March 2, 2010

Lawyers, Guns, and Money: Why the Tiahrt Amendment’s Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment

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Colin Miller*

I. INTRODUCTION

In *City of Chicago v. Beretta U.S.A. Corp.*, the City of Chicago and Cook County filed a civil suit in Illinois state court against certain firearms manufacturers, distributors, and dealers “in an effort to stem the rising tide of gun violence and to recoup some of the expenses that flow from gun crimes.”¹ The suit alleged that these defendants created and maintained “a public nuisance in the city by intentionally marketing firearms to city residents and others likely to use or possess the weapons in the city, where essentially possession of any firearm except long-barrel rifles and shotguns is illegal.”² The plaintiffs sought compensation for, *inter alia*, “the costs of treatment of victims of gun violence and the costs of prosecutions for criminal use of firearms.”³ The Supreme Court will soon decide *McDonald v. City of Chicago*, in which it could find that the Second Amendment is incorporated through the Fourteenth Amendment’s Due Process Clause and/or that the Second Amendment is one of the privileges and immunities of the citizens of the United States.⁴ Either finding would very likely constrain states and localities in their ability to enforce gun control regulations.⁵


² *City of Chicago v. United States Dept. of Treasury*, 287 F.3d 628, 631 (7th Cir. 2002).

³ *Beretta*, 821 N.E.2d at 1006.

⁴ *See* Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J.L. & PUB. POL’Y 203, 210 (2010) (“The question presented in *McDonald* suggests that the Court will consider both the Due Process and the Privileges and Immunities Clauses: ‘Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.’”).

⁵ *See id.* (“In the end, the Second Amendment will very likely constrain state governments as well as the national government.”).
Such a constraint, however, would not be unprecedented; instead, it would merely be an additional tightening of the vice on the ability of states and localities to combat handgun violence. Like the City of Chicago, many cities and localities recently began bringing public nuisance lawsuits against firearms manufacturers, distributors, dealers, and importers as part of a growing trend of using civil litigation to combat crime.\(^6\) Indeed, a public nuisance action is one of the few excepted classes of gun lawsuits which plaintiffs can still bring against the gun industry based upon the criminal misuse of firearms by third parties despite Congress’ passage of the Protection of Lawful Commerce in Arms Act (PLCAA).\(^7\) ATF “trace data is crucial to the success of [such] public nuisance claims,”\(^8\) and the City of Chicago sought access to such data in its public nuisance action.\(^9\) But while the City’s lawsuit seeking access to such data was pending, Congress stepped in and circumvented the judicial process by passing what has since become known as the annual “Tiahrt Amendment.”\(^10\) That Amendment now provides in relevant part that ATF trace data

shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State (including the District of Columbia) or Federal court or in an administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives.\(^11\)

Critics claim that the Amendment was bought by the NRA and is an attempt to insulate the gun industry from civil liability.\(^12\) According to Congress, though, the basis for the Tiahrt

\(^6\) See infra note 60 and accompanying text.

\(^7\) See Angela Jacqueline Tang, Note, Taking Aim at Tiahrt, 50 WM. & MARY L. REV. 1787, 1792 (2009) (noting how the PLCAA “requires dismissal of all but a few excepted classes of gun lawsuits”).

\(^8\) Id.

\(^9\) See City of Chicago v. United States Dept. of Treasury, 287 F.3d 628, 632 (7th Cir. 2002) (“In furtherance of the City's state court litigation and in order to gain information about local and nationwide firearm distribution patterns, the City sought certain records from ATF.”).

\(^10\) See infra note 93 and accompanying text.


\(^12\) See infra notes 97-103 and accompanying text.
Amendment is that, without it, “information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases.” 13 The true motives of Congress in this regard are unclear, but two points are clear. First, while Barack Obama campaigned on the promise of repealing the Tiahrt Amendment, he backed away from this promise by inserting a version of the Tiahrt Amendment into his 2010 budget and his proposed 2011 budget. 14 Second, because the Amendment regulates state as well as federal court proceedings, it is defensible, if at all, under Congress’ Commerce Clause power. 15

This latter point is troublesome for defenders of the Tiahrt Amendment because the Supreme Court found in Lopez v. United States that the Gun-Free School Zones Act (GFSZA) of 1990, which made it a federal offense “‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone,’” exceeded Congress’ Commerce Clause power. 16 Moreover, in Printz v. United States, the Supreme Court found that it was apparent that interim provisions in the Brady Handgun Violence Prevention Act violated the Tenth Amendment because they purported to direct state executive officers to participate in the administration of a federally enacted regulatory scheme. 17 In his concurring opinion in Printz, Justice Thomas found that “[a]bsent the underlying authority to regulate the intrastate transfer of firearms [in the GFSZA], Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations.” 18

14 See infra notes 134-38 and accompanying text.
15 See infra notes 301-05 and accompanying text.
17 See Printz v. United States, 521 U.S. 898, 904 (1997) (“[I]t is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”).
18 Id. at 937 (Thomas, J., concurring).
This article argues that the similar problems exist with the state court evidentiary provisions of the Tiahrt Amendment, *i.e.*, the provisions which indicate that ATF trace data “shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner” and that testimony or other evidence shall not be permitted based upon such data in any state court civil action. Just as Congress could not regulate the intrastate transfer (and possession) of firearms under the GFSZA, it cannot regulate the admission of ATF trace data in state court actions, including public nuisance actions based upon intrastate and even intracity transfers of firearms. And just as Congress could not direct state executive officers to participate in the administration of a federally enacted regulatory scheme concerned with data collected in connection with the transfer of firearms under the Brady Act, it cannot direct state judicial officers to participate in the administration of the similarly focused Tiahrt Amendment.

Part II of this article traces the history of America’s regulation of the gun industry through laws and lawsuits from the passage of the Gun Control Act of 1968 and the creation of the ATF to the recent restrictions imposed on lawsuits against the gun industry in the PLCAA and the Tiahrt Amendment. Part III sets forth the Supreme Court’s Commerce Clause jurisprudence, paying particular attention to *Lopez*’s three categories of activity that Congress may regulate and the four factor test created by the Court in *United States v. Morrison* to determine whether an act falls under *Lopez*’s third category. Part IV addresses the Tenth Amendment and the Court’s anti-commandeering opinions in *Printz* and *New York v. United States*. Part V notes that the Tiahrt Amendment’s state court evidentiary provisions are defensible, if at all, under the Commerce Clause, much like Federal Rule of Evidence 502(d). Part VI contends that, like the GFSZA in *Lopez* and the Violence Against Women Act in *United States v, Morrison*, these provisions exceed Congress’ Commerce Clause power. Finally, Part
VII concludes that even if these provisions are authorized under the Commerce Clause, they run afoul of the Tenth Amendment because Congress lacks the power to prescribe procedural rules for state courts' adjudication of purely state law claims.

II. AMERICAN GUN: THE REGULATION OF THE GUN INDUSTRY THROUGH LAWS AND LAWSUITS

A. The Gun Control Act of 1968 and the ATF

To reduce the “pervasive, nationwide problem” of gun violence, Congress passed the Gun Control Act of 1968 (GCA),\(^\text{19}\) which, *inter alia*, “established the first comprehensive licensing system for importers, manufacturers and dealers in firearms to the retail level.”\(^\text{20}\) Under the Act, any persons in the business of manufacturing, importing, or dealing in firearms are classified as Federal Firearms Licensees (FFLs) and must obtain a Federal Firearms License.\(^\text{21}\) As a condition of its license, each FFL must maintain records of a firearm’s first sale, tracing a firearm from its manufacturer through the distribution chain to its first retail purchaser.\(^\text{22}\) The GCA also precludes FFLs from selling firearms to prohibited persons such as convicted felons, fugitives, domestic violence offenders, and individuals under the age of eighteen.\(^\text{23}\)


In 1972, Congress created the Bureau of Alcohol, Tobacco, and Firearms (ATF) to, *inter alia*, help track, investigate, and arrest those responsible for illegal gun trafficking. Among other things, the ATF administers the National Firearms Trace Database. The gun tracing process can be quite complicated, but the basics are as follows: When a law enforcement official recovers a “crime gun,” the law enforcement agency with jurisdiction submits a trace request containing information concerning the gun and the crime to the National Tracing Center (NTC), the ATF subdivision that maintains the database. This information then becomes part of the trace database.

The NTC then places the information into the ATF’s automated Firearms Tracing System (FTS) and “conducts a trace by first checking the records of out-of-business FFLs…and by checking multiple sales records.” If these steps are unsuccessful, “the NTC contacts the manufacturer or importer, and tracks the recovered crime gun through the distribution chain…to the retail dealer, requesting the dealer to examine his records to determine the identity of the first retail purchaser.” Results are thereafter sent “to the trace requester and entered into the FTS, where they are accessible by NTC personnel.”

There were several problems with the GCA, two of which will be highlighted below.

**B. “Lying and Buying” and the Brady Act**

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25 *Id.* at 19.
26 Commerce in Firearms, *supra* note 20, at 19.
29 *Id.*
30 *Id.*
The first problem was that FFLs had no way of knowing whether customers were prohibited persons, leading to the practice of “lying and buying.”\(^\text{31}\) In order to, \textit{inter alia}, close this loophole, Congress amended the GCA in 1993 through its passage of the Brady Handgun Violence Prevention Act.\(^\text{32}\) The Act required the Attorney General to establish a national instant background-check system by November 30, 1998 and promulgated interim provisions effective until the system was in place.\(^\text{33}\) As will be noted \textit{infra}, in 1997 Congress found that some of these interim provisions were unconstitutional.\(^\text{34}\) On November 30, 1998, however, the FBI complied with the Brady Act’s requirement by creating the National Instant Criminal Background Check System (NICS).\(^\text{35}\)

Under the Brady Act, before a FFL can sell a firearm, the purchaser must fill out ATF Form 4473, which requires the purchaser to provide personal information and represent that he is not a prohibited person.\(^\text{36}\) The FFL then must call NICS and relay the information on the form, at which point NICS determines whether the purchaser is disqualified from owning a firearm.\(^\text{37}\) If NICS approves the purchaser, NICS gives the FFL an approval number to write on the form, and the purchaser may take possession of the firearm.\(^\text{38}\)

C. The Unregulated Illegal Secondary Market for Guns

\(^\text{31}\) \textit{Following the Gun, supra} note 24, at 18.


\(^\text{33}\) \textit{See Printz v. United States}, 521 U.S. 898, 902 (1997) ("The Act requires the Attorney General to establish a national instant background-check system by November 30, 1998…and immediately puts in place certain interim provisions until that system becomes operative.").

\(^\text{34}\) \textit{See infra} notes 273-92 and accompanying text.


\(^\text{36}\) \textit{Commerce in Firearms, supra} note 20, at 12.

\(^\text{37}\) \textit{See Nicholas J. Johnson, Imagining Gun Control in America: Understanding the Remainder Problem, 43 WAKE FOREST L. REV. 837, 875 (2008)} ("The NICS determines whether the buyer is disqualified from owning the gun.").

\(^\text{38}\) \textit{Id.} at 875-76.
A second problem with the GCA was that it only covered the first retail sale, *i.e.*, the primary market for guns; it did not require purchasers reselling guns as part of the secondary market for guns to maintain records or avoid selling to prohibited purchasers. The problem in this regard is that although the secondary market is partially legitimate, it also contains an illegal segment. Indeed, “[t]he illegal, secondary market is a significant source of firearms to criminals,” with criminals acquiring most of their firearms through transactions in the secondary market. Moreover,

recent analyses have shown that guns move quickly from the legal to the illegal market; 13% of guns recovered in crimes were recovered within one year of their sale, and 30% were recovered within 3 years of their first sale. ATF trace data indicates that as many as 43% of guns used in crimes in urban centers across the United States were purchased from retail dealers less than three years prior to commission of the crime. A relatively short interval between the retail sale of a gun and its recovery in a crime is an accepted indicator that a party to the initial retail transaction intended to transfer the gun to a prohibited used or into the illegal market.

Guns move from the legal to the illegal market for guns in a variety of ways, including sales by corrupt FFLs, illegal sales at gun shows, sales by “kitchen-table” dealers not governed by the GCA, sales to straw purchasers who buy guns on behalf of prohibited persons, and multiple sales, *i.e.*, sales “in which the purchaser buys more than one gun at the same time or over a limited time period from a licensed dealer with the intention of later transferring the guns to persons unqualified to purchase under federal and state gun laws.” The Brady Act did

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39 *See, e.g.*, Joseph A. Peters, et al., *Gun Crime and Gun Control: The Hawaiian Experience*, 2005 U. CHI. LEGAL F. 55, 56 (2005) (“Gun buyers and sellers make a substantial number of transactions each year in the exempt secondary market, a loophole that may undermine any effects of primary-market regulations on the availability of guns to teens, convicted criminals, and other prohibited groups.”).

40 *See* City of New York v. Beretta U.S.A. Corp., 401 F.Supp.2d 244, 254 (E.D.N.Y. 2005) (“Although there is a legitimate secondary market for firearms, that market also includes an illegal segment made up of private transactions among non-federally licensed individuals.”).

41 *Id.*

42 *Id.*

43 *Id.* at 254-56.
nothing to remedy these problems with the illegal secondary market for guns.\textsuperscript{44}

\section*{D. Lawsuits Against the Gun Industry and the Emergence of the Public Nuisance Action}

Prior to 2005, plaintiffs such as private citizens, cities, and interest groups brought successful actions against firearms manufacturers, dealers, and importers which sought relief based upon “the harm caused by the misuse of firearms by third parties, including criminals.”\textsuperscript{45} Recently, these plaintiffs began including claims sounding in public nuisance in these actions.

