

Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits

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I. Introduction

In recent years, tort litigation has been used to address a variety of social problems. Examples include lawsuits aimed at reducing smoking-related illness, gun violence, and obesity.¹ Reactions to this use of tort litigation to influence regulatory policy—what scholars have termed “regulation through litigation”—have been mixed. On one hand, commentators have argued that litigation can be an effective means of shaping public policy and improving the performance of other policy-making institutions. Lawsuits can frame issues in new ways, give them greater prominence on the agendas of regulatory institutions, uncover policy-relevant information, and mobilize reform advocates.² On the other hand, commentators have cautioned that regulation through litigation can be inefficient and ineffective. Compared to other forms of regulation, litigation is often unnecessarily complex, protracted, costly, unpredictable, and inconsistent.³ Moreover, courts are generally less well equipped than legislatures and administrative agencies to evaluate technical information,

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1. These lawsuits are based not only on traditional common law tort claims such as misrepresentation, negligence, and product defect, but also on statutory claims such as public nuisance and unfair trade practices. The latter might be better characterized as public enforcement actions. Nevertheless, for the sake of simplicity, I refer to all of these different examples as “tort litigation.”

2. See, e.g., Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769, 769 (1999) (finding “a distinct role for litigation as a complement to a broader, comprehensive approach to . . . policy making”); Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 897–99 (1998) (exploring how tobacco litigation changed government tobacco policy); Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2053 (2000) (considering the interplay between regulation and tort law); Wendy E. Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 694–95 (2007) (arguing that critics of regulation through litigation “ignore debilitating limitations on information that reduce the competence and accountability of agency regulators”).

3. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4 (2001) (criticizing U.S. governance and legal processes as “markedly inefficient, complex, costly, punitive, and unpredictable” and, in consequence, often unjust).

implement regulations, monitor results, and make adjustments.⁴ Policies resulting from litigation may involve less public input and accountability compared to government regulation, serving the private or political interests of the litigants rather than the public interest.⁵ Litigation can also be counterproductive to policy reform by generating a legislative backlash against regulation.⁶

Like any policy tool, litigation has strengths and weaknesses, and it performs better in some contexts than in others. This Article offers a theoretical framework for evaluating the influence of tort litigation on regulatory policy making. The framework has three parts. First, using two examples—gun-industry and clergy-sexual-abuse litigation—the Article highlights six distinct ways in which litigation influences policy making: by (1) framing issues in terms of institutional failure and the need for institutional reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions. Second, the Article suggests empirical measures for assessing the extent to which litigation influences policy making in these six ways. Third, the Article compares the relative success of gun-industry and clergy-sexual-abuse litigation to identify conditions that favor the use of litigation as a policy tool.

This framework can be applied more generally to other examples of regulation through litigation. In this Article, I use it to suggest how we might evaluate lawsuits against producers of greenhouse-gas emissions as a means of addressing climate change. Proponents of climate-change litigation assert that it enhances policy making in all of the ways suggested above. They claim that it frames the issue of climate change in ways that favor policy reforms; generates policy-relevant information; places the issue on the agendas of policy-making institutions; fills a regulatory gap created by federal resistance to addressing the issue; encourages voluntary self-regulation by industry; and allows for diverse regulatory approaches in different regions.⁷ Critics argue that climate-change litigation is doctrinally

4. Peter H. Schuck, *Why Regulating Guns Through Litigation Won't Work*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 225, 234–35 (Timothy D. Lytton ed., 2005).

5. See W. Kip Viscusi, *Overview of REGULATION THROUGH LITIGATION* 1, 1, 20 (W. Kip Viscusi ed., 2002) (discussing the drawbacks to regulation through litigation).

6. See, e.g., Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 4, at 152, 166 (explaining that, in response to lawsuits, the gun industry persuaded thirty-two states to provide the industry with statutory immunity against most litigation).

7. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1617 (2007) (stating that, with regard to greenhouse gases, “eliminating . . . common law incentives creates a high risk of dysfunctional regulation”); David Hunter, *The Implications of Climate Change Litigation for International*

unsound, costly, unlikely to reduce greenhouse-gas emissions, and may even be counterproductive.⁸ The framework presented in this Article offers tools with which to advance this debate. The framework suggests how to define and measure success and how to explain the litigation's degree of success or failure by reference to the larger context in which it is situated. The framework offers guidance for evaluating both the achievements and shortcomings of climate-change litigation so far, as well as its future prospects.

Before I proceed, two caveats are in order. First, this Article does not provide an extensive literature review on the strengths and weaknesses of regulation through litigation or a comprehensive account of gun-industry or clergy-sexual-abuse litigation. Those seeking greater detail should consult sources cited in the footnotes. My aim is instead to sketch a general framework that can be used to evaluate the value of tort litigation as a policy tool in a variety of contexts.

Second, aside from questions about the effectiveness of tort litigation as a policy tool, there is also a question about the legitimacy of using private lawsuits to influence public policy. Critics have argued that regulation through litigation involves judicial usurpation of the legislative role in violation of the separation of powers. Courts, they contend, should focus on resolving cases and controversies and leave public policy to legislatures.⁹ Defenders have countered that the distinct branches of government have historically had overlapping functions within our system of government and that regulation through litigation is entirely consistent with that tradition.¹⁰

Environmental Law-Making, in ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL, AND SUPRA-NATIONAL APPROACHES (H. Osofsky & W. Burns eds., forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005345; Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 99–100 (2007) (explaining that some of the advantages of climate-change litigation are that “courts are insulated from the lobbying endemic in the legislative and regulatory process” and that courts can and must decide cases even as “legislatures are locked in political paralysis”).

8. See, e.g., Joni Hersch & W. Kip Viscusi, *Allocating Responsibility for the Failure of Global Warming Policies*, 155 U. PA. L. REV. 1657, 1692–93 (2007) (arguing that climate-change litigation is not well suited to address the market failures involved, since the damages are largely for “prospective” harm); Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 78 U. COLO. L. REV. (forthcoming 2008), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=shi_ling_hsu (stating that, rather than litigation, “broad-based legislative and international action must be the primary means of addressing the problem of global climate change”); Reimund Schwarze, *Liability for Climate Change: The Benefits, the Costs, and the Transaction Costs*, 155 U. PA. L. REV. 1947, 1947 (2007) (“[C]laims for climate change-related damages could become crushingly expensive and cause high transaction costs.”).

9. Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L. MED. & ETHICS 556, 556–57 (2004).

10. See *id.* at 560 (“Indeed, in many areas of life unregulated by statute, adjudication of common law claims has been the primary, or even sole, source of regulatory policies.” (endnotes omitted)).

While a complete assessment of regulation through litigation must confront this question of legitimacy, I have addressed it elsewhere and will leave it to one side for the purposes of my analysis here.¹¹ In this Article, I will focus exclusively on the effectiveness of tort litigation as a policy tool.

The Article proceeds in four Parts. Part II discusses methodology, clarifying what it means to view tort litigation as a policy tool and how this perspective differs from more traditional accounts of tort law. Part III uses the examples of gun-industry and clergy-sexual-abuse litigation to highlight the ways in which tort litigation can enhance policy making. It also surveys the types of empirical evidence that can be used to determine the significance and value of litigation's impact on policy making. Part IV compares the results of these two examples of regulation through litigation and suggests that clergy-sexual-abuse litigation was more successful in enhancing policy making than was gun-industry litigation. This comparison reveals the conditions that made clergy-sexual-abuse litigation more successful in enhancing policy making and that, more generally, favor the use of regulation through litigation. Part V offers suggestions about how to evaluate climate-change litigation as a regulatory strategy.

II. Tort Litigation as a Policy Venue

Tort litigation has traditionally been understood as a means of dispute resolution and risk regulation. Regulation through litigation illustrates how private lawsuits can sometimes function as what political scientists Frank Baumgartner and Bryan Jones call a "policy venue"—an institutional setting where policy making takes place.¹² Baumgartner and Jones suggest that policy making with regard to any particular issue may experience periods of "equilibrium," characterized by public apathy and institutional stasis, and periods of "instability," characterized by heightened concern and policy innovation.¹³ Equilibrium often occurs after an organization or a government agency establishes jurisdiction over an issue and a policy is put in place.¹⁴ Public attention dies down and vested interests both inside and outside the institution protect the status quo from challenges.¹⁵ By contrast, instability results when existing policy is altered.¹⁶

11. *See generally id.* (discussing the proper role of courts in making public-health policy and examining the arguments made by proponents on both sides of the debate).

12. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 31 (1993). This discussion of tort litigation as a policy venue is drawn from TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* (2008).

13. BAUMGARTNER & JONES, *supra* note 12, at 1–4, 19.

14. *Id.* at 19 (discussing "institutionally induced equilibria").

15. *Id.*

16. *Id.* at 20.

Policy change, according to Baumgartner and Jones, is a function of two factors: framing and venue.¹⁷ When an issue is reframed, it may excite public interest and engender pressure for policy reform.¹⁸ When an issue falls under a different institutional jurisdiction, the change in venue may bring with it new ways of approaching the problem and different tools for responding to it.¹⁹ Moreover, reframing and venue change reinforce each other. Reframing leads other institutions to exercise jurisdiction over an issue, often resulting in venue change, and venue change often results in reframing an issue to conform to the particular institutional perspectives and expertise of the new venue.²⁰ For example,

Tobacco policy in the agriculture arena is seen as an important source of jobs; in health policy circles it evokes images of disease; in insurance and business cost-containment circles it is seen as a source of increased health insurance premiums; in foreign trade circles it is seen as an important source of U.S. export earnings. Each institutional venue is home to a different image of the same question.²¹

Just as framing and venue are mutually reinforcing, so too are framing and venue on the one hand and the mobilization of public opinion on the other. Official frames and venues influence public opinion, while shifts in public opinion influence the institutional framing and venue of an issue.²² All of this mutual reinforcement, or “positive feedback,” accelerates change during periods of instability.²³ It also strengthens entrenchment during periods of equilibrium.²⁴

Tort litigation can provide a new venue for policy issues, framing them in new ways. Tort litigation also attracts press coverage that mobilizes and shapes public opinion, which in turn creates pressure for reform. In these ways, litigation can jump-start reform efforts in other policy venues such as legislatures, administrative agencies, and private associations.

My analysis of tort litigation as a policy venue involves three notable features.²⁵ First, I examine not only litigation outcomes but also the litigation

17. *Id.* at 20.

18. *Id.* at 25–30.

19. *Id.* at 25, 31–35.

20. *Id.* at 36.

21. *Id.* at 31.

22. *Id.* at 246–48.

23. *See id.* at 16–18, 25 (discussing the role of “positive feedback” in bringing about political change).

24. *Id.*

25. My analysis builds on the earlier studies of scholars such as Lynn Mather, Peter Jacobson, Kenneth Warner, and Wendy Wagner, who have developed detailed accounts of the ways in which tort litigation has complemented the policy-making efforts of legislatures, agencies, and private industry to affect tobacco-control policy. *See generally* Jacobson & Warner, *supra* note 2 (suggesting that although litigation serves a purpose, legislative and regulatory processes are still necessary to influence tobacco policy); Mather, *supra* note 2 (examining how tobacco litigation has

process. Tort scholarship has traditionally focused on the policy implications of judgments and settlements in terms of deterring and spreading risk. In addition, I look at how pleading, discovery, motion practice, trials, and appeals influence policy making. Second, I attend to the *interaction* of tort litigation with other regulatory institutions. Beyond merely comparing the tort system's strengths and weaknesses to other regulatory institutions, I consider how tort litigation influences and is influenced by policy making in these other institutions. Third, I focus less on regulatory outcomes than on *policy making*. While it is difficult to measure the effects of litigation on gun violence rates and clergy sexual abuse, it is much easier to identify the ways in which litigation influenced efforts to address these problems. In the end, while some may disagree with my evaluation of gun and clergy-sexual-abuse litigation, I hope that even critics will find these three features of my analysis illuminating and adaptable to other contexts.

Asserting that tort litigation influences policy making is a causal claim. Causal claims involving complex social interactions are notoriously difficult to substantiate. In making such claims, one should be clear about the nature of one's empirical evidence and its limitations. Where possible, it is helpful to combine different types of evidence, such as anecdotal information from interviews, content analysis of documents, and aggregate data. Moreover, I do not mean to suggest a straightforward chain of causation between litigation and policy making. Rather, we should view litigation as one causal factor—within a complex interplay of causal factors and feedback effects—that can prompt and shape policy-making activity.

III. The Influence of Tort Litigation on Policy Making

Gun-industry and clergy-sexual-abuse litigation illustrate six ways in which tort litigation may influence regulatory policy making by: (1) framing issues in terms of institutional failure and the need for institutional reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions. While a complete survey of the evidence that supports these findings is beyond the scope of this Article, I will offer samples of the different types of evidence available and include footnotes citing more extensive evidence.

changed tobacco policy); Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935 (1999) (arguing that attorney-general litigation has had positive contributions to tobacco policy).

