

# Regulating Guns as Products

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## ABSTRACT

*Toy guns are subject to federal product safety regulation. Real guns are not. If a defect in an air rifle causes it to discharge without warning, the manufacturer would be required to promptly notify a safety regulator, the Consumer Product Safety Commission (“Commission”); to recall the air rifle; and to provide a repair, replacement, or refund to consumers. Yet when such defects occur in real guns, the firearms industry has no such obligation. This unique immunity from product safety regulation allows gun defects to go unremedied for far too long. The results are tragic: needless deaths and injuries of police officers, ordinary gun owners, children, and bystanders.*

*This Article argues that the status quo is unacceptable, and proposes a clear, workable solution. Congress should empower the Commission to regulate the safety of guns as products, without granting the Commission authority over “gun control” as traditionally understood. This approach resolves the inadequacies of industry self-regulation, tort, and state consumer law, appropriately leverages the existing Consumer Product Safety Act framework, and is consistent with the Commission’s longstanding oversight of holsters, gun locks, gun safes, and other gun-adjacent products. Under this approach, the firearms industry would be obligated to report safety defects, recall dangerously defective firearms, and offer remedies to consumers. The Commission could also consider adopting commonsense product safety standards—such as regulations to ensure that new firearms have functional safety devices and do not discharge without a trigger pull—just as the Commission adopts safety standards for many other consumer products. But the Commission would be precluded from regulating guns to curtail gun violence or suicide, or to reduce guns’ prevalence.*

*This approach is fully compatible with the Second Amendment in light of New York State Rifle & Pistol Association v. Bruen, 142 S. Ct. 2111 (2022). And lifting the firearms industry’s immunity from product safety law—thereby regulating guns as products—has helpful implications for broader debates on gun*

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*law and policy. By establishing that Commission regulation could simultaneously protect the public from harm and facilitate the right to lawful self-defense, this Article's proposal demonstrates that some gun regulations can concurrently respect gun rights, uphold consumers' rights, and protect lives—and, in doing so, reveals fissures between the interests of the gun industry and gun owners.*

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## INTRODUCTION

On December 23, 2011, sixteen-year-old Jasmine Thar was talking with her cousin in a relative's front yard in North Carolina when she was struck by a single gunshot.<sup>1</sup> Jasmine was killed and two nearby family members wounded.<sup>2</sup> The shot had flown from the closed window of the home across the street.<sup>3</sup> The neighbor—an experienced gun user and Marine Corps veteran—said he had not pulled the trigger of his Remington Model 700 rifle.<sup>4</sup> Jasmine's family sued Remington, and the

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<sup>1</sup> Deuce Niven, *No Criminal Charges in Jasmine Thar Death*, TABOR-LORIS TRIB. (Apr. 22, 2013), <https://www.tabor-loris.com/2013/04/22/no-criminal-charges-in-jasmine-thar-death/> [https://perma.cc/THT2-Y3DP].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Lesley Stahl, *Popular Remington 700 Rifle Linked to Potentially Deadly Defect*, CBS NEWS (Feb. 19, 2017, 7:07 PM), <https://www.cbsnews.com/news/popular-remington-700-rifle-linked-to-potentially-deadly-defects/> [https://perma.cc/H7MD-NQLV].

company settled on undisclosed terms without admitting fault.<sup>5</sup> Remington had known about a trigger-mechanism defect in its Model 700 since at least the early 1970s.<sup>6</sup> It received hundreds of consumer complaints, including reports of deaths and injuries.<sup>7</sup> Yet the company did nothing about its rifle's propensity to unintentionally discharge until a 2013 class settlement, four decades after the defect became apparent.<sup>8</sup>

