (listing states that have preempted handgun liability actions).

119. *Id.* at 18-19, 22-24.

120. *Id.* at 10, 22.

121. *Id.* at 10.

122. Eggen & Culhane, *supra* note 9, at 130. Consider also the following scenario: a manufacturer of box-cutters gets a call from a Saudi dealer, who requests two dozen specially made box-cutters with plastic blades and handles in an x-ray resistant case. The last such order to this dealer supplied the tools for the 9/11 catastrophe. The manufacturer agrees. Is he liable for the ensuing disaster? Assuming there is no National Box-cutter Association, the answer could well be yes.

123. H.R. REP. NO. 108-59, at 97.

124. *Id.* at 97-98.

125. *Id.* at 19, 22-24.

126. *Id.* at 27.

127. *Id.* at 17-19.

128. *Id.* at 57.

C. Substantive Defects:¹²⁹ Violating the Letter and Spirit of the Tenth Amendment

PoLCAA derived its purpose from the Commerce Clause,¹³⁰ its scope from the Necessary and Proper Clause,¹³¹ and its power from the Supremacy Clause.¹³² In *McCulloch v. Maryland*, Chief Justice John Marshall summed up the aggregate effect of all three:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹³³

The legislators' professed "end" in creating PoLCAA—to protect the gun trade from frivolous lawsuits¹³⁴—was valid under the Commerce Clause.¹³⁵ But the "means"—exempting an entire industry from liability by a generally applicable prohibition—were not.¹³⁶ Such legislation would have subverted the Tenth

129. In *Garcia v. San Antonio Metro Transit Authority*, the Court held that the Tenth Amendment's reservation of unenumerated sovereign powers to the several states does not substantively limit or restrain congressional powers under the Commerce Clause. 469 U.S. 528, 554 (1985). Rather, the Court explained, any substantive restraint on the exercise of Commerce Clause power must derive from "failings in the national political process" that deprive the states from asserting and protecting their sovereign authority. *Id.* This view was quickly discarded, however, in *New York v. United States*, 505 U.S. 144, 157 (1992), where the Court held that congressional Commerce Clause power is substantively precluded from infringing upon state sovereignty—sovereignty that is negatively defined by the limitations on federal power as set out in Article I. See also Peter A. Lauricella, Comment, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1386-89 (1997) (describing the Court's changing view on substantive restraints on Commerce Clause power).

130. U.S. CONST. art. I, § 8, cl. 3.

131. U.S. CONST. art. I, § 8, cl. 18.

132. U.S. CONST. art. VI, cl. 2.

133. 17 U.S. (4 Wheat.) 316, 421 (1819).

134. See 149 CONG. REC. S3996, S3998 (2003) (statement of Sen. Craig (introducing Senate Bill 659, PoLCAA, as a bill "solely directed at stopping frivolous, politically-driven litigation against law-abiding individuals for the misbehavior of criminals over whom they had no control").

135. See *Lopez*, 514 U.S. at 558-59 (stating that Congress, through the Commerce Clause, has the power to regulate the uses of channels of interstate commerce, the instrumentalities of interstate commerce, and matters having a substantial affect on interstate commerce).

136. The current Court has held that both the scope of the Necessary and Proper Clause and the power of the Supremacy Clause are dependent upon the constitutionality of their application in light of the principles of federalism. *Printz v. United States*, 521 U.S. 898, 920-25 (1997).

Amendment¹³⁷ by impinging upon the concurrent sovereignty of the states as conceived by the framers and recognized by the current Court.¹³⁸ The Court's recent affirmation of the federalist principles embodied in the Tenth Amendment is anathema to retroactive exemptions like PoLCAA, which would, if passed into law, excessively interfere with state governments' ability to function.

1. *The Return of Federalism*

For most of the past century, the states' Tenth Amendment powers receded before the ever-expanding scope of the Commerce Clause.¹³⁹ Under the combined aegis of the Commerce and the Necessary and Proper Clauses, Congress was able to effect substantial social change, legitimizing among other things a national minimum wage.¹⁴⁰ But in doing so, the federal government encroached greatly upon state powers, and essentially reduced the Tenth Amendment to "a truism."¹⁴¹ It was not until recently that the Supreme Court began reining in the scope of the Commerce Clause.¹⁴²

This sea change first occurred in 1976 in *National League of Cities v. Usery*,¹⁴³ where the Court held that the federal government could not usurp a traditional government function of a

137. "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." U.S. CONST. amend. X. See also *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting) (quoting John Marshall as saying: "The spirit of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme"). State "integrity" arises from the concept of concurrent sovereignty, which is an inviolable precept of our system of government. *New York*, 505 U.S. at 162-63. See also *id.* at 188, (quoting James Madison in *The Federalist No. 39* as saying that the Constitution "leaves to the several States a residuary and inviolable sovereignty").