A. *Gun-Industry Litigation*

Beginning in the early 1980s, gun-violence victims began turning to the tort system seeking compensation for their injuries.²⁶ They filed claims not only against their assailants but also against gun sellers and manufacturers.²⁷ By suing sellers and manufacturers, who have deeper pockets than the assailants, victims sought to improve their chances of receiving compensation.²⁸ They also viewed litigation as a way to promote safer firearms designs, deter future sales to criminals, and place part of the blame for gun violence on the industry.²⁹ By the late 1990s, municipalities began suing the gun industry to recover the costs of law enforcement and emergency medical services related to gun violence.³⁰ Several of these government lawsuits also demanded injunctions that would have forced the industry to incorporate safety features into firearms and restrict sales in ways aimed at reducing gun violence.³¹ The gun industry and its allies responded with a successful lobbying campaign that convinced over thirty states to grant the industry statutory immunity from suit and culminated in the enactment of federal immunity legislation in 2005.³²

Almost all of the lawsuits against gun sellers and manufacturers seeking design modifications or marketing restrictions have been dismissed by courts prior to trial.³³ Of the few favorable jury verdicts obtained by plaintiffs, all but one were overturned on appeal.³⁴ A handful of claims settled prior to trial.³⁵ A few lawsuits currently remain, in which plaintiffs are arguing that the federal immunity statute is either not applicable to their claims or unconstitutional.³⁶ While lawsuits against gun manufacturers and wholesale

26. This discussion is drawn from Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry* to *SUING THE GUN INDUSTRY*, *supra* note 4, at 1. For more detail, see *id.* at 2–15 (discussing the rise of gun-industry litigation).

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 7–11.

30. *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1106 (Ill. 2004) (describing the city's public-nuisance claim against a gun manufacturer); *see also* Timothy D. Lytton, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, in *SUING THE GUN INDUSTRY*, *supra* note 4, at 250, 257–58 (discussing *id.*).

31. *See, e.g.*, *City of Chicago*, 821 N.E. 2d at 1106 (“[P]laintiffs seek . . . permanent injunctive relief . . .”); *see also* Lytton, *supra* note 26, at 257–58 (discussing *id.*).

32. Lytton, *supra* note 26, at 166.

33. *See* Schuck, *supra* note 4, at 225, 226 (noting the lack of success in gun-industry tort litigation).

34. Lytton, *supra* note 26, at 5.

35. *Id.*

36. *See* *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006) (dismissing a lawsuit against gun-industry defendants based on a federal immunity statute), *appeal docketed*, No. 06-56872 (9th Cir. Jan. 23, 2007); *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517 (E.D.N.Y. 2006) (finding the federal immunity statute not applicable to a lawsuit brought by New York City against gun industry defendants), *rev'd*, No. 05-6942, 2008 WL 1884167, at *15 (2d Cir. Apr. 30, 2008); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007)

distributors appear to be winding down, New York City has recently filed lawsuits against out-of-state retail gun dealers to whom crime guns recovered in New York City have been traced.³⁷ The City has settled with several dealers who have agreed to supervision of their sales practices by a court-appointed special master, and litigation against the remaining dealers is currently in progress.³⁸

Gun litigation has been part of a larger trend to frame gun violence as an industry problem best addressed by greater regulation of firearm design and marketing.³⁹ In the 1960s and 1970s, injury prevention emerged as a field of inquiry within public health.⁴⁰ As this field developed, researchers turned their attention to gun violence as a source of injury.⁴¹ By analyzing gun violence as an “epidemic,” public-health scholars sought to identify the causes and distribution of gun-violence injury using epidemiological tools common in the study of disease.⁴² Identifying firearms as the “disease agent” spurred interest in safer gun designs.⁴³ A search for “environmental factors” that foster gun violence led researchers to examine the marketing and distribution of firearms, giving rise to proposals for greater restrictions on gun sales.⁴⁴ Increasing interest in firearm designs and marketing restrictions spurred by this public-health approach has expanded the focus of attention from the individual perpetrators of gun violence to include manufacturers and dealers. As a result, there has been less emphasis on criminal sanctions as a response to gun violence and more interest in industry regulation as a way to prevent it.⁴⁵ Early lawsuits against the gun industry were inspired by this focus on industry regulation and helped promote it.⁴⁶

(finding federal immunity statute not applicable to lawsuit brought by the city of Gary, Indiana against gun-industry defendants).

37. *See, e.g.*, *City of New York v. Bob Moates' Sport Shop, Inc.*, No. 06-CV-6504, 2008 WL 427964 (E.D.N.Y. Feb. 15, 2008) (awaiting trial on Sept. 2, 2008); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369 (E.D.N.Y. 2007).

38. John Sullivan, *Three More Gun Dealers Settle Suit*, N.Y. TIMES, Mar. 21, 2007, at B4. Because of legal restrictions on the use of federal crime-gun trace data, on which New York City's suit is based, it is unclear whether other cities could replicate this type of suit. *See* Timothy Lytton, *The Sting*, BOSTON GLOBE, Aug. 27, 2006, at D1.

39. This paragraph is drawn from Lytton, *supra* note 26, at 4.

40. *Id.*

41. *Id.*

42. WINDLE TURLEY & JAMES E. ROOKS, JR., FIREARMS LITIGATION 12 (1988).

43. *See, e.g.*, Susan DeFrancesco, *Children and Guns*, 19 PACE L. REV. 275, 278–84 (1999) (listing gun designs that could improve safety); Garen J. Wintemute, *The Future of Firearm Violence Prevention: Building on Success*, 282 JAMA 475, 476 (1999) (identifying changes in gun designs in the mid-1990s).

44. Wintemute, *supra* note 43, at 475–77.

45. For a recent survey of this public-health approach to gun violence, see generally DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH (2004).

46. WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW 101–02 (2003); TURLEY & ROOKS, *supra* note 42, at 12.

By framing gun violence as an industry problem, litigation has given gun-control proponents new rhetorical tools in public and legislative debates over gun-control policy.⁴⁷ Traditionally, gun-control debates have pitted concerns about public safety against gun-ownership rights. Lawsuits have allowed gun-control proponents to develop their own rhetoric of rights, arguing that gun litigation, regardless of its regulatory implications, is primarily an effort to vindicate plaintiffs' rights to compensation for their injuries.⁴⁸ By focusing attention on allegations of industry misconduct, litigation has also allowed gun-control proponents to portray their efforts as aimed at holding corporate wrongdoers accountable rather than limiting the rights of ordinary gun owners.⁴⁹ And finally, the epidemiological approach to gun violence employed by plaintiffs helps gun-control proponents recast gun control as an effort to eradicate a public-health problem rather than restrict gun ownership.⁵⁰

Litigation has also generated information relevant to regulating firearm design and gun-industry marketing practices. Discovery has uncovered that gun manufacturers are further along in developing safer gun designs than their public statements suggest. For example, in one case, plaintiffs obtained a "highly confidential" memorandum from gun manufacturer Colt concerning the development of a "smart gun" that would operate only if fired by an authorized user.⁵¹ The memorandum revealed that "Colt management has not wanted to tip its hand in terms of how close Colt is to launching its first 'Smart Gun' product."⁵² The memorandum explained that the "reasons Colt management has not kept the public informed with its recent exceptional progress, which may result in a quicker time to market," are a desire to avoid "the press, legislators, or plaintiff lawyers influencing the launch decision as Colt is testing and evaluating its first generation models," fear that other competitors might "start catching up if it is believed that [a] viable 'Smart Gun' were about to be released," and concern that \$20 to \$40 million of federal funding for research on smart-gun technology being sought by Colt could be threatened if press reports on Colt's progress led Congress to conclude "that further research dollars are not needed."⁵³

Litigation has also exposed gun-industry executives' awareness of how guns are diverted into illegal secondary markets and their resistance to

47. This paragraph draws on Lytton, *supra* note 6, at 164–66.

48. *Id.* at 165.

49. *Id.* at 164.

50. *Id.* at 165.

51. Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 4, at 271, 278–79 (citing Memorandum from Steven M. Sliwa, CEO and President, Colt Mfg. Co. to Zilkha Capital Partners, Zilkha Venture Partners, and iColt (June 28, 1999)).

52. *Id.* at 279.

53. *Id.*

reform. In one lawsuit, former high-ranking gun lobbyist Bob Ricker revealed the following in an affidavit:

The firearm industry . . . has long known that the diversion of firearms from legal channels of commerce to the illegal black market in California and elsewhere, occurs principally at the distributor/dealer level. Many of those firearms pass quickly from licensed dealers to juveniles and criminals through such avenues as straw sales, large-volume sales to gun traffickers and various other channels by corrupt dealers or distributors who go to great lengths to avoid detection by law enforcement authorities. Leaders in the industry have long known that greater industry action to prevent illegal transactions is possible and would curb the supply of firearms to the illegal market. However, until faced with a serious threat of civil liability for past conduct, leaders in the industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market and have sought to silence others within the industry who have advocated reform.⁵⁴

Ricker's affidavit goes on to provide detailed accounts of the techniques used by rogue dealers to enable the diversion of guns into the black market and the efforts of gun-industry executives to avoid taking any responsibility for the problem.⁵⁵

Litigation has generated policy-relevant information outside of the discovery process as well. In order to provide the evidentiary basis for tort claims, municipal plaintiffs Chicago; Detroit; Gary, Indiana; and New York City have run sting operations that exposed illegal sales practices among gun dealers.⁵⁶ Litigation has also provided occasion for experts to perform in-depth analysis of publicly available data on gun violence. Plaintiffs have presented expert testimony analyzing Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) crime-gun trace data, arguing that the "oversupply" of guns to dealers in Southern states with relatively liberal gun laws provides a source of guns that are illegally trafficked into Northern states with more stringent laws where they are used to commit crimes.⁵⁷

For many decades, gun control has appeared periodically on the policy agendas of local governments, state legislatures, and Congress. Litigation gave it added prominence. Ironically, it was gun-industry defendants and

54. Declaration of Robert A. Ricker in Support of Plaintiffs' Opposition to Defendant Manufacturers' Motion for Summary Judgment ¶ 8, *People v. Arcadia Mach. & Tool, Inc.*, No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003), *aff'd sub. nom. In re Firearm Cases*, 24 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005).

55. *Id.* ¶¶ 9–13.

56. Lytton, *supra* note 38; Allen Rostron, *Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 491–92 (2006) (reviewing *SUING THE GUN INDUSTRY*, *supra* note 4).

57. *E.g.*, *Hamilton v. Beretta*, 750 N.E.2d 1055, 1059–60 (N.Y. 2001); *see also* Lytton, *supra* note 26, at 9–10 (discussing *Hamilton*).

their allies who capitalized on this aspect of the litigation. They used the litigation as an opportunity to secure statutory immunity from tort liability, making the likelihood of additional government regulation of the gun industry even more remote.⁵⁸ Litigation also motivated successful efforts by the gun lobby to restrict the availability and use of federal crime-gun trace data compiled by the BATFE that served as the basis for many plaintiffs' claims. The Tiahrt Amendment, an appropriations rider first passed in 2003 and renewed each year since then,⁵⁹ prohibits the BATFE from publishing reports using the data, limits local-government access to the data, and prevents using the data as evidence in any legal proceeding not filed by the BATFE.⁶⁰

Although the litigation has been counterproductive in terms of promoting further government regulation of the gun industry, it has given the issues of gun safety and responsible marketing greater salience among policy makers within the industry. In the wake of the litigation, the industry has developed and adopted self-regulatory measures such as selling trigger locks with guns, distributing educational materials for children about gun safety, and conducting advertising campaigns denouncing straw purchases and other illegal sales practices.⁶¹

In some instances, gun litigation has filled gaps in preexisting regulatory schemes. For example, consider the case of mail-order gun kits.⁶² Federal law requires that those regularly in the business of selling guns obtain a federal firearms license,⁶³ conduct background checks on all buyers,⁶⁴ restrict out-of-state sales to other federal firearms licensees (FFLs),⁶⁵ and comply with federal, state, and local firearms laws.⁶⁶ In addition, the law requires that all guns carry a serial number on the frame or receiver of the gun in order to assist law enforcement in tracing the sales and ownership history of the gun if used in a crime.⁶⁷ One strategy for evading

58. Lytton, *supra* note 6, at 152.

59. See Andrew Taylor, *Lawmakers Block Access to Gun Sales Data*, WASHINGTONPOST.COM, July 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071201290.html> (describing the most recent failed attempt to eliminate the Tiahrt Amendment).

