CHAPTER 6

The NRA, the Brady Campaign, & the Politics of Gun Litigation

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The military strategist Karl von Clausewitz asserted that war is a continuation of politics by other means.[1] The same might be said of gun litigation. For many big city mayors and gun control advocates, filing lawsuits against the firearms industry represents a way to pursue gun control policies that they have failed to achieve through the political process. Efforts to pass laws mandating safer gun designs and imposing marketing restrictions have for many decades been thwarted by the National Rifle Associate (NRA) and its legislative allies. The mayors and gun control advocates blame their failure to achieve stricter gun laws on NRA corruption of the legislative process. So they have turned to the courts, asking judges to impose gun controls that they believe would otherwise be passed by an uncorrupted legislative process.

In response to these lawsuits, the gun industry, with help from the NRA, has turned to state legislatures and Congress for protection. Together, they have introduced bills seeking statutory immunity from suit in forty-six state legislatures and Congress, and industry immunity laws have been passed in thirty-two states, including Texas, Florida, Pennsylvania, Virginia, Georgia, Michigan, and Ohio. Supporters of these immunity bills have argued that plaintiffs are misusing the tort system, seeking through litigation gun control regulations that they have been unable to achieve legislatively, and filing municipal suits en masse in order to create overwhelming defense costs that will force the industry to settle, regardless of the legal merits of the claims against it.

Proponents of the lawsuits respond that the gun lobby's success in

obtaining statutory immunity merely confirms its undue legislative influence, which explains the need for filing lawsuits in the first place. Furthermore, proponents of the suits point out that the industry's statutory immunity undermines the integrity of the tort system, determining liability on the basis of political muscle rather than judicial procedure. Thus, while the gun industry and its supporters accuse plaintiffs of misusing the court system in order to subvert legislative democracy, plaintiffs and their allies accuse the gun lobby of corrupting the legislative process and undermining judicial independence.

Both sides in the controversy over gun litigation have sought to gain an advantage by using one branch of government in order to compensate for lack of influence within another. The debate is no longer merely about the merits of gun control but also about whether to hold the debate in the statehouse or the courthouse. In this chapter, I critically examine the arguments of both sides. On the one hand, I question gun control advocates' justification of gun litigation as a response to legislative failure. There is reason to be skeptical of the claim that NRA influence has corrupted the legislative process and that this justifies recourse to the courts as a way to circumvent the legislative process altogether. On the other hand, I challenge defendants' use of immunity legislation to stifle litigation. Broad grants of statutory immunity undermine the integrity of the judicial process by resolving lawsuits on the basis of political power rather than legal principle, and they impair the capacity of courts to play a supportive role in refining and enforcing the legislature's own regulatory policies.

Both sides have taken extreme positions: insisting that either all of the litigation is justified or none of it is. If the first casualty of war is truth, then the first casualty of gun litigation has been moderation. In this chapter, I outline an intermediate position between these two extremes. In criticizing the use of gun litigation to circumvent the legislative process, I do not mean to reject all lawsuits against the gun industry, nor do I mean to deny that suits setting forth viable common law claims may have implications for the legislative process and that these implications play a legitimate role in the legislative process. Correlatively, in arguing against broad grants of legislative immunity for the industry, I nevertheless recognize the appropriateness of more focused legislative responses to litigation, where legislatures disagree with the policy implications of particular judicial decisions.

The polarization that characterizes the current politics of gun litigation rests on competing views about the proper division of labor between courts and legislatures. Whereas proponents of the suits see litigation as a ready substitute for the legislative process, opponents deny that courts have any significant role to play in policy-making. My more moderate position rests upon an alternative model of how courts and legislatures can and do work together in a complementary manner to fashion coherent and effective public policy. Within this model, legislatures, as the most democratic branch of government, relying on the expertise and experience of administrative agencies, take the lead in making policy choices and crafting solutions to social problems. Courts, through the adjudication of common law claims, play a secondary role that complements the efforts of legislatures and agencies to make and enforce public policy. In this chapter, I introduce this model of complementarity between legislatures and courts, which I refine further in chapter 10. My aim is to advance the politics of gun litigation beyond its current highly polarized state in which, in addition to their substantive disagreements, the two sides cannot even agree where to meet.

Gun Litigation as a Means of Circumventing the Legislative Process

For some plaintiffs and their attorneys, filing lawsuits against the gun industry represents a way to pursue gun control without having to face the obstacles of legislative politics. As the plaintiffs' attorney in one case explained, "We are taking the gun dealers to court because the political process failed us."[2] The plaintiffs' attorney in another high-profile suit put it somewhat more crassly: "You don't need a legislative majority to file a lawsuit."[3]

Gun control advocates often blame their failure to pass stricter gun laws on NRA corruption of the legislative process. They point out that the NRA mobilizes grass roots opposition to gun control using extremist rhetoric, engages in intensive lobbying at all levels of government, and uses campaign contributions to reelect its allies and punish its enemies. NRA success, they argue, is a textbook example of a special interest group capturing the legislative process, and the remedy is to file lawsuits asking courts to impose gun controls that would otherwise be passed by a truly representative legislature.[4] It is unclear, however, whether mobi-

lizing opposition, intensive lobbying, and campaign contributions are symptoms of capture or instead signs of a healthy participatory democracy. Either way, gun control proponents should be less confident in their accusations of foul play since they engage in exactly the same activities. Furthermore, and perhaps even more to the point, even if capture is a useful way to characterize NRA legislative success, it is unclear whether litigation is an appropriate substitute for the legislative process. As we shall see, this strategic use of gun litigation as a response to NRA dominance of the legislative process threatens to undermine the integrity of the tort system and to weaken the possibilities for cooperation between legislatures and courts in making gun violence policy.