Under either common law or statutory codification, all states recognize the tort of public nuisance,\textsuperscript{46} “but variations in state statutory causes of action will likely produce different results in different fora.”\textsuperscript{47} The Restatement of Torts defines a public nuisance as an “unreasonable interference with a right common to the general public.”\textsuperscript{48} In most states, a defendant can be held liable for a public nuisance if it intended to create such a nuisance, had notice of it, or should have known about it, but a minority of states deem public nuisance a strict liability tort.\textsuperscript{49}

The lawsuit brought in \textit{NAACP v. Acusport},\textsuperscript{50} is similar to most public nuisance actions brought based upon gun violence. In \textit{Acusport}, the NAACP brought a public nuisance action against handgun manufacturers, importers, and distributors, and the United States District Court for the Eastern District of New York found that the NAACP proved the following facts by clear

\begin{footnotesize}
\textsuperscript{46} See Restatement (Second) of Torts § 821B cmt. C (1979).
\textsuperscript{47} The Paths of Civil Litigation, 113 HARV. L. REV. 1759, 1760-61 (2000) [hereinafter Civil Litigation].
\textsuperscript{48} Restatement (Second) of Torts § 821B.
\textsuperscript{49} Civil Litigation, supra note 47, at 1762.
\textsuperscript{50} 271 F.Sup 2d 435 (E.D.N.Y. 2003).
\end{footnotesize}
and convincing evidence:\textsuperscript{51}

Careless practices and the lack of appropriate precautions by some gun retailers cause the diversion of numerous handguns from the legal primary market into the illegal secondary market in New York.\textsuperscript{52} As noted, some of these practices include “straw sales,” “multiple sales,” and gun show sales.\textsuperscript{53} These practices and other unsafe conduct cause many unnecessary deaths and much unnecessary injury in New York.\textsuperscript{54} Many of these deaths and injuries are unnecessary because manufacturers and distributors can, through the use of handgun traces and other sources of information, substantially reduce the number of firearms leaking into the illegal secondary market and ultimately into the hands of criminals in New York.\textsuperscript{55} Specifically,

\begin{quote}
[t]he flow of guns into criminal hands in New York would substantially decrease if manufacturers and distributors insisted that retail dealers who sell their guns be responsible-\textit{e.g.}, that they not sell at gun shows, but sell from the equivalent of a store front with a supply of stocked guns; that they not sell under a variety of names; that they protect against theft; that they train and supervise employees to prevent straw sales (which are often notoriously obvious to the seller); and that they take other appropriate and available protective action.\textsuperscript{56}
\end{quote}

Evidence from the ATF Trace Database was essential to the NAACP in proving these facts. The court noted that evidence from this database and expert testimony based upon that evidence gave the court a picture only slightly out of focus of the merchandising practices of defendants that enormously increase the probability of unnecessary deaths caused by criminals using the guns they sell. Plaintiff’s experts, contrary to the caviling of defendants’ experts,…produced “a practical formula for calculating...a hybrid sequence of equations and measurements,”…that tell us what we need to know with accuracy sufficient to the enterprise.\textsuperscript{57}

\textsuperscript{51} \textit{Id.} at 449.
\textsuperscript{52} \textit{Id.} at 450.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 449.
\textsuperscript{55} \textit{Id.} at 449-50.
\textsuperscript{56} \textit{Id.} at 450.
\textsuperscript{57} \textit{Id.} at 453.
Even with this evidence, however, the NAACP was unable to establish one element necessary for it to recover in its action for public nuisance against the defendants. Private public nuisance plaintiffs must establish that they suffered a particular harm from the public nuisance different in kind from that suffered by the community as a whole. The court found that the NAACP had not established this element despite its claim that the criminal possession and use of handguns in New York causes a “relatively greater adverse effect on the NAACP and its members.”

Public plaintiffs, however, do not have to prove this element, and cities and localities recently began bringing public nuisance lawsuits against firearms manufacturers, dealers, and importers as part of a growing trend of using civil litigation to combat crime. At first, these actions met minimal success in the courts, which did not understand how a tort traditionally applied to redress property damage applied to lawsuits against the gun industry. After this initial period of futility, however, cities began enjoying success with these actions. But that success, as well as the success of any actions against firearms manufacturers, dealers, and importers based upon the criminal misuse of firearms by third parties was called into question by Congress’s passage of the Protection of Lawful Commerce in Arms Act in 2005.

E. **The Protection of Lawful Commerce in Arms Act and its Limits Upon Lawsuits Against the Gun Industry**

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58 Id. at 448.
59 Id. at 449.
60 Civil Litigation, supra note 47, at 1759.
61 Tang, supra note 7 at 1799 & n.73.
62 See Id. at 1799 (“After this period of hesitancy, however, some cities have enjoyed success.”).
In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA).\textsuperscript{63}

For PLCAA purposes, a “qualified civil liability action” is

[a] civil action…brought…against a manufacturer or seller of a qualified product…for damages,…injunctive,…or other relief, resulting from the criminal…misuse of a qualified product by…a third party, but shall not include….

an action in which a manufacturer or seller of a qualified product knowingly 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….\textsuperscript{64}

Moreover, the PLCAA defines a “qualified product” as “a firearm…or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.”\textsuperscript{65}

The PLCAA did two things. First, it stated that “[a] qualified civil liability action may not be brought in any Federal or State court.”\textsuperscript{66} Second, it stated that such “[a] qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.”\textsuperscript{67}

In the accompanying House Report, Congress issued the following findings: According to Congress, it was passing the PLCAA in response to lawsuits that had “been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.”\textsuperscript{68} Congress found that

Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should not, be liable

\textsuperscript{63} Id. at 1803.
\textsuperscript{65} Id.
for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.\textsuperscript{69}

Congress also found that

The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation’s laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.\textsuperscript{70}

Furthermore, Congress indicated that one of the purposes of the PLCAA was “[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.”\textsuperscript{71}

Commentators have noted that the PLCAA “is written in broad terms and is clearly intended to insulate gun manufacturers from bearing responsibility for the harm caused by the criminal use of their products.”\textsuperscript{72} Importantly, however, some courts have found that the PLCAA did not preclude parties from bringing public nuisance actions against gun manufacturers and sellers resulting from the criminal misuse of guns by third parties.\textsuperscript{73}

Certainly, there were some courts which found that the PLCAA did foreclose such actions. In \textit{Ileto v. Glock, Inc.}, shooting victims and their family members brought a public nuisance action against firearms manufacturers, distributors, and dealers.\textsuperscript{74} As noted, there is an exception to the PLCAA for “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product,

\textsuperscript{73} \textit{See} Tang, supra note 7, at 1804 (“Courts reached diverging opinions over the PLCAA’s meaning.”).
\textsuperscript{74} 421 F.Supp.2d 1274, 1278 (C.D. Cal. 2006).
and the violation was a proximate cause of the harm,” the so-called “predicate exception.”

And, according to the plaintiffs, their action alleged that the defendants violated California’s public nuisance statute, which was “capable of being applied to the sale or marketing of firearms,” triggering the predicate exception. The United States District Court for the Central District of California disagreed, finding, inter alia, “that Congress intended the predicate exception to apply only to State and Federal statutes specifically governing the firearms industry.” Other courts have agreed with this construction of the predicate exception.

Conversely, some courts have found that the predicate exception does apply to public nuisance actions, rendering the PLCAA inapplicable. For example, in City of New York v. Beretta U.S.A. Corp., the City of New York brought a public nuisance action against the main suppliers of handguns in the United States. The City claimed that the predicate exception applied to its action, and the United States District Court for the Eastern District of New York agreed, finding that New York’s public nuisance statute was applicable to the sale or marketing of the firearms because it was “capable of being applied” to it. Other courts have agreed with this broader reading of the predicate exception and allowed public nuisance actions against firearms manufacturers and dealers to go forward.

75 See supra note 64 and accompanying text.
76 Ileto, 421 F.Supp.2d at 1284.
77 Id.
78 Id. at 1292.
79 See, e.g., District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 171-72 (D.C. 2008) (“By the terms of the PLCAA, the plaintiffs’ action under the SLA was properly dismissed.”).
80 401 F.Supp.2d 244, 251 (E.D.N.Y. 2005).
81 Id. at 261-66.
82 See, e.g., Smith & Wesson v. City of Gary, 875 N.E.2d 422, 434 (Ind.App. 2007) (“Because the City’s complaint and the Indiana Supreme Court’s opinion indicate that the City alleged that the Manufacturers ‘violated a State or Federal statute applicable to the sale or marketing of the product,’ we conclude that the City’s action falls under the predicate exception and is not barred by the PLCAA.”).
Thus, according to some courts, a public nuisance action is one of the few excepted classes of gun lawsuits which plaintiffs can still bring despite the PLCAA.\(^{83}\) Moreover, as noted previously,\(^{84}\) ATF “trace data is crucial to the success of [such] public nuisance claims.”\(^{85}\) Congress’ decision to enact and reenact the “Tiahrt Amendment,” however, has called into question whether public nuisance plaintiffs can admit such evidence at trial.

F. The Tiahrt Amendment(s) and the (In)Admissibility of ATF Trace Data in Federal and State Civil Actions

In \textit{City of Chicago v. Beretta U.S.A. Corp.}, the City of Chicago filed a civil suit in Illinois state court against certain firearms manufacturers, distributors, and dealers.\(^{86}\) The suit alleged that these defendants created and maintained “a public nuisance in the city by intentionally marketing firearms to city residents and others likely to use or possess the weapons in the city, where essentially possession of any firearm except long-barrel rifles and shotguns is illegal.”\(^{87}\) Specifically, the City claimed that the defendants’ actions undermined its ability to enforce its gun control ordinances; the City’s theory of liability thus rested “in part on the defendants’ distribution practices.”\(^{88}\)

In order to establish these distribution patterns, the City submitted a formal FOIA request to the ATF, seeking, \textit{inter alia}, information from its trace database.\(^{89}\) After the ATF failed to comply fully with the request, the City filed suit, \textit{City of Chicago v. Dept. of Treasury}, against

\(^{83}\) See Tang, \textit{supra} note 7, at 1792 (noting how the PLCAA “requires dismissal of all but a few excepted classes of gun lawsuits”).

\(^{84}\) See \textit{supra} note 57 and accompanying text.

\(^{85}\) Tang, \textit{supra} note 7, at 1792.

\(^{86}\) City of Chicago v. United States Dept. of Treasury, 287 F.3d 628, 631 (7th Cir. 2002).

\(^{87}\) Id.

\(^{88}\) Id.

\(^{89}\) See \textit{id.} at 632 (“In furtherance of the City’s state court litigation and in order to gain information about local and nationwide firearm distribution patterns, the City sought certain records from ATF.”).
the ATF in federal district court, seeking disclosure of the withheld information; the court later
granted the City’s motion for summary judgment, and the Seventh Circuit affirmed after the
ATF’s appeal.90 The ATF thereafter filed a petition for writ of certiorari with the Supreme
Court, which granted it on November 12, 2002.91

While City of Chicago was pending Supreme Court review, Congress decided to step in
and circumvent the judicial process. Before 2003, the “ATF had always made some portion of
the crime gun trace data available to the public.”92 Representative Todd Tiahrt, however,
sponsored a rider to the Consolidated Appropriations Act of 2003, which stated in relevant part
that

No funds appropriated under this Act or any other Act with respect to any fiscal
year shall be available to take any action based upon any provision of…[the
Freedom of Information Act] with respect to records collected or maintained
pursuant to [the GCA]…or provided by…law enforcement agencies in connection
with…the tracing of a firearm.…93

The Committee on Appropriations claimed that this Amendment was born out of its
concern “that certain law enforcement databases may be subject to public release under the
Freedom of Information Act (FOIA).”94 The Committee found that, if such public release
occurred, “information collected and maintained by ATF related to ongoing criminal
investigations of firearms, arson or explosive offenses could be released, potentially
compromising those cases.”95 According to the Committee, “[t]he need to maintain these

90 Id. at 632, 638.
92 Brady Center to Prevent Gun Violence, Without a Trace: How the Gun Lobby and the Government Suppress the
Without a Trace].
95 Id.
databases on a limited confidential basis that has been in place at ATF for several years for tracing records derive[d] from the long-term nature of criminal investigations."⁹⁶

Critics claimed that something more insidious was hiding behind this austere veneer. According to the Brady Center to Prevent Handgun Violence,

The legislation was indeed an attempt to help the NRA and the gun lobby, by not only thwarting Chicago’s case, but by preventing anyone from obtaining trace data through FOIA. The threat of more public reports, based on analysis of trace data, linking the gun industry to supply of the illegal market of guns, was too great.⁹⁷

The Washington Post reported that “before the vote, Tiahrt assured colleagues the NRA had reviewed the language” of the rider and quoted Tiahrt as saying, “I wanted to make sure I was fulfilling the needs of my friends who are firearms dealers. NRA officials were helpful in making sure I had my bases covered.”⁹⁸

According to the Brady Center, Tiahrt did in fact make sure that his bases were covered by offering the rider in the perfect vehicle.⁹⁹ By appending the rider to the appropriations bill, he was able to prevent it from being scrutinized in a congressional committee and subjected to a floor debate.¹⁰⁰ Indeed, the only opposition to the rider came after the rider was already appended to the appropriations bill.¹⁰¹ In a floor statement, Illinois Senator Richard Durbin lamented that the rider was “slipped in the bill” and contended that it was a response to City of Chicago.¹⁰² According to Durbin,


⁹⁶ Id.
⁹⁷ Without a Trace, supra note 92, at 28.
⁹⁹ See id. at 27 (“The technique of inserting substantive provisions into appropriations legislation is a favorite tool of special interest lobbyists.”).
¹⁰⁰ See id. (“Unlike other legislation, riders to appropriations bills also do not regularly undergo scrutiny in congressional committees or have full floor debate”).
¹⁰² Id.
This provision sets a dangerous precedent because it essentially directs a Federal agency not to comply with the Federal court ruling, thus undermining the very purpose of FOIA. If litigants can be denied information under FOIA through legislative action—even when a Federal court has upheld this request—FOIA itself is in jeopardy.

There is no cost justification for this. This doesn't have anything to do with appropriations. This is an effort by the gun industry to stop cities that are ravaged by gun crime from going after the irresponsible gun dealers who are selling guns to criminals. And the NRA and the gun industry are shielding them with this rider in the appropriations bill.103

Congress eventually passed what has since become known as the annual “Tiahrt Amendment,”104 and, in 2004, it arguably strengthened it. Whereas the initial Tiahrt Amendment only provided that no appropriated funds could be used to disclose any gun trace data maintained pursuant to the GCA through FOIA, the 2004 version precluded “disclosure to the public” of this data through any means.105 Notwithstanding this change, however, two courts still found that cities could gain access to ATF trace data.