60. A more current version of the Amendment is codified at 18 U.S.C. § 923 note (Supp. V 2000).

61. See James Bennet, *Gun Makers Agree on Safety Locks*, N.Y. TIMES, Oct. 9, 1997, at A1 (discussing gun manufacturers' voluntary decisions to provide child-safety locks with handguns); National Shooting Sports Foundation (NSSF), Safety and Education, <http://www.nssf.org/safety/index.cfm?AoI=safety> (promoting the gun safety programs of the foundation). The National Shooting Sports Foundation is the trade association of the firearm industry. National Shooting Sports Foundation (NSSF), About, <http://www.nssf.org/about/nssf.cfm?AoI=generic>.

62. The discussion of gun kits draws on Lytton, *supra* note 30, at 252–54. The language in this paragraph appears in *id.* at 252.

63. 18 U.S.C. § 923(a).

64. *Id.* § 922(s).

65. *Id.* § 922(a)(2).

66. *Id.* § 923(d)(1).

67. 26 U.S.C. § 5842(a) (2000).

these regulations is to sell guns disassembled in the form of parts kits, since the regulations apply to firearms but not to firearm parts.

Just such a scheme gave rise to the case of *Halberstam v. S.W. Daniel, Inc.*⁶⁸ The defendant gun manufacturer in that case sold its semiautomatic pistol in the form of a mail-order parts kit.⁶⁹ While the statutory definition of a firearm includes “any combination of parts from which a firearm . . . can be assembled,”⁷⁰ the defendants’ gun kits included all the necessary parts except the frame.⁷¹ The kits did, however, include sheet-metal flats that, when folded, were designed to serve as frames.⁷² The defendants sold their guns to out-of-state purchasers who were not FFLs⁷³—they took phone orders, provided postal delivery, gave discounts for bulk purchases, made no request for any information other than that required for payment and shipping, and failed to keep any sales records.⁷⁴ Furthermore, they avoided having to place serial numbers on their guns since the unmarked sheet-metal flats did not constitute frames until folded.⁷⁵ The defendants subsequently testified that they did not care who purchased their weapons.⁷⁶ One of their guns was used in a shooting, and a number of the victims brought suit against the company.⁷⁷ The plaintiffs alleged that, while technically legal, the defendants’ marketing practices were negligent insofar as the defendants failed to exercise reasonable care to prevent acquisition of their guns by individuals with a high propensity for criminal misuse.⁷⁸ The plaintiffs’ claim ultimately made it to trial, where a jury agreed that the defendants’ marketing practices were negligent but found that they were not a substantial factor in causing the plaintiffs’ injuries.⁷⁹ While the *Halberstam* plaintiffs’ claim ultimately foundered on the issue of causation,⁸⁰ the lawsuit put an end to the defendants’ practice of selling guns free from federal regulations by disassembling them into gun kits.⁸¹ It has also put other manufacturers on notice that such sales practices may be considered negligence for which they

68. No. 95-3323 (E.D.N.Y. Apr. 1, 1998) (on file with author). For a detailed analysis of this unreported case, see generally Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998).

69. Lytton, *supra* note 68, at 686.

70. 18 U.S.C. § 921(a)(29)(B).

71. Lytton, *supra* note 30, at 252.

72. Lytton, *supra* note 68, at 695.

73. Lytton, *supra* note 30, at 252.

74. Lytton, *supra* note 68, at 695.

75. *Id.* at 695 & n.78.

76. *Id.* at 695.

77. *Id.* at 687.

78. *Id.*

79. *Id.* at 697–98. At trial, the defendants produced an affidavit and a deposition by the criminal assailant in which he stated that he had purchased the gun from someone on the street and that he had never had any business dealings with the defendants. *Id.* at 696.

80. Lytton, *supra* note 30, at 253.

81. Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1272 (2000).

could be held liable where there is a close connection between the sale and misuse of a gun.⁸²

The threat of tort liability can provide individuals and corporations with a powerful incentive to comply with regulations where enforcement resources are limited.⁸³ For example, each year the BATFE is able to inspect only a fraction of the tens of thousands of licensed gun dealers, and the agency is limited by statute to one unannounced audit of a dealer in any given year.⁸⁴ Tort liability based on violation of federal sales regulations provides an added incentive for dealers to comply with the law, even if they are unlikely to be inspected by the BATFE.

Because tort litigation is for the most part a matter of state law, regulation through litigation is a decentralized approach to regulation.⁸⁵ One advantage of a decentralized approach to regulation is that it provides opportunities to test different regulatory strategies in different jurisdictions⁸⁶—for states to serve as “laboratories” for policy innovation.⁸⁷ The major disadvantages are lack of accountability, uniformity, predictability, and federal agency expertise.⁸⁸ Gun regulation has traditionally been a mix of national mandates and state and local measures. By focusing attention on gun designs and gun-industry marketing practices and by generating new policy-relevant information, gun litigation has contributed to state and local policy experimentation.⁸⁹

B. Clergy-Sexual-Abuse Litigation

Clergy-sexual-abuse litigation includes thousands of lawsuits across the country, spanning more than twenty years from the mid-1980s to the present. I will focus here on three cases that each played a significant role within the

82. See Lytton, *supra* note 68, at 705 (“In exceptional cases, *selling* firearms may be considered a substantial factor in bringing about injuries resulting from criminal misuse of a gun.”). The practice of selling gun kits has not entirely ceased. The author found an AR15 rifle kit for Internet auction on BuySellGuns.com on September 21, 2007.

83. This discussion of enforcement draws on Lytton, *supra* note 30, at 263–64.

84. *Id.* at 263.

85. This discussion of federalism draws on *id.* at 264.

86. *Id.*

87. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

88. Lytton, *supra* note 30, at 264; see also PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 363–64 (2000) (discussing reasons why common law policy making can be problematic).

89. See Lytton, *supra* note 30, at 262–64, 269 (explaining how the information acquired by gun-litigation plaintiffs during discovery can serve to enhance legislative regulation and administrative oversight of the industry); SCHUCK, *supra* note 88, at 364–65 (emphasizing the innovation in policy that may result from tort litigation).

history of clergy-sexual-abuse litigation and can be used to illustrate the influence of this litigation on policy making.⁹⁰

In the summer of 1983, it came to light that Father Gilbert Gauthé had sexually abused dozens of children in a small parish near Lafayette, Louisiana, where he served as the local priest.⁹¹ One family, the Gastals, refused the diocese's offer of a confidential settlement and, in 1984, filed suit against Gauthé and his superiors.⁹² Alleging theories of respondeat superior and negligent supervision, the Gastals won a \$1.25 million verdict against the diocese.⁹³ The diocese appealed, and the parties eventually settled for \$1 million.⁹⁴

Prior to the Gauthé case, incidents of clergy sexual abuse were viewed as rare and isolated occurrences, and they attracted limited local press coverage or, more often, no press coverage at all. The Gastals' civil suit against Gauthé and the Diocese of Lafayette was the first case of clergy sexual abuse to attract national attention, and in conjunction with concurrent cases around the country, it created the impression of a pervasive, nationwide problem. The Gauthé litigation inspired victims around the country to come forward and, in increasing numbers, to file lawsuits.⁹⁵ It also caught the attention of bishops around the country, who began for the first time as a group to discuss the problem and explore ways to address it.⁹⁶

In 1992, the Diocese of Fall River, Massachusetts settled claims of sexual abuse by Father James Porter with sixty-eight victims for an undisclosed sum—reported in the *Boston Globe* as “at least \$5 million.”⁹⁷ This was, to date, the largest group settlement of sexual-abuse claims against the Church.⁹⁸ But this was not the end of the story. The diocese

90. The following discussion of the Gauthé, Porter, and Geoghan cases draws on Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809, 815–17, 823 (2007) [hereinafter Lytton, *Clergy Sexual Abuse*]. The language in the next nine paragraphs appears in *id.* For a more complete history, see generally LYTTON, *supra* note 12, at 13–41; LEON J. PODLES, *SACRILEGE: SEXUAL ABUSE IN THE CATHOLIC CHURCH* (2007) (providing a history of clergy sexual abuse).

91. See JASON BERRY, *LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN* 14–15, 18, 25–26 (1992) (detailing the events in which Gauthé's sexual abuse came to light).

92. *Id.* at 23–26.

93. Petition for Damages ¶¶ 21–22, *Gastal v. Hannan*, No. 84-48175 (La. 15th Dist. June 27, 1984) (on file with author); see also Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 815 (discussing *id.*).

94. BERRY, *supra* note 91, at 168. For a detailed account of the case, see generally *id.* at 148–68; J. MINOS SIMON, *LAW IN THE CAJUN NATION* 134–63 (1993).

95. Evidence of increased litigation following the Gauthé case is largely anecdotal and based on interviews with plaintiffs' attorneys and victim advocates. See LYTTON, *supra* note 12, at 14–19) (discussing the “first wave” of sexual abuse lawsuits against the Catholic Church). For limited aggregate data suggesting an increase in litigation during this period, see *id.* at 49–54.

96. *Id.* at 14–17.

97. Stephen Kurkjian, *68 Victims Settle Porter Case with Catholic Church*, BOSTON GLOBE, Dec. 4, 1992, at 1.

98. *Id.*

subsequently settled another thirty-three claims for undisclosed sums.⁹⁹ The total number of Porter's victims is estimated at well over 100—some put the total closer to 200—abused over a fourteen-year period from 1960–1974, in five parish assignments in Massachusetts, Minnesota, New Mexico, and Texas.¹⁰⁰

The Porter case attracted widespread media attention, led to a dramatic increase in the number of victims willing to come forward, and stimulated further litigation against the Church. Parallels with the Gauthé case were inescapable. The Porter case fueled perceptions among victims and plaintiffs' attorneys of an organized conspiracy among the bishops to protect child molesters and to conceal the widespread problem of clergy sexual abuse within the Church.¹⁰¹ For their part, Church officials pledged to formulate more effective policies to prevent child sexual abuse by clergy and to respond more openly when it occurred.¹⁰²

In 2002, litigation against the Boston archdiocese for sexual abuse committed by Father John Geoghan became a symbol for the clergy-sexual-abuse scandal. The archdiocese had quietly settled the claims of over fifty of Geoghan's victims in the late 1990s for over \$10 million,¹⁰³ and in 2002, it entered into a highly publicized settlement with an additional eighty-six victims for another \$10 million.¹⁰⁴

What distinguished the Geoghan case from its predecessors was the astounding scope of the abuse and the cover-up. In the end, 200 Geoghan victims, molested over a thirty-three year period, filed claims, and experts estimate that the total number of Geoghan's victims could be as high as 800.¹⁰⁵ Diocesan personnel files show that Church officials were aware of Geoghan's misconduct, failed to report it or notify parishioners, and repeatedly reassigned him to positions where he would have access to children.¹⁰⁶ The cover-up implicated no less than six bishops and ultimately forced Cardinal Bernard Law, the highly influential Archbishop of Boston, to step down and seek refuge in Rome.¹⁰⁷ The wave of litigation initiated by the Geoghan affair turned out to be a tidal wave that swept the country from Boston to Los Angeles.

99. Survivor Connections, Chronology: Frank Fitzpatrick vs. Father Porter, <http://www.Survivorconnections.net/flfvsporter.html>.

100. These and other details of the case can be found in ELINOR BURKETT & FRANK BRUNI, *A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH* 8–24 (1993).

101. LYTTON, *supra* note 12, at 25.

102. *Id.* at 24–25.

103. Michael Rezendesz, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A1.

104. Walter V. Robinson & Michael Rezendesz, *Geoghan Victims Agree to \$10M Settlement*, BOSTON GLOBE, Sept. 19, 2002, at A1.

105. INVESTIGATIVE STAFF, BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* 6, 14–16, 27 (2002) [hereinafter *BETRAYAL*].

106. *Id.* at 3, 14, 23, 26.

107. *Id.* at viii, x, 3, 14, 22, 24, 205–06.

Litigation played a major role in framing clergy sexual abuse as an institutional failure on the part of Catholic Church officials rather than merely a problem of individual priests. The Gastals' complaint in the Gauthé case named well-known Church officials and institutions. While the complaint included allegations against Father Gauthé himself, the most detailed allegations were against Church officials, whom the plaintiffs asserted "made possible" the abuse by Gauthé by failing to remove him from ministry or inform parishioners even after the officials knew of his repeated sexual abuse of children.¹⁰⁸ The plaintiffs further alleged that "[C]hurch officials made a studied effort to conceal and withhold . . . information concerning Gauthé's misconduct from members and families of the [C]hurch," and that Church officials, "having full knowledge . . . of his tendencies to sexually abuse young children," moved him from one parish to another.¹⁰⁹ In doing so, the complaint concluded that Church officials "knowingly created an environment which operated to maximize opportunities for Gauthé to further wantonly sexually abuse innocent young children."¹¹⁰ The complaint also referred to Church officials as "corporate officers," suggesting corporate wrongdoing and cover-up.¹¹¹

Early local press coverage of the case, relying heavily on the complaint and interviews with the plaintiffs' attorney, adopted this frame of institutional responsibility, as did subsequent regional and national press coverage.¹¹² This pattern was repeated and magnified in the Porter and Geoghan cases.¹¹³ As the scandal developed, some blamed it on a few "bad apples" within the priesthood, tolerance for homosexuality in the Church, anti-Catholic bias in the media, or money-hungry plaintiffs' lawyers.¹¹⁴ The frame of institutional responsibility, however, has predominated in press coverage and popular opinion.¹¹⁵ Even Church officials, in their public comments, have often framed the issue in terms of institutional responsibility.¹¹⁶

Litigation has also generated information about clergy sexual abuse within the Church. Discovery has uncovered and made public the identities of individual abusers as well as techniques used by Church officials to

108. Petition for Damages, *supra* note 93, ¶ 23.

109. First Supplemental and Amended Petition ¶ 5, *Gastal v. Hannan*, No. 84-48175-A (La. 15th Dist. Oct. 25, 1984) (on file with author).