Does the NRA Exert Undue Influence?

By all accounts, the NRA is a formidable lobbying force. It has a long and successful record of opposing firearms restrictions. Proposals in the 1930s to impose sales restrictions and gun registration in response to high levels of gang violence met with strong resistance mounted by the NRA and were significantly scaled back in the National Firearms Act of 1934 and the Federal Firearms Act of 1938. Efforts to revise and strengthen these same regulations in the 1960s following the assassinations of President Kennedy, Martin Luther King Jr., and Robert Kennedy, culminating in the Gun Control Act of 1968, were similarly contested by the NRA. At the height of its powers in the 1970s and 1980s, the NRA repeatedly blocked attempts to expand gun control, notably exempting firearms from regulation by the Consumer Product Safety Commission established in 1972 and even repealing earlier sales restrictions and record-keeping requirements in the Firearms Owners' Protection Act of 1986. At the state level, the NRA enjoyed similar success, defeating a California handgun ban referendum in 1982 and convincing state legislatures to pass laws preempting local gun control ordinances throughout the 1980s. While NRA dominance of the legislative arena began to decline in the 1990s due to internal disputes within the organization and the rise of an effective pro-control lobby, it remains a powerful force at the federal, state, and local levels.[5]

Today, the NRA continues to exert considerable influence on the legislative process. In 2000, *Fortune* magazine ranked the NRA first on its

list of the twenty-five most powerful lobby groups, ahead of the American Association of Retired Persons (AARP), the Association of Trial Lawyers of America (ATLA), and the AFL-CIO.[6] The NRA, one of the nation's largest membership organizations, boasts a current membership of 4.3 million members, received over $55 million in contributions in 2002, and spent $16.8 million in the 2000 election.[7] By contrast, its counterpart, the Brady Campaign to Prevent Gun Violence (formerly Handgun Control, Inc.), reports a current membership of 500,000, received $6.3 million in 2002, and spent $1.7 million in the 2000 election.[8]

The NRA is notorious for its success in using direct mailings to mobilize impassioned grass roots opposition to legislative gun control proposals. Legislators regularly report an overwhelming number of letters, telegrams, e-mails, and phone calls from NRA members demanding that they support the NRA position on particular bills. Aside from the sheer volume of these messages, some threaten violent retaliation against those who cross the NRA.[9] NRA members can be counted on to show up at town meetings and to call in on radio talk shows nationwide to attack politicians who support gun control. As one Senate staffer described it, what most influences politicians is not "the contributions they get from the NRA. They care about the piles of mail, these nasty calls, and people picketing their state offices."[10]

In addition to mobilizing grass roots activism, the NRA exerts influence within the legislative process. NRA allies in Congress chair key committees and successfully block hearings or votes on gun control bills.[11] During Ronald Reagan's presidency, NRA lobbyists worked with administration officials to draft legislation designed to head off more restrictive proposals.[12]

In electoral politics, the NRA has earned a reputation for hardball campaigning against those who oppose it. It even backed the socialist candidate Bernie Sanders against incumbent Republican Pete Smith in the 1990 Vermont race for the U.S. Congress after Smith announced his support for the 1989 assault weapons ban. The NRA and its local affiliates campaigned heavily against Smith. They attacked his credibility for having changed his views on gun control, printing bumper stickers that read "Peter Smith: The Big Lie." Gun shop flyers compared Smith to Hitler, his campaign yard signs were blasted with buckshot, and irate gun owners threatened his life and his family.[13]

NRA defenders characterize its lobbying activities as "democracy in

action." To be sure, the organization's ability to mobilize widespread and intense grass roots opposition to gun control suggests that it represents a significant constituency. It is nevertheless true that the NRA's single-minded extremism and intimidating style have allowed it consistently to thwart moderate gun control measures favored not only by a majority of Americans but even by a majority of gun owners.[14] It is for this reason that gun control proponents have turned to the courts. As New Orleans mayor Marc Morial explained in justifying the city's suit against the gun industry, "With the legislature in the National Rifle Association's pocket, isn't this the only way we can go after them?"[15]

Two questionable assertions underlie the use of lawsuits to overcome the NRA's success in defeating stricter gun control laws. The first is that NRA lobbying power corrupts the legislative process. The second is that tort litigation is an appropriate response.

There are a number of reasons to doubt that NRA lobbying power corrupts the legislative process. For one thing, proponents of gun control engage in substantially the same lobbying tactics as the NRA. The Brady Campaign is no stranger to direct mailings, letter-writing campaigns, manipulation of legislative committee proceedings, access to the administration, and electoral politics. The Brady Campaign uses direct mailings to mobilize support for gun policies, and the Brady Campaign helped to organize the Million Mom March on Washington, D.C., on May 14, 2000. Throughout the 1970s, as chairman of the Senate Judiciary Committee, longtime gun control proponent Senator Edward Kennedy used his power to block consideration of bills to scale back firearms restrictions. In the 1980s, as a minority member of the committee, he blocked consideration of such bills by reading out loud the text of state gun statutes until committee members would leave the room out of boredom and the meeting would have to be adjourned for lack of a quorum. Democratic congressman Peter Rodino of New Jersey played a similar role as chairman of the House Judiciary Committee.[16] In the Clinton administration, the Brady Campaign found a willing partner in successfully passing the 1993 Brady Act mandating background checks for gun purchases. And like the NRA, the Brady Campaign contributes to the reelection of its allies and campaigns against its enemies.