First, after Congress passed the Tiahrt Amendment, the Supreme Court vacated City of Chicago so that the Seventh Circuit could consider what effect, if any, the Tiahrt Amendment had on the case.106 The Seventh Circuit then found that the amendment did not prohibit the release of ATF trace data to the City as long as the City paid for the costs of production.107

Meanwhile, in the aforementioned City of New York v. Beretta U.S.A. Corp.,108 the United States District Court for the Eastern District of New York reached a similar conclusion. In Beretta, the City had argued that the Tiahrt Amendment’s proscription on “disclosure to the

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103 Id.
104 Without a Trace, supra note 92, at v.
105 118 Stat. 3, 53.
107 City of Chicago v. United States Department of the Treasury, 384 F.3d 429, 435 (7th Cir. 2004).
public” did not preclude disclosures in the course of judicial proceedings.\(^\text{109}\) As support for this argument, the City noted that in cases where Congress wanted to prohibit the disclosure of information to parties in the context of civil litigation, it had used unequivocal language explicitly prohibiting such disclosure.\(^\text{110}\) For instance, Congress precluded disclosure of certain consumer product safety reports in the course of judicial proceedings by passing 15 U.S.C. § 2055(e)(2), which stated that such reports “shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding....”\(^\text{111}\) The court found that these arguments held water and thus authorized disclosure, finding that if Congress intended to foreclose all disclosures of ATF trace data, “it could have expressly indicated that intent in the statute.”\(^\text{112}\)

The following year, Congress accepted the court’s invitation. The Tiahrt Amendment to the Consolidated Appropriations Act of 2005 provided in relevant part that

\begin{quote}
no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives...to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives..., and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the provisions of that chapter.\(^\text{113}\)
\end{quote}

\(^{109}\) Id. at 57.
\(^{110}\) Id. at 58.
\(^{111}\) Id.
\(^{112}\) Id. at 59.
The Committee on Appropriations report made clear that these changes were a response to the two aforementioned opinions. According to the report, “[t]he Committee was concerned by recent actions in Federal courts in which litigants have tried to nullify the effect of the language that was enacted to ensure the confidentiality of…” ATF trace data. The Committee then noted that it was changing the language of the Tiahrt Amendment “to make clear that ATF shall not make these law enforcement records available to anyone other than to law enforcement agencies for a bona fide criminal investigation.” In making this change, the Committee reiterated that the primary purpose behind the Tiahrt Amendment was to prevent the disclosure of information that could hamper criminal investigations.

The Seventh Circuit took this amendment as a Congressional rebuke to its City of Chicago opinion and promptly fell into lockstep, vacating its prior opinion and denying the City access to ATF trace data. The Eastern District of New York, however, remained obstinate. Like the Seventh Circuit, the Eastern District of New York found that Congress had changed the rules of the game, but it found that in the absence of “clear congressional intent,” the new Tiahrt Amendment did not apply retroactively. Therefore, the court found that it could not “change the rules mid-litigation” and determined that the City could still access ATF trace data. After this ruling, the ATF turned over all trace data that it had not previously disclosed to the City.

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115 Id.
116 See id. (“It is of great concern that releases have occurred, and if repeated, may result in wide-spread disclosure of this information to the public at large. This holds the potential of endangering law enforcement officers and witnesses, jeopardizing on-going criminal investigations and homeland security.”).
117 City of Chicago v. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 423 F.3d 777, 782-84 (7th Cir. 2005).
119 Id. at 147.
The following year, Congress modified the final clause of the Tiahrt Amendment so that it now stated in relevant part that ATF trace data shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act in any State…or Federal court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives….\textsuperscript{121}

This seemed like another direct rebuke to the Eastern District of New York, but it is impossible to tell because these new “evidentiary restrictions were placed in the 2006 rider with no debate.”\textsuperscript{122} Relying in part upon this fact, the Eastern District of New York remained undaunted and held steadfast in its finding that the Tiahrt Amendment did not preclude the City from accessing ATF trace data in the case before it.\textsuperscript{123} According to the court, the portion of the Tiahrt Amendment deeming ATF trace data inadmissible only “bar[red] the use of appropriated funds for the \textit{future} disclosure of ATF trace data to anyone besides law enforcements recipients….\textsuperscript{124}

Before Congress passed the Continuing Appropriations Resolution of 2007, it received opposition to the Tiahrt Amendment from two fronts. First, in April 2006, the Brady Center to Prevent Gun Violence issued a report contending that the Tiahrt Amendment “prevents ATF from disclosing to the public crime gun trace data that has long been gathered by ATF and released – data that has been used in countless studies and public reports to evaluate the effectiveness of legislative proposals and of the ATF’s enforcement efforts.”\textsuperscript{125} Second, New

\textsuperscript{122} \textit{Beretta}, 429 F.Supp.2d at 528.
\textsuperscript{123} \textit{Id.} at 526.
\textsuperscript{124} \textit{Id.} (emphasis added).
\textsuperscript{125} \textit{Without a Trace, supra} note 92, at v.
York City Mayor Mike Bloomberg and Boston Mayor Thomas M. Menino spearheaded the inaugural Mayors’ Summit on Illegal Handguns on April 25, 2006.\(^\text{126}\) That summit produced a memorandum “[o]ppos[ing] all federal efforts to restrict cities’ right to access, use, and share trace data.”\(^\text{127}\) This opposition was largely credited with defeating an attempt to permanently codify the Tiahrt Amendment into Title 18,\(^\text{128}\) and the coalition of mayors later grew into Mayors Against Illegal Guns (MAIG), a coalition of mayors working together to “share best practices, develop innovative policies, and support legislation at the national, state, and local levels that will help law enforcement target illegal guns.”\(^\text{129}\) The opposition was not enough, however, to buoy an alternate attempt to eliminate the Amendment altogether.\(^\text{130}\) Instead, Congress merely passed the exact same version of the Tiahrt Amendment that it had passed the year before, again with no debate.\(^\text{131}\)

The following year, though, Congress seemingly responded to the Eastern District of New York, the MAIG, and the Brady Center in altering the Tiahrt Amendment, again with no debate. Congress softened the Tiahrt Amendment by removing the restriction from it that had limited law enforcement agencies to requesting “only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure” and adding a provision permitting the ATF to release data to “a Federal agency for a national security purpose.”\(^\text{132}\) Conversely, Congress strengthened the Tiahrt Amendment’s evidentiary

\(^{126}\) See Tang, supra note 7, at 1813-14 (“New York City's Mayor Bloomberg, in cooperation with Boston's Mayor Menino, hosted the inaugural Mayors' Summit on Illegal Guns on April 25, 2006.”).


\(^{130}\) Tang, supra note 7, at 1814.

\(^{131}\) Id.

restrictions to make clear that, contrary to the holding of the Eastern District of New York in "Beretta," ATF trace data is never admissible in any past or future federal or state action except an ATF enforcement action.\textsuperscript{133}

In 2008, Barack Obama campaigned on the promise that “Obama and Biden would repeal the Tiahrt Amendment, which restricts the ability of local law enforcement to access important gun trace information, and give police officers across the nation the tools they need to solve gun crimes and fight the illegal arms trade.”\textsuperscript{134} In 2009, however, after his election, President Obama backed away from this promise and did not repeal the Tiahrt Amendment.\textsuperscript{135} Instead, President Obama merely prodded Congress into making “a relatively minor change: The ATF now can share information with state and local police about any gun it traces, regardless of whether it was used in a crime.”\textsuperscript{136} This new provision was not accompanied by any debate but was accompanied by “a broad new gag order on law enforcement, even beyond what had been imposed under the Bush Administration, to prevent the sharing of crucial crime gun data with legislators or the public.”\textsuperscript{137} In 2010, President Obama has inserted the same version of the current Tiahrt Amendment into his proposed 2011 budget.\textsuperscript{138}

III. THE COMMERCE CLAUSE, THE THREE \textit{LOPEZ} CATEGORIES, AND THE \textit{MORRISON} FOUR FACTOR TEST

\begin{itemize}
\item[\textsuperscript{133}] Tang, \textit{supra} note 7, at 1816.
\item[\textsuperscript{134}] See Change.gov, Urban Policy, \url{http://change.gov/agenda/urbanpolicy_agenda/}.
\item[\textsuperscript{136}] \textit{Id.}
\end{itemize}
A. **The Early, Broad Reading**

The Commerce Clause empowers Congress “[t]o regulate Commerce…among the several States.” In the more than half a century before 1995, the Supreme Court read this power expansively, not once striking down a federal statute on the ground that it exceeded Congress’ power under the Clause. A few cases typify this broad reading.

1. **Wickard v. Filburn and Local Acts With Substantial Effects on Interstate Commerce**

   In its 1942 opinion in *Wickard v. Filburn*, the Court addressed the constitutionality of the Agricultural Adjustment Act of 1938, which established wheat production quotas “to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.” In *Filburn*, a farmer brought an action seeking to enjoin enforcement of the Act’s marketing penalty against him based upon his production and consumption of homegrown wheat which was never intended for sale. According to the farmer, these activities were beyond Congress’ Commerce Clause power because they were local in character, with their effect on interstate commerce being “indirect” at most. The Court disagreed and upheld the Act, finding that

   > [e]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of

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139 U.S. Const. art. I, § 8, cl. 3.
140 See United States v. Cleveland, 951 F.Supp. 1249, 1252 (E.D. La. 1997) (“*Lopez* marked the first time since 1936 that the Supreme Court invalidated a federal statute under the Commerce Clause….”).
141 317 U.S. 111, 115 (1942).
142 *Id.* at 113.
143 *Id.* at 119.
whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’

2. *Hodel v. Indiana* and Complex Regulatory Schemes

In its 1981 opinion in *Hodel v. Indiana*, the Court addressed the constitutionality of the Surface Mining Act, which, *inter alia*, regulated intrastate coal mining through various provisions. The State of Indiana and others claimed that the Act exceeded Congress’ power under the Commerce Clause, but the Court disagreed, concluding that the Act advanced legitimate goals such as “ensur[ing] that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce.” In reaching this conclusion, the Court found the claim that a number of the challenged provisions could not “be shown to be related to the congressional goal of preventing adverse effects on interstate commerce” to be “beside the point.” According to the Court, “[a] complex regulatory program such as established by the Act can survive a Commerce Clause challenge without a showing that every single facet of the program is directly related to a valid congressional goal.” Instead, the Court found that it was “enough that the challenged provisions [we]re an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfie[d] this test.”

B. The *Lopez Trilogy*

1. *United States v. Lopez* and the Revival of the Commerce Clause

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144 *Id.* at 125.
146 *Id.* at 329.
147 *Id.* at 329 n.17.
148 *Id.*
149 *Id.*
In *United States v. Lopez*, high school student Alfonso Lopez, Jr. was arrested for bringing a concealed .38-caliber handgun and five bullets to school.\(^{150}\) Thereafter, Lopez was charged with violating the Gun-Free School Zones Act (GFSZA) of 1990, which made it a federal offense “‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone’”\(^{151}\) Lopez moved to dismiss the indictment on the ground that Congress lacked the power under the Commerce Clause to pass the GFSZA, but the district court denied the motion, and Lopez was eventually convicted.\(^{152}\) Lopez then appealed to the Fifth Circuit, which agreed with Lopez, prompting the government’s appeal to the Supreme Court and the revival of justiciable limits on Congress’ Commerce Clause power.\(^{153}\)

In its 1995 opinion in *Lopez*, the Court began by construing even modern-era precedents such as *Wickard* as confirming that the congressional power under the Commerce Clause “is subject to outer limits.”\(^{154}\) According to the Court, congressional actions only fall within these limits when there is a “rational basis…for concluding that a regulated activity sufficiently affected interstate commerce.”\(^{155}\) The Court then read its prior precedent as “identif[ying] three broad categories of activity that Congress may regulate under its commerce power”:

First, Congress may regulate the use of the channels of interstate commerce....Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities....Finally, Congress’ commerce authority includes the power to regulate

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\(^{151}\) *Id.* (quoting 18 U.S.C. § 922 (q)(1)(A)).
\(^{152}\) *Id.* at 551-52.
\(^{153}\) *Id.* at 552.
\(^{154}\) *Id.* at 556-57.
\(^{155}\) *Id.* at 557.
those activities having a substantial relation to interstate commerce…, \textit{i.e.}, those activities that substantially affect interstate commerce.\textsuperscript{156} 

The Court “quickly disposed of” the first two categories as providing power to Congress to enact the GFSZA.\textsuperscript{157} The Court first found that the Act was “not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of interstate commerce.”\textsuperscript{158} It then found that the Act could not “be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.”\textsuperscript{159}

This left the third category as the only potential source for Congressional power.\textsuperscript{160} Applying this category, the Court explained that it had “upheld a wide variety of Congressional Acts regulating intrastate activity…[by] conclud[ing] that the activity substantially affected interstate commerce.”\textsuperscript{161} It then provided as examples “the regulation of intrastate coal mining;…intrastate extortionate credit transactions,…restaurants using substantial interstate supplies,…inns and hotels catering to interstate guests,…and production and consumption of homegrown wheat.”\textsuperscript{162} The Court found that these examples were non-exhaustive but that they established a clear pattern: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”\textsuperscript{163}

According to the Court, however, the GFSZA was not part of that pattern. Instead, the Court concluded that the GFSZA “[wa]s a criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those

\textsuperscript{156} \textit{Id.} at 558-59. 
\textsuperscript{157} \textit{Id.} at 559. 
\textsuperscript{158} \textit{Id.} at 559. 
\textsuperscript{159} \textit{Id.} 
\textsuperscript{160} \textit{Id.} 
\textsuperscript{161} \textit{Id.} 
\textsuperscript{162} \textit{Id.} at 559-60. 
\textsuperscript{163} \textit{Id.} at 560.
Moreover, the Court found that the GFSZA “[wa]s not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate commerce were regulated.” These findings alone seemed sufficient to support the Court’s conclusion that the GFSZA did not fall under the third Commerce Clause category.

The Court went on, however, to note that the GFSZA “contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects commerce.” As a counterpoint, the Court cited to the Hobbs Act, which contained a jurisdictional element because it “made it a crime for a felon to ‘receiv[e], posses[s], or transport[t] in commerce or affecting commerce…any firearm.” Conversely, the Court found that the GFSZA “ha[d] no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce.”

The Court next noted that as part of its Commerce Clause analysis it could “of course consider legislative findings, and indeed congressional committee findings, regarding effect on interstate commerce.” This consideration, however, yielded the same result because “the Government concede[d] that ‘[n]either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” The Court conceded “that Congress normally is not required to make formal

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164 Id. at 561.
165 Id.
166 Id.
167 Id.
168 Id. at 561-62 (emphasis added).
169 Id. at 562.
170 Id.
171 Id.
findings as to the substantial burdens that an activity has on interstate commerce.”  The important point for the Court, though, was that “to the extent that congressional findings would enable [it] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.”