138. Alexander Hamilton said: "When a '[l]aw . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is . . . 'merely [an] act of usurpation' which 'deserve[s] to be treated as such.'" THE FEDERALIST NO. 33 (Alexander Hamilton). He was quoted in *Printz*, 521 U.S. at 923-24. The concept of concurrent state and federal sovereignty, the Court explains, provides an unprecedented "double security" to the citizens of the United States. *Id.* at 920, 922. It protects both state and federal government from incursion by each other and allows for each to have a "direct relationship" with "the people who sustain it and are governed by it." *Id.* at 920. See also *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (quoting Madison on the "double security" provided by state sovereignty).

139. John D. Tortorella, Note, *Reining in the Tenth Amendment: Finding a Principled Limit to the Non-Commandeering Doctrine of United States v. Printz*, 28 SETON HALL L. REV. 1365, 1365-66 (1998).

140. *Garcia*, 469 U.S. at 555-56.

141. *United States v. Darby*, 312 U.S. 100, 124 (1941).

142. See Tortorella, *supra* note 139, at 1369-77 (providing a brief summary of federalism).

143. 426 U.S. 833 (1976).

state.¹⁴⁴ Although this traditional test was abandoned nine years later in *Garcia v. San Antonio Metro Transit Authority*,¹⁴⁵ the idea of an inviolable state sovereignty persisted in Justices O'Connor's and Powell's dissents in *FERC v. Mississippi*¹⁴⁶ and *Garcia*,¹⁴⁷ and finally re-emerged in the majority's ruling in *New York v. United States*.¹⁴⁸ In 1994 the Court held in *New York* that while the federal government could directly regulate private citizens, it could not commandeer state legislatures to do so.¹⁴⁹ This non-commandeering principle was confirmed and expanded in *Printz v. United States* to protect state executive officers, as well as state legislatures, from federal regulation.¹⁵⁰

The resulting doctrine bans federal regulatory schemes that impress state officials,¹⁵¹ but tolerates federal laws of general applicability—i.e., those that regulate both private and public actors alike.¹⁵²

144. Under the traditional government functions test the federal government had no power to regulate the states as states—that is, in the states' capacity to regulate themselves in areas of traditional government functions. *Id.* at 845-52. In *FERC v. Mississippi*, Justice O'Connor wrote that the federalist principles protected by the balancing test were accountability, efficiency, innovation, encouragement of participation in government at the local level, and freedom from tyranny. 456 U.S. 742, 787-91 (1982) (O'Connor, J. concurring).

145. The *Garcia* majority struck down the traditional functions test because the amorphous standard had resulted in contradictory rulings. 469 U.S. at 538-39. Justice Powell, in his dissent, said that by abandoning the balancing test the majority decision "effectively reduces the Tenth Amendment to meaningless rhetoric . . ." *Id.* at 560 (Powell, J., dissenting).

146. 456 U.S. at 775-95.

147. 469 U.S. at 557-89.

148. See *New York*, 505 U.S. at 188 (holding that the Low-Level Radioactive Waste Policy Act, which required non-compliant states to take title to the radioactive waste they produced, commandeered state legislatures and was thus unconstitutional).

149. *Id.*

150. See *Printz*, 521 U.S. at 932-35 (holding that the Brady Handgun Violence Prevention Act, by requiring state sheriffs to run background checks on potential handgun purchasers, commandeered state executive officers and was thus unconstitutional).

151. *New York*, 505 U.S. at 188. The Court explained that no matter how important Congress' reasons were, "the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation." *Id.* at 178. The Court suggested that Congress could encourage a state to comply with a regulation by offering financial incentives, but could not coerce it to do so. *Id.* at 167-68.

152. In *New York*, the Court chose not to revisit cases holding that its non-commandeering doctrine does not apply when the act in question affects both private and public parties. 505 U.S. at 160 (citing *FERC*, 456 U.S. at 758-59). But the *New York* majority also admitted that recent Court rulings concerning generally applicable laws that affect the authority of state governments have "traveled an unsteady path." *Id.*

But do firearm industry retroactive exemptions like PoLCAA regulate private and public actors alike? I submit that, while ostensibly a precedent-friendly prohibition of general applicability,¹⁵³ PoLCAA as drafted was actually neither consistent with precedent nor generally applicable.¹⁵⁴ And even if it could have been construed as such, it was nonetheless specifically designed to curtail and destroy the exclusive powers of state executive officers.¹⁵⁵ Such excessive interference with state government is both dangerous and unconstitutional, and was fully predicted in Justice O'Connor's dissent in *Garcia*.¹⁵⁶ Should PoLCAA—or any similar act—be made into law, the enactment should trigger a balancing test set forth in *Printz* to weigh the Act's purpose against its interference with state government, and its efficiency against its imposed administrative burden.¹⁵⁷

2. Past Prohibitions: PoLCAA Distinguished

The Tenth Amendment protects states from both overbroad federal prohibitions and regulatory schemes.¹⁵⁸ The Court has held recently that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”¹⁵⁹

The Supreme Court, however, has upheld the constitutionality of prohibitions in the past in cases such as *Reno v. Condon*,¹⁶⁰ *South Carolina v. Baker*,¹⁶¹ *Fry v. United States*,¹⁶² and *Maryland v. Wirtz*.¹⁶³ But these are variously distinguishable from PoLCAA as acts of limited intrusion¹⁶⁴ that were subject to exception,¹⁶⁵ and created in times of national emergency.¹⁶⁶ They

153. S. 659, 108th Cong. § 4. H.R. REP. NO. 108-59, at 11.

154. See *infra* Part III.C.2.

155. The Act was primarily created to retroactively invalidate the city suits brought against the gun industry since 1998. Loiacono, *supra* note 21, at 11.