Gun control proponents have attempted to distinguish NRA and Brady Campaign lobbying efforts. Whereas the NRA is a special interest group, the argument goes, the Brady Campaign is a public interest

group. The NRA's larger and more active membership base, however, suggests that, if anything, the NRA is a more representative group than the Brady Campaign. This brings us to a second reason to doubt that NRA lobbying power corrupts the legislative process. Interest groups, even ones that represent minority views, make a valuable contribution to the legislative process.[17] 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. On the 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 that it operates or the role that it plays in policy-making. Whether the American Civil Liberties Union, the Moral Majority, the Sierra Club, the National Abortion Rights League, the NRA, or the Brady Campaign 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 Sierra Club, the largest of these groups aside from the NRA, claims only seven hundred thousand members. And, yet, interest groups such as these play a vital democratic role in a polity as large and as complex as ours. Joining and being active in an interest group is an effective, perhaps even the most effective, way for most individuals to participate in the political process. Interest groups provide a forum for the exchange of ideas among members, and their lobbying activities give voice to members' views in the legislative process. In addition, interest groups generate public information about all kinds of issues—from the political process to the environment—that is essential for an informed citizenry.

A third reason to doubt that NRA lobbying power corrupts the legislative process is that such assertions often rest on a romantic vision of the legislative process. NRA success in defeating popular legislation by means of parliamentary maneuvers such as watering down bills in committee, blocking consideration of them, and offering "killer" amendments is not evidence of corruption but rather is a normal feature of the legislative process. Legislation is, by design, hard to pass. 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.[18] 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 that may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a few bad ones." His compatriot James Madison supported such procedures as not merely a safeguard but also as promoting legislative deliberation and refinement of bills. These hurdles, or "vetogates," as scholars have called them, block the vast majority of proposed legislation.[19] Of the 8,948 bills proposed in the 107th Congress (2001–2), only 377 were signed into law.[20] In New York State during the 2001 legislative session, 14,972 were proposed but a mere 188 passed and were signed by the governor.[21] Thus, killing legislation is as much a part of the normal legislative process as is passing it. In working to block legislation on behalf of their members, lobby groups do not corrupt but rather facilitate the normal legislative process.

While interest group activity is good for the legislative process in the ways I have mentioned, there is always a risk of abuse. Laws prohibiting bribery and extortion are designed to deter and punish the worst abuses. Death threats and other hardball tactics by the NRA or its affiliates are best dealt with by criminal prosecution of the perpetrators. Alternatively, or in addition, these abuses could be addressed by filing tort suits aimed at deterring the abusive conduct. But tort suits designed to thwart the NRA's lobbying goals, as opposed to its tactics, are not an appropriate response, as they interfere with the legitimate and beneficial lobbying role that the NRA, like all lobbies, plays in the legislative process.

Interest groups can also exert influence in ways that, while legal, are nevertheless troubling. They can use wealth or personal connections to influence the political process, and many decry the influence of economic and social elites within the political sphere.[22] Federal and state laws mandate the disclosure of lobbying activities in order to discourage those that might most offend public sentiment without imposing potentially unconstitutional constraints on lobbying. Using economic and social power to

influence the legislative process, while common among many industry lobbies, is a charge that is difficult to level at the NRA, whose money comes in small contributions from a membership base made up largely of working- and middle-class gun owners who hardly constitute a social elite.[23]

The NRA's many members are perhaps the most impassioned of any interest group, and its reputation for swinging elections is, if somewhat inflated, well deserved. Its allies include many powerful legislators at both the state and federal levels, as well as many governors and, depending upon who is sitting in the White House, cabinet members and the president himself. While this formidable power does account for its persistent legislative successes, it does not, however, make a particularly strong case for denouncing this influence as undue or illegitimate.

Arguments against Using Litigation to Circumvent the Legislative Process

Even if charges of NRA corruption of the legislative process were true, tort litigation would not be an appropriate substitute. When parties attempt to fight legislative battles in courtrooms, they are prone to infuse the judicial process with the very same political forces to which they objected in the legislative process. While in the judicial context these political forces may play out to a different party's advantage, they ultimately politicize the courts in ways that are self-defeating and bad for the courts as an institution.