110. *Id.*

111. Petition for Damages, *supra* note 93, ¶ 23(1)-(m).

112. See Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 824-28 (describing press coverage of the Gauthé case).

113. See *id.* at 821-31 (describing press coverage of the Porter and Geoghan cases).

114. *Id.* at 830, 845.

115. *Id.* at 832.

116. See *id.* at 872-75 (describing public comments from Church officials acknowledging the institutional responsibility of the Church for clergy sexual abuse). For extensive evidence of these framing effects of clergy-sexual-abuse litigation, see generally LYTTON, *supra* note 12, at 91-107.

conceal this information—such as keeping records related to abuse in secret files mandated by canon law or invoking the doctrine of mental reservation to justify incomplete or misleading answers in depositions.¹¹⁷ Publicity surrounding litigation has also encouraged many victims to come forward for the first time with allegations of abuse.¹¹⁸

Beyond discovery, litigation has also prompted Church officials, law enforcement, and activists to investigate and publish reports on clergy sexual abuse. Public concern, especially among Catholics, raised by the Geoghan case and the subsequent wave of litigation, led the U.S. Conference of Catholic Bishops (USCCB) in 2002 to commission the most comprehensive study to date of clergy sexual abuse within the Catholic Church. The study, entitled *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002*, examines the prevalence of clergy sexual abuse in the Catholic Church, the demographics of perpetrators and victims, the types and circumstances of abuse, responses to the abuse by Church and civil authorities, and the financial costs of claims against the Church.¹¹⁹ The study's findings are based on survey responses from diocesan officials, and they represent a significant disclosure of information contained in diocesan files and secret archives.¹²⁰ The report also includes an extensive literature review and annotated bibliography of child sexual abuse.¹²¹ In addition, individual bishops around the country have launched internal investigations and issued their own reports with regular updates on clergy sexual abuse within their dioceses.¹²²

Litigation has also prompted grand jury and state-attorney-general investigations into clergy sexual abuse that have produced extensive local reports on clergy sexual abuse. For example, in the wake of the Geoghan

117. *See id.* at 147–52 (outlining the various techniques used by the church to frustrate discovery).

118. *See, e.g., id.* at 25 (discussing how the Porter case led many new victims to come forward).

119. JOHN JAY COLL. OF CRIMINAL JUSTICE, *THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002* (2004) [hereinafter JAY STUDY]. For a summary and analysis of this report's findings, see generally LYTTON, *supra* note 12, at 42–54.

120. JAY STUDY, *supra* note 119, at 13–14.

121. *Id.* at 153–285.

122. *See, e.g.,* ARCHDIOCESE OF CHICAGO, *TEN YEAR REPORT ON CLERICAL SEXUAL ABUSE OF MINORS IN THE ARCHDIOCESE OF CHICAGO JANUARY 1, 1993–JANUARY 16, 2003* (2003), available at http://www.archchicago.org/pdf/ten_year_report.pdf; ARCHDIOCESE OF LOS ANGELES, *REPORT TO THE PEOPLE OF GOD: CLERGY SEXUAL ABUSE, ARCHDIOCESE OF LOS ANGELES 1930–2003* (2004), available at <http://www.bishop-accountability.org/usccb/natureandscope/dioceses/reports/losangelesca-rpt.pdf>; ARCHDIOCESE OF LOS ANGELES, *ADDENDUM TO THE REPORT TO THE PEOPLE OF GOD* (2005), available at <http://www.archdiocese.la/protecting/pdf/Addendum-11-15-05.pdf>; Statement of Archbishop Sean P. O'Malley, *Regarding Clergy Sexual Abuse in the Archdiocese of Boston from 1950–2003* (Feb. 26, 2004), available at <http://www.rcab.org/News/releases/2004/statement040226.html>; Press Release, U.S. Conference of Catholic Bishops, *USCCB Efforts to Combat Clergy Sexual Abuse Against Minors: A Chronology 1982–2006*, available at <http://www.usccb.org/comm/combatefforts.shtml>.

case, Massachusetts attorney general Thomas Reilly conducted an investigation and published a report on clergy sexual abuse within the Boston archdiocese.¹²³ One of the report's chief findings was that "[w]idespread sexual abuse of children was due to an institutional acceptance of abuse and a massive and pervasive failure of leadership."¹²⁴

Litigation has promoted the generation of information not only among bishops and government officials but also by victims, lawyers, and activists who were mobilized by the litigation. These groups have collected and organized vast amounts of existing information and made it publicly accessible on the Internet. For example, the BishopAccountability.org Web site contains over 25,000 news articles, thousands of documents from diocesan archives, twenty-five reports, and its own database of over 3,000 accused priests and other Church personnel, searchable by name, diocese, and state.¹²⁵

Litigation placed clergy sexual abuse on the policy agendas of Church and government policy makers.¹²⁶ In response to the Gauthé case and the growing revelation of a nationwide problem, the National Council of Catholic Bishops (NCCB) (a precursor organization to the USCCB) dedicated an executive session at its June 1985 meeting to examine the psychological, legal, and moral aspects of clergy sexual abuse within the Church.¹²⁷ The bishops also considered nonbinding recommendations for how individual dioceses could best respond to the problem, and they charged the Committee on Priestly Life & Ministry to undertake further consideration of the matter.¹²⁸ Following the meeting, NCCB staff conducted research on

123. THOMAS F. REILLY, OFFICE OF THE ATT'Y GEN., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON (2003), available at <http://www.bishop-accountability.org/resources/resource-files/reports/ReillyReport.pdf>.

124. *Id.* at 25 (emphasis omitted). Other findings included that Church officials: (1) "knew the extent of the clergy-sexual-abuse problem for many years before it became known to the public," (2) "did not notify law enforcement authorities of clergy sexual abuse allegations," (3) "did not provide all relevant information to law enforcement authorities during criminal investigations," (4) "failed to conduct thorough investigations of clergy sexual abuse allegations," (5) "placed children at risk by transferring abusive priests to other parishes," (6) "placed children at risk by accepting abusive priests from other dioceses," and (7) "failed to adequately supervise priests known to have sexually abused children." *Id.* at i-ii (emphasis omitted).

125. BishopAccountability.org, Catholic Priest Sex Abuse Archive, <http://www.bishop-accountability.org>. For an extensive review of the information generated by clergy-sexual-abuse litigation, see LYTTON, *supra* note 12, at 158-60.

126. These three paragraphs draw on LYTTON, *supra* note 12, at 125-26. The information in this paragraph relies on detailed accounts in BERRY, *supra* note 91, at 96-102, 110-12; JASON BERRY & GERALD RENNER, VOWS OF SILENCE: THE ABUSE OF POWER IN THE PAPACY OF JOHN PAUL II, at 48 (2004); BETRAYAL, *supra* note 105, at 39; BURKETT & BRUNI, *supra* note 100, at 164, 173; DAVID FRANCE, OUR FATHERS: THE SECRET LIFE OF THE CATHOLIC CHURCH IN AN AGE OF SCANDAL 230 (2004); Interview with Mark E. Chopko, General Counsel, U.S. Conference of Catholic Bishops (Mar. 22, 2006) (on file with author); Press Release, U.S. Conference of Catholic Bishops, *supra* note 122.

127. Press Release, U.S. Conference of Catholic Bishops, *supra* note 122.

128. *Id.*; see also Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 863.

the spread of litigation, addressing clergy sexual abuse around the country. NCCB staff also helped dioceses develop training programs to prevent child abuse, policies for reporting it, and protocols for assisting victims and their families.¹²⁹ Some individual bishops took it upon themselves to investigate abuse in their own dioceses, issue reports, and create new procedures for dealing with claims.¹³⁰

The Porter case in 1992 put the issue of clergy sexual abuse back at the top of the NCCB's agenda. At their June meeting that year, the bishops dedicated most of their eight-hour closed executive session to the question of whether priests who had sexually abused children should be allowed to return to ministry.¹³¹ At their November meeting later that year, the bishops formally endorsed a nonbinding set of principles to guide bishops' responses to clergy sexual abuse.¹³² A year later, at their June 1993 meeting, the bishops issued public statements of remorse, created an ad hoc subcommittee on sexual abuse, and adopted a brief nonbinding resolution pledging an "appropriate and effective" response to the problem.¹³³ As in the wake of the 1985 Collegette meeting, the issue continued to receive attention in committees and individual dioceses.¹³⁴

If clergy sexual abuse first appeared on the NCCB agenda in 1985 and rose to the top of it in 1992 and 1993, it is fair to say that it completely dominated the bishops' agenda in 2002. The Geoghan case and its aftermath concerned the bishops throughout the year. In fact, the only item on the agenda for the June 2002 meeting in Dallas was clergy sex abuse.¹³⁵ After highly publicized proceedings, the bishops adopted a *Charter for the Protection of Children & Young People*, a binding policy that proclaimed "zero tolerance" for clergy sexual abuse within the Church.¹³⁶ The Charter created lay review boards in each diocese to assess claims and make recommendations to the bishop; a National Review Board charged with overseeing compliance with the policy and commissioning a comprehensive

129. *Id.*

130. BURKETT & BRUNI, *supra* note 100, at 173.

131. *Id.* at 173–74.

132. See STEPHEN J. ROSSETTI, *A TRAGIC GRACE: THE CATHOLIC CHURCH AND CHILD SEXUAL ABUSE* 14 (1996) (discussing the November meeting of bishops); Harry J. Flynn, *Dallas and Beyond: Perspectives of a Bishop and Pastor*, in *SEXUAL ABUSE IN THE CATHOLIC CHURCH: TRUSTING THE CLERGY?* 13, 15 (Marie M. Fortune & W. Merle Longwood eds., 2003) (outlining the five principles that were proposed by the meeting of bishops).

133. FRANCE, *supra* note 126, at 230–31.

134. See PETER STEINFELS, *A PEOPLE ADRIFT: THE CRISIS OF THE ROMAN CATHOLIC CHURCH IN AMERICA* 50–52, 56–61 (2003) (detailing the committee approach taken by the Catholic Church in its response to the clergy-sexual-abuse scandals of the early 1990s); Flynn, *supra* note 132, at 15–17 (“[D]uring the years when most national media found little interest in the issue of sexual abuse of minors by clergy, dioceses were continuing to confront this problem . . .”).

135. See FRANCE, *supra* note 126, at 362.

136. See Raymond O’Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 408–09 (2004) (discussing the adoption of the Charter and its “goal of zero-tolerance”).

study of the problem; and an Office of Child and Youth Protection to assist with implementation of the policy.¹³⁷ Subsequent revisions to the Charter and Norms demanded by the Vatican, ongoing debate over its provisions and implementation, and publication of the comprehensive study have maintained clergy sexual abuse on the USCCB's agenda.¹³⁸ Individual bishops in their dioceses have also implemented additional reforms.¹³⁹

Litigation also placed clergy sexual abuse on the agendas of law enforcement officials.¹⁴⁰ Tort litigation against the Church and the public concern it generated increased efforts to investigate and prosecute clergy sexual abuse.¹⁴¹ Of course, it would be a gross overstatement to suggest that in all cases civil litigation was responsible for increased investigation and prosecution. Indeed, in some cases, secrecy agreements in civil settlements proved to be a hindrance to enforcement and prosecution. Nevertheless, there is evidence that civil litigation placed clergy sexual abuse on the agendas of many law enforcement officers and agencies.¹⁴²

Accounts of high-profile cases offer anecdotal evidence that tort litigation increased criminal investigation and prosecution of clergy sexual abuse. For example, the plaintiffs' attorney in the Gauthé case, J. Minos Simon, suggests that District Attorney Nathan Stansbury was reluctant to prosecute Gauthé, and that press coverage of the civil suits provided the pressure, or at least the cover, necessary to proceed against the Church.¹⁴³ In the Porter case, plaintiffs' attorney Eric MacLeish's use of the press, without even filing a formal complaint, provided essential pressure for prosecution of James Porter by the local district attorney.¹⁴⁴ Having been rebuffed by the district attorney more than once, several Porter victims came to MacLeish, who helped them attract media coverage of their story in leading media

137. *Id.* at 423–28.