156. 469 U.S. at 588.

157. *Printz*, 521 U.S. at 932.

158. *New York*, 505 U.S. at 166.

159. *Id.*

160. 528 U.S. 141, 148 (2002) (upholding the Driver's Privacy Protection Act of 1994, which prohibited a state from selling personal information collected from citizens applying for drivers licenses).

161. 485 U.S. 505, 527 (1988) (upholding Congress' power to prohibit states from issuing unregistered bonds).

162. 421 U.S. 542, 548 (1975) (upholding injunction to prevent Ohio from paying wage and salary increases in excess of that mandated by the Economic Stabilization Act).

163. 392 U.S. 183, 192 (1968) (upholding the Fair Labor Standards Act).

164. The Court noted in *Fry* that the federal regulation was limited in application, not a “drastic invasion of state sovereignty,” and that the regulation in *Wirtz* had been even less intrusive. *Fry*, 421 U.S. at 547 n.6.

165. An example of this would be Congress' exception of the working poor,

also mainly regulated the states' collection and dispersal of revenue.¹⁶⁷

Not so with PoLCAA. PoLCAA would have deeply and permanently intruded upon the states' sovereignty by undercutting their ability to defend their citizens from harm and maintain a viable common law system.¹⁶⁸ The Act contained no exceptions for any conduct that was not already protected under criminal or contract common law.¹⁶⁹ Further, while the NRA claimed that a national emergency existed, such was manifestly not the case.¹⁷⁰ Finally, PoLCAA was vastly different in scope from these or other exemptions¹⁷¹ because it sacrificed the established

who would be allowed to continue to receive wage increases despite the Fair Labor Standards Act. *Id.*

166. *Id.* at 548.

167. Both the Fair Labor Standards Act, 29 U.S.C. §§ 201-216, and the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (repealed 1974), were enacted to counteract inflation. The Driver's Privacy Protection Act, 18 U.S.C. § 2721, and the Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, 96 Stat. 324 (1982), were enacted to rein in states' unacceptable means of generating revenue. PoLCAA, which is meant to prevent injunctive as well as compensatory remedies, falls outside the scope of these cases.

168. See Morrison Letter, *supra* note 4 ("[I]f Congress could preempt state common law in this instance, it would seem to have no impediment to eliminating any aspect of state tort law . . . without providing a federal program or remedy to replace it.").

169. S. 659, 108th Cong. § 5(A).

170. By its own admission, the gun trade is a comparatively small industry. See *infra* text accompanying note 227.

171. Congress exempts parties from liability in one of three scenarios. The first is when a party acts in compliance with a federal regulatory scheme. Thus, reporting agencies in compliance with the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, may not be held liable to consumers for defamation, invasion of privacy or negligence, absent a showing of malice or willful intent. See also Ronald G. Spaeth et al., *Quality Assurance and Hospital Structure: How the Physician-Hospital Relationship Affects Quality Measures*, 12 ANNALS HEALTH L. 235, 237 (2003) (granting qualified immunity for physicians engaging in peer review programs created by The Health Care Quality Improvement Act); 5 U.S.C. § 706 (exempting cities that comply with conditional storm water discharge permits issued under Clean Water Act for third party discharges); 23 C.F.R. § 646.214(b) (2005) (stating that compliance with the Federal Highway Administration Act's warning device standards preempts state tort liability). The second type of exemption is granted to untargeted parties that are collateral to an affirmative regulatory scheme. Thus, persons not qualifying as "sellers" are not liable under the Securities Act for selling securities by means of a faulty prospectus or oral communication (and likewise persons not qualifying as "offerors" are not liable for violative offers). Securities Act of 1933 § 12, 15 U.S.C. § 77l. See also 18 U.S.C. § 1962(b) (saying that under the Racketeer Influenced and Corrupt Organizations Act, non-racketeering businesses are not liable under a theory of respondeat superior). Lastly, Congress may carve out an exception for a threatened subset that is part of a larger, heavily regulated group. For example, under the Federal Aviation Act, lessors of aircraft are exempt from both federal and state liability actions. 49 U.S.C. § 44112(b). The gun

powers of state legislatures and chief executive officers, not for the general benefit of the public, but to safeguard the profits of a single, largely unregulated industry.¹⁷²