Some proponents of lawsuits against the gun industry have been open about their intention to use litigation as a means to circumvent the legislative process. As Wendell Gauthier, the lead plaintiff's attorney in the City of New Orleans's suit against the gun industry, put it, "The mayor tried to crack down on the [gun] dealers when he was a state senator, and the gun lobby crushed his efforts each time. He couldn't even get a bill out of committee. If lawyers hadn't launched *Brown v. Board of Education*, you would never have had school integration because it was so unpopular with lawmakers."[24] Gauthier went so far as to characterize the plaintiffs' bar "as a *de facto* fourth branch of government . . . [that achieves] regulation through litigation where legislation [has] failed."[25]

There are a number of problems with this justification for lawsuits against the gun industry. First, the failure to get a bill out of committee—by far the most common fate of legislative proposals—is not evidence of a problem with the legislative process that requires a remedy, much less one designed to circumvent the legislative process altogether. Second, the analogy with *Brown* is inapt. Whereas in *Brown* plaintiffs called upon courts to overturn school segregation laws as *unconstitutional,* in lawsuits against the gun industry attorneys like Gauthier are calling upon courts to contradict legislative determinations about gun control merely because they consider them *unwise*. Within our constitutional tradition, courts are empowered to strike down laws that exceed the limits of legitimate legislative power, but they cannot invalidate legislative determinations just because the court disagrees with them. While proponents of gun litigation may be eager to wear the mantle of civil rights, legally they are engaged in a very different exercise. And, finally, that gun controls achieved through litigation are the product of an unelected group of private lawyers acting as a "*de facto* fourth branch of government" in defiance of legislative policy choices is hardly something to boast about.

Treating the courts as merely a second front in legislative battles with the NRA threatens to politicize the judiciary even more than it already is. Of course, only a naive and romantic view of the courts would consider them apolitical. Most state court judges are elected, and appointment of the remaining state and federal judges is highly political. However, when there is bipartisan agreement that the primary function of courts should be to decide disputes in accordance with established legal principles, and that judges should exercise discretion only within the constraints of those principles and in line with legislative trends, then judges will be elected and selected largely for their commitment to restraint and not merely for their personal political views. As agreement over whether courts do or should conform to this model of judicial restraint breaks down, elections and appointment battles will become more partisan. We are then likely to see an increase in the lobbying activities that characterize the legislative process.

Proponents of lawsuits against the gun industry are betting that they will have more success with judicial than with legislative politics. In the short term, they may be right. The lobbying power of plaintiffs' attor-

neys in affecting judicial elections and appointments is likely greater than that of the NRA.[26] In the long run, however, there is no reason to think that the NRA would be incapable of shifting resources from legislative to judicial politics. Moreover, regardless of which side might win this particular battle to influence the judiciary, increased political pressure on the judicial process would encourage judges to abandon restraint whenever politically desirable. Failure to take seriously limits on the policy-making role of courts threatens to erode public confidence in their impartiality, which rests on a widely shared belief that they resolve disputes based on established legal principles rather than on judges' political views and that when judges' political views do enter into their decisions, they do so in a restrained way.

Gun Litigation as a Means of Influencing the Legislative Process

Some proponents of lawsuits against the gun industry view them as a way not to circumvent legislative debate but to change the terms of it. Indeed, one scholarly article recently characterized this as the primary function of the litigation: "Although the gun lawsuits are unlikely to have any near-term effect on storage, carrying, or gun misuse, litigation may have some indirect effect in each of these areas by strengthening the hand of gun control advocates in the legislative process."[27] There are two distinct ways in which this might occur. First, the prospect of bankrupting liability, or even just defense costs, might make accepting greater regulation in exchange for relief from the suits a more attractive legislative option for the industry and the gun lobby. Second, the language of the legal claims themselves—defective design, negligent marketing, and nuisance—might spill over into public and legislative discourse and reframe the problem of gun violence and options for addressing it. Tort litigation often has these implications for the legislative process—affecting the balance of power and the terms of debate—two of the many ways in which the resolution of private disputes inevitably impacts public affairs. Yet if this becomes the primary goal of suits against gun makers—using tort litigation as merely another lobbying tactic—it may undermine public confidence in the courts and provoke legislative backlash, resulting in significant damage to the tort system as an institution.

Litigation as a Bargaining Tool

In discussing the use of litigation as a bargaining tool within the legislative process, it is important to distinguish between the threat of imposing defense costs and the threat of liability. Threatening to impose defense costs on a legislative adversary involves a misappropriation of public resources. It is a misuse of the court system to employ the rules of pleading, discovery, and trial, which are enforced by the state and paid for by the public, as a lobbying tool. The purpose of these rules, and the justification for their costly imposition on parties to litigation, is to generate the information necessary to resolve private claims. They are not designed to help parties increase their bargaining power, and when they have been used in this way, such tactics have prompted reform.[28]

By contrast, using the threat of liability as a way to pressure a legislative opponent involves no such misappropriation of public resources. Liability, in contrast to defense costs, is a debt owed to the plaintiffs; it is a private resource that, unlike publicly funded procedural mechanisms, plaintiffs are entitled to use as a bargaining chip: to cash it in or trade it for something more desirable. Liability exposure—the risk of liability—is also a private resource, which can be valued at its potential payout discounted by the probability of winning a lawsuit.[29] Using liability or liability exposure as lobbying resources is no more objectionable than using other private resources such as money or the threat of demonstrations.

Of course, in practice, threats to sue often rely for their effectiveness not only on liability exposure but also on the specter of high defense costs. Nevertheless, it is important to distinguish between legitimate bargaining tactics such as threatening to sue under a theory that has a reasonable chance of surviving dismissal, as well as some chance of winning, and misuse of the legal process for private advantage, as when plaintiffs file multiple suits simultaneously merely in order to intensify defense costs. The two sides in gun litigation regularly fail to make this distinction: plaintiffs have at times shamelessly touted their ability to impose crushing defense costs on the industry, while the industry has too often whined about having to defend against "junk lawsuits," which not only survive discovery but also, in a few cases, result in verdicts favorable to plaintiffs.

