Gun bill a messy mix of law, politics

By TIMOTHY D. LYTTON

In the controversy surrounding President Bush's judicial nominees, the administration and its Republican supporters have insisted that courts should stick to applying the law and leave policymaking to democratically elected legislatures. Law and politics — the argument goes — should not be mixed.

The gun industry immunity bill headed for President Bush's desk, however, violates this principle by injecting politics into private lawsuits. Those who really care about the separation of law and politics should be outraged by this bill.

The House passed the Protection of Lawful Commerce in Arms Act last Thursday by a lopsided vote of 283-144. The bill, which would grant the gun industry immunity from civil lawsuits, already had been approved by the Senate. President Bush is certain to sign the bill as soon as it reaches his desk.

While immunity will be a great boon to the gun industry, it will do irreparable damage to the integrity of the civil justice system.

The bill's sponsors have argued that lawsuits against the gun industry are an attempt by gun control advocates to impose sales restrictions and safety mandates rejected by Congress and state legislatures — to achieve gun control by judicial fiat. Supporters see themselves as defenders of the separation of powers, in which legislatures make laws and courts stick to settling disputes.

In reality, however, legislative interference in pending lawsuits against the industry would not protect separation of powers, but undermine it.

If judicial lawmaking violates this principle, so too does legislative adjudication.

The courts have, in fact, already rejected all but a few of the suits, weeding out those that overreach from those that present legitimate claims under established doctrine. In the area of gun litigation, the courts have shown great respect for the separation of powers by dismissing those lawsuits that call on them to impose new restrictions on gun sales. In a few cases, where established doctrine permits, they have decided legal claims against the industry in ways that support legislative mandates.

By contrast, congressional passage of the gun industry immunity bill would undermine the separation of powers by interfering in the adjudication of private lawsuits — deciding them on the basis of political power rather than legal principle.

The immunity bill will bar even lawsuits that support Congress' own efforts to regulate guns.

Take, for example, the 1998 case of Halberstam vs. Daniel, in which shooting victims alleged that their injuries resulted from the irresponsible marketing practices of the defendant gun maker. Federal law requires that those regularly in the business of selling guns obtain a federal firearms license, conduct background checks on all buyers, and restrict out-of-state purchases to other federal firearms licensees. To evade these regulations, the defendant in Halberstam sold a disassembled semi-automatic assault pistol in the form of a parts kit.

Since the regulations apply only to firearms, and not firearms parts, these sales were technically not covered by the law. The defendant sold its gun kits by mail order over the phone, to out-of-state purchasers without federal firearms licenses, offering discounts for bulk purchases and requesting no background information except that necessary for payment and shipping.

Federal law exempts gun parts from sales restrictions because Congress did not wish to impede the sale of spare parts for firearms. It would be perverse to argue that the purpose of this exemption was to allow the unregulated sale of disassembled guns. Marketing guns in the form of parts kits, while within the letter of the law, clearly violates its purpose.

Federal law also requires that all guns carry a serial number on the frame of the gun to assist law enforcement in tracing the sales and ownership history of any gun used in a crime. By selling the frames in the form of sheet metal flats with instructions on how to fold them into frames after purchase, the Halberstam defendant avoided the requirement to place serial numbers on the guns it sold. The defendant also kept no sales records. One of its guns was subsequently purchased on the black market and used in a deadly assault on a van full of children, killing one and injuring another.

While a jury in the Halberstam case found the defendant's initial sale of the gun too far removed from the subsequent shooting to support liability (the gun was resold after the initial purchase), it nevertheless found that the defendant's marketing scheme was negligent, thus validating the idea that selling unregulated gun kits could support liability in other cases.

By holding gun makers like the defendant in Halberstam liable, the courts provide essential support to legislative gun control mandates. Without civil lawsuits, irresponsible manufacturers and rogue dealers can circumvent the law with impunity. Imposing civil liability in such cases does not contradict Congress' legislative mandates; it makes them more effective.

If they really valued the separation of powers, congressional supporters of the Protection of Lawful Commerce in Arms Act would have thought twice before voting for it. The courts are doing a fine job of balancing the rights of the gun industry against the rights of those harmed by it, and they don't need any interference from Congress.

Timothy D. Lytton is a professor at Albany Law School and editor of "Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts."

Without civil lawsuits, irresponsible manufacturers and rogue dealers can circumvent the law with impunity.