As such, PoLCAA was distinguishable from the most current case concerning federal prohibitions. In *Reno v. Condon*, the Court found a federal prohibition to be constitutional because, although it regulated state activities by prohibiting the sale of drivers' personal information without their consent, Congress did not "seek[] to control or influence the manner in which States regulated private parties."¹⁷³ PoLCAA, by contrast, would have allowed Congress to control and influence the manner in which the states regulate private parties, because the Act was created for the express purpose of stripping state chief executive officers of powers exclusive to their office¹⁷⁴—namely, their ability to protect their electorate by bringing public nuisance suits against the gun industry.¹⁷⁵

The counterargument to this claim, of course, is that public nuisance suits are not exclusive to executive officers because private parties may file them as well, and therefore such a prohibition might be seen as generally applicable and therefore constitutional.¹⁷⁶ Unlike a public plaintiff, however, a private party may only prevail in a public nuisance suit if he or she can show injury that differs *in kind* from that of the general public.¹⁷⁷ The harms caused by the gun industry's irresponsible practices—death, injury, apprehension, loss of personal and commercial welfare, etc.—are shared by countless others throughout the

industry is neither heavily regulated, nor collateral to a heavily regulated group, nor a threatened subset of a heavily regulated group. Bhowmik, *supra* note 2, at 68. It is the most loosely regulated industry in the United States. *Id.*

172. H.R. REP. NO. 108-59, at 103.

173. 528 U.S. at 150-51.

174. See 149 CONG. REC. S3996, S3998 (statements on Introduced Bills and Joint Resolutions) (stating emphatically that the lawsuits that Senate Bill 659 is meant to prevent "are not brought by individuals . . . [but are part of] a politically-inspired initiative trying to force social goals through an end-run around the Congress . . .").

175. State officials' power to bring a public nuisance claim on behalf of their electorate is "among the highest and most time-honored duties of executive officials." Kairys, *supra* note 41, at 1173. While public nuisance suits may be brought by mayors or governors, it is a particularly appropriate tool of attorneys general. See Kao, *supra* note 47, at 226-27 (stating that attorneys general are the "undisputed representative[s] of the public interest" in cases concerning "the health, welfare, and safety of state residents"). Attorneys general are thus "champions of the public interest". Robert M. McGreevey, *The Illinois Attorney General's Representation of Opposing State Agencies—Conflicts of Interest, Policy and Practice*, 66 ILL. B.J. 308, 308 (1978).

176. Antolini, *supra* note 56, at 766.

177. *Id.*

country.¹⁷⁸ No private party's injury can be unique in this context, and therefore none are qualified to bring suit. Thus, only state executive officers may effectively bring a public nuisance action against the gun industry; it is an act particular to their official capacity.¹⁷⁹

In this way, PoLCAA's regulation of state executives has parallels in *Printz*, where the Court ruled that the Brady Handgun Violence Prevention Act was unconstitutional because it compelled sheriffs to conduct background checks using certain databases and records to which only they had access.¹⁸⁰ Similarly, PoLCAA would have regulated a vital and exclusive tool of state executive officers: the public nuisance suit.

Such an interference with state government would also go against the Court's statement in *New York*, that "[n]either government may destroy the other nor curtail in any substantial manner the exercise of its powers."¹⁸¹ It is hard to imagine a more severe curtailment of state power than an exemption like PoLCAA. With a single stroke of the pen, the legislatures and executive officers of fifty states and countless cities would be deprived of the ability to seek redress from gun manufacturers for injury to the public.¹⁸² Such an industry-specific "gift basket" would be unique,¹⁸³ but not unforeseen.

178. See *AcuSport, Inc.*, 271 F. Supp.2d at 508 ("Every segment of our society suffers the same kind of injury as a result of the criminal misuse of firearms . . .").

179. Kairys, *supra* note 41, at 1173.

180. 521 U.S. at 933.

181. 505 U.S. at 163 (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926)).

182. It can be argued that executive officers of cities should be just as exempt from federal regulation as state officers. In *Printz*, the Court quoted with approval Madison's insistence that even "local or municipal authorities . . . [are] no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *Printz*, 521 U.S. at 920-21 (quoting THE FEDERALIST NO. 39 (James Madison)).

183. Never before has a federal prohibition of general applicability absolved an entire industry of civil liability. H.R. REP. NO. 108-59, at 103. The H.R. 1036 House Report tries to draw a comparison to the federal government's exemption of the aviation industry from liability. *Id.* at 11. This gross misrepresentation glosses over the fact that the aviation industry is "one of the most intensely regulated industries in the United States". Patrick J. Shea, *Solving America's General Aviation Crisis: The Advantages of Federal Preemption over Tort Reform*, 80 CORNELL L. REV. 747, 749 (1995). Congress has preempted the aviation field so as to affirmatively promulgate safety rules, inspect and certify aircraft, certify pilots, regulate owners, operate air traffic functions, and investigate domestic aviation accidents. *Id.* at 751. PoLCAA has taken no such measures.