Reframing the Terms of Debate

Aside from using defense costs and liability exposure to pressure the industry, gun control advocates see litigation as a way to reframe the policy debate over gun control both in legislatures and among the public at large. By changing the terms of debate, gun control advocates hope to gain a rhetorical advantage in the legislative and public arenas.[30] The way that issues get framed—the language used to describe a problem and the particular causal factors identified as the source of the problem—makes some policy alternatives more attractive than others.[31] From the very beginning, controversy over gun control has been fueled by persistent disagreement over how to characterize the problem of gun violence. On the one hand, gun control proponents assert that gun violence is a product of widespread and largely unregulated private gun ownership. Reducing gun violence, according to this view, requires clamping down on gun proliferation by restricting gun purchases. On the other hand, gun control opponents insist that gun violence is a crime problem, not a gun ownership problem. The proper response to gun violence, according to this view, is to punish criminals who misuse guns, not to deprive potential victims of an effective means of self-defense by restricting everyone's ability to purchase a gun. In support of this approach, gun control opponents frequently cite the Second Amendment, which they interpret as granting individuals a constitutional right to own and carry a firearm.

Lawsuits against gun manufacturers have focused attention on allegations of industry misconduct, and, in doing so, they have deemphasized the role of criminal assailants and discussion of gun ownership rights. When framed as a problem of industry misconduct, the obvious solution to gun violence is victim compensation at industry expense and industry regulation. The enemy is no longer individual gun owners but far less sympathetic corporate defendants.

Furthermore, lawsuits brought by individual victims have allowed gun control proponents to appropriate the rhetoric of rights, which has traditionally been the exclusive property of gun control opponents. Until recently, the gun control controversy was fueled by a tension between two fundamental American values—public safety and individual rights—that pitted proponents of protecting the public from gun violence against defenders of an individual's right to own firearms. Gun

control proponents cited social science data suggesting that widespread and largely unregulated private gun ownership causes high rates of gun violence, while gun control opponents denounced gun controls, no matter how effective in reducing violence, as violations of a constitutional right. 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 the rights of plaintiffs to be compensated for injuries caused by industry wrongdoers. The constitutional right to bear arms must now be weighed against the right to have one's day in court.

At the same time, lawsuits brought by government entities attempt to characterize the problem of gun violence not as a contest of rights but as a public health problem. By analyzing the incidence and impact of gun violence on different demographic groups—employing the same tools used to analyze disease—public health scholars have advocated strategies to prevent gun violence before it occurs. Not surprising, these strategies include modification of gun designs and restrictions on gun sales. The appeal of such strategies has been enhanced by an emphasis on preventing youth violence in particular. The rhetorical power of appeals to child protection—whether in campaigns against sexual assault, drug use, or tobacco control—has not gone unnoticed by gun control proponents within the public health community. Government entity lawsuits, which rely on crime statistics rather than individual victims and seek design modification and marketing restrictions, portray gun violence incidents in the aggregate and provide official endorsement of the public health approach to gun control as a question of how best to eliminate a disease rather than how to weigh competing rights. (In response, gun control opponents have shot back with social science data of their own, suggesting that well-armed communities enjoy lower rates of gun violence, known as the "more guns, less crime" argument. Thus, they too have sought to level the rhetorical playing field by deploying both individual rights and public safety arguments to support their position.)

Many factors influence issue framing, including media coverage, legislative lobbying, and litigation. In this respect, gun control is no exception. As long as lawsuits against the industry are based on plausible theories of liability aimed, in good faith, at winning rather than merely generating press coverage, then it is hard to see on what grounds one might object to their effect on the framing of legislative debates over gun

control. If, however, plaintiffs pursue reframing as not merely a by-product of gun litigation but the primary aim, then they can rightly be accused of misusing the litigation process for a private advantage unrelated to the resolution of claims before the court.

Statutory Immunity as a Response to Gun Litigation

In response to the wave of lawsuits against the gun industry, the NRA launched a nationwide lobbying campaign in state legislatures and Congress to secure statutory immunity for the industry. So far, thirty-two states have passed such legislation. These laws vary widely in scope. Some of them merely prohibit municipalities from suing the industry. Others grant the industry blanket immunity from suit, with narrow exceptions for guns that malfunction (for example, guns that backfire) and breach of contract (for example, failure to deliver guns that have been paid for). In 2003 and early 2004, Congress considered a bill that would have granted the industry this type of blanket immunity nationwide. The bill, which enjoyed overwhelming support in both the House and the Senate, was scuttled at the last minute by its Senate sponsors who opposed amendments to the bill extending a ban on assault weapons and requiring background checks for gun sales at gun shows.

Gun litigation opponents justify statutory immunity as an appropriate response to lawsuits that seek to circumvent the legislative process. By granting such sweeping immunity, even against legitimate claims, legislatures have substituted their own judgment for that of courts and have rejected plaintiffs' claims without a hearing. Thus, while gun litigation opponents accuse plaintiffs of seeking to circumvent the legislative process, they are no less guilty themselves of attempting to circumvent the judicial process. And, unlike plaintiffs, they have been largely successful.

