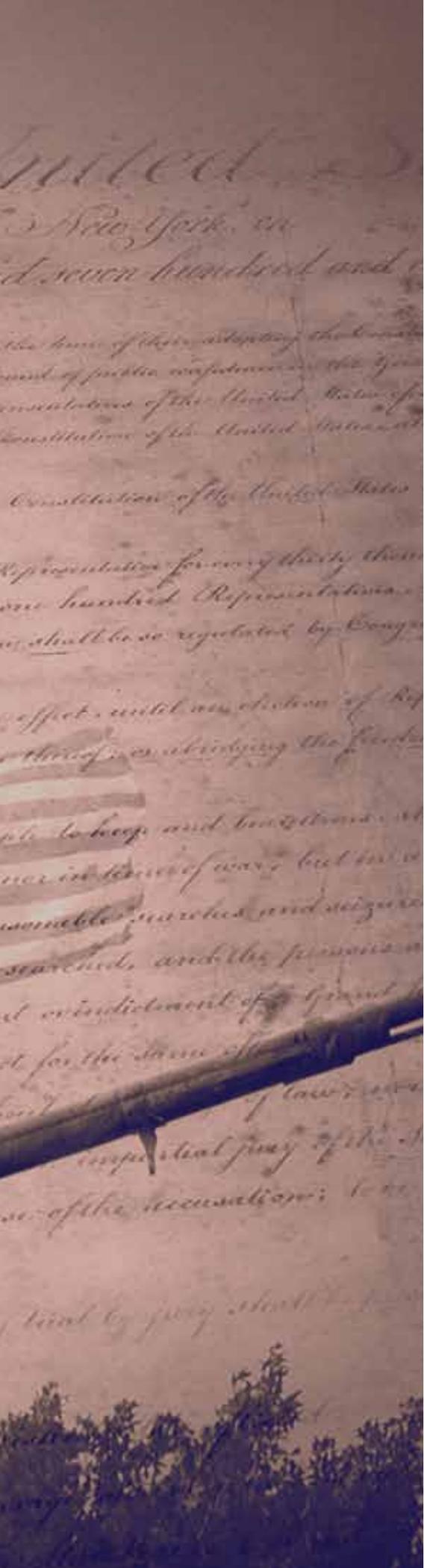
A bronze statue of a Minuteman soldier from the American Revolutionary War, standing and holding a long rifle. The background is a faded, sepia-toned image of the United States Constitution, with the words "CONGRESS OF THE U" and "and held at the City of" visible at the top. The overall tone is historical and somber.

Using the Courts to Address America's Gun Violence Epidemic

BY JON LOWY AND ELIZABETH BURKE



One hundred thousand people are shot every year in America, about 30,000 fatally. Every day more than 80 families lose a loved one to the gun violence epidemic facing our country. After the mass shooting of 20 first-graders and six educators at Sandy Hook Elementary School in Newtown, Conn., polls showed that more than 90 percent of Americans favored requiring background checks for all sales of guns, and the majority favored banning sales of military-style assault weapons and high-capacity ammunition magazines. Yet the National Rifle Association has made it a priority to defeat any bill that would reasonably regulate guns. The bipartisan effort to expand background checks to most gun sales died in the U.S. Senate, and bills to keep AK-47s and 30-round magazines off the streets failed as well. There is no public policy issue that faces such a stark disconnect between the public demand – and need – for reasonable regulation, and legislative failure to follow the voters’ will.

Ignoring public opinion and the 100,000 gunshot victims per year in America, the gun lobby aggressively pushes for laws and policies which make it easier for dangerous people to have nearly unlimited ability to purchase guns and carry them in public places. These policies do not protect Americans or make our society safer. These policies do only one thing: make it easier to sell more guns.

Congress has not only failed to act to stem the tide of gun violence, they have eliminated regulations and oversight, carving out special exemptions that favor the gun industry with laws advantageous to gun manufacturers.

Bringing liability cases against criminal and negligent gun dealers is a top priority in the fight against gun violence in our country. These are cases that expose the practices of dealers who are supplying large numbers of criminals and causing thousands of deaths a year. Litigation can hold these dealers accountable and reform the industry.

When President George W. Bush signed the Protection of Lawful Commerce in Arms Act (PLCAA) in 2005, the NRA hailed it as the most significant piece of pro-gun legislation in 20 years. PLCAA confers special immunity from civil liability on the gun industry, shielding it from American common-law principles of civil justice that apply to every other industry or person who causes injury. Some courts have held that PLCAA shields gun sellers from simple negligence and product liability law, making it far easier to hold a BB gun

Photo by Aldaron

manufacturer liable than Bushmaster, the manufacturer of the assault weapon used by the Sandy Hook killer and the D.C.-area snipers. Other industries that operate in the U.S. and sell to American consumers face liability if they manufacture or sell their products in a dangerously negligent manner. While not always popular, these suits help to ensure that the safest possible practices are used in the manufacture and distribution of products intended for consumer use. Guns are a consumer product and there is no inherent reason why they should enjoy greater protection than any other product. PLCAA has not stopped lawsuits against irresponsible gun companies (as explained below), and there are serious arguments that the law is an unconstitutional infringement on state autonomy, judicial independence, and civil rights. However, as interpreted by some courts, PLCAA has denied justice victims of negligent gun industry conduct.