3. PoLCAA Predicted

Justice Powell, in his dissent in *Garcia*, pointed out that in abandoning the traditional functions test, the majority had provided no standard to determine when the national political process had malfunctioned.¹⁸⁴ Henceforth, Justice O'Connor added, all that stood between state sovereignty and Congress "is the latter's underdeveloped capacity for self restraint."¹⁸⁵ Specifically, Justice Powell warned of

[t]he rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation [A] "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities.¹⁸⁶

Should an act like PoLCAA be passed into law, the political process will have indeed failed, and so selectively will it have failed—resulting in legislation that specifically targets the states left that have not exempted the gun industry from liability—that the Act should qualify as a true political malfunction: one in which states are "singled out in a way that [leaves them] politically isolated and powerless."¹⁸⁷

Should a similar act be passed into law in the future, it must either be amended in such a way as to cure its defects, or be judged by new criteria that would properly weigh its (de)merits.¹⁸⁸ To do otherwise would be to allow the creation of a regulatory void that defies precedent,¹⁸⁹ undermines the separation of powers,¹⁹⁰

184. 469 U.S. at 564 n.7 (Powell, J., dissenting).

185. *Id.* at 588 (O'Connor, J., dissenting).

186. *Id.* at 576 (Powell, J., dissenting). Rehnquist concluded his dissent by saying that he was confident that a "balancing test" would someday "command the support of a majority of this Court" once again. *Id.* at 580 (Rehnquist, J., dissenting).

187. *Baker*, 485 U.S. at 512-13.

188. See *infra* Part IV.A.

189. *Supra* Part III.C. While facially a mere prohibition, PoLCAA deviates from past prohibitions because it erases important and long-held executive remedies to benefit a single industry. H.R. REP. NO. 108-59, at 103. As far-reaching as a regulatory scheme, PoLCAA nevertheless provides no new system of governance to replace what it has demolished. Morrison Letter, *supra* note 4, at 3. PoLCAA has in effect exploited a loophole left open in *New York* and *Printz* by making a simple prohibition do the work of a major regulatory scheme. It thus facially complies with the Court's ruling in *New York* and *Printz*, while in fact turning the non-commandeering doctrine on its head. If allowed to stand, the exception will devour the rule, and PoLCAA will have created a regulatory void that is entirely unprecedented. H.R. REP. NO. 108-59, at 103.

190. See *Printz*, 521 U.S. at 922 ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—

and reduces the Tenth Amendment to a truism.¹⁹¹

IV. BALANCING TEST OR BIGGER BUDGET

Even if a firearm industry retroactive exemption like PoLCAA qualifies as generally applicable, its unique structure and scope would nonetheless trigger a balancing test to weigh the act's purpose against its violation of Tenth Amendment principles, and its efficiency against its administrative burden. Barring such a test, the best hope for making the act constitutional would be to amend it so as to greatly increase the regulatory powers of the ATF.

A. *The Return of the Balancing Test*

Toward the end of the majority's opinion in *Printz*, the Court addressed the federal government's plea that the Brady Handgun Violence Prevention Act¹⁹² be ruled constitutional because it "serves very important purposes, is most efficiently administered by [chief law enforcement officers] . . . and places a minimal and only temporary burden upon state officers."¹⁹³ In response, the Court stated that "[a]ssuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments."¹⁹⁴ The Court went on to say that such was not the case with the Brady Act.¹⁹⁵

PoLCAA, however, is not the Brady Act. It is the perfect embodiment of the Court's hypothetical, which, if rephrased, would run thus:

When a federal law of general applicability, by incidental application to the states, interferes excessively with the functioning of state government, then the Court, in determining the act's constitutionality, may consider the importance of the act's purpose, the efficiency of its administration, and the nature of the burden imposed on state officers.¹⁹⁶

PoLCAA would qualify under the test. It is (ostensibly) a

and at no cost to itself—the [executive officers] of the 50 States.”). *See also* H.R. REP. NO. 107-727, pt. 2, at 88-89 (statement of Mr. Frank) (stating that the proposed amendment is the “nail in the coffin” of state power, and suggesting that the Act be renamed the “Decent Burial for the Doctrine of States’ Rights Act”).

191. *Darby*, 312 U.S. at 124.

192. 18 U.S.C. §§ 921-931.

193. *Printz*, 521 U.S. at 931-32.

194. *Id.* at 932.

195. *Id.*

196. *Id.*

federal law of general applicability.¹⁹⁷ It also would “incidentally” deprive state officers, such as the governors and attorneys general of all fifty states, of the right to bring negligence or public nuisance claims against the gun industry on behalf of the public.¹⁹⁸ This would be an excessive interference with the states’ ability to function. U.S. cities are drowning in a sea of guns.¹⁹⁹ The death toll is unconscionable,²⁰⁰ the benefit to the drug trade is immeasurable,²⁰¹ and the annual cost of extra policing, hospitalization, and loss of work, is staggering.²⁰² To prevent state executive officers, as elected champions of the people, from recouping some of the public’s monetary losses while saving thousands of lives in the process, would be an act of unthinkable shortsightedness and should qualify as excessive interference.