Jasmine's death, and the manufacturer's avoidance of accountability, was not a unique tragedy. Consider the seven-year-old California boy shot by a handgun notorious for its poor construction. When a babysitter unloaded the weapon to keep it away from the boy, a bullet launched from the gun and tore through the child's spine.<sup>9</sup> He died at age twenty-nine of complications from quadriplegic paralysis.<sup>10</sup> Or consider the Troy, New York, police detective whose SIG Sauer P320 pistol fired while holstered, blasting through his leg, thigh, and knee.<sup>11</sup> This was one of more than a hundred reported incidents of P320s firing without a trigger pull.<sup>12</sup> In a lawsuit filed in 2022—one of more than two dozen federal suits against SIG Sauer—a group of twenty police officers, military veterans, federal agents, and others alleged that they had been injured after their P320 discharged without a trigger pull.<sup>13</sup>

Ordinarily, a product with such a litany of defect reports would be closely scrutinized by the Consumer Product Safety Commission

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<sup>5</sup> *Id.*

<sup>6</sup> See *O'Neal v. Remington Arms Co.*, 817 F.3d 1055, 1058 (8th Cir. 2015) (discussing minutes from a Remington product safety subcommittee meeting in 1979 that estimated “at least 1% of the two million Model 700 rifles it had manufactured prior to 1975—or 20,000 rifles—would inadvertently fire merely by releasing the safety”).

<sup>7</sup> See Susan Peschin, Whit Collins & Robert Ricker, *Buyer Beware: Defective Firearms and America's Unregulated Gun Industry*, CONSUMER FED'N OF AM., 6 (Feb. 2005), [https://consumerfed.org/pdfs/buyer beware\\_report.pdf](https://consumerfed.org/pdfs/buyer beware_report.pdf) [<https://perma.cc/5C54-TFLH>] (“The Remington 700 bolt-action rifle has been involved in approximately 100 death and injury claims, and thousands of malfunction complaints.”).

<sup>8</sup> See *infra* Section III.B.1 (discussing the history of the Remington defect and the company's inaction).

<sup>9</sup> Steve Marble, *Brandon Maxfield, Shooting Victim Who Took Down California Gunmaker, Dies at 29*, L.A. TIMES (Nov. 18, 2016, 4:25 PM), <https://www.latimes.com/local/obituaries/la-me-brandon-maxfield-20161118-story.html> [<https://perma.cc/56BS-QYXP>].

<sup>10</sup> *Id.*; *Maxfield v. Bryco Arms*, No. A103358, 2005 WL 419595, at \*1 (Cal. App. Ct. 2005) (affirming verdict).

<sup>11</sup> Complaint at 5, *Colwell v. Sig Sauer, Inc.*, No. 1:21-CV-1200 (N.D.N.Y. Nov. 2, 2021), ECF No. 1 (alleging “substantial injury, maceration of tissue, blood loss, and nerve damage”).

<sup>12</sup> E.g., Champe Barton & Tom Jackman, *Popular Handgun Fires Without Anyone Pulling the Trigger, Victims Say*, WASH. POST (Apr. 11, 2023, 7:00 AM), <https://www.washingtonpost.com/dc-md-va/2023/04/11/sig-sauer-p320-fires-on-own/> [<https://perma.cc/PY74-3BBS>]; Trone Dowd, *Milwaukee Police Will Stop Using Gun That Keeps Going Off by Mistake*, VICE NEWS (Nov. 3, 2022, 12:49 PM), <https://www.vice.com/en/article/epzkkj/milwaukee-police-sig-sauer-pistol> [<https://perma.cc/MY8K-WL7L>].

<sup>13</sup> Complaint at 1, 9, *Armendariz v. Sig Sauer, Inc.*, No. 1:22-cv-536 (D.N.H. Nov. 30, 2022), ECF No. 1.

(“CPSC” or “Commission”).<sup>14</sup> The Commission, however, lacks power to regulate the safety of firearms or ammunition. Congress chose in the 1970s to bar the CPSC from engaging in any regulatory activity over firearms or ammunition.<sup>15</sup> Thus, neither the Consumer Product Safety Act (“CPSA”)<sup>16</sup> nor the Federal Hazardous Substances Act (“FHSA”)<sup>17</sup> apply to the firearms industry. And no other federal agency regulates firearm product safety.<sup>18</sup> The result: *no* federal regulator may adopt safety-performance or safety-feature standards for firearms or ammunition or oversee recalls of defective firearms or ammunition in the consumer marketplace. The sole legal remedies for hazard-creating defects in these products are civil suits.<sup>19</sup>