138. *Id.* at 408–46.

139. See *A Look at the Impact of the Roman Catholic Sex Abuse Scandal on the States*, BOSTONGLOBE.COM, Apr. 27, 2002, http://www.boston.com/news/daily/27/church_abuse_glance.htm (detailing incidents and responses in the fifty states); see also, e.g., DIOCESE OF MANCHESTER, DIOCESAN TASK FORCE ON SEXUAL MISCONDUCT POLICY: REPORT TO THE BISHOP OF MANCHESTER (2003), available at <http://www.bishop-accountability.org/resources/resource-files/reports/ManchesterTaskForceReport.pdf> (making recommendations on reforming the diocese's sexual-misconduct policy).

140. These two paragraphs draw on Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 867–68. The language in this particular paragraph appears in *id.* at 867.

141. *Id.*

142. *Id.*

143. See SIMON, *supra* note 94, at 137, 141 (describing Stansbury's desire to preserve the established order of things and his failure to allow a grand jury to review the evidence until after Simon's clients went public and news reports appeared). But see BERRY, *supra* note 91, at 20, 25, 49–50, 118–19, 121–24 (portraying Stansbury as pursuing a prompt and vigorous prosecution based on his own desire to see Gauthé punished for his crimes).

144. The rest of this paragraph relies on FRANCE, *supra* note 126, at 208–11, 215, and BURKETT & BRUNI, *supra* note 100, at 13–17. Language in this paragraph appears in Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 868.

venues such as the *New York Times*, *Newsweek*, *People*, *Primetime Live*, *60 Minutes*, *Geraldo*, *The Oprah Winfrey Show*, *The Phil Donahue Show*, and *Sally Jessy Raphael*.¹⁴⁵ With an entourage of press, the victims then filed a complaint with the local police.¹⁴⁶ Ten days later, the district attorney launched an investigation that eventually culminated in the prosecution and conviction of Porter.¹⁴⁷ The Geoghan litigation, as we have seen, prompted grand jury and state-attorney-general investigations. Civil litigation and the public outrage it sparked eroded law enforcement officials' traditional reluctance to offend local Church officials and led to the criminal investigations and prosecutions.¹⁴⁸

Litigation has also prompted state legislatures to fill perceived gaps in laws aimed at protecting children from sexual abuse and punishing those responsible. State legislatures have taken up proposals to extend or eliminate statutes of limitation for child sexual abuse, remove clergy exemptions to mandatory child-abuse-reporting laws, create child-endangerment provisions that would make diocesan supervisors criminally liable for assigning known abusers to positions where they will have access to children, and remove civil damage caps for charitable organizations in cases of sexual abuse.¹⁴⁹ While some of these proposals have fared better than others, they are powerful evidence that clergy abuse was placed on state legislative agendas in response to the wave of media coverage and public concern in 2002 following the Geoghan case.

Litigation has encouraged self-regulation by Church officials, prompting new policies aimed at preventing abuse before it occurs and reporting it after it happens. These policies have been developing over time, starting with responses to the Gauthier case in 1985 and culminating in the 2002 Dallas Charter.¹⁵⁰ The Charter requires all dioceses to establish "safe environment" programs designed to educate children, parents, clergy, educators, and volunteers about child sexual abuse.¹⁵¹ A 2005 USCCB audit found that 90% of dioceses had established safe-environment programs and had trained over 7 million people, including 5.7 million children.¹⁵² In

145. Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 868.

146. BURKETT & BRUNI, *supra* note 100, at 14–15.

147. *Id.* at 15.

148. PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CRISIS* 36, 48 (1996).

149. See, e.g., Jesse Belcher-Timme, Note, *Unholy Acts: The Clergy Sex Scandal in Massachusetts and the Legislative Response*, 30 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 243, 270–72 (2004) (describing various state policy initiatives designed to prevent future clergy sexual abuse). For a more detailed discussion, see LYTTON, *supra* note 12, at 132.

150. U.S. CONFERENCE OF CATHOLIC BISHOPS, *CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE* (2002), available at http://www.usccb.org/bishops/charter_final.pdf.

151. *Id.* at 15.

152. U.S. CONFERENCE OF CATHOLIC BISHOPS, *REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE* 17–19 (2006), available at <http://www.usccb.org/ocyp/OCYPREPORT.pdf>. For a more extensive analysis of the Church's internal efforts to respond to clergy sexual abuse, see LYTTON, *supra* note 12, at 172–76.

addition to safe-environment programs, litigation has prompted the bishops and the Vatican to exclude candidates for the priesthood whom they believe pose a high risk of committing child sexual abuse. In June 2005, the bishops adopted revised guidelines on priestly formation that exclude seminary applicants with any history of sexual abuse of minors, require close attention to a candidate's past, and emphasize the need to foster a strong commitment to celibacy.¹⁵³

Litigation and the policy responses to it have given rise to a variety of different approaches to addressing clergy sexual abuse. This decentralization is a good example of the virtues of federalism, enabling dioceses to experiment with different prevention and treatment programs, and states to implement different reform measures such as extending or suspending statutes of limitation or eliminating mandatory reporting exclusions. The opportunity to test out these approaches and compare them across jurisdictions is likely to generate important insights in the search for the most effective means of addressing child sexual abuse within religious as well as secular institutions.

IV. The Conditions That Favor Regulation Through Litigation

So far, I have highlighted the positive impact of gun-industry and clergy-sexual-abuse litigation on policy making in terms of framing, information generation, agenda setting, gap-filling, encouraging self-regulation, and federalism. I do not, however, wish to overstate the case for regulation through litigation. Like all policy tools, litigation works better in some contexts than in others. By comparing the results of gun-industry and clergy-sexual-abuse litigation—taking into account both their shortcomings and their achievements—we can identify several conditions that favor the use of litigation as a policy tool.

Consider first the results of gun litigation. While gun litigation reinforced the framing of gun violence as an industry problem best addressed through safety improvements in gun design and marketing restrictions, public-health advocates had been promoting that frame for many years before the first lawsuits were filed in the early 1980s.¹⁵⁴ Moreover, public discussion of government regulation of gun designs dates back at least to 1972 when Congress explicitly exempted gun designs from federal regulation by the Consumer Products Safety Administration,¹⁵⁵ and federal efforts to address gun violence through marketing restrictions date back even further to

153. Jerry Filteau, *New, Stricter Priestly Formation Program Issued for U.S. Catholic Seminaries*, CATHOLIC ONLINE, Aug. 29, 2006, http://www.catholic.org/national/national_story.php?id=21058.

154. See *supra* notes 40–46 and accompanying text.

155. See Pub. L. No. 92-573, § 3, 86 Stat. 1208 (1972) (codified as amended at 15 U.S.C. § 2052(a)(1)(E) (2000)) (excluding firearms and ammunition from the definition of the term “consumer product”).

a 1927 law prohibiting the sale of handguns through the mail,¹⁵⁶ followed by the National Firearms Act of 1934¹⁵⁷ and the Federal Firearms Act of 1938.¹⁵⁸ While litigation emphasized themes of victim's rights, corporate misconduct, and public health in the framing of gun violence, these themes have hardly eclipsed the powerful Second Amendment and self-defense rhetoric of gun-rights advocates. If anything, gun litigation has coincided with increasing interest in the question of whether the Second Amendment guarantees an individual right to own a gun.¹⁵⁹ The rhetoric of gun rights featured prominently in successful gun-lobby efforts to obtain statutory immunity from tort liability in state legislatures and Congress.¹⁶⁰ Litigation has done little to deflate the role of Second Amendment rhetoric in gun-control debates, and it may well have helped to draw attention to it.

One should also be careful not to overstate the importance of information uncovered by the litigation. While the Colt smart-gun memorandum revealed that the company failed to disclose just how far along it was in developing a smart gun, it also showed that the company was eager to design one and capitalize on the market for it.¹⁶¹ Colt can hardly be blamed for conducting product research and development in a way designed to maintain its competitive advantage and maximize the return on its investment. The Ricker affidavit suggests at most that gun-industry executives knew of and did nothing to prevent irresponsible sales practices farther down the distribution chain and that they knowingly profited from these practices.¹⁶² While this information is significant, it is hardly a smoking gun that establishes a manufacturer conspiracy to promote gun trafficking. It shows instead complicity, which is no big surprise to gun-control advocates, regulators, or policy makers.¹⁶³

As for the agenda-setting effects of gun litigation, opponents of regulation capitalized more effectively on this aspect of the litigation than did advocates of safer gun designs and stricter marketing restrictions. Securing legislative immunity from tort liability was a major victory for the gun lobby. In the legislative arena, litigation was largely counterproductive.

156. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059 (codified as amended at 18 U.S.C. § 1715 (2000)).

157. 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2000)).

158. 52 Stat. 1250 (1938) (repealed 1968).

159. John Gibeaut, *A Shot at the Second Amendment*, A.B.A. J., Nov. 2007, at 50, 50.

160. See, e.g., Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(a)(1)–(2), 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. § 7901) (stating in Congressional findings that “[t]he Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms”).

161. See *supra* notes 51–53 and accompanying text.

162. See *supra* notes 54–55 and accompanying text.

163. See Wagner, *supra* note 51, at 285–86 (describing the lack of “smoking gun” evidence in gun litigation). *But see* Rostron, *supra* note 56, at 489–93 (noting that “significant incriminating evidence” has begun to emerge through the course of gun litigation).

While the *Halberstam* case appears to have been a successful means of filling in the statutory gap that allowed for unrestricted sales of gun kits,¹⁶⁴ plaintiffs in other cases have sought to expand gun regulation in ways that would contradict the explicit will of the legislature. For example, plaintiffs have sought injunctions or pursued settlements that would limit individuals to one gun purchase per month in states whose legislatures have considered and rejected such proposals.¹⁶⁵ Pursuing litigation as a way to overcome legislative rejection of regulatory measures creates competition rather than complementarity between tort litigation and the legislative process.

Similar competition can be seen in gun litigation's effect on enforcement of existing regulations.¹⁶⁶ While the threat of liability promotes compliance with existing sales regulations among gun dealers, at the same it undermines time an explicit congressional mandate that those regulations not be enforced aggressively. For example, New York City's recent lawsuits against out-of-state gun dealers are based on a sting operation conducted by a private firm paid by the City that documented illegal sales practices by the dealers.¹⁶⁷ Several of the dealers have settled with the City, agreeing to supervision of their sales practices by a court-appointed special master chosen and paid for by the City.¹⁶⁸ The special master will be given unrestricted access to the dealers' records and inventory and will be empowered to conduct ongoing surveillance.¹⁶⁹ The litigation, explained Mayor Michael Bloomberg, was designed to send a message to rogue dealers that even if they stand little chance of getting caught by law enforcement, they could be subject to civil suit for violations of federal law.¹⁷⁰ The success of the New York City gun-dealer lawsuits should be viewed against the backdrop of the federal Firearms Owners Protection Act of 1986¹⁷¹ (FOPA), which significantly restricts the powers of the BATFE to enforce federal gun laws because gun-rights advocates were concerned that the bureau was using its powers to harass dealers.¹⁷² FOPA was the product of a seven-year legislative battle in Congress and the result of sustained consideration, debate, and compromise.¹⁷³ New York City's gun-dealer lawsuit is designed to replace the federal government's scheme of limited

164. See *supra* notes 68–82 and accompanying text.

165. Lytton, *supra* note 30, at 260–61.

166. This paragraph and the next draw on Lytton, *supra* note 38.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. §§ 921–930 (2000)).

172. See David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 606 n.118 (1986–1987) (detailing numerous Senate hearings on abuses of enforcement powers by the BATFE).

173. *Id.* at 585.

enforcement with one of vigorous enforcement—paid for by the City of New York and enforced by a federal judge.¹⁷⁴

Finally, federalism in gun policy has led not only to local experimentation but also to a measure of local conflict. For example, Chicago's lawsuit against the gun industry was based on allegations that legal gun sales in surrounding suburbs to Chicago residents undermined the City's gun ban and resulted in gun violence, which the City characterized as a public nuisance.¹⁷⁵ The City demanded injunctive relief in the form of marketing restrictions on suburban dealers designed to limit the flow of guns into the city.¹⁷⁶ Just as the suburban governments' desire to permit easy access to guns undermined the City's ban, the City's suit, had it been successful, would have imposed the City's more stringent gun-control regulations on the surrounding suburban governments.

By contrast, clergy-sexual-abuse litigation appears to have had a greater impact and more positive influence on policy making. While plaintiffs may not have been the first to frame clergy sexual abuse as an institutional problem, they were to the first to demand publicly that Church officials be held responsible for it. Clergy-sexual-abuse litigation shattered decades of near-universal silence about a social problem of shocking depravity and scope. Prior to the Gauthe case in 1984, what little knowledge there was of clergy sexual abuse was not openly discussed or addressed by victims, their families, fellow parishioners, clergy, Church officials, therapists, the press, lawyers, law enforcement, or legislators. Local media reporting of sexual abuse by clergy was scant and infrequent, and there was no national media coverage of the issue. Prosecutions were rare and public discussion and policy debate nonexistent. Litigation was the primary force in attracting attention to the problem, shaping perceptions of it, and making it a policy priority among Church and government officials. The framing and agenda-setting effects of clergy-sexual-abuse litigation on policy making have been extraordinarily powerful.