Finally, the Court noted that the Government contended that possession of a firearm substantially affects interstate commerce in three ways: According to the Government, possession of a firearm in a school zone may result in violent crime, and

First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population….Second, violent crime reduces the willingness of individuals to travel to areas that are perceived to be unsafe….Third, the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being.

According to the Court, and the Government’s own admission, under this “costs of crime” reasoning….Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” The Court found this unpalatable, determining that, under this reasoning, it would be “difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” The Court thus deemed the GFSZA unconstitutional, concluding that, “[t]o uphold the Government’s contentions here, we would

\[172\] Id.
\[173\] Id. at 563.
\[174\] Id. at 563-64.
\[175\] Id. at 564.
\[176\] Id.
have to pile inference upon inference in a manner that would bid fair to convert authority under
the Commerce Clause to a general police power of the sort retained by the States.”

After Lopez, Congress amended the GFSZA so that it now contains a jurisdictional
element that makes it applicable only to firearms that have “‘moved in or that otherwise affect[]
interstate or foreign commerce.’” In the amended GFSZA, Congress included express
congressional findings regarding the effects upon interstate commerce of gun possession in a
school zone. The Eighth and Ninth Circuits subsequently found that the post-amendment
GFSZA is constitutional under Congress’ Commerce Clause power.

2. United States v. Morrison and the Four Factor Test

In its 2000 opinion in United States v. Morrison, the Supreme Court “utilized and
expanded upon the framework outlined in Lopez.” In Morrison, a former Virginia Tech
student brought an action under the Violence against Women Act (VAWA) against two Hokie
football players who allegedly sexually assaulted her. The district court, however, found that

177 Id. at 567.
178 Kenton J. Skarin, Not All Violence is Commerce: Economic, Violent Criminal Activity, RICO, and Limitations on
922(q)(2)(A) (2006)).
180 See United States v. Dorsey, 418 F.3d 1038, 1045-46 (9th Cir. 2005) (“This jurisdictional element saves § 922(q)
from the infirmity that defeated it in Lopez.”); United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999) (per curium)
(We hold that the amended Act is a constitutional exercise of Congress's Commerce Clause power.”); but see
United States v. Hoffmeyer, 2001 WL 34372871, No. 00-CR-91-C at *21 (W.D. Wis., Jan. 25, 2001) (“Clearly,
such a broad reading of Lopez would be inconsistent with the Court's concerns that there be meaningful limits to
Congress's commerce power.
182 Corey Rayburn Yung, One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration
183 Morrison, 529 U.S. at 602-04.
VAWA was, *inter alia*, unjustified under the Commerce Clause, and the Fourth Circuit affirmed, prompting the plaintiff’s appeal to the Supreme Court.\(^{184}\)

In *Morrison*, the Court restated the three Commerce Clause categories it laid out in *Lopez* and noted, *inter alia*, that *Lopez* had “canvassed and clarified [its] case law governing th[e] third category of Commerce Clause regulation,” *i.e.*, the power to regulate activities having a substantial relation to interstate commerce.\(^{185}\) The Court then found that “several significant considerations contributed to [its] decision” that the GFSZA did not fall within the third Commerce Clause category.\(^{186}\)

First, the Court noted that it observed in *Lopez* that the GFSZA “was ‘a criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.’”\(^{187}\) The Court pointed out that the petitioners (as well as the dissent) “downplay[ed] the role that the economic nature of the regulated activity plays in our Commerce Clause analysis.”\(^{188}\) The Court, however, parried this contention, concluding that “a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”\(^{189}\) Indeed, the Court noted that its review of Commerce Clause case law in *Lopez* revealed that in cases in which it “sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”\(^{190}\)

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\(^{184}\) Id. at 604-05.

\(^{185}\) Id. at 609.

\(^{186}\) Id.

\(^{187}\) Id. at 610.

\(^{188}\) Id.

\(^{189}\) Id.

\(^{190}\) Id. at 611.
The Court then found that the second significant consideration in *Lopez* was the fact that the GFSZA lacked an express jurisdictional element. A third consideration, according to the Court, was the fact that neither the GFSZA nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone. Fourth, the Court contended that its “decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.”

Applying these considerations to the VAWA, the Court found that “the proper resolution of the present cases [wa]s clear.” Under the first consideration, the Court concluded that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” The Court contended that it could reach this conclusion without “need[ing] to adopt a categorical rule against aggregating the effect of any noneconomic activity,” finding it sufficient that its prior cases had “upheld Commerce Clause regulation only where that activity is economic in nature.”

Under the second consideration, the Court noted that, like the GFSZA, the VAWA “contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce,” with Congress instead “elect[ing] to cast [VAWA’s] remedy over a wider, and more purely interstate, body of violent crime.” Conversely, under the third factor, the Court found that, unlike with the GFSZA, the VAWA

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191 *Id.* at 611-12.  
192 *Id.* at 612.  
193 *Id.*  
194 *Id.* at 613.  
195 *Id.*  
196 *Id.*  
197 *Id.*
“[wa]s supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.”\textsuperscript{198} Specifically, the Court noted that in passing the VAWA, “Congress found that gender-motivated violence affects interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce;...by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”

Nonetheless, the Court concluded that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”\textsuperscript{199} Instead, the Court found that it was up to the judiciary and not the legislature to determine whether Commerce Clause legislation is constitutional.\textsuperscript{200}

Applying the fourth consideration, the Court found that the VAWA failed this test. It noted that, as in \textit{Lopez}, the government asked it “to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce.”\textsuperscript{201} And, as in \textit{Lopez}, the Court refused to follow the government down the rabbit hole, finding that, if accepted, the government’s “reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”\textsuperscript{202}

In summation, the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on

\textsuperscript{198} \textit{Id.} at 614.  
\textsuperscript{199} \textit{Id.}  
\textsuperscript{200} \textit{Id.}  
\textsuperscript{201} \textit{Id.} at 615.  
\textsuperscript{202} \textit{Id.}
interstate commerce.\textsuperscript{203} Instead, the Court noted that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate Commerce has always been the provenance of the States.”\textsuperscript{204} Indeed, the Court could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”\textsuperscript{205}

3. \textit{Gonzales v. Raich} and Quintessentially Economic Activities

In \textit{Gonzales v. Raich}, California passed the Compassionate Use Act of 1996 (CUA), which exempted from criminal prosecution physicians, patients, and primary caregivers “who possess[ed] or cultivate[d] marijuana for medicinal purposes with the recommendation or approval of a physician.”\textsuperscript{206} The federal government, however, decided to enforce a federal act, the Controlled Substances Act (CSA), and prosecute a cultivator and a patient who had acted in compliance with the CUA.\textsuperscript{207} The cultivator and patient then brought an action against the federal government, claiming that the CSA “as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceed[ed] Congress’ authority under the Commerce Clause.”\textsuperscript{208}

The Court began by noting that its case law had “firmly establish[ed] Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a

\textsuperscript{203} \textit{Id.} at 617.
\textsuperscript{204} \textit{Id.} at 618.
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} 545 U.S. 1, 6 (2005).
\textsuperscript{207} \textit{Id.} at 7.
\textsuperscript{208} \textit{Id.} at 15.
substantial effect on interstate commerce.” The Court then found its prior opinion in *Wickard* to be “of particular relevance” based upon the striking similarities between *Wickard* and the case before it. According to the Court, “like the farmer in *Wickard*, respondents [we]re cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal interstate market.” Also, the Court found that “[j]ust as the Agricultural Adjustment Act was designed ‘to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses…’ and consequently control the market price,…a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.” Finally, the Court noted that in *Wickard*, it had “no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on market and price conditions.” Therefore, it had no problem finding that, in the present case, “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”

The Court then found it unproblematic that “Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market.” Instead, the Court noted that it had “never required Congress to make particularized findings in order to legislate.” According to the Court, “[w]hile congressional findings are

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209 *Id.* at 17.
210 *Id.*
211 *Id.* at 18.
212 *Id.* at 18-19.
213 *Id.* at 19.
214 *Id.*
215 *Id.* at 21.
216 *Id.*
certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident…, the absence of particularized findings does not call into question Congress’ authority to legislate.” And indeed, the Court did note that Congress had made some “findings regarding the effects of intrastate drug activity on interstate commerce.”

The Court, however, found that, unlike in Lopez and Morrison, Congress did not need to make particularized findings in the case before it because the connection between intrastate drug activity and interstate commerce was self-evident. According to the Court, in Lopez, the GFSZA was not a valid exercise of Congressional power under the Commerce Clause because it “did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.” Meanwhile, the Court found that Morrison was based decided upon the same ground because the VAWA “did not regulate economic activity.”

Conversely, the Court found no problem with the challenged application of the CSA because, “[u]nlike those at issue in Lopez and Morrison, the activities regulated by the CSA are quintessentially economic.” In reaching this conclusion, the Court relied upon Webster’s Third New International Dictionary, which defines “economics” as “the production, distribution, and consumption of commodities.” Using this definition, the Court determined that the CSA regulated economic activity because it regulated “the production, distribution, and consumption activity.

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217 Id.
218 Id. at 21 n.32.
219 Id. at 23.
220 Id.
221 Id. at 25.
222 Id. at 25-26.
of commodities for which there is an established, and lucrative, interstate market.”

According to the Court, this rendered the challenged application of the CSA a valid exercise of Congressional power under the Commerce Clause because “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”

C. Pierce County, Washington v. Guillen and Applying the Commerce Clause to Rules of Evidence

In Pierce County, Washington v. Guillen, the Supreme Court addressed the constitutionality of a federal statute governing information compiled or collected by states and localities in connection with federal highway safety programs. In Guillen, motorists involved in traffic accidents in Washington sought access to accident reports and other materials and data held by county agencies relating to the traffic history of the sites of their accidents.

Pierce County, Washington and the city of Lakewood refused to release any of these materials, claiming that they were privileged because they were compiled pursuant to the Hazard Elimination Program. That program provides funding to state and local governments so that they can improve the most dangerous sections of their roads, but, to receive this funding, states and localities are required to “conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements…” Compliance with this requirement, however, was not initially a given. Instead, “[s]tates feared that diligent efforts to

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223 Id. at 26.
224 Id.
227 Id. at 634
228 Guillen, 537 U.S. at 133.
identify roads eligible for aid under the Program would increase the risk of liability for accidents that took place at hazardous locations before improvements could be made.”

In response, in 1987, Congress adopted 23 U.S.C. § 409, which initially provided that

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

After the passage of this statute, state courts split on two issues. First, some courts found that § 409 made such data inadmissible at trial and not subject to pretrial discovery while other courts read the statute as rendering such data inadmissible at trial but discoverable. Second, some courts held that § 409 only covered materials generated by governmental agencies for Hazard Elimination Program purposes while other courts held that it covered these materials as well as materials collected, but not generated by, those agencies. Siding with those courts reading § 409 more broadly, Congress amended the statute in 1991 and 1995 so that it now covers materials “compiled or collected” by governmental agencies and provides that those materials “shall not be subject to discovery or admitted into evidence….”

The issue of whether Pierce County and the city of Lakewood could refuse to disclose materials they compiled pursuant to the Hazard Elimination Program eventually reached the

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230 Guillen, 537 U.S. at 134.
232 Guillen, 537 U.S. at 134-35.
233 Id. at 135.
Supreme Court of Washington, which found that it first had to define the scope of § 409.\textsuperscript{235} According to a majority of the justices, its scope was wide, covering even materials originally prepared for purposes unrelated to the Hazard Elimination Program as long as they were later collected for Hazard Elimination Program purposes.\textsuperscript{236} The majority also found that this reading rendered the statute beyond the scope of Congress’ Commerce Clause power.\textsuperscript{237}

The court cited to \textit{Lopez} and \textit{Morrison} and acknowledged Lakewood’s contention “that Congress has the power under the Commerce Clause to regulate ‘Federal-aid road systems, which undoubtedly are channels and instrumentalities of interstate commerce, as well as road systems within th[e] state that substantially affect interstate commerce.’”\textsuperscript{238} And indeed, the court found that “a sufficient nexus exist[ed] between interstate commerce and the Federal-aid highway system to justify the ‘regulatory scheme when considered as a whole.’”\textsuperscript{239}

The problem for Lakewood (and Pierce County) was that the court also found that, pursuant to \textit{Hodel}, it had to determine whether the amended § 409 was “‘an integral part of [a] regulatory program.”\textsuperscript{240} According to the court, § 409 was initially “designed to promote administrative candor in the application for, and implementation of, federal safety enhancement funds,…and to prevent federal mandates ‘from providing an additional, virtually no-work tool, for direct use in private litigation.’”\textsuperscript{241} The court then found that the portion of post-amendment § 409 which covered materials not originally prepared for Hazard Elimination Purposes was not

\begin{thebibliography}{9}
\bibitem{235} Guillen v. Pierce County, 31 P.3d 628, 641 (Wash. 2001).
\bibitem{236} Id. at 646.
\bibitem{237} Id. at 654.
\bibitem{238} Id.
\bibitem{239} Id.
\bibitem{240} Id.
\bibitem{241} Id.
\end{thebibliography}
an integral part of the program and thus beyond the scope of Congress’ Commerce Clause power.\textsuperscript{242}

Several concurring justices did not dispute this Commerce Clause conclusion but did disagree with the majority’s construction of § 409. According to these justices, under post-amendment § 409, materials originally prepared for purposes unrelated to the Hazard Elimination Program did not magically become privileged simply by virtue of the fact that they were later collected for Hazard Elimination Program purposes.\textsuperscript{243} True, agencies could preclude litigants from discovering the particular assortment of materials that they collected for Hazard Elimination Purposes, but these justices found that litigants could still discover the original materials from their original sources.\textsuperscript{244}

The United States Supreme Court later agreed with the concurring justices’ construction of § 409 but took the further step of disagreeing with the majority’s Commerce Clause conclusion. The Court’s conclusion was curt. According to the Court, Congress adopted the Hazard Elimination Program

to assist state and local governments in reducing hazardous conditions in the Nation’s \textit{channels of commerce}. That effort was impeded, however, by the States’ reluctance to fully comply with the requirements of [the Hazard Elimination Program], as such compliance would make state and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions. In view of these circumstances, Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of [the Hazard Elimination Program] would result in more diligent efforts to collect relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation’s roads. Consequently, both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the \textit{channels of commerce} and increasing protection for the \textit{instrumentalities of

\textsuperscript{242} Id.
\textsuperscript{243} Id. at 658-59 (Madsen, J., concurring).
\textsuperscript{244} Id.
interstate commerce. As such, they fall within Congress’ Commerce Clause power.\textsuperscript{245}

In other words, the Court agreed with Lakewood that § 409 was a valid exercise of Congress’ Commerce Clause power under the first two Lopez categories because it regulated the channels and instrumentalities of interstate commerce.\textsuperscript{246} The Court thus did not need to address Lakewood’s argument that § 409 was a valid regulation of activities on federal-aid road systems that substantially affect interstate commerce.