If, then, PoLCAA qualifies as a federal prohibition of general application that excessively interferes with state government, we should then weigh its purpose against its violation of the Tenth Amendment, and its efficiency against the imposed administrative burden.²⁰³

PoLCAA’s primary purpose was to spare the gun industry from frivolous lawsuits.²⁰⁴ Such suits, the legislators stated, as might be allowed by a “maverick judicial officer or petit jury,”²⁰⁵ could bankrupt the gun industry and do damage to the public’s Second Amendment rights.²⁰⁶ But no such public nuisance suit has

197. The Act applies to all “persons,” persons being defined as “any individual, corporation, company, association . . . or any other entity, including any governmental entity.” S. 659, 108th Cong. § 4(3).

198. *Id.* § 3(a).

199. On average, there are over 400,000 violent gun crimes per year. AMERICANS FOR GUN SAFETY FOUNDATION, THE ENFORCEMENT GAP: FEDERAL STRATEGY NEGLECTS SOURCES OF CRIME GUNS 53 (2004), available at <http://www.agsfoundation.com/media/AGS-enf.pdf> (last visited May 25, 2005).

200. Siebel, *supra* note 22, at 410.

201. DIAZ, *supra* note 6, at 108, 131.

202. Bhowmik, *supra* note 2, at 72. See also Cook et al., *supra* note 11, at 347 (quoting one estimate that puts the damage at \$80 billion per year).

203. *Printz*, 521 U.S. at 931-32.

204. See S. 659, 108th Cong. § 2(a)(6), (b)(1) (stating that the city suits are “based on theories without foundation in hundreds of years of the common law” such as could only be sustained by a “maverick judicial officer”). See *supra* text accompanying note 134 (discussing the purpose behind Senate Bill 659).

205. S. 659, 108th Cong. § 2(a)(6).

206. The gun industry’s defense costs are unarguably high. See BROWN & ABEL, *supra* note 6, at 160 (quoting Colt’s legal fees as \$100,000 per week at one point). See *id.* at 157-59 (describing the bankrupting of the California “Saturday Night Special” manufacturers, and the role played by then Governor Gray Davis). The biggest company to go bankrupt, however, is Smith & Wesson. See *id.* at 205-30, 298-99 (outlining the provisions of the Smith & Wesson settlement, and its aftermath). Following the settlement, the NRA initiated a ferocious retaliatory campaign against the manufacturer that inspired spam, slander, death threats, and a ruinous boycott. *Id.* at 214-16,

ever been ruled frivolous.²⁰⁷

This lack of foundation is particularly egregious when compared with the Act's violation of the Tenth Amendment.²⁰⁸ The extent to which PoLCAA would violate the Tenth Amendment, which is a prime textual source for the principles of federalism,²⁰⁹ can be measured by the Act's conflict with the federalist principles themselves. These principles have been set forth by Justice O'Connor as accountability, innovation, democracy, freedom from tyranny, and efficiency.²¹⁰

PoLCAA's violation of these principles is manifest. The Act would undercut the accountability of state officials by eviscerating their ability to protect their electorate from the gun industry's irresponsible marketing and design practices.²¹¹ It would squelch innovation by preventing state legislatures from coming up with original solutions to their state's unique challenges.²¹² It would stifle democracy because, faced with the greatly reduced power of state and municipal government, citizens are dissuaded from participating in any sort of local political process on the legitimate grounds that such participation seems largely meaningless.²¹³

226, 299. This incident belies the NRA's supposed fear of industry-wide bankruptcy; clearly, state executive officers should not be penalized for the NRA's practice of cannibalizing its own.

207. Of the thirty-plus city and state suits that have been brought, not one has been deemed frivolous by the courts. H.R. REP. NO. 107-727, pt. 1, at 11.

208. See *supra* Part III.C (discussing how PoLCAA violates the Tenth Amendment).

209. *Printz*, 521 U.S. at 924 n.13.

210. See *FERC*, 456 U.S. at 787-91 (O'Connor, J., dissenting).

211. See *id.* at 787 (O'Connor, J., dissenting) ("Congressional compulsion of state agencies . . . blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs."). See also *New York*, 505 U.S. at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."). The Court in *New York* goes on to explain that, because state officials may "bear the brunt of public disapproval" for enforcing unpopular laws, accountability is diminished when officials are compelled to enforce laws not in accordance with their electorate's beliefs and not preempted by federal regulation. *Id.* at 169. Obviously such regulation must be constitutional for the Supremacy Clause to take effect. *Printz*, 521 U.S. at 924-25.

212. See *FERC*, 456 U.S. at 788-89 (O'Connor, J., dissenting) (stating that state innovation contributes to valuable new "social, economic, and political ideas" such as minimum wage laws, the vote for women, and no-fault automobile insurance). See also *Garcia*, 469 U.S. at 567 n.13 (Powell, J., dissenting) (arguing that federal preemption in no way encourages state innovation).