This Article critiques the firearms industry’s immunity from federal product safety law. It explains how the absolute bar on Commission jurisdiction over guns and ammunition fails both gun owners and the public. And it proposes a specific alternative that is constitutional, workable, and consistent with the existing consumer product-safety framework: Congress should authorize the CPSC to exercise product safety regulatory authority over the firearms industry, including receiving defect reports, overseeing voluntary and mandatory recalls, and adopting mandatory product safety-performance or safety-feature standards, but should not authorize the CPSC to regulate in the broader arena of gun policy.

Part I critically analyzes the 1970s debates culminating in Congress’s decision to grant the firearms industry a unique immunity from

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<sup>14</sup> See *infra* Sections IV.A.1, V.C (discussing how the CPSC reviews reports of safety defects and noncompliance from companies to determine whether a recall or other corrective action is necessary).

<sup>15</sup> See *infra* Section I.A (describing legislative history); see also Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 130 (2002); U.S. GOV’T ACCOUNTABILITY OFF., GAO/PEMD-91-9, ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 34 (1991) [hereinafter 1991 GAO Report], <https://www.gao.gov/assets/pemd-91-9.pdf> [https://perma.cc/DCN8-6GFH].

<sup>16</sup> Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051–2083).

<sup>17</sup> Pub. L. No. 86-613, 74 Stat. 372 (1960) (codified as amended at 15 U.S.C. §§ 1261–1278).

<sup>18</sup> Peschin et al., *supra* note 7, at 5; Andrew Jay McClurg, *The Second Amendment Right to be Negligent*, 68 FLA. L. REV. 1, 7–8 (2016); Julia Samia Mair, Stephen Teret & Shannon Frattaroli, *A Public Health Perspective on Gun Violence Prevention*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 39, 50 (Timothy D. Lytton ed., 2009).

<sup>19</sup> Many federal regulations govern the importation, sale, use, and possession of firearms. But none govern defect reporting or recall obligations, or set design, manufacturing, or labeling standards for firearms. See Gary Klein, *In the Hands of the Maker: The Failure of Consumer Product Safety Oversight of Guns*, 33 LOY. CONSUMER L. REV. 58, 91, n.127 (2021) (Bureau of Alcohol, Tobacco, Firearms and Explosives regulations do not obviate need for product-safety regulation because such regulation has “little to do with consumer product safety regulation or enforcement”); Eggen & Culhane, *supra* note 15, at 131 (“[A]ny sense that the firearm industry is substantially regulated is illusory.”).

federal product safety laws. It examines how sporadic proposals in past decades to close the regulatory gap have failed. Part II describes the opportunity missed by Congress, identifies a workable distinction between product safety regulation of guns and “gun control,” and refutes the misconception that the CPSC regulatory authority is an “all or nothing” proposition.

Part III explains how the firearms industry’s immunity from product safety regulation needlessly causes death and injury. Although less common than gun homicides and suicides, accidental gun deaths and injuries remain a persistent problem.<sup>20</sup> This Part identifies and debunks the pervasive myths—promoted by the gun industry and its allies—that gun defects never exist, and that every unintentional gun death or injury is attributable to culpable user conduct. Using case studies of publicly known firearm defects, it demonstrates that a subset of the hundreds of unintentional gun deaths, and tens of thousands of unintentional gun injuries requiring hospitalization, in the United States each year are caused by defects or by the industry’s failure to adopt readily available safety features.<sup>21</sup> It describes how dangerous defects can include discharges without a trigger pull and, conversely, a *failure* to fire when the trigger is pulled and the safety is disengaged. And it explains how firearms, more than other consumer products, present heightened hazards to users when designed or manufactured incorrectly.

Part IV explains why existing remedies are insufficient. It assesses the vital consumer protections cut off by the firearms industry’s immunity from product-safety regulation. It explains the weakness of unilateral, unmonitored, voluntary industry recalls; how industry’s self-regulation efforts fail to protect gun users or the public; and why existing accountability mechanisms, such as product liability suits, warranty claims, and state statutes setting firearm safety standards, cannot substitute for federal product safety regulation.