D. The Constitutionality of the PLCAA Under the Third Lopez Category

Several courts have addressed the constitutionality of the PLCAA, with each court finding that the Act was a valid exercise of Congress’ Commerce Clause power.\textsuperscript{247} For instance, in City of New York v. Beretta U.S.A. Corp., the United States District Court for the Eastern District of New York concluded that Lopez and Morrison did not compel the conclusion that the PLCAA is unconstitutional.\textsuperscript{248} The court began by observing that the problem with the GFSZA in Lopez was that it “‘did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.’”\textsuperscript{249} Moreover, the court found that

[a]lthough the argument could be made that the…[GFSZA]…was a part of the regulatory scheme controlling gun distribution, the Court [in Lopez] reasoned that the statute was not an essential part of such a comprehensive regulatory scheme, which could be undercut unless the intrastate activity, in this case the possession of firearms, were regulated.\textsuperscript{250}

\textsuperscript{245} Id. at 147 (emphases added).
\textsuperscript{246} Id.
\textsuperscript{247} See, e.g., Ileto v. Glock, Inc., 565 F.3d 1126, 1140 (9th Cir. 2009) (“Congress carefully constrained the Act's reach to the confines of the Commerce Clause.”).
\textsuperscript{248} 401 F.Supp.2d 244, 287 (E.D.N.Y. 2005).
\textsuperscript{249} Id. (quoting Gonzales v. Raich, 545 U.S. 1, 23 (2005)).
\textsuperscript{250} Id. at 284.
Conversely, the court noted that “Congress expressly found that the possibility that members of the national Gun Industry would be held liable in legal actions of the type foreclosed by the [PLCAA] ‘constitutes an unreasonable burden on interstate and foreign commerce of the United States.’”\(^{251}\)

Moreover, the court found that the connection between the regulated activity and interstate commerce under the [PLCAA] was far more direct than that in *Morrison.*\(^{252}\) Indeed, the court pointed out that the City itself made “frequent reference to the predominately interstate and foreign nature of the gun trade it s[ought] to control.”\(^{253}\) The Eastern District of New York acknowledged that “a court may have reservations about the likelihood of the predicted catastrophic collapse of the Gun Industry,” but it found that “there is a rational basis for Congress’ determination that the Act was necessary to protect that industry” because “[s]uccessful lawsuits against the Gun Industry would arguably affect the manner in which national and international manufacturers and wholesalers of handguns do business.”\(^{254}\)

The Second Circuit later affirmed this holding, noting that, in addition to the points raised by the district court, the PLCAA contains a jurisdictional element.\(^{255}\) According to the Court, the claim preclusion provisions of the Act only apply to “‘qualified products,’” where “‘qualified product means a firearm…or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.’”\(^{256}\) Therefore, unlike the GFSZA and the VAWA, “the PLCAA raise[d] no concerns about Congressional intrusion into ‘truly local’

\(^{251}\) *Id.*
\(^{252}\) *Id.*
\(^{253}\) *Id.*
\(^{254}\) *Id.*
IV. TENTH AMENDMENT AND CONGRESS’ INABILITY TO COMMANDEER STATE GOVERNMENTS

A. Pre-New York Readings of the Tenth Amendment

The Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Supreme Court initially found that this amendment merely stated the “truisms that all is retained which has not been surrendered.” In its 1976 opinion in *Nat’l League of Cities v. Usery*, however, the Court resuscitated the Amendment, finding that it “expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.” *Usery* was a harbinger of the Rehnquist Revolution, with Justice Rehnquist applying this policy in his majority opinion to conclude that Congress may not exercise its Commerce Clause “power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made,” lest “the National Government…devour the essentials of state sovereignty.”

The Supreme Court’s 1985 opinion in *Garcia v. San Antonio Metropolitan Transit Authority* rendered this reading ephemeral and revealed that the Rehnquist Revolution had not

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257 Id.
258 U.S. Const. amend. X.
259 United States v. Darby, 312 U.S. 100, 124 (1941).
261 Id. at 855 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).
yet taken root.\textsuperscript{263} In \textit{Garcia}, the Court overruled \textit{Usery}, with Justice Blackmun finding that the Tenth Amendment did not affirmatively limit Congress’ Commerce Clause power.\textsuperscript{264} \textit{Usery} itself was short lived as a mere seven years later, now Chief Justice Rehnquist had his Rehnquist Five (Rehnquist, O’Connor, Scalia, Kennedy, and Thomas) in place and ready to start the federalism revolution that would continue three years later in \textit{Lopez}.

B. \textit{New York v. United States, Printz v. United States and the Modern Reading of the Tenth Amendment}

In its 1992 opinion in \textit{New York v. United States}, the Supreme Court used the Tenth Amendment to strike down a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985,\textsuperscript{265} which gave states the “option” of either taking title to (and possession of) low level radioactive waste generated within their borders or becoming liable for all damages that waste generators suffered as a result of the states’ failure to do so promptly.\textsuperscript{266} Justice O’Connor wrote the majority opinion, which was joined by the other members of the Rehnquist five as well as Justice Souter.\textsuperscript{267} The Court found that the Constitution did not delegate to Congress the power “to impose either option as a freestanding requirement” because “[e]ither type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between


\textsuperscript{264} See \textit{Garcia}, 469 U.S. at 547 (“If there are to be limits on the Federal Government’s power to interfere with state functions-as undoubtedly there are-we must look elsewhere to find them.”).


\textsuperscript{266} 505 U.S. 144, 174-75 (1992).

\textsuperscript{267} Id.
federal and state governments.”\textsuperscript{268} Therefore, the Court concluded that “[w]hether one views the
take title provision as lying outside Congress' enumerated powers, or as infringing upon the core
of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the
federal structure of our Government established by the Constitution.”\textsuperscript{269}

In reaching this conclusion, the Court found irrelevant cases cited by the government
“discuss[ing] the well established power of Congress to pass laws enforceable in state court.”\textsuperscript{270}
According to the Court, these cases involved nothing more than application of the Judges Clause,
“the Supremacy Clause’s provision that federal law ‘shall be the supreme Law of the Land,’
enforceable in every state.”\textsuperscript{271} Federal statutes enforceable in state courts do, in a sense, direct
state judges to enforce them, but this sort of federal “direction” of state judges is mandated by
the text of the Supremacy Clause.”\textsuperscript{272}

In \textit{Printz v. United States},\textsuperscript{273} the Supreme Court subsequently extended and elaborated on
its reasoning in \textit{New York}.\textsuperscript{274} In \textit{Printz}, the Court addressed the constitutionality of the
aforementioned interim provisions in the Brady Handgun Violence Prevention Act.\textsuperscript{275} As noted,
the Brady Act required the Attorney General to establish a national instant background-check
system by November 30, 1998 and promulgated interim provisions effective until the system was
in place.\textsuperscript{276} Under those interim provisions, FFLs had to collect information from proposed
purchasers and provide that information to the chief law enforcement officer (CLEO) of the

\begin{itemize}
  \item \textsuperscript{268} Id. at 175.
  \item \textsuperscript{269} Id. at 177.
  \item \textsuperscript{270} Id. at 178.
  \item \textsuperscript{271} Id.
  \item \textsuperscript{272} Id. at 178-79.
  \item \textsuperscript{273} 521 U.S. 898 (1997).
  \item \textsuperscript{274} Kenneth A. Klukowski, \textit{Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or
  \item \textsuperscript{275} 521 U.S. 898, 902-04 (1997).
  \item \textsuperscript{276} Id. at 902.
\end{itemize}
proposed purchaser’s state of residence.\textsuperscript{277} In many states, the CLEO was then required to perform certain duties such as making a reasonable effort to determine whether the proposed purchaser’s receipt or possession of the firearm would violate the law.\textsuperscript{278}

The Court found that it was apparent that the interim provisions of the Brady Act violated the Tenth Amendment because they “purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”\textsuperscript{279} The government, though, tried to distinguish the Brady Act from the act in \textit{New York} on the ground that the interim provisions of the Brady Act merely required state officials to \textit{enforce} policy, not \textit{make} it.\textsuperscript{280} The Court, however, found this to be a false dichotomy and concluded that even assuming that the Brady Act left state officials with no policymaking discretion, this would not make the act any more constitutionally defensible.\textsuperscript{281} This was because, according to the Court, the sovereignty of states “is arguably less undermined by requiring them to make policy in certain fields than…by ‘reduc[ing] [them] to puppets of a ventriloquist Congress.’”\textsuperscript{282}

Because the Court found that Congress was improperly serving as puppet master to state \textit{executive} officials, it did not need to give weight to the government’s citation to statutes enacted by the earliest Congress imposing obligations on state \textit{judiciaries}.\textsuperscript{283} The government noted that Congress enacted statutes during its earliest days requiring state judges to, \textit{inter alia}, perform functions related to the naturalization of citizens and hear claims regarding the seaworthiness of

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\textsuperscript{277} \textit{Id.} at 902-03.
\textsuperscript{278} \textit{Id.} at 903
\textsuperscript{279} \textit{Id.} at 904.
\textsuperscript{280} \textit{Id.} at 926-27.
\textsuperscript{281} \textit{Id.} at 928.
\textsuperscript{282} \textit{Id.}
\textsuperscript{283} \textit{Id.} at 905-07.
\end{footnotesize}
vessels, fugitive slaves, Canadian refuges assisting the United States during the Revolutionary war, and the deportation of alien enemies in times of war. According to the government, these statutes meant that Congress had the authority to enlist state executive officials, but the Court found that “[t]hese early laws established, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”

The Court found that it was “understandable why courts should have been viewed distinctively in this regard [because] unlike legislatures and executives, they applied the law of other sovereigns all the time.” It held that “[t]he principle underlying [these] so-called ‘transitory’ causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum State would enforce.” The Court noted that “[t]he Constitution itself, in the Full Faith and Credit Clause,…generally required such enforcement with respect to obligations arising in other States.”

In his concurring opinion, Justice Thomas noted that the Court had found in *Lopez* that the GFSZA was unconstitutional because Congress’ Commerce Clause power “does not extend to the regulation of wholly *intra* state, point-of-sale transactions.” Extrapolating from this conclusion, Justice Thomas found that “[a]bsent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations.”

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284 *Id.*
285 *Id.* at 907.
286 *Id.*
287 *Id.*
288 *Id.*
289 *Id.* at 937 (Thomas, J., concurring).
290 *Id.*
Later, in *Reno v. Condon*, the Supreme Court concluded that the problem with the portions of the acts at issue in *New York* and *Printz* was not that “Congress lacked legislative authority over the subject matter” in either case, but that the statutes at issue in those cases violated Tenth Amendment federalism principles.” Condon compels the conclusion that even if a Congressional act survives Commerce Clause scrutiny, “it can be unconstitutional under the Tenth Amendment.”

C. *Guillen* and the Failure of the Supreme Court to Address the Tenth Amendment Issue

As noted, the Supreme Court’s opinion in *Guillen* found Congress did not exceed its Commerce Clause power in enacting § 409, which rendered information compiled or collected by states and localities in connection with federal highway safety programs inadmissible and not subject to discovery. In *Guillen*, the Court further found that it did not need to address the respondents’ argument that “§ 409 violates the principles of dual sovereignty embodied in the Tenth Amendment because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action.” According to the Supreme Court, it did not need to address this issue because “[t]he court below did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress’ enumerated powers.”

Some commentators, however, have disputed this conclusion. For instance, Professor Mitchell Berman has contended that the Court’s “characterization of the Washington Supreme

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293 See supra notes 245-46 and accompanying text.
295 *Id.*
Court’s decision rings false” for a few reasons. First, Berman noted that in a section of its opinion captioned “Unconstitutional Violation of State Sovereignty,” the Supreme Court of Washington concluded that Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and ‘raw data’ created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections also serve federal purposes.

Second, Berman noted that, in its opinion, the court went into a lengthy discussion of Tenth Amendment stalwarts *Usery* and *Garcia* and explained how the latter opinion had “been fundamentally eroded by recent decisions….” Berman also pointed out that the Supreme Court of Washington found it noteworthy that, a year after *Usery*, the Supreme Court issued *Patterson v. New York*, in which it “indicated that it thought that internal state court procedures such as the determination of evidentiary rules deserved deference under the federalist framework as an area traditionally regulated by states.” Specifically, in *Patterson*, the Court cautioned,

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government,…and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally ‘within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,’ and its decision in this regard is not subject to proscription under the Due Process Clause unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’

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298 Id. at 653.
299 Berman, supra note 296, at 1509.
V. CONGRESS’ POWER TO PASS THE TIAHRT AMENDMENT DERIVES, IF AT ALL, FROM ITS AUTHORITY UNDER THE COMMERCE CLAUSE

Congress recently passed Federal Rule of Evidence 502(d), which regulates waiver of the attorney-client privilege and work product protection in state and federal court proceedings. Because this new rule regulated state as well as federal court actions, it could only have been defensible under the Commerce Clause as “Congress's authority to regulate the operation of state courts must derive, if at all, from the Commerce Clause.” As Professor Timothy Glynn testified during hearings of the Advisory Committee on Evidence Rules, “Congress's power to enact Rule 502, as a preemptive statute, would require that Congress act under its Commerce Clause power, rather than just under its Article 3 power, bolstered by the necessary and proper clause.” Indeed, after these hearings on proposed Rule 502, the Committee issued a report indicating, inter alia, that

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. The Tiahrt Amendment similarly regulates state as well as federal court proceedings. As noted, the amendment applies “in any State…or Federal court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives…” Thus, the Act is similarly defensible, if at all, under the Commerce Clause.