213. See *FERC*, 456 U.S. at 790 n.28 (O'Connor, J., dissenting) (quoting IGNAZIO SILONE, *THE SCHOOL FOR DICTATORS* 119 (William Weaver trans. 1963) (1938): "When democracy, driven by some of its baser tendencies, suppresses [local institutions], it is only devouring itself."). See also *Garcia*, 469 U.S. at 571 (Powell, J., dissenting) (explaining that state sovereignty

Most importantly, PoLCAA would subvert the states' ability to combat tyranny by setting a precedent whereby the states are merely unwitting pawns of the federal government, which is all too frequently a pawn of industry.²¹⁴ Weighing PoLCAA's merits against its violation of the Tenth Amendment can only reveal a gross imbalance.

Finally, we must compare PoLCAA's efficiency to its administrative burden. Even if the threat of frivolous lawsuits were legitimate, the blanket prohibition is overbroad; it would not be an efficient solution to bar high-ranking state officials from bringing such suits. The number of attorneys general is not large,²¹⁵ the number of those whose legislatures would allow them to bring suit is smaller,²¹⁶ the number of those who would then do so is smaller still.²¹⁷ Furthermore, attorneys general are duty-bound to protect their electorate, and their actions are closely scrutinized.²¹⁸ To bar such state officers from bringing public nuisance suits because they might do so frivolously would be both unrealistic and shortsighted.²¹⁹ It would assume that either gun manufacturers never create public nuisances and never will, or alternately that such abuses do and will take place, but the gun industry's financial well-being outweighs the public's need for a remedy. Recent industry and state disclosures about the actual financial losses involved reveal these assumptions to be baseless.²²⁰

should be respected because it is the states that "attract and retain the loyalty of their citizens"). Powell's dissent also states that local participation in the political process is more effective, frequent, and closer to the democratic ideal than that occurring on a national scale. *Id.* at 576 n.18.

214. See *New York*, 505 U.S. at 188 (saying the "States are not mere political subdivisions of the United States"). The Court admonishes us to resist "the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187. See also JOHN K. GALBRAITH, *THE ESSENTIALS OF JOHN GALBRAITH* 132, 141, 150 (2001) (describing the heavy influence of industry on the federal government).

215. Each state has one attorney general.

216. Twenty-three states have granted gun manufacturers immunity from civil suits. Bhowmik, *supra* note 2, at 94 n.96.

217. In the six years since the city suits began, only one attorney general, New York's Eliot Spitzer, has chosen to bring a suit against the gun industry. BROWN & ABEL, *supra* note 6, at 180.

218. See *id.* at 180-85, 230-31 (revealing the careful deliberation preceding the public nuisance suit brought against the gun industry by New York Attorney General Eliot Spitzer).

219. See Kao, *supra* note 47, at 225-27 (explaining why, under the *parens patriae* doctrine, states have an inherent duty to protect their citizens). This also applies to municipal officials. See *United Bldg. & Constr. Trades Council of Camden County v. Mayor & Council of Camden*, 465 U.S. 208, 218 (1984) ("[A] municipality is merely a political subdivision of the State from which its authority derives.").

220. An unending stream of ATF traces provides the gun industry with notice that their oversaturation techniques are systematically exploited by certain dealers to put guns in the hands of criminals. BROWN & ABEL, *supra*

Even if the gun industry were vulnerable to frivolous lawsuits,²²¹ stripping state executive officers of their common law powers would be a highly inefficient solution.

Besides being inefficient, PoLCAA would impose a heavy administrative burden. On its face, the Act seems to impose no burden on state officers because it does not force them to comply with a regulatory scheme.²²² But the removal of vital and long-held executive powers would not lighten the burden on a state officer.²²³ The officers' duty is to promote the welfare of their electorate, so to remove a means by which the officers can effect that duty would be in fact a heavy imposition, because it would increase the threat of future industry abuses while reducing the officers' ability to curb the same.²²⁴ The idea that PoLCAA imposes

note 6, at 164. This notice has been acknowledged by gun executives. *Id.* at 140. The absurdity of giving gun industry lawsuit expenses more weight than state firearm expenses can be seen by the fact that one estimate of the annual damage to the United States (\$20 billion) is more than thirteen times larger than the gun industry's (self-reported) annual gross income. Bhowmik, *supra* note 2, at 72; H.R. REP. NO. 108-59, at 11.

221. The gun industry grosses \$1.5 billion per year, as compared to the tobacco industry at \$45 billion. H.R. REP. NO. 108-59, at 11.

222. This is, in fact, the problem. *See supra* text accompanying note 76 (stating the danger of a broad preemptive prohibitions).