Part V argues for a limited yet robust role for the CPSC. To protect consumers and the public, Congress should eliminate the firearms industry’s immunity from Commission jurisdiction and apply the standard CPSA product safety framework to the industry. Like other manufacturers, the firearms industry should be required to comply with ordinary safety-defect reporting and recall obligations. The CPSC should also be authorized to set consumer product safety standards for the gun industry, consistent with the CPSA rulemaking process, which protects both

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<sup>20</sup> See *infra* Part III.

<sup>21</sup> For example, newly manufactured guns could be required to include chamber load indicators or magazine safety disconnect devices, or be subject to drop-test standards to ensure that they are not prone to discharge without a trigger pull. See Peschin et al., *supra* note 7, at 53 (“Internal memos, gun patents, and employee depositions show that many safety features are inexpensive, easily incorporated into existing models, and have been available for decades.”).



consumers and industry. But the CPSC’s jurisdiction would be limited to a traditional product safety scope: the Commission would not regulate to prevent harms inflicted by intentional or culpable firearm use.

This Part argues that the CPSC is the sole federal agency with the expertise and credibility to address product-safety hazards in firearms and ammunition. It marshals evidence showing that Commission regulation of the industry under the existing CPSA framework best accords with consumer expectations, and that firearms and ammunition should be treated as the “consumer products” they are. It assesses the CPSC’s track record of effectively overseeing recalls involving gun-adjacent products—such as defective gun holsters and gun safes—and explains how the Commission is far more suitable than other agencies, such as the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) or the Food and Drug Administration (“FDA”), to regulate the safety of guns as products.

Part VI anticipates and responds to objections to this proposal. It establishes how the proposed blueprint is consistent with the Second Amendment and would facilitate, rather than burden, the right to lawfully bear arms in self-defense. It discusses several reasons why CPSC safety regulations should not trigger the historical-analogy test under *New York State Rifle & Pistol Association v. Bruen*.<sup>22</sup> Moreover, if *Bruen* does apply, CPSC regulation would pass its test: manufacturer-level firearm-safety regulations have antecedents spanning 17th-century England to 19th-century America.<sup>23</sup> Fears that Commission oversight would lead to overregulation are also allayed by the CPSA framework, which contains many substantive, procedural, and structural protections against overregulation.

Part VI also defends this Article’s proposal against the opposite critique: that it is too limited. Limiting CPSC’s oversight over the firearms industry to product safety regulation—rather than allowing the Commission to engage in broader gun policy—is supported by both practical and normative considerations. The risks of overtaxing the Commission’s resources and heightening political polarization both strongly weigh in favor of limiting CPSC’s oversight of the gun industry to the product-safety sphere. More fundamentally, Congress and the states—not the CPSC—must address the urgent problems of gun violence and suicide, and legislators should not evade political and moral accountability by delegation to the Commission. Part VII offers concluding thoughts on this proposal’s implications for broader gun discourse.

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<sup>22</sup> 142 S. Ct. 2111 (2022).

<sup>23</sup> See *infra* Section VI.A.3.

## I. THE EMERGENCE OF THE FIREARMS INDUSTRY'S IMMUNITY

### A. *Enactment of the CPSA*

Before the 1960s, federal product-safety legislation was piecemeal,<sup>24</sup> focusing on individual product-specific hazards that became apparent after successive waves of deaths and injuries.<sup>25</sup> The inadequacy of this approach became apparent to the burgeoning consumer movement.<sup>26</sup> In 1967, Congress established the National Commission on Product Safety and directed it to undertake “a comprehensive study and investigation” of risks posed by hazardous household products.<sup>27</sup> The National Commission on Product Safety’s final report, issued in 1970, concluded that 20 million Americans were injured, and 30,000 killed, by household products every year.<sup>28</sup> It concluded that American consumers were exposed to “unreasonable consumer product hazards” to a degree “excessive by any standard of measurement,” and that self-regulation was “patently inadequate.”<sup>29</sup>