The special protection for the gun industry doesn't end with PLCAA. Congress went even further when it allowed a rider to a federal spending bill that restricted the ability of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to share gun trace data. When a gun is used in a crime, it is traced back to its original point of sale. This gun trace data is crucial in determining which gun dealers are actively selling to criminals. This data had long been shared with the public in response to FOIA requests and was crucial for bringing public nuisance lawsuits against gun manufacturers. Congressman Todd Tiahrt (R-Kansas), the author of the rider, was quoted as saying, "I wanted to make sure I was supporting my friends who are firearms dealers. NRA officials were helpful in making sure I had my bases covered."

As a result of a special exemption in the Consumer Product Safety Act, guns are the only consumer product exempt from federal product safety oversight, so guns can be made and sold without feasible, inexpensive life-saving safety features. ATF is the only law enforcement agency in the nation that is arbitrarily prevented from doing its job; for example, an NRA-driven law bars ATF from conducting more than one spot inspection of a gun dealer in a year.

Opponents of reasonable gun regulations cite the Second Amendment when defending these special protections for gun manufacturers and dealers. The gun lobby argues that no restriction on the right to sell or possess firearms is constitutional because of the Second Amendment. Fortunately, this argument has been definitively put to rest in the seminal Supreme Court decision interpreting the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570 (2008). While the 5-4 *Heller* decision recognized a right of law-abiding, responsible citizens to have a gun in the home for self-defense, the court stated that the "Second Amendment, like all rights, is **not unlimited**." *Heller* at 54, emphasis added. The

Heller court specifically noted that the Second Amendment did not prevent reasonable restrictions and listed examples of some longstanding regulations that were not in violation of the Second Amendment, such as bans on concealed weapons or dangerous and unusual weapons, as well as prohibitions on gun possession by felons or the mentally ill, or possession of guns in schools or government buildings. *Heller* at 54. In many ways, it is clearer now than ever before that reasonable regulation of firearms is constitutional.

The next five years will be crucial in defining the contours of the Second Amendment as numerous cases work their way through the judicial system. Proponents of lax gun laws have launched an unprecedented onslaught to gut gun laws in the courts, and to establish a broad constitutional right that would mandate their "any gun, anywhere, anybody" agenda. Over the next few years, as these cases are decided in the courts, precedent will be set that will determine the extent to which communities can respond to gun violence through legislative action, perhaps for a generation.

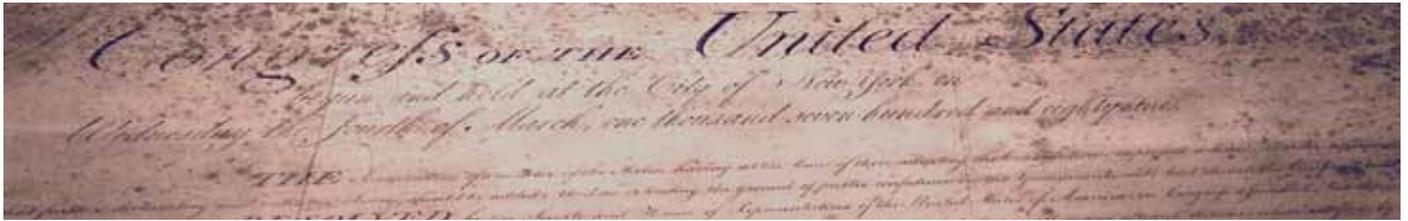
With Congress mired in gun industry influence and money, the fight for reasonable gun violence prevention policies has moved into the state legislatures and the courthouses. The Brady Center recognizes that this is a time of great opportunity in the effort to reduce gun violence. There are reasonable gun regulations, which if enacted and upheld, can begin to reduce gun deaths. Liability cases against negligent gun companies can reform dangerous gun industry practices, even with the limitations placed by PLCAA. The courts are a level playing field and are generally not influenced by special interest money. The Brady Center has launched a working group of concerned attorneys called Lawyers for a Safer America. LSA gives lawyers around the country

the opportunity to work on important Second Amendment cases.

Several state legislatures have enacted reasonable restrictions on firearms since the tragedy in Newtown. Connecticut, Maryland, Colorado and New York have all passed reasonable gun control measures designed to reduce gun violence in their states. These measures include limits on high-capacity magazines and certain types of unusually dangerous firearms. Opponents of gun regulation have filed suits in all states where such measures have passed, asserting that a state does not have the right to regulate guns because of the Second Amendment. LSA is working with lawyers around the country to file amicus briefs and assist states in protecting their reasonable gun regulation.