223. The public has a right to live in health, safety, and peace. Kao, *supra* note 47, at 216. The government's duty to safeguard this right has been continually reaffirmed by gun rights advocates who argue for less litigation and more enforcement of existing gun laws. *See* AMERICANS FOR GUN SAFETY FOUNDATION, *supra* note 199, at 66 (stating the purpose of the foundation). And yet the ability of the federal government to do so is being continually undermined by special interest groups. In August of 2003 the NRA backed a "brazen" bill which, if passed into law, would seriously undermine the ATF's power to detect and prosecute illegal gun trafficking. Dick Dahl, *NRA Seeks to Undercut BATF Powers*, at <http://www.jointogether.org/gv/news/features/reader/0,2061,566162,00.html> (Aug. 8, 2003). The ATF's job has been rendered even more difficult by former U.S. Attorney General John Ashcroft, who severely checked the ATF's ability to use Brady Act background check records in investigations, and reversed the DOJ's longstanding Second Amendment policy. Bhowmik, *supra* note 2, at 99-104; BROWN & ABEL, *supra* note 6, at 292-96. With the federal government's ability to enforce federal firearms statutes in continual flux, the burden falls upon state government officials to take whatever measures they can to protect their electorate, to whom they are ultimately accountable. *New York*, 505 U.S. at 169. "Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." *Id.* The "preemption" referred to here by the Court is narrowly conceived of as a federal regulatory scheme that the state may choose to forgo, in which case it will be enforced by the federal government. *Id.* at 161. There are two elements here—state choice and federal proactive measures—that are missing from PoLCAA. The act is a coercive curtailment of state powers that takes much and gives nothing back. *Id.* at 162. It does not relieve a state's burden; it increases it.

224. In fact, the damage that PoLCAA would inflict upon state autonomy is far more egregious because of the precedent it would set. If the gun industry

a light burden, or no burden, merely because it is a prohibition, is illusory.²²⁵

However important the purpose of protecting the gun industry from frivolous lawsuits—a danger as of yet unmanifested²²⁶—the solution of barring state officials from bringing such suits is both inefficient and burdensome. PoLCAA would therefore fail under the balancing test suggested in *Printz*.

B. Increasing the Regulatory Powers of the ATF

Law, like nature, abhors a vacuum.²²⁷ If passed, an exemption like PoLCAA will create a regulatory vacuum wherein the most irresponsible practices of the firearm industry can thrive unchecked.²²⁸ The best way to counterbalance the states' loss of power in such a situation would be to greatly increase the ATF's funding and regulatory powers so that the agency can conduct more frequent and rigorous investigations of federal firearms violations.²²⁹ The ATF could also be granted powers to ban, monitor, and set standards for gun industry products.²³⁰ Such a preemption would then efficiently and constitutionally relieve the states of a burden which they may no longer legally shoulder.

V. THE RETURN OF THE GREAT AND RADICAL VICE

PoLCAA was and is a valentine to America's most dangerous trade.²³¹ The fierce lobbying of the NRA threatens to create an act

can win blanket civil immunity for itself, what is to keep the pharmaceutical industry from doing the same thing? Or the auto industry? PoLCAA opens the door to the frightening prospect of endless partisan hearings, backroom deals, and a "blue light special" on civil immunities.

225. By way of an analogy, no one would claim that a prohibition that banned state executive officers from using their telephones at work was not a heavy burden simply because it did not proscribe affirmative acts.

226. See *supra* text accompanying note 208.

227. "Nature abhors a vacuum." BENEDICT SPINOZA, *ETHICS*, Part I, Proposition 15: note (1677).

228. See *supra* text accompanying note 169.

229. An increase in ATF funding and regulatory power is needed regardless of PoLCAA's fate. Federal gun crimes are rarely enforced or prosecuted. See generally AMERICANS FOR GUN SAFETY FOUNDATION, *supra* note 199. Corrupt FFLs were very rarely prosecuted, although they were by far the biggest source of illegally trafficked guns. *Id.* at 4. Of the twenty-two federal gun statutes, eighty-seven percent of prosecutions were brought under two statutes, while the other twenty went virtually ignored. *Id.* at 2. Only 0.2% of the 12,406 (24 or 25) federal gun prosecutions in 2003 were for illegally selling firearms to a minor, despite the fact that juveniles committed an estimated 106,000 violent gun crimes between 2000 and 2002. *Id.* at 4, 11, 53. For every 1,000 stolen firearms that authorities recover, there are only 5 federal prosecutions. *Id.* at 38.

230. DIAZ, *supra* note 6, at 200-06.

231. Chairman Sensenbrenner used the same metaphor at the House Committee Markup in reference to ranking member John Conyers' facetious

with a deficient legislative record and a hybrid structure which defies precedent, goes against the holdings of the current Court, and is nemesis to the future of state sovereignty.²³² It would also force an issue that was predicted in *Garcia*²³³ and acknowledged in *Printz*:²³⁴ that a law of general applicability that excessively interferes with the operations of state government may call for a balancing test to determine its constitutionality.²³⁵ The application of such a test would reveal the most glaring shortcomings of a firearm industry retroactive exemption, which, if unaltered so as to further empower the regulatory capabilities of the ATF, will unleash the newest incarnation of the “great and radical vice”:²³⁶

“LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist.”²³⁷

suggestion that PoLCAA be expanded to exempt all gun users as well as manufacturers. H.R. REP. NO. 108-59, at 59.

232. See *supra* Part III.

233. 469 U.S. at 576-80 (Powell, J., dissenting).

234. 521 U.S. at 932.

235. *Id.* at 931-32.

236. *New York*, 505 U.S. at 163 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)).

237. *Id.* (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)).