In response to these findings, Congress enacted the CPSA in 1972.<sup>30</sup> In a radical departure from earlier legislation, the CPSA established a sweeping framework to bolster the safety of almost all consumer products.<sup>31</sup> It created CPSC and directed the new agency to develop and enforce that framework to protect the public from “unreasonable risks

<sup>24</sup> E.g., Flammable Fabrics Act, Pub. L. No. 83-88, 67 Stat. 111 (1953); Federal Refrigerator Safety Act, Pub. L. No. 84-930, 70 Stat. 953 (1956); Poison Prevention Packaging Act (“PPPA”), Pub. L. No. 91-601, 84 Stat. 1670 (1970).

<sup>25</sup> E.g., ALISSA CORDNER, TOXIC SAFETY: FLAME RETARDANTS, CHEMICAL CONTROVERSIES, AND ENVIRONMENTAL HEALTH 24–26 (2016); Barbara Young Welke, *Owning Hazard, A Tragedy*, 1 U.C. IRVINE L. REV. 693, 696 (2011) (enactment of Flammable Fabrics Act responded to burning injuries suffered by hundreds of children in cowboy playsuits and other flammable clothing); Marian Moser Jones & Isidore Daniel Benrubi, *Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States*, 103 AM. J. PUB. HEALTH 801, 804–09 (2013) (enactment of Federal Hazardous Substances Act and PPPA responded to childhood poisonings).

<sup>26</sup> See Teresa M. Schwartz & Robert S. Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. L. REV. 401, 428 (1984) (“Congress enacted the CPSA . . . at the end of the ‘consumer decade’—a decade marked by high expectations about the government’s ability to correct safety problems and passage of numerous health and safety statutes.”).

<sup>27</sup> Pub. L. No. 90-146, §§ 1–2, 81 Stat. 466, 467 (1967).

<sup>28</sup> Nat’l Comm’n on Prod. Safety, *Hearing Before the S. Comm. on Commerce*, 91st Cong. 37 (1970).

<sup>29</sup> *Id.* at 37–38.

<sup>30</sup> E.g., S. REP. NO. 94-251, at 4 (1975), as reprinted in 1976 U.S.C.C.A.N. 993, 996; CPSA, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051–2083).

<sup>31</sup> See Timothy D. Zick, Note, *Reporting Substantial Product Safety Hazards Under the Consumer Product Safety Act: The Products Liability Interface*, 80 GEO. L.J. 387, 387 (1991) (describing the CPSA as “a regulatory scheme whose mandate might best be summed up as a collective command to make almost everything safer”).



of injury.”<sup>32</sup> Today, the CPSA remains the baseline statute governing the safety of almost all consumer products in the United States.<sup>33</sup>

### B. *The CPSA’s Pointed Exclusion: The Guns Carve-Out*

The CPSA’s lofty aims, and its broad definition of “consumer products,”<sup>34</sup> sharply contrasted with Congress’s decision to carve out guns and ammunition from CPSC jurisdiction. The tension in excluding firearms from the “consumer product” category—later adopted as the threshold for CPSC jurisdiction under the CPSA—was already apparent in 1967, when Congress created the National Commission on Product Safety.<sup>35</sup> Congress instructed the study commission to examine hazardous “household products,” but defined that phrase to exclude all products “subject to regulations prescribed under” the Federal Firearms Act (“FFA”)<sup>36</sup> or National Firearms Act,<sup>37</sup> although neither act is aimed at product safety.<sup>38</sup>

Before the CPSA’s enactment, Congress considered prospective CPSC authority over firearms and ammunition as part of the broader debates over the new agency’s powers and structure. An early Senate version of the legislation would have barred the new regulator<sup>39</sup> from

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<sup>32</sup> 15 U.S.C. § 2051(a)–(b); *see also* Zick, *supra* note 31, at 388 (describing CPSA’s creation of the CPSC).