Until recently, clergy-sexual-abuse litigation has not always encouraged information generation. Plaintiffs' lawyers, especially in years prior to the Geoghan affair, frequently opted for settlements that included secrecy agreements, making it even less likely that information about allegations would ever be disclosed. Nevertheless, most of what is known about clergy sexual abuse is the product of civil discovery or investigations by Church and government officials, prompted by widespread public concern that was generated by litigation. In the absence of litigation, it is unlikely that the nature and scope of the problem would have come to light.

174. Lytton, *supra* note 38.

175. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1106 (Ill. 2004).

176. *Id.* at 1132.

The effectiveness of self-regulation instituted by dioceses—in particular, of safe-environment programs and screening procedures—is still unclear. According to victim-advocate David Clohessy,

The Church reforms have been largely smoke and mirrors The bishops have hired these so-called audit teams. So it's like the bishops have basically drawn up the rules for the ball game, they've decided who gets to play, they've hired the umpires and—lo and behold, surprise, surprise—they say that they're winning.¹⁷⁷

The National Review Board has recently begun to study the effectiveness of the Church's voluntary reform efforts.¹⁷⁸

As we have seen, gun litigation might be criticized for attempting, in some cases, to advance policies rejected by legislatures—for example, one-gun-per-month sales restrictions. I have suggested that this is not so much gap-filling as circumventing the legislative process altogether. It would be much harder to criticize clergy-sexual-abuse litigation on this basis. When clergy-sexual-abuse plaintiffs and their attorneys sought to advance policies clearly at odds with existing legislation, they directed their efforts at the legislative process. For example, victims and plaintiffs' attorneys played a central role in the lobbying campaign to suspend the statute of limitations for child-sexual-abuse claims in California.¹⁷⁹ Elsewhere, they have participated in similar efforts to extend or eliminate statutes of limitations for child sexual abuse, end clergy exemptions to mandatory child-abuse-reporting laws, create child-endangerment provisions that would make diocesan supervisors criminally liable, and remove civil damage caps for charitable organizations in cases of sexual abuse.¹⁸⁰

And finally, unlike gun litigation, clergy-sexual-abuse litigation does not create interjurisdictional conflict. More stringent laws or enforcement practices in one jurisdiction do not interfere with approaches in other jurisdictions that grant greater leeway to Church officials to resolve the problem internally.

Based on the foregoing analysis of their achievements and shortcomings, I think it fair to conclude that, compared to gun litigation, clergy-sexual-abuse litigation offers a more attractive example of regulation through litigation. Gun litigation played a relatively small role in a larger gun-control movement that preceded it by decades. And while the litigation focused attention on the role of the gun industry in facilitating gun violence,

177. See LYTTON, *supra* note 12, at 174–75.

178. *Id.* at 175.

179. See Laurie Goodstein, *California Dioceses Brace for New Abuse Suits as Law Allows Litigation of Old Cases*, N.Y. TIMES, Dec. 6, 2002, at A28 (describing the efforts of two lawyers taking clients to legislators to describe past clergy sexual abuse).

180. See Belcher-Timme, *supra* note 149, at 243, 270–72 (recommending legislative changes aimed at more effective prosecution of those involved in clergy sexual abuse and its cover-up).

the results in terms of industry reform and government regulation have been modest, and in some respects counterproductive.

By contrast, clergy-sexual-abuse litigation has had an especially powerful impact on policy making. Clergy-sexual-abuse litigation initiated widespread public concern and began the mobilization of groups that led the call for reform. Most of what is publicly known about clergy sexual abuse was discovered by lawyers or comes from studies and investigations that, but for the litigation, would likely never have been undertaken. Litigation drew attention to the role of Church officials in facilitating child sexual abuse, placed the issue on the agendas of Church and government policy makers for the first time, and generated pressure on them to address the problem. The results of the litigation include a public accounting of the role of Church officials in facilitating decades of child sexual abuse, mandatory nationwide Church policies, and a host of law enforcement and legislative reforms.

Four features of clergy-sexual-abuse litigation help explain why it has had such a beneficial impact on policy making.¹⁸¹ First, allegations of widespread child sexual molestation by compulsive pedophile priests covered up at the highest levels of the Catholic Church made for an especially scandalous narrative that fueled an unusual level of moral outrage. Popular culture in the mid-1980s was highly receptive to this story of child sexual abuse, clerical misconduct, and institutional responsibility. Public awareness of child sexual abuse was fueled throughout the 1970s and 1980s by child-welfare advocates and feminist activists.¹⁸² Concurrent with the Gaulte case, a series of high-profile prosecutions for ritual child sexual abuse in daycare centers swept the nation from California to Massachusetts.¹⁸³ The late 1980s also saw a series of popular televangelists taken down by sexual and financial scandals.¹⁸⁴ Government and corporate corruption have been recurring popular concerns throughout American history, and the post-Watergate 1980s were no exception. The narrative of clergy sexual abuse promulgated by plaintiffs thus had an especially high degree of cultural resonance. Moreover, it was widely disseminated by

181. This paragraph draws on LYTTON, *supra* note 12, at 192.

182. See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 127 (1984) (noting that the governmental concern over child abuse and neglect was part of “a larger social current” including civil rights, welfare rights, and feminist movements, all of which “captured the imagination of many people”).

183. See DEBBIE NATHAN & MICHAEL SNEDEKER, SATAN’S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT 4 (1995) (comparing the high-profile ritual-child-sexual-abuse prosecutions of the 1980s and early 1990s to “the crusades of the McCarthy era” and “the Salem witch trials”); DOROTHY RABINOWITZ, NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES (2003) (recounting the facts of a number of well-known ritual-child-sex-abuse accusations and prosecutions).

184. See Anson Shupe, *Economic Fraud and Christian Leaders in the United States*, in WOLVES WITHIN THE FOLD: RELIGIOUS LEADERSHIP AND ABUSES OF POWER 49, 57–58 (Anson Shupe ed., 1998) (summarizing the sexual and financial scandals surrounding prominent televangelists Oral Roberts, Jimmy Swaggart, and Jim Bakker in the late 1980s).

media coverage, was repeatedly invoked in ongoing litigation and public discussion, and was ultimately adopted by Church leaders and public officials, all of which enhanced its power to attract attention and shape perceptions.

Second, plaintiffs' success in litigation—in the form of judgments and settlements—sparked national press coverage, encouraged additional victims to come forward, and in turn fueled more litigation. This positive feedback generated increasing momentum over time, creating what political scientists refer to as a “cascade” in which “each change begets another even larger change.”¹⁸⁵ Cascades have been studied in a variety of contexts, including social trends, market booms and busts, and political campaigns.¹⁸⁶ They help to account for how initially small events can be magnified by positive feedback and generate the momentum to create significant change.¹⁸⁷ The cascade initiated by the Gauthé case involved other types of feedback as well. As they gained more litigation experience, plaintiffs' lawyers became more skilled at uncovering the information necessary to substantiate claims, which encouraged them and other lawyers to bring more lawsuits. Plaintiffs' success in litigation led many judges over time to be more skeptical of Church compliance with discovery orders and to favor plaintiffs' requests for broad and aggressive discovery.¹⁸⁸ Litigation thus produced more clients, better lawyering skills with which to pursue their claims, a growing supply of attorneys to bring the claims, and increasing sympathy among judges.

The momentum generated by this cascade of litigation was enhanced by other implications of plaintiffs' successes outside of the civil justice system. For example, the public outrage generated by clergy-sexual-abuse litigation exerted pressure on law enforcement officials to investigate Church officials and to prosecute wrongdoers.¹⁸⁹ And litigation made it politically less costly to do so. The same is true with regard to legislative initiatives to remove obstacles to suing the Church such as statutes of limitation and charitable immunity. Thus, the cascade of litigation following plaintiffs' success in the Gauthé case, sustained by subsequent successes in later cases, generated growing momentum that helps to explain the powerful influence of clergy-sexual-abuse litigation on policy making. This is not to downplay the impact

185. See BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* 139 (2005) (discussing self-reinforcing “stochastic mechanisms” that help explain “the observed complexity in any given case of policy change”).

186. *Id.* at 140–41.

187. *Id.* at 140.

188. See, e.g., *Ex parte Zoghby*, 958 So.2d 314, 326 (Ala. 2006) (finding that the trial court did not exceed the scope of its discretion in ordering discovery of documents that the defendant priest claimed were protected by the clergyman privilege); *People v. Campobello*, 810 N.E.2d 307, 317 (Ill. App. Ct. 2004) (“We reject the Diocese’s attempt to conjure a right to secrecy, and with it immunity from the State’s subpoena power, simply by pointing to the veil it has cast over itself.”).

189. See, e.g., SIMON, *supra* note 94, at 141 (attributing the ultimate willingness of law enforcement to investigate and prosecute Gauthé to the public’s awareness and the media’s coverage of the civil suits).

of procedural aspects of litigation, but only to suggest that their impact on policy making is not entirely independent of successful outcomes—at least in enough cases to generate positive feedback.

Third, the silence and inaction surrounding clergy sexual abuse prior to the Gauthé litigation in 1984 made litigation's impact on policy making more dramatic. There are many theories as to why Church officials failed to address the problem prior to 1984. These include fear of liability, concern that acknowledging the problem would give rise to scandal and undermine respect for the Church, a longstanding aversion to government involvement in Church affairs, and belief that secrecy was in the best interests of victims and their families.¹⁹⁰ In addition, law enforcement officials and legislators failed to take action out of allegiance to the Church or fear of its political influence.¹⁹¹ When the pressure of litigation and public outrage overcame the resistance of Church and government officials to address the problem, the policy changes were dramatic. One sees ambitious policy reforms following the Gauthé, Porter, and Geoghan cases. Political scientists Frank Baumgartner and Bryan Jones explain this type of pattern using the concept of friction. Resistance to change, they explain, whether political, institutional, or cognitive, is a kind of friction that, when overcome, produces a “jump” in policy.¹⁹² Thus, the policy vacuum prior to 1984 and the friction-like resistance to change made the policy-making activity prompted by clergy-sexual-abuse litigation appear especially dramatic.¹⁹³

Fourth, clergy-sexual-abuse litigation enhanced the performance of other policy-making institutions—specifically the USCCB, the criminal justice system, and state legislatures—by initially prompting them to take action and then complementing their efforts. Litigation framed the problem as one of institutional failure, put it on policy agendas, and prompted other institutions to investigate it. Litigation enabled these other institutions to address the problem of clergy sexual abuse more effectively, and without it, it is highly unlikely that any of them would have had the will or the knowledge necessary to do so.

To summarize, clergy-sexual-abuse litigation owes its remarkable success in enhancing policy making to four factors. First, the litigation employed a narrative with a high degree of cultural resonance. Second, the

190. See LYTTON, *supra* note 12, at 140–43 (analyzing the Church's failure to address the problem of clergy sexual abuse prior to 1984).

191. *Id.* at 144–45.

192. JONES & BAUMGARTNER, *supra* note 185, at 145.

193. We should be careful not to overstate the case. It would be inaccurate to say that there was no policy-making activity among the bishops in the years between the Gauthé and Porter cases (1985–1991) and the Porter and Geoghan cases (1994–2001). National Council of Catholic Bishops (NCCB) staff and subcommittees were busy gathering information and assisting individual dioceses in developing new policies during both of these periods. Nevertheless, friction remained and gave rise to jumps in policy. For a more nuanced account, see generally LYTTON, *supra* note 12, at 13–41.

litigation was fueled by a cascade of positive feedback that generated momentum for policy change. Third, the friction created by resistance to policy change among Church and government officials required significant reform pressure, which made eventual changes in policy especially dramatic. And fourth, the litigation complemented, rather than competed with, other policy-making institutions by enhancing their understanding of the problem and their motivation to address it.

This is not to say that gun-industry litigation lacked these four features. To the contrary, its limited success can be attributed to precisely these factors. The narrative of random gun violence on urban streets and in suburban schools and of callous corporate officials more concerned with profits than with public safety resonated powerfully with widespread and persistent public concerns about crime and consumer protection. The wave of individual and municipal lawsuits against the gun industry looks like a smaller version of the positive-feedback cascade that fueled clergy-sexual-abuse litigation. There is also considerable friction in gun-control politics due to the gun lobby's resistance to policy change. And, as we have seen, gun litigation complemented legislative and agency regulation in a number of ways.