The Case against Immunity Laws

Sweeping statutory immunity for the gun industry is a bad idea for a number of reasons. First, it damages the doctrinal integrity of tort law. The primary purpose of tort law is to provide a system of predictable and

stable rules for resolving private conflicts. While, in practice, the system contains inconsistencies, judges do attempt to employ similar considerations in deciding different cases so as to promote coherence within the system as a whole. There is even considerable uniformity among different states, despite the fact that tort law is state law and states are free to develop their own doctrines. Sweeping statutory immunity for the gun industry carves out an exception exclusively for one industry on the basis of political power rather than any concern for the doctrinal integrity of tort law. This, no less than filing suits in order to circumvent the legislative process, is a politicization of the tort system.

Second, sweeping statutory immunity for the gun industry usurps judicial power. It is the job of courts, not legislatures, at least in the first instance, to judge whether particular legal claims fall within established liability doctrines. Judges know and understand the limits of tort doctrine better than legislatures, and their judgments are based on deliberation rather than interest group politics. Of course, politics does affect judicial decision making. Unlike the legislative process, however, a number of structural features of judicial process mitigate this influence, such as the issuing of written opinions, appellate review, and a sense of judicial role. And, in any case, courts have dismissed the majority of claims against the gun industry at the outset, which undermines the need for statutory immunity in the first place. Within our constitutional scheme, legislative adjudication, no less than judicial legislation, erodes the separation of powers.

Third, sweeping statutory immunity for the gun industry weakens the capacity of tort litigation to complement legislative policy-making and effective administrative regulation. Lawsuits against the gun industry complement legislative and agency policy-making in a number of ways. The discovery process in some lawsuits has already uncovered hidden information about the industry, which has been less than forthcoming about its experiences with safer design alternatives and its knowledge about the risks of different marketing practices. Findings of liability can fill gaps in the system of laws and agency rules that regulate the industry. And liability can supplement scarce enforcement resources by providing an additional incentive for the industry to comply with existing regulations. By eliminating the complementary regulatory role of the tort system, sweeping statutory immunity is detrimental to a legislature's own policy-making effectiveness.

Narrower immunity laws focused merely on prohibiting municipal suits are, however, less open to these objections. Most of these laws reserve to the state the right to sue the industry. They impose a uniform governmental approach to suing the industry by depriving local governments of the right to sue, while allowing the state itself to sue should it choose to do so. Laws such as these that define the rights of local government do not carve out politically motivated exceptions to core tort doctrines; they fall squarely within the traditional province of state legislatures, and they preserve a complementary role for the tort system insofar as they leave individual suits unaffected.

A number of municipalities have mounted court challenges to immunity laws. The cities of New Orleans, Atlanta, and Detroit have argued that immunity laws passed after they filed suit, attempting retroactively to preempt their claims, are unconstitutional. The Louisiana Supreme Court rejected the New Orleans challenge, holding that, as a municipal corporation created by the state, the City had no federal constitutional rights that it could assert "in opposition to the will of its creator" and that, under the state constitution, the immunity law was a valid exercise of the state's police power.[32] Georgia and Michigan appellate courts rejected challenges by Atlanta and Detroit on similar grounds.[33] Immunity bills so far appear to be an effective tactic in extinguishing both pending and future municipal claims against the gun industry.

Federal Immunity

The Protection of Lawful Commerce in Arms Act, considered by Congress in 2003 and early 2004, is the most sweeping statutory immunity measure yet, both in its broad protection from liability and in its federal scope. The bill, which ultimately failed, enjoyed overwhelming support. It had 250 cosponsors in the House of Representatives and 55 in the Senate. While it passed by a margin of 285–140 in the House, it was ultimately defeated in the Senate after the NRA and its Senate sponsors withdrew their support in opposition to amendments extending a ban on assault weapons and requiring background checks on gun sales at gun shows. Given the strong support for gun industry immunity in Congress, the issue is likely to come up again.

Federal gun industry immunity is especially vulnerable to the objec-

tions raised previously to state immunity laws. There can be little doubt that the Protection of Lawful Commerce in Arms Act was more a product of interest group politics than of careful deliberation about reforming tort doctrine. Democratic opponents of the bill in the House of Representatives denounced its sponsors for cutting off Judiciary Committee discussion of the bill after a mere three hours and maneuvering to limit debate and amendments during floor consideration of the bill. Furthermore, the bill's insensitivity to the separation of powers is manifest in its "findings," which begin with a declaration that "[c]itizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms" and goes on to state that imposing liability on the industry would "constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution."[34] Thus, the act, motivated by a desire to preempt judicial overreaching, itself begins by purporting to interpret the Second and Fourteenth Amendments to the Constitution—a power traditionally reserved to the courts. Moreover, the act also passes judgment on the legal theories at issue in lawsuits against the industry, asserting that "[t]he liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law."[35] From a separation of powers perspective, it is one thing for a legislature to overturn common law rules by statute; it is another thing altogether for it to declare what the common law is.