301 See Fed.R.Evid. 502(d).
VI. THE STATE COURT EVIDENTIARY PROVISIONS ON THE TIAHRT AMENDMENT EXCEED CONGRESS’ COMMERCE CLAUSE POWER

A. These Provisions Are Clearly Indefensible Under the First Two Lopez Categories

As noted, in Lopez, the Supreme Court read its prior precedent as identifying three categories of activity that Congress may regulate under the Commerce Clause:

First, Congress may regulate the use of the channels of interstate commerce….Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities….Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce…. i.e., those activities that substantially affect interstate commerce.306

In Lopez, the Court found that one of its prior opinions identifying these categories was

Perez v. United States, in which it held that

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods…or of persons who have been kidnaped [sic]….Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft…. or persons or things in commerce, as, for example, thefts from interstate shipments….Third, those activities affecting commerce.307

Generally, courts have found that the channels of interstate commerce “consist of actual roads, railroads, or waterways.”308 Meanwhile, “[e]xamples of instrumentalities include automobiles, freight, or airlines.”309 And “persons or things in interstate commerce” are “people and goods travelling in interstate commerce.”310

308 Skarin, supra note 178, at 200 n.84 (2009).
309 Id. at 200 n.85.
It is clear from Supreme Court precedent that Congress’ Commerce Clause power under either of the first two Lopez categories does not extend to the state court evidentiary provisions of the Tiahrt Amendment, i.e., the provisions which indicate that ATF trace data “shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner” and that testimony or other evidence shall not be permitted based upon such data in any state court civil action.\(^{311}\) This article takes no position on the discovery provisions of the Tiahrt Amendment, i.e., the provisions that indicate that ATF trace data “shall be immune from legal process [and] shall not be subject to subpoena or other discovery….\(^{312}\) This article simply argues that when plaintiffs lawfully have this data, which many public nuisance plaintiffs do,\(^{313}\) Congress cannot regulate the admissibility of this evidence in state court.

In Lopez itself, the Court “quickly disposed of” the first two Commerce Clause categories as providing Congress with the power to enact the GFSZA,\(^{314}\) which made it a federal offense “‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’”\(^{315}\) The Court found in Lopez that the GFSZA was not “a regulation of the use of the channels of interstate commerce” and was not “an attempt to prohibit the interstate transportation of a commodity through the channels of commerce.”\(^{316}\) It also found that the Act was not an attempt “to protect an instrumentality of interstate commerce or a thing in interstate commerce.”\(^{317}\) While the Court did not explain these findings, the import of its conclusions is clear. Firearms might be “things” that are transported through the


\(^{312}\) Id.

\(^{313}\) See, e.g., E-mail from Dan Vice, Brady Center to Prevent Gun Violence, to author (Apr. 30, 2009) (on file with author) (“We do have trace data that we would like to use in ongoing cases such as City of Gary v. Smith & Wesson Corp….”).


\(^{315}\) Id. at 551 (quoting 18 U.S.C. § 922 (q)(1)(A)).

\(^{316}\) Id. at 559.

\(^{317}\) Id.
“channels” of interstate commerce, and they may be transported by “persons” in
“instrumentalities” in interstate commerce, but the GFSZA did not regulate the manner in which
these persons transported these things in interstate commerce and “did not regulate
instrumentalities or channels, in the sense that these are not the things upon which the statute
operated.” Instead, the GFSZA was a “criminal statute[] that regulate[d] the purely intrastate
possession of firearms.”

The state court evidentiary provisions of the Tiahrt Amendment are similarly indefensible
under the first two *Lopez* categories. These provisions make ATF trace data inadmissible in civil
actions, including actions against gun manufacturers, distributors, dealers, and importers. As
noted, after passage of the PLCAA, most of those actions will be public nuisance actions. Those gun manufacturers, distributors, dealers, and importers might market and sell guns that
were transported in the channels of interstate commerce in instrumentalities in interstate
commerce, but the state court evidentiary provisions of the Tiahrt Amendment do not operate
upon and regulate those channels and instrumentalities or the manner in which persons
transported those guns. Instead, they regulate the admission of evidence in state court actions,
including public nuisance actions based upon the *intrastate* and even *intracity* selling of those
guns.

To wit, as noted, in *City of Chicago v. United States Department of Treasury*, the City of
Chicago filed a civil suit in Illinois state court against certain firearms manufacturers,
distributors, and dealers, alleging that these defendants created and maintained “a public

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318 Lynn A. Baker & Mitchell Berman, *Getting Off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 Ind. L.J. 459, 493 (2003). This quote actually refers to § 409 from *Guillen*, but the same logic applies to the Tiahrt Amendment.
320 See supra note 121 and accompanying text.
321 See supra note 84 and accompanying text.
nuisance in the city by intentionally marketing firearms to city residents and others likely to use or possess the weapons in the city, where essentially possession of any firearm except long-barrel rifles and shotguns is illegal.”

And in *Smith & Wesson Corp. v. City of Gary*, the City of Gary, Indiana brought a public nuisance action against handgun manufacturers, wholesalers, and retailers, claiming that their careless practices contributed to “seventy murders with handguns [which] took place in Gary in 1997, and another fifty-four in 1998.” The firearms in both of these cases might have been transported in interstate commerce before they were marketed and distributed in Chicago and Gary, but these evidentiary provisions do not regulate the interstate transportation of these guns. Instead, at least in public nuisance actions, they regulate the admission of evidence during state court litigation connected to the *intrastate* and even *intracity* selling and use of these guns.

Courts’ conclusions regarding U.S.C. § 922(o) do not compel a different result. In his dissenting opinion in *United States v. Rybar*, then Third Circuit Judge Alito noted that panels in the Fifth, Sixth, and Ninth Circuits had viewed 18 U.S.C. § 922(o), which makes it “unlawful for any person to transfer or possess a machinegun,” “as a regulation of the channels of interstate commerce.”

For example, in *United States v. Rambo*, the Ninth Circuit found that § 922(o) regulates the use of the channels of interstate commerce because “there can be ‘no unlawful possession under section 922(o) without an unlawful transfer,’” rendering the statute “‘an attempt to prohibit the interstate transportation of a commodity through the channels of interstate commerce.’” According to the Ninth Circuit, this distinguished § 922(o) from the GFSZA

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322 City of Chicago v. United States Dept. of Treasury, 287 F.3d 628, 631 (7th Cir. 2002).
323 875 N.E.2d 422, 425 (Ind.App. 2007).
324 103 F.3d 273, 289 (Alito, J., dissenting).
325 74 F.3d 948, 952 (9th Cir. 1996) (*quoting* United States v. Kirk, 70 F.3d 791, 796 (5th Cir. 1995).
326 *Id.* (*quoting* United States v. Lopez, 514 U.S. 549, 559 (1995)).
because the latter “did not regulate the market in weapons and instead regulated merely the possession of a weapon in a specific geographic area.”

Judge Alito disagreed, finding that

First (but least important), it is not true that every possession criminalized by 18 U.S.C. § 922(o) must be preceded by an “unlawful transfer.” A lawfully possessed semiautomatic weapon could be converted by its owner into an automatic….The statute may also reach a person who initially possesses a machine gun lawfully pursuant to 18 U.S.C. § 922(o)(2)(A), which permits possession under governmental authority, but who exceeds the scope of that authority or retains possession after it has terminated. Second and more important, this reasoning seems to confuse an unlawful transfer with an interstate transfer. Even if it were true that every possession made illegal by 18 U.S.C. § 922(o) were preceded by an unlawful transfer, it would not follow that every such possession is preceded by an interstate transfer, and Congress's authority under the first Lopez category concerns the passage of people and goods in the channels of interstate commerce. Third, insofar as the Fifth, Sixth, and Ninth Circuits justified 18 U.S.C § 922(o) as an attempt to suppress an interstate market by banning purely intrastate possession, their arguments fall within the third Lopez category, i.e., Congress's authority to regulate an intrastate activity (intrastate possession) that has a substantial effect on interstate commerce (the interstate market).

Alito also noted that the Sixth and Tenth Circuits had upheld § 922(o) under the second Lopez category, i.e., under its power “to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” In reaching this conclusion, these courts distinguished § 922(o) from the GFSZA on the ground that the former, unlike the latter, “limits its reach to a discrete set of firearms possessions that have an implicit connection with interstate commerce.” Alito again disagreed with these conclusions, finding that

Based on the Lopez Court's description of this second category of congressional authority and on the examples that it provided, it is apparent that this authority reaches threats to “the instrumentalities” of interstate commerce, i.e., the means of

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327 Id.
328 Rybar, 103 F.3d at 289 (Alito, J., dissenting).
329 Id. at 287.
conveying people and goods across state lines, such as airplanes and trains. This power also reaches threats to people and goods travelling in interstate commerce, such the theft of goods moving interstate and the setting of rates that could affect interstate trade.\footnote{331}

According to Alito, then, “§ 922(o) would fall within this second \textit{Lopez} category if Congress had banned the intrastate possession of machine guns in order to prevent them from being used to damage vehicles travelling interstate, to carry out robberies of goods moving in interstate commerce, or to threaten or harm interstate travellers.”\footnote{332} Alito concluded, however, that there was no indication that Congress passed § 922(o) for these purposes and deemed it indefensible under the second \textit{Lopez} category.\footnote{333}

This article does not attempt to resolve this conflict because it is clear that the state court evidentiary provisions of the Tiahrt Amendment are not defensible under the first or second \textit{Lopez} categories, even under these Fifth, Sixth, Ninth, and Tenth Circuit decisions. As noted, these courts found that § 922(o) was defensible under the first and/or second \textit{Lopez} categories because Congress limited the statute’s reach to machinegun possessions and transfers implicitly or explicitly connected with interstate commerce.\footnote{334} This fact distinguished § 922(o) from the GFSZA, which did not contain a jurisdictional element.\footnote{335} As will be noted in more detail \textit{infra}, the Tiahrt Amendment also does not contain a jurisdictional element, meaning that it, like the GFSZA, is not defensible under either of the first two \textit{Lopez} categories.\footnote{336}

More importantly, however, the Tiahrt Amendment does not look especially like either the GFSZA or § 922(o) because it does not directly regulate firearms; instead, it regulates the

\footnote{331} \textit{Rybar}, 103 F.3d at 290 (Alito, J., dissenting).  
\footnote{332} \textit{Id.}.  
\footnote{333} \textit{Id.}.  
\footnote{334} See \textit{supra} notes 325-26 & 329 and accompanying text.  
\footnote{335} See \textit{supra} notes 327 & 330 and accompanying text.  
\footnote{336} See \textit{infra} notes 382-92 and accompanying text.  

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admission of trace data during state court litigation connected to guns.\textsuperscript{337} This makes the Amendment most similar to the Brady Act and the PLCAA. As noted, the interim provisions of the Brady Act governed the collection of data from proposed handgun purchasers, and the Court in \textit{Printz} found that these provisions violated the Tenth Amendment.\textsuperscript{338} In its appellate brief in \textit{Printz}, the United States contended that these provisions were constitutional under the third \textit{Lopez} category and did not claim that they were warranted under the first two \textit{Lopez} categories.\textsuperscript{339} It is difficult to see how there is any meaningful difference between these interim provisions and the state court evidentiary provisions of the Tiahrt Amendment which might make the latter defensible under either of the first two \textit{Lopez} categories.

Meanwhile, as noted, the PLCAA precludes a “qualified civil liability action” against a manufacturer or seller of a firearm “that has been shipped or transported in interstate or foreign commerce.”\textsuperscript{340} All of the courts addressing whether this Act is a valid exercise of Congress’ Commerce Clause power have analyzed the issue solely under the third \textit{Lopez} category.\textsuperscript{341} This is because “the PLCAA does not regulate firearms as a commodity, but instead regulates lawsuits that concern firearms.”\textsuperscript{342} Therefore, it seems clear that Congress cannot regulate state court litigation connected to even the interstate transfer of firearms under the first two \textit{Lopez} categories. Because the state court evidentiary provisions of the Tiahrt Amendment merely regulate state court litigation connected to the transfer of firearms and not firearms as commodities, they cannot be constitutional under either of the first two \textit{Lopez} categories.

\textsuperscript{337} See supra note 121 and accompanying text.
\textsuperscript{338} See supra notes 275-82 and accompanying text.
\textsuperscript{341} See, e.g., City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 393 (2\textsuperscript{nd} Cir. 2008) (“It is the third category with which we are here concerned.”).
In *Guillen*, the Supreme Court did find that an evidentiary provision somewhat similar to the state court evidentiary provisions of the Tiahrt Amendment was constitutional under the first two *Lopez* categories.\(^{343}\) That provision, however, covered information compiled or collected by states and localities in connection with federal highway safety programs.\(^{344}\) According to the Court, this provision fell within the first two *Lopez* categories because Congress has the power to regulate Federal-aid road systems, which are channels and instrumentalities of interstate commerce; therefore, the provision was “aimed at improving safety in the channels of interstate commerce and increasing protection for the instrumentalities of interstate commerce.”\(^{345}\)

Whatever the validity of this conclusion,\(^{346}\) the Tiahrt Amendment is not aimed at improving safety in the channels of interstate commerce and increasing protection for the instrumentalities of interstate commerce. Instead, according to the Committee on Appropriations, the Tiahrt Amendment was passed based upon concern that, without it, “information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases.”\(^{347}\) Thus, the amendment, like the GFSZA and the VAWA, is aimed at suppressing violent crime and not defensible under the reasoning used in *Guillen*.

**B. These Provisions Do Not Fall Under the Third *Lopez* Category**

\(^{343}\) See *supra* note 245 and accompanying text.

\(^{344}\) See *supra* notes 231-34 and accompanying text.


\(^{346}\) See, e.g., Baker & Mitchell Berman, *supra* note 318, at 493 (“But § 409 did not regulate instrumentalities or channels, in the sense that these are not the things upon which the statute operated. It seems more accurate—certainly no less accurate—to describe § 409 as a regulation of state court procedure adopted for the purpose of protecting instrumentalities and channels.”).

Thus, if the evidentiary provisions of the Tiahrt Amendment are a valid exercise of Congress’ Commerce Clause power, it can only be under the third *Lopez* category, *i.e.*, as a regulation of “activities that substantially affect interstate commerce.” In *Morrison*, the Court set forth four factors for courts to consider in determining whether an act of Congress is valid under the third *Lopez* category: whether the regulated activity is economic, whether the act contains a jurisdictional element/limitation, whether Congress offers legislative findings supporting a substantial effect, and whether a sufficient nexus exists between the activity regulated and interstate commerce. It is clear that none of these factors support a finding that the Tiahrt Amendment is constitutional under the third *Lopez* category.