But these factors were considerably less pronounced in gun litigation than in clergy-sexual-abuse litigation, and this helps to explain why the latter was so much more successful. As compelling as the gun violence narrative is, it is not as shocking as the story of clergy sexual abuse.¹⁹⁴ The limited success among gun-litigation plaintiffs failed to spark much positive feedback, and the litigation therefore generated little momentum for reform. Gun litigation, rather than overcoming friction, provoked a legislative backlash that increased resistance to policy change. What the litigation did achieve did not seem so dramatic in the context of a decades-old battle over

194. See Allen Rostron, *Shooting Stories: The Creation of Narrative and Melodrama in Real and Fictional Litigation Against the Gun Industry*, 73 *UMKC L. REV.* 1047, 1069–70 (2005) (discussing the difficulty of translating municipal gun claims into compelling narratives). It has been suggested that the success of clergy-sexual-abuse litigation is partly attributable to the lack of a counter-narrative. That is, whereas in gun litigation the plaintiffs' gun-violence narrative was countered by the gun industry's gun-rights narrative, in clergy-sexual-abuse litigation no one countered the plaintiffs' institutional-failure narrative with a defense of child sexual abuse. But this misconstrues the analogy. In the gun-litigation context, the counter-narrative was not a defense of the problem of which the plaintiffs complained—gun violence—but rather concern over the danger that litigation would undermine widespread private gun ownership, which gun-rights advocates portray as essential to liberty. Similarly, in the clergy-sexual-abuse-litigation context, the counter-narrative was not a defense of child sexual abuse but rather concern over the danger that litigation would interfere with the Church's ability to deal with what it considered its own internal affairs without government interference—an ability Church defenders argue is essential to religious liberty. See, e.g., Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 *CATH. U. L. REV.* 125, 132–34 (2003) (describing the threat of litigation to the independence of the Church). This counter-narrative of religious liberty was widely promulgated by Church officials in the early years of the scandal. See generally *id.* at 132–47. That concerns about Church autonomy have been so thoroughly eclipsed by the story of institutional failure is evidence of just how successful litigation has been in framing the issue of clergy sexual abuse.

gun control. And finally, as we have seen, in certain cases gun-litigation plaintiffs have tried to advance policies explicitly rejected by state legislatures, putting litigation in competition with other policy-making institutions. The perception that plaintiffs are misusing the civil justice system to circumvent the legislative process has made courts, legislators, and the public less sympathetic to their claims.

V. Implications for Climate-Change Litigation

Individuals and government entities have filed tort actions against companies that produce greenhouse-gas emissions with the aim of promoting policies that will reduce climate change.¹⁹⁵ These tort suits are part of a complex array of litigation efforts brought by private parties and public entities against industrial polluters and government agencies; under common law and statutory theories; and in state, federal, foreign, and international courts.¹⁹⁶ I will confine my analysis to common law tort litigation, since the theoretical framework developed in this Article is best suited to evaluating the effectiveness of tort litigation as a policy tool. Of course, the concepts of framing, agenda setting, information generation, gap-filling, incentives for self-regulation, and regulatory diversity may be helpful in evaluating other forms of climate-change litigation, but such a comprehensive analysis is beyond the scope of this Article.

It may be helpful to begin by describing a few examples of climate-change tort claims. In *Connecticut v. American Electric Power Co.*,¹⁹⁷ eight Eastern states and the City of New York have sued five electric utilities whose 174 facilities produce “approximately ten percent of all carbon dioxide emissions from human activities in the United States.”¹⁹⁸ The lawsuit alleges that the defendants’ emissions constitute a public nuisance.¹⁹⁹ The plaintiffs seek an injunction requiring each defendant “to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.”²⁰⁰ A federal district court dismissed the suit, which is currently on appeal.²⁰¹ In *California v. General Motors Corp.*,²⁰² the State of

195. See Hsu, *supra* note 8 (manuscript at 11–12) (discussing civil lawsuits filed against private entities responsible for emitting greenhouse gases).

196. *Id.* at 8–14. See also Hunter, *supra* note 7 (manuscript at 3) (citing several recent climate-change lawsuits).

197. 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal docketed*, No. 05-5104 (2d Cir. June 7, 2006). For a discussion of this case and other global-warming litigation, see generally Tom Lindley & Steve Higgs, *Climate Change on Trial*, OR. INSIDER, Apr. 2007, at 1.

198. Complaint at 1, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04 Civ. 5669), *available at* http://www.oag.state.ny.us/press/2004/jul/jul21a_04_attach.pdf.

199. *Id.*

200. *Id.* at 49.

201. Lindley & Higgs, *supra* note 197, at 3.

202. No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal docketed*, No. 07-16908 (9th Cir. Oct. 24, 2007); see also Lindley & Higgs, *supra* note 197, at 3.

California has sued six auto manufacturers, alleging that emissions from cars they manufactured constituted a public nuisance causing coastal and beach erosion, reductions in snow pack, sea-water intrusion into freshwater areas, prolonged heat waves, and increased risk and intensity of wildfires.²⁰³ The claim was dismissed and is currently on appeal.²⁰⁴ Finally, *Comer v. Murphy Oil, USA*²⁰⁵ is a class action lawsuit by fourteen Hurricane Katrina victims against an array of over one hundred oil, coal, and chemical companies alleging that their emissions of greenhouse gases increase the frequency and ferocity of hurricanes in the Gulf of Mexico.²⁰⁶ Based on theories of public nuisance, negligence, trespass, and misrepresentation, the plaintiffs seek compensation for damages resulting from Hurricane Katrina.²⁰⁷ This case too was dismissed and is currently on appeal.²⁰⁸

Defenders of climate-change litigation have argued that it enhances policy making in many of the ways suggested above. My aim here is to canvass some of these claims and recommend areas for further inquiry that would enhance our understanding of the litigation's impact on policy making. It is too early to draw reliable conclusions about the effectiveness of climate-change tort litigation—first, because not enough is known about the impact of existing litigation and second, because climate-change litigation is still a relatively new phenomenon that is likely to develop further. My comments are intended neither as an endorsement nor a critique of the litigation but rather as a set of hard questions and an agenda for future research.

David Hunter has argued that regardless of the outcome of climate-change lawsuits, merely filing them has significant implications for policy making in terms of framing, generating information, and agenda setting.²⁰⁹ According to Hunter, plaintiffs' claims have framed climate change in terms of dramatic narratives linking greenhouse-gas emitters to environmental changes that have imposed specific harms on identifiable victims.²¹⁰ These narratives, suggests Hunter, make "climate change more tangible and more immediate, which significantly changes the tone of the climate debate."²¹¹ "A focus on victims," he continues, "increases the saliency of questions

203. Second Amended Complaint at 2, *General Motors*, 2007 WL 2726871.

204. *General Motors*, 2007 WL 2726871, at *1, *appeal docketed*, No. 07-16908 (9th Cir. Oct. 24, 2007); *see also* Lindley & Higgs, *supra* note 197, at 3 (discussing *General Motors* in the context of global-warming litigation).

205. No. 1:05-CV-00436 (S.D. Miss. Aug. 30, 2007), *appeal docketed*, No. 07-60756 (5th Cir. Sept. 28, 2007).

206. Third Amended Class Action Complaint at 1–8, *Comer*, No. 1:05-CV-00436, 2006 WL 1474089.

207. *Id.* at 19–20; *see also* Lindley & Higgs, *supra* note 197, at 3–4.

208. Order Granting Defendants' Motion to Dismiss at 1–2, *Comer*, *appeal docketed*, No. 07-60756 (5th Cir. Sept. 28, 2007).

209. Hunter, *supra* note 7 (manuscript at 1–2).

210. *Id.* at 4.

211. *Id.*

about compensation and adaptation to climate change, and the urgency of mitigating climate change to avoid even worse impacts in the future. This builds momentum at both the national and international levels for stronger climate-policy making.”²¹² Hunter also suggests that the use of scientific information as evidence for legal claims “adds legitimacy and prestige” to the science suggesting climate change, making it more prominent in “public discourse.”²¹³ Moreover, litigation may influence “the development of climate science” by providing “an incentive to some scientists to prioritize certain questions that they might otherwise ignore.”²¹⁴ Hunter asserts as well that “[c]limate change litigation empowers civil society to shape the agenda in ways not allowed in formal negotiations.”²¹⁵ Litigation also “shines the spotlight” on climate change and “force[s] . . . governments to address the impacts of climate change . . .”²¹⁶ “Even when domestic actions fail,” he concludes, “they may indirectly build pressure for legislative and policy action . . . win or lose, climate litigation strategies have harkened a new era of climate politics.”²¹⁷

Alice Kaswan has suggested that climate-change litigation can enhance policy making by filling regulatory gaps and encouraging industry to support regulation:

In the absence of comprehensive federal and state climate-change legislation, federal and state common law actions are essential tools for allowing the victims of climate-change (all of us) to begin to address its consequences. . . . In an ideal world, a democratic legislative process to control climate-change would be preferable to the decisions of individual judges. But when the legislative process has failed to produce results, the political argument for allowing common law actions, that the legislative process may be paralyzed or captured, provides a compelling justification for allowing the courts to hear the common law actions that have been brought to date. . . . The existing common law can fill the vacuum.²¹⁸

In addition to filling gaps, Kaswan suggests that litigation “might prompt an otherwise paralyzed legislature or administrative agency into action.”²¹⁹ The threat of lawsuits, she argues, might also encourage industries to support rather than oppose a legislative response: “Industries that might otherwise oppose regulation might be more willing to support a legislative program if the alternative is piecemeal and unpredictable common

212. *Id.*

213. *Id.*

214. *Id.* at 6, 7.

215. *Id.* at 15.

216. *Id.* at 13.

217. *Id.* at 17, 19.

218. Kaswan, *supra* note 7, at 104–05.

219. *Id.* at 100.

law actions.”²²⁰ Even if Congress were to promulgate comprehensive climate regulation, Kaswan argues, Congress should not preempt future common law litigation.²²¹ While common law actions would be rendered unnecessary under most circumstances, “it is possible that the political process will generate weak and relatively ineffective legislation. If so, the common law would provide the victims of climate-change with an important antidote to a flawed political process.”²²²

William Buzbee has argued that climate-change litigation can enhance policy making by providing diverse regulatory approaches. He contends that,

The [greenhouse-gas] challenge involves a multiplicity of sources, varied risks and harms in different locations, changing science and engineering, and an array of scale challenges. No one regulator can effectively regulate at all levels. In addition, the actual federal track record has been one of backpedaling and half measures, while some states and local governments have taken a leading role. Their diverse efforts serve in a role long embraced in federalism jurisprudence, that of “laboratories” of democracy.²²³

Buzbee thus envisions a robust and ongoing role for litigation as a policy tool in addressing climate-change litigation.²²⁴

While Hunter, Kaswan, and Buzbee each defend a broad array of climate-change litigation efforts, I will focus on their claims as they apply to tort actions. That climate-change tort litigation might enhance policy making in the ways they suggest seems entirely plausible in light of the results of gun-industry and clergy-sexual-abuse litigation. The relatively weak performance of gun-industry litigation in comparison to clergy-sexual-abuse litigation, however, cautions that conditions may not always favor the use of litigation as a regulatory strategy. Studies of gun-industry and clergy-sexual-abuse litigation suggest different types of evidence that might be available to test claims about the effectiveness of climate-change litigation and identify conditions that are likely to favor its use as a policy tool.

As we have seen, framing issues in terms of narratives with a high degree of cultural resonance enhances litigation’s capacity to influence policy making. In the case of clergy-sexual-abuse litigation, lawsuits broke the silence surrounding clergy sexual abuse and framed it as an issue of institutional failure by Church officials. Media coverage based on litigation

220. *Id.*; see also Kirsten Engle, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563, 1570–77 (2007) (arguing that the unpredictability of piecemeal environmental regulation leads industries to support comprehensive federal regulation that they otherwise might not).

221. Kaswan, *supra* note 7, at 108–09.

222. *Id.* at 108.

223. Buzbee, *supra* note 7, at 1617–18 (footnotes omitted).

224. *Id.* at 1618–19.

sources made this the dominant frame among the public and policy makers. By contrast, in gun-industry litigation, lawsuits merely reinforced a preexisting frame already present in gun-control policy debates and public-health advocacy, and the frame of industry responsibility for gun violence has by no means eclipsed the competing frames put forward by gun-rights advocates invoking the Second Amendment and self-defense. Hunter is surely correct to suggest that stories linking polluters to tangible harms and identifiable victims have cultural resonance. What remains to be established, however, is the extent to which litigation—as opposed to science or grassroots activism, for example—is responsible for this view of the problem among the public and policy makers.