LSA will also work with the nation's cities to assist them when opponents of gun regulation try to overturn city efforts at reducing gun violence. For example, when Philadelphia and Pittsburgh passed packages of gun regulations designed to

In Florida, the legislature passed a bill that would have taken away a physician's license if that physician even talked about gun ownership with a patient.



make their streets safer, the NRA tried to enjoin the cities from enacting their laws. *National Rifle Association v. City of Philadelphia*, No. 001472 (Court of Common Pleas of Philadelphia County), *National Rifle Association v. City of Pittsburgh*, No. 09-007912 (Court of Common Pleas of Allegheny County). The NRA argued that a state preemption statute barred any city from enacting common sense gun regulation. The Brady Center assisted the cities in defending their gun violence reduction policies.

The opponents of reasonable regulation on guns have gone further than just challenging regulations passed by states. Some amazing examples of overreach by legislatures have occurred. In Florida, the legislature passed a bill that would

have taken away a physician's license if that physician even talked about gun ownership with a patient. The Brady Center and LSA lawyers quickly filed suit and prevailed at the trial court level, with the court striking down the law in its entirety based on argument that it was unconstitutional. The case is on appeal and was to be argued in July in the U.S. Court of Appeals for the 11th Circuit. *Dr. Bernd Wollschlaeger, et al. v. Governor of the State of Florida, et al.*, Appellants, No. 12-14009.

In Nelson, Ga., the town council passed an ordinance in April requiring that a "head of household" maintain a working firearm and ammunition in the home for the protection of its inhabitants. The Brady Center, with the help of LSA lawyers, filed suit against Nelson, claiming that these laws are

unconstitutional and violate equal protection. Certainly if the Constitution protects an individual's right to own a gun, it also protects his or her right not to own a gun. *Brady Center v. City of Nelson, Georgia*, U.S. District Court for the Northern District of Georgia, 2-13-cv-104-WCO.

LSA and the Brady Center also see other opportunities to reduce gun violence through the courts. There is ample precedent that reasonable gun violence prevention can be achieved through bringing liability actions against negligent gun dealers. Courts and juries have repeatedly been amenable to finding gun dealers liable for the damage done by their negligent sales practices. Litigation is a powerful and effective tool for reforming the gun industry, even despite the restrictions

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Congress has enacted.

Seven-year-old Nafis Jefferson was playing with his friends on the sidewalk in his South Philadelphia neighborhood when they found a gun. One of the children picked up the loaded .44-caliber Rossi revolver, pointed it at Nafis and pulled the trigger. The bullet hit Nafis in the head and killed him. The Brady Center and Philadelphia attorney Mark Lewinter filed suit on behalf of his mother. *Jefferson v. Amadeo Rossi, S.A.* (Court of Common Pleas of Philadelphia County). Gun trace data showed that the gun was sold from a licensed gun shop called Sauers Trading to Perry Bruce on Aug. 4, 1997. The Rossi revolver was one of 11 **guns** Bruce purchased from Sauers in a three-year period. Of the 11 handguns sold to Bruce, nine were inexpensive, easily concealable semi-automatic handguns referred to as Saturday Night Specials, which have no value to collectors.

Discovery revealed that Sauers had sold at least 41 handguns to six gun traffickers between 1993 and 1999. Sauers also testified that he never

questioned Bruce or any purchaser to determine if sales were potential straw purchases because he didn't think it was his business. Further, Bruce testified that Sauers "had to know what I [Bruce] was doing," and also said that Sauers asked Bruce to wait until all his other customers left before selling guns to Bruce.

Sauers agreed to settle the suit as the case was headed to trial in August 2004. While the settlement amount was officially confidential, local news media reported that it was approximately \$850,000. Besides the magnitude of the settlement, the case was notably the first in the nation in which a gun dealer settled or was found liable for negligently selling guns to a trafficker who in turn supplied the criminal market.

In another case, the Brady Center and Philadelphia co-counsel filed suit against Lou's Loan and Phoenix Arms on July 20, 2005, on behalf of the parents of Anthony Oliver. *Oliver v. Lou's Loans, et al.*, No. 1836, (Court of Common Pleas of Philadelphia

County). Anthony, 14-year-old, was shot by his friend with a .25-caliber Phoenix Arms semiautomatic handgun. His friend, who was also 14, had bought the gun on the street and thought the gun's safety was activated when he pulled the trigger and shot Anthony in the stomach. Oliver died later that night.

The gun was originally sold by Lou's Loan in Upper Darby, Pa., to an individual named Jerry Battle, who bought multiple guns from the store that were later used in crimes. Gun trace data showed that from 1996 to 2000, **Lou's sold 441 crime guns**, making it the top crime gun dealer in Pennsylvania. Phoenix Arms, the manufacturer of the weapon that killed Oliver, continued to supply Lou's, despite the store's record. Lou's later had its license revoked by ATF in July 2006 and in 2008 Lou's Loans settled the suit with plaintiffs. ■

Jon Lowy and Elizabeth Burke are attorneys with the Brady Center for the Prevention of Gun Violence.

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