1. **These Provisions Do Not Regulate Economic Activity**

In *Lopez*, the Court found that the GFSZA did not regulate economic activity because it was “a criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” The Court also found in *Morrison* that the VAWA did not regulate economic activity because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” Conversely, the Court in *Raich* found that, as applied to the intrastate manufacture and possession of marijuana for medical purposes, the CSA regulated economic activity because, “[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.” As noted, in reaching this conclusion, the Court relied upon Webster’s Third New International

350 Lopez, 514 U.S. at 561.
351 Morrison, 529 U.S. at 613.
352 Gonzales v. Raich, 545 U.S. 1, 25 (2005).
Dictionary, which defined “economics” as “the production, distribution, and consumption of commodities.”353 That same dictionary defines a “commodity” as “1: an economic good: as a: product of agriculture or mining b: an article of commerce especially when delivered for shipment…c. a mass-produced unspecialized product.”354

Under these definitions, it is clear that the state court evidentiary provisions of the Tiahrt Amendment do not regulate economic activity. These provisions regulate the admissibility of ATF trace data in state court litigation.355 First, ATF trace data is not a commodity. As noted,356 some courts have found that 18 U.S.C. § 922(o), which makes it “unlawful for any person to transfer or possess a machinegun,” is constitutional under the Commerce Clause because, in the words of Lopez, it regulates “the interstate transportation of a commodity through the channels of interstate commerce.”357 Some of these courts have done so based upon the recognition that “[a] machinegun is a commodity which is transferred across state lines for profit by business entities.”358 Conversely, ATF trace data is not a commodity that is that is transferred for profit by business entities; it is data compiled by public agencies to assist in crime prevention and detection.359 In an article about the (un)constitutioanality under the Commerce Clause of new Federal Rule of Evidence 502(d), which, as noted, regulates waiver of the attorney-client privilege and work product protection in state and federal proceedings, Professor Henry Noyes reached the same conclusion regarding information covered by the privilege/protection.360

353 Id. at 25-26.
355 See supra note 121 and accompanying text.
356 See supra notes 324-27 & 329-30 and accompanying text.
359 See supra notes 94-96, 114-16 & 121 and accompanying text.
360 See Noyes, supra note 302, at 716 (“Waivers of the attorney-client privilege and the attorney work product protection are not commodities, and they are not produced, distributed or consumed--they are not economic activity of individuals.”).
Second, “[s]tate court litigation is not a commodity.”\textsuperscript{361} As noted, the Court in \textit{Raich} used the Webster’s Third New International Dictionary to define “economics,”\textsuperscript{362} and that same dictionary has a product-oriented definition of “commodity.”\textsuperscript{363} Indeed, most modern dictionaries define a “commodity” as a product-oriented term.\textsuperscript{364} Therefore, state court litigation is not a commodity because “[n]either the act of litigation, nor the resources utilized in the course of such litigation, is susceptible to being characterized as a good, product, or article of commerce.”\textsuperscript{365} Instead, “[t]he act of litigation itself is more akin to a process initiated for the purpose of enforcing a right, seeking a remedy, or reversing a wrong.”\textsuperscript{366} This is because the resources utilized in the course of such litigation are service-based rather than product-driven….Parties to the litigation pay legal fees, not in exchange for some good or product, but for receipt of beneficial services that their attorneys are expected to provide. Society, through tax dollars, pays the compensation of individuals working in the court system (\textit{i.e.}, judges, juries, clerks, court reporters) with the expectation that those individuals will provide the services through which justice can be achieved. In sum, civil litigation is an activity that targets the exploitation of human services, not the production, distribution, and consumption of goods. As a result, such litigation does not constitute an economic activity pursuant to the standard set forth by the majority in \textit{Raich}.

Certainly, there are economic aspects to litigation, but the Tiahrt Amendment merely regulates the (in)admissibility of evidence, \textit{i.e.}, procedural law. Consequently, “by making procedural law for state courts, Congress regulates not the economic aspects of litigation, but instead regulates the state's regulation of litigation.”\textsuperscript{368}

\textsuperscript{361} \textit{Id.} at 718.
\textsuperscript{362} See supra note 222 and accompanying text.
\textsuperscript{363} See supra note 354 and accompanying text.
\textsuperscript{365} \textit{Id.}
\textsuperscript{366} \textit{Id.}
\textsuperscript{367} \textit{Id.}
Third, rules of evidence like the state court evidentiary provisions of the Tiahrt Amendment do not regulate commerce. In *Richmond & Allegheny R.R. v. R.A. Patterson Tobacco Co.*, the Supreme Court found “that a state rule of evidence is not a regulation of commerce.” In *Patterson Tobacco*, the Court dealt with the constitutionality of a Virginia statute which held Virginia railroads responsible for the safe carriage of goods, even to destinations beyond the railroad’s line, unless the railroad produced a written release. The Court deemed this statute “simply establishe[d] a rule of evidence” and found that evidentiary rules do “not amount to a regulation of interstate commerce” and do not violate the Dormant Commerce Clause. And while “the Supreme Court's decision in *Patterson Tobacco* held that a *state* rule of evidence was not a regulation of interstate commerce, the same conclusion should result when assessing a federal rule of evidence enacted by Congress that controls the admission of evidence in state court.” This is because “[t]he definition of “commerce” is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.”

Of course, the Court found in *Hodel* that “[a] complex regulatory program…can survive a Commerce Clause challenge without a showing that every single facet of the program is directly related to a valid congressional goal.” Instead, the Court found that it was “enough that the challenged provisions [w]ere an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfie[d] this test.” And *Lopez* and *Morrison* did not

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369 169 U.S. 311 (1898).
370 Bellia, *supra* note 292, at 968.
371 *Patterson Tobacco*, 169 U.S. at 312.
372 *Id.* at 315.
373 Noyes, *supra* note 302, at 717.
376 *Id.*
disturb this holding in *Hodel.*\(^{377}\) Indeed, in determining that the GFSZA did not regulate economic activity, the Court in *Lopez* cited to *Hodel* but ultimately found that the GFSZA was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”\(^{378}\)

As the Eastern District of New York found in *Beretta,* the Court in *Lopez* could have held that the GFSZA was an essential and indispensible part of the complex regulatory scheme controlling gun distribution.\(^{379}\) While the Supreme Court did not reach that conclusion, the Eastern District of New York did reach that conclusion with regard to the PLCAA.\(^{380}\) As noted, however, that court (and then the Second Circuit) reached this conclusion because the PLCAA had a far more direct connection to interstate commerce than did the VAWA and had two important features that the GFSZA lacked: a jurisdictioonal element and express congressional findings.\(^{381}\) As the next three subsections make clear, the Tiahrt Amendment lacks a direct connection to interstate commerce and lacks these two features as well, making it indefensible under *Hodel* and *Lopez/Morrison.*

2. **These Provisions Do Not Contain a Jurisdictional Element**

In *Lopez,* the Court found that the GFSZA exceeded Congress’ Commerce Clause power in part because it “ha[d] no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on

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\(^{380}\) Id.
\(^{381}\) See supra notes 251-57 and accompanying text.
interstate commerce.” Similarly, the problem with the VAWA under this factor was that it “contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce,” with Congress instead electing to cast the Act’s remedy over even purely intrastate violent crime.

The same problem exists with the state court evidentiary provisions of the Tiahrt Amendment because the Amendment does not contain an express jurisdictional element limiting its application to a discrete set of firearms cases that additionally have an explicit connection with or effect on interstate commerce. Instead, the Amendment provides broadly that trace data shall be inadmissible in civil actions in state (or federal) court; it contains no requirement that the subject firearms were shipped or transported in interstate or foreign commerce.

Thus, like the GFSZA, the Tiahrt Amendment applies even in cases where firearms never leave their states of origin, and like Morrison, it applies even in cases involving purely intrastate violent crime. As noted, the GFSZA made it a federal offense “‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’” According to the Court in Lopez, the GFSZA was thus unlike the Hobbs Act, which contained a jurisdictional element because it “made it a crime for a felon to ‘receiv[e], posses[s], or transport[t] in commerce or affecting commerce…any firearm.’” Conversely, under the GFSZA, an individual could be prosecuted for possessing a firearm in an Illinois school zone even if the firearm were manufactured and sold in Illinois.

The same analysis could apply in the typical public nuisance case against gun

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382 Lopez, 514 U.S. at 562.
384 See supra note 121 and accompanying text.
386 Id. at 561-62 (emphasis added).
manufacturers and dealers. As noted, both *City of Chicago v. United States Department of Treasury* and *Smith & Wesson Corp. v. City of Gary*, involved lawsuits against firearms’ suppliers based upon the *intrastate*, really the *intracity*, transfer and misuse of firearms (i.e., the guns were sold and misused in Chicago and Gary, respectively).\(^\text{387}\) In other words, in the typical public nuisance lawsuit, the plaintiff is alleging that the *intrastate/intracity* transfers of firearms led to *intrastate/intracity* violent crime, meaning that there is no interstate component to such public nuisance action unless the firearms were manufactured in other states.

Of course, it is likely that these firearms were in fact manufactured in other states. In amending the GFSZA after the Court struck it down in *Lopez*, Congress found and declared that, *inter alia*, “firearms and ammunition move easily in interstate commerce” and that “even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce.”\(^\text{388}\) But the key point under the second *Morrison* factor is not whether a Congressional act likely regulates only conduct with an explicit connection with or effect on interstate commerce; it is whether the act has an express jurisdictional element ensuring that its reach is limited to a discrete set of behavior that additionally has an explicit connection with or effect on interstate commerce. Like the pre-Amendment GFSZA, the Tiahrt Amendment lacks such an element and thus fails the second *Morrison* factor.

As noted, courts categorically have found that the PLCAA is a valid exercise of Congress’ Commerce Clause power under the third *Lopez* category.\(^\text{389}\) The first important

\(^{387}\) *See supra* notes 322-23 and accompanying text.


\(^{389}\) *See supra* notes 247-57 and accompanying text.
difference between the PLCAA and the Tiahrt Amendment is that, as noted previously, the PLCAA does have an express jurisdictional element. In Beretta, the Second Circuit specifically noted in its Commerce Clause analysis that the PLCAA had an express jurisdictional element because the claim preclusion provisions of the Act only apply to “‘qualified products,’” where “‘qualified product means a firearm…or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.’” Therefore, unlike the GFSZA in Lopez, the VAWA in Morrison, and the Tiahrt Amendment, “the PLCAA raises no concerns about Congressional intrusion into ‘truly local’ matters.”

3. Neither the Tiahrt Amendment Nor Its Legislative History Contain Congressional Findings Regarding Effects Upon Interstate Commerce

In Lopez, it was significant to the Court in striking down the GFSZA that neither the Act “nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” The Court conceded that Congress is ordinarily not required to make such formal findings but found this absence important in the case before it because any substantial effect that the GFSZA had on interstate commerce was not visible to the naked eye. In Morrison, the Court made it clear, however, that even Congressional findings are not necessarily sufficient. The Court in Morrison noted that the VAWA “[wa]s supported by numerous findings regarding the serious impact that gender-

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390 See supra notes 255-57 and accompanying text.
392 Id.
394 Id. at 563.
motivated violence has on victims and their families” as well as on interstate commerce. Nonetheless, the Court concluded that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”

As with the GFSZA, the Tiahrt Amendment does not contain any express congressional findings regarding the effects upon interstate commerce of introducing ATF trace data in state civil proceedings. Indeed, each version of the Tiahrt Amendment with the evidentiary provisions does not contain any legislative history at all. Some of the earlier versions of the Tiahrt Amendment without the evidentiary provisions did contain legislative history but no congressional findings. Moreover, this legislative history makes it clear that the Tiahrt Amendment is officially directed at safeguarding the criminal law enforcement process, not interstate commerce. Again, the Committee on Appropriations noted that this Amendment was born out of its concern that, without it, “information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases.”

As noted previously, courts categorically have found that the PLCAA is a valid exercise of Congress’ Commerce Clause power under the third *Lopez* category. But again, the PLCAA had several express congressional findings regarding the potential adverse effects on interstate commerce that could result from the type of lawsuits covered by the Act. Indeed, in upholding the PLCAA from a Commerce Clause challenge in *Beretta*, the Eastern District upheld the Act in

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396 Id.
397 See supra notes 121-37 and accompanying text.
398 See supra notes 94-96 & 114-16 and accompanying text.
399 See id.
401 See supra notes 247-57 and accompanying text.
402 See supra note 251 and accompanying text.
part based upon its recognition that “Congress expressly found that the possibility that members of the national Gun Industry would be held liable in legal actions of the type foreclosed by the [PLCAA] ‘constitutes an unreasonable burden on interstate and foreign commerce of the United States.’” Conversely, the Tiahrt Amendment contains no similar express congressional findings.

4. The Link Between the Admission of ATF Trace Data and a Substantial Effect on Interstate Commerce is Attenuated

In *Morrison*, the Court contended that its “decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.” According to the Court, as in *Lopez*, the government asked it “to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce.” And, as in *Lopez*, the Court found that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate Commerce has always been the provenance of the States.” Significantly, the Court concluded that it could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”

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405 *Id.* at 615.
406 *Id.* at 618.
407 *Id.*
This last conclusion is significant because Congress’ official claim is that the Tiahrt Amendment is directed toward the suppression of violent crime. As noted, the Committee on Appropriations claimed that the Tiahrt Amendment was born out of its concern that, without it, “information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases.” Thus, if asked to defend the Tiahrt Amendment, ostensibly the Government would raise the same costs of crime argument that the Court rejected in _Lopez_: that the disclosure of ATF trace data may result in violent crime by compromising criminal investigations, which would in turn have an adverse effect on the nation’s economic well-being. And under _Lopez_, this hypothesized effect would not pass Constitutional muster.

Critics have claimed that the true purpose of the Tiahrt Amendment is to insulate the gun industry from civil liability. The government thus could try to defend the Amendment by using the same logic applied to the PLCAA. As noted the Eastern District of New York in _Beretta_ upheld the PLCAA against a Commerce Clause challenge because, _inter alia_, Congress expressly found that the possibility that members of the national Gun Industry would be held liable in legal actions of the type foreclosed by the [PLCAA] ‘constitutes an unreasonable burden on interstate and foreign commerce of the United States.’ The Eastern District of New York acknowledged that “a court may have reservations about the likelihood of the predicted catastrophic collapse of the Gun Industry,” but it found that “there is a rational basis for Congress’ determination that the Act was necessary to protect that industry” because “[s]uccessful lawsuits against the Gun Industry would arguably affect the manner in which

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408 See _supra_ notes 94-96 and 114-16 and accompanying text.
410 See _supra_ notes 97-103 and accompanying text.
national and international manufacturers and wholesalers of handguns do business.\textsuperscript{412}

This holding, however, illustrates exactly the problem with the Tiahrt Amendment as it currently exists. The court in \textit{Beretta} acknowledged that courts might have reservations about whether there is any real likelihood that PLCAA actually prevents the catastrophic collapse of the gun industry but found that it was bound to respect Congress’ claim because there was a rational basis for it. Conversely, courts might question whether the Tiahrt Amendment is really directed at safeguarding the criminal law enforcement process, but they are bound to respect Congress’ claim. Because that claim is the same as the claim made in \textit{Lopez} and \textit{Morrison}, the link between the admission of ATF trace data and a substantial effect on interstate commerce is attenuated. And because all of the \textit{Morrison} factors weigh in favor of the state court evidentiary provisions of the Tiahrt Amendment exceeding Congress’ Commerce Clause power, they should be deemed unconstitutional. Moreover, even if those provisions are authorized under the Commerce Clause, they violate the Tenth Amendment.