Research on clergy-sexual-abuse litigation illustrates six ways to go about answering this question: (1) conducting interviews with those concerned about climate change—journalists, opinion leaders, officials, and members of the general public—to see whether their views about climate change are based on litigation sources or media coverage of litigation; (2) doing content analysis of media coverage of climate-change litigation, policy documents, and transcripts of official hearings and debates to determine whether and to what extent they rely on litigation sources; (3) measuring the placement and volume of media coverage to look for correlations with litigation activity; (4) measuring the levels and locations of grassroots activism to look for correlations with litigation activity; (5) measuring the levels and venues of government regulatory activity to look for correlations with litigation activity; and (6) examining poll data for trends in views of climate change to look for correlations with litigation activity.²²⁵ Of course, each of these types of evidence has shortcomings. Interviews provide merely anecdotal evidence. Media coverage is only a proxy for public opinion.²²⁶ Poll data is often skewed by the phrasing of survey questions. And any correlation between litigation activity on one hand and media coverage, grassroots activism, government regulatory activity, or poll data on the other hand does not by itself prove causation. Nevertheless, when taken together, these diverse types of evidence can support conclusions about causation, and

225. See generally LYTTON, *supra* note 12, at 81–136 (discussing analogous techniques in clergy-sexual-abuse litigation).

226. Media scholars have suggested that media coverage of an issue—as measured by the placement and the volume of stories—offers a proxy for public awareness of and concern about an issue. See SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION 16 (1987) (“Those problems that receive prominent attention on the national news become the problems the viewing public regards as the nation’s most important.”); John Bohte et al., *One Voice Among Many: The Supreme Court’s Influence on Attentiveness to Issues in the United States: 1947–1992*, in LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 23–24 (David Schultz ed., 1998) (arguing that relations between the media and the public are reciprocal in that market forces dictate that the media follow stories that attract audiences, while media coverage helps shape public opinion).

they will advance our understanding of litigation's influence on views of climate change among the public and policy makers.²²⁷

Determining the influence of climate-change litigation is complicated by the fact that it did not emerge, as did clergy-sexual-abuse litigation, in the context of a vacuum. Because public discussion of clergy sexual abuse was nonexistent prior to the filing of the Gauthé case in 1984, it is relatively easy to trace the view of clergy sexual abuse promulgated by the media and adopted by the public and policy makers to litigation. The primary news source for information about clergy sexual abuse was and continues to be litigation documents and plaintiffs' attorneys. By contrast, the extent to which gun litigation has influenced media coverage or public and official views of gun violence is much harder to determine. Far from breaking any silence surrounding the issue, gun-industry litigation emerged in the context of decades of public and official outcry over gun violence and regular news headlines as well as nationwide debate, activism, and government regulatory activity related to gun control.²²⁸ At best, gun litigation's influence on public and official views of gun violence is marginal and difficult to isolate.²²⁹ In this respect, climate-change litigation is more akin to gun-industry litigation than to clergy-sexual-abuse litigation. Scientific concern, media coverage, grassroots activism, state and local policy initiatives, congressional hearings, foreign government action, and international regulatory activity are all sources of information on climate change that predate litigation and are more widely followed than climate-change lawsuits. Establishing and isolating the influence of litigation on public and official views of the issue amidst this wide array of information sources is likely to be a difficult task.

Similar challenges face Hunter's claims about the agenda-setting effects of climate-change litigation, which require establishing and isolating the influence of litigation on the agendas of policy making institutions in the context of so much concurrent and interrelated activity. Moreover, there is reason to be cautious about his claim that litigation "builds momentum at both the national and international levels for stronger climate policy making."²³⁰ As we have seen, momentum in clergy-sexual-abuse litigation was fueled by high-profile litigation victories in the form of judgments and settlements. Media coverage of these litigation victories triggered positive

227. See Lytton, *Clergy Sexual Abuse*, *supra* note 90, at 875–77 (arguing that clergy-sexual-abuse litigation shaped the opinions of both the public and policy makers as evidenced by public-opinion polls and media coverage).

228. See Dan M. Kahan, Donald Braman & John Gastil, *A Cultural Critique of Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra* note 4, at 105–06 (arguing that gun-industry litigation is shaped primarily by the "cultural priors" of society).

229. For an argument that gun litigation had no effect on public and official views, see generally *id.* See also Rostron, *supra* note 56, at 500–02 ("It remains to be seen whether the litigation will have any lasting effect on attitudes toward the industry and gun violence, especially now that federal immunity legislation could put an end to tort litigation concerning guns.").

230. Hunter, *supra* note 7 (manuscript at 4).

feedback, increasing the number of victims willing to sue, the number of attorneys willing to represent them, judicial openness to their claims, and ultimately the amount of litigation. This cascade of litigation greatly enhanced its influence on policy making. By contrast, in gun-industry litigation, a dearth of plaintiff victories impeded the kind of momentum generated by clergy-sexual-abuse litigation and severely limited its ultimate impact on policy making. It is too early to tell whether climate-change litigation will generate the kind of high-profile plaintiff victories capable of creating enough momentum to influence policy making. If plaintiffs cannot eventually obtain enough such victories, then it is unlikely the litigation will have the kind of policy-making impact that Hunter suggests.

More evidence is also needed to assess the extent to which climate-change litigation generates or promulgates policy-relevant information. Interviews with scientists could help to determine whether litigation has shaped their research agendas. Content analysis of media coverage, policy documents, and transcripts of official hearings and debates along the lines suggested above, along with poll data, could offer some indication as to whether litigation has made climate-change science more prominent in public discourse.

Kaswan's assertion that climate-change litigation can fill gaps in legislative and administrative regulation needs further clarification. She suggests that so far "the legislative process has failed to produce results," "that it may be paralyzed or captured," and that litigation can serve as an "antidote to a flawed political process" by filling the resulting "vacuum."²³¹ To begin with, the absence of legislation is not, by itself, evidence of paralysis. Legislation is by design hard to pass.²³² Every bill, in order to become a law, must overcome a number of institutional hurdles: legislative procedures such as committee review, scheduling, filibusters, and floor debate, as well as constitutional requirements of approval by two legislative bodies and the executive. Popular legislation is regularly blocked, despite majority support, by a small group of committee members, a powerful majority leader, a minority faction of senators, or an executive veto. Founding Father Alexander Hamilton viewed these procedural hurdles as a virtue, characterizing them as "security against the [enactment] of improper laws" and suggesting that "[t]he injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones."²³³ His compatriot James Madison supported such procedures as not merely a safeguard but also as promoting

231. Kaswan, *supra* note 7, at 104–05, 108. *See also id.* at 70 (quoting another scholar that "the problem of climate change lends itself to the perversion of the public interest by special-interest industry groups with a vested economic stake in the United States' continued reliance upon fossil fuels").

232. This paragraph and the next draw from Lytton, *supra* note 6, at 158–60.

233. THE FEDERALIST NO. 73, at 443–44 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

legislative deliberation and refinement of bills.²³⁴ These “vetogates,” as scholars have called them, block the vast majority of proposed legislation.²³⁵ Of the 2,154 bills proposed in the Senate and the 4,646 bills proposed in the House during the 109th Congress (2005–2006), only 482 were signed into law.²³⁶ In New York State during the 2007 legislative session, 16,239 were proposed but a mere 690 were enacted into law.²³⁷ Thus, killing legislation is as much a part of the normal legislative process as passing it.

Secondly, successful lobbying efforts opposing legislation are not necessarily a sign that the legislative process has been “captured.” Interest groups, even ones that represent minority views, make a valuable contribution to the legislative process.²³⁸ There is a long-standing ambivalence in American politics toward the role of interest groups—what Founding Father James Madison called “factions”—in our democracy.²³⁹ On one hand, we denounce “special” interest groups as antidemocratic in their use of money and influence to defeat popular legislation or to pass laws granting special favors. On the other hand, we praise “public” interest groups for representing not only their members but also large silent majorities or voiceless minorities. Popular distinctions between the two are largely rhetorical, expressing approval or disapproval of a particular group’s aims rather than any real difference in the way it operates or the role it plays in policy making. Whether the American Civil Liberties Union, the NRA, the Sierra Club, or the U.S. Chamber of Commerce are special or public interest groups depends upon whom one asks. The fact is that all of these organizations, judging by membership, represent small minorities within the overall population. The largest of these groups, the NRA, claims a membership of 4.3 million,²⁴⁰ while the Sierra Club claims a membership of more than 1.3 million.²⁴¹ And yet interest groups such as these play a vital democratic role in a polity as large and as complex as ours, allowing for citizen participation and providing a forum for the generation and dissemination of information.

234. *See generally* THE FEDERALIST NO. 10 (James Madison) (discussing the virtue of multiple competing interests and the moderating effects of such competition on the outcome of legislation).

235. WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66–67 (3d ed. 2001).

236. *See* 153 CONG. REC. D1674 (daily ed. Dec. 31, 2007) (Final Résumé of Congressional Activity for the Second Session of the 109th Congress); 152 CONG. REC. D158 (daily ed. Mar. 2, 2006) (Final Résumé of Congressional Activity for the First Session of the 109th Congress).

237. *See generally* New York State Legislative Retrieval Service, www.nyslrs.state.ny.us.

238. This paragraph relies on SCHUCK, *supra* note 88, at 204–50.

239. *Id.* at 204 (citing THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)).

240. National Rifle Association, Institute for Legislative Action: About, <http://www.nraila.org/> About (stating that the NRA has “more than 4 million members”); *see also* Elizabeth Olson, *Amassing the Troops for Political Battle*, N.Y. TIMES, May 4, 2006, at C7.

241. Sierra Club Home Page, <http://www.sierraclub.org>.

Gun-industry litigation offers an example of using lawsuits as a means of overcoming powerful lobbying forces that blocked more expansive gun-control legislation. I have argued elsewhere that we should be wary of suggestions that legislative consideration and rejection of gun-control measures constitute a failure of the legislative process or that successful gun-lobby efforts constitute capture of the legislative process.²⁴² Moreover, the perception that litigation has been used to circumvent the legislative process and to promote regulatory measures rejected by legislatures led some judges to dismiss gun-industry litigation and many legislatures to grant the industry statutory immunity.²⁴³ By contrast, the vacuum that characterized the context of clergy-sexual-abuse litigation was not legislative rejection of more expansive regulation, but no legislative consideration at all. Indeed, it was a total public silence on the issue at all levels and branches of government.

In arguing that climate-change litigation is filling a regulatory gap left open by the legislative process, the litigation's defenders need to clarify exactly why they believe the legislative process has failed. As I have suggested, the rejection of more expansive regulation need not suggest paralysis, and the active participation of interest groups in the legislative process does not necessarily constitute capture. Kaswan does explain that one reason for the federal government's failure to adopt additional climate-change regulation is opposition by legislators from states that "may be reluctant to face the short-term economic consequences of climate-change mitigation" and President Bush's opposition to "mandatory emissions reductions."²⁴⁴ But legislative and executive opposition hardly amounts to a form of institutional failure or a "flawed political process." The legislative backlash against gun-industry litigation suggests that any perception that climate-change litigation is designed to circumvent the legislative process may undermine its effectiveness.

It is still too early to assess Kaswan's suggestion that litigation might encourage industry to support a unified federal regulatory scheme. In the case of both gun-industry and clergy-sexual-abuse litigation, lawsuits encouraged self-regulation. They did not, however, change gun-industry executives' or Church officials' traditional resistance to more stringent government regulation.

It will be interesting to see how Buzbee's assertion that climate-change litigation allows for local flexibility and experimentation plays out as litigation and regulation in the area develop. Buzbee focuses on the

242. See Lytton, *supra* note 6, at 155–60.

243. See, e.g., *City of Chicago v. Beretta*, 821 N.E.2d 1099, 1106 (Ill. 2004) ("Any change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts . . . [W]e point to the virtue of judicial restraint."); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(a)(8), 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. § 7901) (specifically listing as a congressional finding the "attempt to use the judicial branch to circumvent the Legislative branch").

244. Kaswan, *supra* note 7, at 69–71.

relationship between federal and local regulatory efforts. It might also be worth attending to the relationship between litigation efforts on one hand and legislative and administrative regulation on the other hand. The mixed results of gun-industry litigation and the success of clergy-sexual-abuse litigation suggest that tort litigation is most likely to enhance policy making when it complements the efforts of other policy-making institutions. When litigation efforts are perceived as being at odds with legislative or administrative policy making, this may provoke a backlash in the form of immunity legislation, foreclosing the potential contribution of litigation to policy experimentation.

In conclusion, it bears repeating that I do not question the legitimacy of using tort litigation as a means of promoting regulatory policy. In the absence of preemption, courts have jurisdiction to hear common law claims and decide them in ways that inevitably require policy choices and have policy implications beyond the particular dispute in question. At the same time, however, I believe that the effectiveness of tort litigation as a policy tool varies. Gun-industry litigation, while not entirely unsuccessful, offers a cautionary tale. Clergy-sexual-abuse lawsuits, by contrast, highlight the policy-making benefits of tort litigation. In evaluating the effectiveness of climate-change litigation, we would do well to apply the lessons learned from these earlier experiences with regulation through litigation.