Notable also is the extent to which this immunity legislation is itself a vehicle for framing the terms of debate over both gun control and tort reform. One hears in congressional debate a contest for ownership over resonant terms such as *rights*, *junk*, and *nuisance:* the "right to keep and bear arms" versus the "right to have one's day in court"; groundless "junk lawsuits" versus unsafe "junk guns"; and "nuisance suits" versus "liability for nuisance."[36] In an ironic twist, Republicans, normally champions of regulatory federalism, have appropriated the traditionally Democratic insistence on the need for a national standard, while Democrats, for their part, have offered impassioned pleas on behalf of the states to make their own determinations about gun industry immunity. While the highly rhetorical and somewhat unprincipled character of the

debate is a normal feature of legislative politics, this legislation, if ultimately successful, will be notable for the damage that it is likely to inflict on the integrity of the tort system, the separation of powers, and the capacity of courts to play a supportive role in regulating the gun industry.

Focused Legislative Responses to Particular Judicial Decisions

Immunity laws are not the only legislative responses to gun litigation. In 1988, the Maryland legislature passed a law overturning the doctrine of strict liability for the manufacture, distribution, and sale of Saturday Night Specials established by *Kelley v. R.G. Industries* and creating in its place a board of experts to identify and restrict the sale of handguns with a high risk of criminal misuse.[37] In 2002, the California legislature repealed a provision of the Civil Code granting immunity to the gun industry against product liability claims in response to the California Supreme Court's rejection of *Merrill v. Navegar,* which relied on the provision.[38] In both of these instances, the legislature effectively overturned a particular judicial rule because it objected to the policy implications of the rule.

In criticizing sweeping immunity laws, I do not mean to suggest that legislatures should refrain from overturning common law doctrines when the legislature disagrees with the policy implications of those doctrines. I do mean to suggest, however, that the legislature should do so in a restrained way, one that respects the preeminence of courts in shaping tort doctrine and preserves the regulatory benefits of tort litigation. Legislative responses in Maryland and California exemplify this approach. Unlike sweeping immunity laws, these more focused responses promote the integrity of tort doctrine, respect the separation of powers, and preserve a regulatory role for the courts.

Maryland's Rejection of Judicial Doctrine Established by Kelley v. R.G. Industries

The Maryland legislature's response to *Kelley v. R.G. Industries* exemplifies a restrained approach to legislative review of judicial policy

choices. In deciding *Kelley*, the Supreme Court of Maryland recognized that it was creating a novel theory of recovery—one, however, that it believed fit within the structure of existing doctrine. And in promulgating this novel theory, the court sought to do so in accordance with "the public policy of the State set forth by the General Assembly of Maryland."[39] After a lengthy analysis of legislative policy, the court concluded that "the policy implications of the gun control laws enacted by both the United States Congress and the Maryland General Assembly reflect a governmental view that there is a handgun species, i.e., the so-called Saturday Night Special, which is considered to have little or no legitimate purpose in today's society" and which therefore merited distinct treatment from that accorded to other firearms or consumer products. In creating a new common law rule, the court took the unusual step of making it prospective, applying it only to the *Kelley* case and to sales of Saturday Night Specials occurring after the date of the opinion.

The Maryland legislature disagreed with the court's new rule and three years later passed legislation replacing it with an administrative scheme designed to achieve substantially the same results. The Maryland law repudiated the *Kelley* doctrine, stating that "[a] person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person."[40] At the same time, the law established a nine-member Handgun Roster Board charged with creating a list of handguns that could legally be sold in the state. The board comprises representatives from law enforcement, the gun industry, the NRA, gun control organizations, and the general public. Approval for sale is based on a number of criteria designed to exclude cheap, easily concealed guns. In theory, the legislature's purpose in creating the board was to ban the sale of Saturday Night Specials within the state. In practice, the board has excluded relatively few handguns—only thirty-four compared to the over fifteen hundred approved as of 2002—due to insufficient firearms expertise, lack of information, vagueness of exclusion standards, and gun-lobby influence in appointments.[41]

The Maryland legislature's focused response to *Kelley* has three notable virtues. First, overturning the novel doctrine established by the case introduced no inconsistency into tort doctrine. Strict liability for the manufacture, distribution, and sale of Saturday Night Specials was itself an exception to tort law's approach to firearms in particular and con-

sumer products in general, which are not subject to strict liability absent a defect. If anything, eliminating the *Kelley* rule made tort doctrine more consistent. Second, the Maryland legislature's rejection of *Kelley* respected the separation of powers, focusing on the particular rule at stake without delegitimating the court's authority to declare the common law. Absent from the statute are "findings," such as those in the federal Protection of Lawful Commerce in Arms Act, concerning the constitutionality of the litigation or what the common law is. Third, the legislature's response did not interfere with the court's capacity to complement the regulatory process. Instead of attempting to remove the court altogether from deciding gun litigation, the legislature merely overturned a judicial policy choice with which it disagreed, thereby providing guidance to the court in future cases. Given the legislature's establishment of the Handgun Roster Board, it could be said that the legislature in fact agreed with the court's policy aims of eliminating the sale of Saturday Night Specials and did not so much overturn *Kelley* as replace it with an administrative mechanism that it believed would be more effective.