VII. THE STATE COURT EVIDENTIARY PROVISIONS OF THE TIAHRT AMENDMENT VIOLATE THE TENTH AMENDMENT

As noted, the Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\textsuperscript{413} In \textit{Printz v. United States}, the Supreme Court found that the Brady Act’s interim provisions impermissibly commandeered state executive officials under the Tenth Amendment and did not need to give weight to the government’s citation to statutes enacted by the earliest Congress imposing obligations on state

\textsuperscript{412} \textit{Id.}
\textsuperscript{413} U.S. Const. amend. X.
According to the Court, “[t]hese early laws established, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” According to Professor Anthony J. Bellia, Jr. in his article, *Federal Regulation of State Court Procedures*, these laws also established, at most, that Congress could impose obligations on state judges to employ procedures or order remedies that were part of the substance of federal rights, not that it could prescribe procedural rules for state courts' adjudication of purely state law claims.

As noted, the Congressional statutes cited by the government in *Printz* required state judges to, *inter alia*, perform functions related to the naturalization of citizens and hear claims regarding the seaworthiness of vessels, fugitive slaves, Canadian refuges assisting the United States during the Revolutionary war, and the deportation of alien enemies in times of war. Professor Bellia points out that “[n]one of these statutes…directed state judges to employ procedures or order remedies independent of substantive rights arising under federal law.” The statutes concerning naturalization set forth procedures related to the substance of the federal right to be adjudged a citizen. The statute concerning the seaworthiness of vessels related to the federal right to have a vessel adjudged seaworthy. The fugitive slave statute was connected to the federal right to reclaim fugitive slaves. The statute governing Canadian

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415 *Id.* at 907.
416 *See* Bellia, *supra* note 292, at 986 (“Accordingly, they seem consistent with both the proposition that state courts generally must enforce federal rights of action and the proposition that the states must follow only those federal procedures that form part of the substance of federal rights.”).
417 *Printz*, 521 U.S. at. 905-07.
418 *See* Bellia, *supra* note 292, at 986.
419 *Id.* at 986-87.
420 *Id.* at 987.
421 *Id.*
refugees “appears to have done nothing more than require state courts to exercise their concurrent jurisdiction over federal claims.”\textsuperscript{422} And under the statute concerning the deportation of aliens during times of war, “state courts were required to do nothing more than adjudicate a federal claim and order the remedy that was part and parcel of the claim.”\textsuperscript{423} According to Bellia, “[a]s none of these statutes prescribed procedural or remedial rules that state courts had to follow independent of substantive federal rights, they are not evidence that early Congresses understood themselves to have the power to pass statutes doing so.”\textsuperscript{424}

Instead, Bellia contends that “[u]nder conflict-of-laws principles that predate the Founding of the Union, it is axiomatic that a forum state may apply its own procedural law to all rights of action that it enforces.”\textsuperscript{425} Now, the precedent embodying these principles related to state courts applying their procedure rather than the procedure of other states or foreign governments.\textsuperscript{426} That said, “[i]f a state court enforces federal law in the same manner as it would the law of another state or a foreign government, it follows that a state has exclusive control over court ‘procedure’ even as against the federal government.”\textsuperscript{427} And, according to Bellia, “[t]hough the Court has never expressly held that this is so, it has repeatedly implied that there exists a realm of exclusive state power over court procedures even against the federal government.”\textsuperscript{428} To wit, in \textit{Mondou v. New York}, the Court held that rights of action arising under the federal Employers’ Liability Act were enforceable in state courts.\textsuperscript{429} The Court “expressly noted, however, that Congress had not attempted in FELA ‘to enlarge or regulate the

\textsuperscript{422} \textit{Id.}

\textsuperscript{423} \textit{Id.}

\textsuperscript{424} \textit{Id.}

\textsuperscript{425} \textit{Id.} at 978.

\textsuperscript{426} \textit{Id.} at 980.

\textsuperscript{427} \textit{Id.}

\textsuperscript{428} \textit{Id.}

\textsuperscript{429} 223 U.S. 1, 56 (1912).
jurisdiction of state courts or to control or affect their modes of procedure,’ as if to do so would be unconstitutional.” 430

Moreover, Bellia pointed out that “the Court has used sovereignty language to describe the states’ authority over court procedures in other legal contexts.” 431 For instance, in In re Tarble’s Case, a habeas corpus case, the Court found that state governments are not responsible to the federal government (and vice versa) “[i]n their laws, and mode of enforcement.” 432 In Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., the Court upheld a state statute requiring arbitration in certain insurance disputes against a Due Process Clause challenge, concluding “that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.” 433 And in Bronson v. Kinzie, the Court noted in dicta in a case dealing with the Contracts Clause that “undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future.” 434

In Jinks v. Richland County, S.C., the respondent contended that, as with the interim provisions of the Brady Act in Printz, 28 U.S.C. § 1367(d) “is not a ‘proper’ exercise of Congress’s Article I powers because it violates principles of state sovereignty.” 435 § 1367(d) requires state courts to toll the statute of limitations period while a supplemental claim is pending in federal court and for 30 days after the dismissal of the claim, unless state law provides for more than 30 days. 436 The respondent “view[ed] § 1367(d)’s tolling rule as a regulation of state-court ‘procedure,’ and contend[ed] that Congress may not, consistent with the Constitution,

430 Bellia, supra note 292, at 980 (quoting Mondou, 223 U.S. at 56).
431 Id. at 981.
432 80 U.S. (13 Wall.) 397, 407 (1871).
433 284 U.S. 151, 158 (1931).
434 42 U.S. (1 How.) 311, 315 (1843).
prescribe procedural rules for state courts' adjudication of purely state-law claims."\textsuperscript{437} The respondent cited Bellia’s aforementioned article for this argument, but the Court found that it did not need to resolve this issue because

\begin{quote}
[a]ssuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is ‘proper,’ between federal laws that regulate state-court ‘procedure’ and laws that change the ‘substance’ of state-law rights of action, we do not think that state-law limitations periods fall into the category of “procedure” immune from congressional regulation.\textsuperscript{438}
\end{quote}

The question thus becomes whether the state court evidentiary provisions of the Tiahrt Amendment are procedural and thus possibly violative of the Tenth Amendment or substantive like § 1367(d). In \textit{Sibbach v. Wilson & Co.}, the Supreme Court found that the test for whether a rule is procedural “must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”\textsuperscript{439} Under this test, “[t]he overwhelming number of commentators have concluded that most rules of evidence are procedural.”\textsuperscript{440} This is because most rules of evidence merely “involve the orderly conduct of judicial business.”\textsuperscript{441} Thus, for instance, the rules of evidence governing expert testimony are procedural because they “reflect a procedural judgment that juries are aided by hearing expert testimony and that assistance enhances the accuracy of the entire process—even in situations where an expert is not absolutely certain about his conclusion.”\textsuperscript{442}

\begin{footnotes}
\textsuperscript{437} \textit{Jinks}, 538 U.S. at 464.
\textsuperscript{438} \textit{Id.} at 464-65.
\textsuperscript{439} 312 U.S. 1, 14 (1941).
\textsuperscript{442} Slutzman v. CRST, Inc., 997 F.2d 291, 295 (7th Cir. 1993).
\end{footnotes}
Conversely, evidentiary privileges are at least “arguably substantive because they promote social policy rather than regulating court procedure.” This is because “[t]hey stem from the legislature's policy decision to protect certain interpersonal relationships, even at the expense of leaving the truth uncovered in some lawsuits.” Assuming that evidentiary privileges are substantive, the respondents in *Guillen* might have been unsuccessful in their Tenth Amendment challenge to § 409, which renders information compiled or collected by states and localities in connection with federal highway safety programs inadmissible and not subject to discovery. As noted, the Supreme Court of Washington found that § 409 is unconstitutional because Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and ‘raw data’ created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections also serve federal purposes.

In support of that conclusion, the Supreme Court of Washington cited the Supreme Court’s opinion in *Patterson v. United States* for the proposition “that internal state court procedures such as the determination of evidentiary rules deserved deference under the federalist framework as an area traditionally regulated by states.” Nonetheless, the United States Supreme Court subsequently strangely found that it did not need to address the issue of whether § 409 violated the Tenth Amendment because “[t]he court below did not address this precise argument....

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443 *Id.*
444 *Id.*
445 See *supra* notes 293-300 and accompanying text.
447 Berman, *supra* note 296, at 1509.
If, however, § 409 created an evidentiary privilege, and if evidentiary privileges are substantive, then it seems clear that *Jinks* would compel the conclusion that the Court would have upheld it against a Tenth Amendment challenge. But it seems equally clear that § 409 did not create an evidentiary privilege, and it is even clearer that the Tiahrt Amendment did not create an evidentiary privilege. It is well established that the holder of any evidentiary privilege “may customarily waive it.” Thus, Federal Rule of Evidence 606(b) is not an evidentiary privilege because it generally precludes jurors from impeaching their verdicts after trial and does not allow for waiver, even if each juror decides that he wants to testify. Similarly, § 409 broadly states that information covered by it “shall not be admitted into evidence….” It contains no clause indicating that this rule can be waived and does not even identify a privilege holder covered by the rule.

The Tiahrt Amendment also contains no clause indicating that its evidentiary provisions can be waived and identifies no privilege holder. Moreover, privileges typically apply at any proceeding (unless the privilege holder has allegedly engaged in behavior that explicitly or impliedly waives the privilege) while the Tiahrt Amendment does not apply at a proceeding commenced by the ATF. Thus, it is difficult to see how the Tiahrt Amendment could be construed as an evidentiary privilege.

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449 Indeed, this is the conclusion that Professor Noyes reached with regard to Federal Rule of Evidence 502(d) in his aforementioned article. See Noyes, *supra* note 302, at 730.


451 Gold, *supra* note 450, at 135; Miller, *supra* note 450, at 931.


453 See id.


455 Gold, *supra* note 450, at 135; Miller, *supra* note 450, at 931.
Of course, even if the Tiahrt Amendment is not an evidentiary privilege, it could still be construed as substantive because its legislative history indicates that it was passed based upon concern that, without it, “information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases.”  

In this sense, the Amendment could be seen as substantive because it is aimed at promoting social policy rather than regulating court procedure.

One problem with such an argument is that this legislative history was connected to earlier versions of the Tiahrt Amendment preventing the discovery of ATF trace data, not the versions of the Amendment deeming such evidence inadmissible.  

It would be difficult to argue that the state court evidentiary provisions of the Tiahrt Amendment are substantive when Congress has not indicated what social policy they promote. Furthermore, it seems unlikely that at least one of these evidentiary provisions is based upon the fear of compromising criminal investigations. As noted, the Tiahrt Amendment not only deems ATF trace data inadmissible but also states, “nor shall testimony or other evidence be permitted based on the data.”  

Thus, even if a plaintiff has ATF trace data, the Tiahrt Amendment precludes that plaintiff’s experts from testifying based upon that evidence as the plaintiff’s experts did in Acusport.  

In other words, this evidentiary provision of the Tiahrt Amendment modifies Federal Rule of Evidence 703 (and state counterparts), which provides in relevant part that

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in

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457 See supra notes 94-138 and accompanying text.
459 See supra note 57 and accompanying text.
forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.\textsuperscript{460}

If a plaintiff introduces ATF trace data at trial, making it a matter of public record, it is least arguable that this data could fall into the wrong hands and compromise criminal investigations. But if an expert were merely to offer generalized opinions or inferences based upon such data without the underlying data being introduced into evidence, it would not become a matter of public record and could not compromise criminal investigations. Therefore, at the very least, this evidentiary provision of the Tiahrt Amendment regulates state counterparts to Federal Rule of Evidence 703, which are rules regarding expert testimony. Because, as noted, rules of evidence governing expert testimony are procedural\textsuperscript{461} and public nuisance claims are state law claims,\textsuperscript{462} this provision prescribes a procedural rule for state courts' adjudication of purely state law claims. The authorities cited by Bellia strongly imply that Congress lacks this power under the Tenth Amendment, meaning that the Supreme Court can and should strike down this provision should the issue reach it.

As for the other state court evidentiary provisions, it appears that they could be considered privileges and/or substantive if Congress changes the wording of these provisions and adds legislative history indicating the social policy that they are designed to promote. As things currently stand, however, these provisions face the same problem that they face under the Commerce Clause: Congress simply has not yet indicated what purpose they are supposed to serve.

\textbf{VII. CONCLUSION}

\textsuperscript{460} Fed.R.Evid. 703.
\textsuperscript{461} See supra note 442 and accompanying text.
\textsuperscript{462} See supra note 46 and accompanying text.
In *Ileto v. Glock, Inc.*, the Ninth Circuit affirmed a district court’s dismissal of a public nuisance lawsuit against firearms manufacturers, marketers, importers, distributors, and sellers based upon the PLCAA despite “sympathize[ing] with Plaintiffs, who suffered grievous harm…” Luckily, other courts have found that the PLCAA does not preempt public nuisance actions, allowing cities and localities to proceed to use such civil litigation to combat crime. Unluckily, Congress has hamstrung such plaintiffs in their attempts by passing the Tiahrt Amendment, and President Obama has backed away on his promise to repeal it. But it is difficult to see how that Amendment can be constitutional because it is officially directed at safeguarding the criminal law enforcement process, and the Court in *Morrison* could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” While President Obama has, for the moment, removed the possibility of a legislative repeal of the Tiahrt Amendment, courts should be able to step in and deem the Amendment unconstitutional under the Commerce Clause and/or the Tenth Amendment.

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463 565 F.3d 1126, 1146 (9th Cir. 2009).  