California's Repeal of Gun Industry Protections in Response to Merrill v. Navegar

The California legislature's response to *Merrill v. Navegar* offers a second example of a more restrained approach. In *Merrill*, the California Supreme Court rejected plaintiffs' negligent marketing claim that the manufacturer of a semiautomatic pistol designed for close combat-style assaults should have limited promotion and sale of the gun to military and law enforcement, the only consumers who might have legitimate use for such a weapon. Citing Section 1714.4 of the California Civil Code, the court explained that "the Legislature has declared as a matter of public policy that a gun manufacturer may not be held liable '[i]n a products liability action . . . on the basis that the benefits of [its] product do not outweigh the risk of injury posed by [the product's] potential to cause serious injury, damage, or death when discharged.' "[42] The court held that the plaintiffs' negligent marketing claim was essentially a "products liability action" barred by the statute since the claim relied on assertions about the particular design of the gun and its potential to cause serious injury.

In response to the *Merrill* decision, the California legislature repealed Section 1714.4. The legal effect of this action was to remove the statutory obstacle to gun manufacturer liability and leave the courts free to decide gun industry liability based on common law or, depending on the case, based on Civil Code tort provisions as interpreted by the courts.[43] This response has the same three virtues as the Maryland legislature's response to the *Kelley* decision. First, the California legislature acted in a way that enhanced, rather than detracted from, the consistency of California tort doctrine. Section 1714.4 was a special exemption for the firearms industry from the product liability principles applicable to all other consumer products. In repealing it, the legislature removed an inconsistency that it itself had created back in 1983. Second, the legislature respected the separation of powers, leaving clarification of how the common law and the Civil Code applied to gun litigation up to the courts. Third, the legislature's repeal not only preserved but encouraged the courts to revisit the issue and to play a complementary role in gun industry regulation. The *Merrill* decision and the subsequent repeal of 1714.4 illustrate a high degree of cooperation, mutual respect, and complementarity between the California Supreme Court and the legislature on the issue of gun violence policy: the court showed great deference in its interpretation of the legislature's policy preferences, and the legislature responded by indicating a contrary preference and leaving the court to work out the doctrinal implications.

Exercising Mutual Restraint: The Complementary Roles of Legislatures and Courts

The analysis throughout much of this chapter relies on a model of policy-making and regulation in which legislatures and courts play distinct and complementary roles. According to this model, legislatures should take the lead in shaping public policy. The perception of democratic legitimacy makes them better suited than courts to broker political compromises between competing interest groups. Furthermore, they have the power to establish, fund, and supervise agencies capable of gathering information and developing special expertise in a particular regulatory area. At the same time, legislatures should leave room for courts to play

a secondary role, one that, in the end, can strengthen the effectiveness of their own policy choices. In responding to court decisions with which they disagree, legislatures should exercise restraint, overturning the particular doctrinal choices with which they disagree without eliminating altogether future court involvement in an area of public policy. Legislatures should also exercise restraint in replacing common law rules with statutory substitutes, especially when this introduces inconsistencies into tort doctrine. When Congress has occasionally granted a particular industry immunity from tort liability—as in the case of the coal industry, vaccine makers, or the airline industry following the September 11, 2001, terrorist attacks—it has provided an alternative compensation system for victims.[44] Similarly, when passing legislation that preempts state tort law, Congress has relied heavily on particular agencies equipped to regulate the relevant industry. Such limitations on the role of the tort system should be justified by the public interest, not by political influence.

As for the role of courts within this model, the primary duty of common law courts is to provide a stable and predictable system of rules for resolving private disputes. Insofar as it is highly deliberative and insulated from political pressures, the judicial process is well suited to this task. When ambiguities arise in the application of existing rules, judges must exercise discretion and should be guided in part by the public policy implications of different options for deciding a case. In making policy choices within the context of resolving doctrinal ambiguities, the idea of complementarity suggests that courts should show deference to legislative policy preferences where discernable. By playing a complementary role, courts can enhance legislative policy-making by uncovering hidden information, filling gaps in the regulatory regime, and supplementing scarce enforcement resources. In chapter 10, I develop this complementary model further.

Conclusion

In this chapter, I have criticized the efforts of gun control advocates to use litigation as a means of circumventing the legislative process. These efforts threaten to politicize the judiciary, and they are likely, in the end, to be self-defeating as the gun lobby focuses its superior political power on judicial elections. I have also criticized the gun lobby's largely suc-

cessful attempts to secure statutory immunity for the gun industry as a way to stifle litigation. Such sweeping immunity damages the doctrinal integrity of tort law, undermines the separation of powers, and impairs the capacity of tort litigation to support legislative regulatory efforts. Tort litigation should not be used merely as a means of promoting an unsuccessful legislative agenda, and immunity legislation is no substitute for individual adjudication of private claims.

While I have denounced blatantly political suits, I do not mean to deny that private litigation can play a legitimate role in public policy debates. The threat of liability is a legitimate bargaining tool in the legislative process, and the reframing of issues among the general public and within legislative debates is a normal by-product of high-profile litigation. Furthermore, in arguing against broad immunity legislation, I do not mean to deny that focused legislative responses to judicial decisions are a healthy part of the interplay between legislatures and courts, one that reasserts, when necessary, the primacy of legislatures in the policy-making process.

Throughout, my analysis has been based on a model of policy-making in which legislatures and courts work together in a complementary fashion to shape and to carry out coherent and effective regulatory choices. The viability of this model depends upon the ability of legislatures and courts to exercise mutual restraint. In the case of gun litigation, this means that courts should dismiss purely political suits and legislatures should leave courts to adjudicate legitimate ones.