<sup>33</sup> *See* Dennis B. Wilson, *What You Can’t Have Won’t Hurt You! The Real Safety Objective of the Firearms Safety and Consumer Protection Act*, 53 CLEV. ST. L. REV. 225, 227 (2005) (referring to the CPSA as “the law that has been applied to seek to ensure the safety of other consumer products for over thirty years”).

<sup>34</sup> 15 U.S.C. § 2052(a)(5).

<sup>35</sup> Joint Resolution to Establish a National Commission on Product Safety, Pub. L. No. 90-146, § 6, 81 Stat. 466, 470 (1967).

<sup>36</sup> Pub. L. No. 75-785, 52 Stat. 1250 (1938). The FFA was repealed by the Gun Control Act of 1968 (“GCA”), Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921–928). However, most of the FFA’s substantive provisions were reenacted at the same time. *See, e.g.,* *United States v. Lopez*, 2 F.3d 1342, 1350 (5th Cir. 1993) (noting that Title IV of Omnibus Crime Control and Safe Streets Act of 1968 (“OCCSSA”) “repealed the [FFA] . . . and enacted a new chapter 44 (‘Firearms’) of Title 18 (18 U.S.C. [§] § 921–928), which incorporated, with some amendments, almost all the provisions of the [FFA]”); Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 653–55 (2022) (noting that both GCA and its “prelude,” Title IV of the OCCSSA, modified FFA provisions).

<sup>37</sup> Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872); Joint Resolution to Establish a National Commission on Product Safety, Pub. L. No. 90-146, § 6, 81 Stat. 466, 470 (defining “household products”).

<sup>38</sup> *See supra* note 19.

<sup>39</sup> S. REP. NO. 92-749, at 31, 61 (1972). That version of the legislation would have created an independent “Consumer Safety Agency” containing “a Commission of Foods and Nutrition, a Commission of Drugs, and a Commission of Product Safety, each to be headed by a separate Commissioner.” *Id.* at 15. The House version of the legislation, ultimately adopted by the Conference Committee and enacted into law, settled instead upon an independent, multimember Commission. *See* H.R. REP. NO. 92-1593, at 29–35 (1972) (Conf. Rep.).

declaring a firearm or ammunition a “banned hazardous consumer product,”<sup>40</sup> but allowed it to set “a consumer product safety standard for firearms or ammunition.”<sup>41</sup> The Senate Commerce Committee contemplated that the new regulator might “direct [its] . . . attention” to “eliminating such unsafe consumer products” as low-quality firearms, referred to as “Saturday night specials,” given the “dangers they present to their users.”<sup>42</sup> It viewed this approach as entirely compatible with “the Committee’s intent” that the new regulator not “intervene in the gun control controversy.”<sup>43</sup> In the Senate Committee’s view, the clause excluding “firearms from the products that might be declared banned hazardous consumer products” was sufficient to ensure that the new safety agency would not become a “vehicle to resolve the policy issues concerning Federal firearms control.”<sup>44</sup>

But a much more restrictive House companion bill ultimately won the day.<sup>45</sup> In contrast to the nuanced Senate position, allowing the Commission to regulate unsafe firearms while preventing the Commission from addressing gun control policy, the House-proposed substitute text entirely excluded firearms and ammunition from Commission jurisdiction.<sup>46</sup> Representative John Dingell, a Michigan Democrat and leading NRA ally,<sup>47</sup> authored an amendment in the House Commerce Committee “to prohibit any type of regulatory activity by the Commission” over firearms or ammunition.<sup>48</sup> The Commerce Committee adopted the Dingell Amendment on a 19–13 vote,<sup>49</sup> and the conference committee ultimately excluded from the CPSA’s “consumer product” definition “any article which, if sold by the manufacturer, producer, or importer,

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<sup>40</sup> S. REP. NO. 92-749, at 31.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 81.

<sup>45</sup> See generally H.R. REP. NO. 92-1593, at 32–64 (1972) (Conf. Rep.). See *Consumer Product Safety Act: Law and Explanation*, Trade Regul. Rep. (CCH) ¶ 100 (Nov. 11, 1972) (explaining that the Conference Committee recommended “substantially all of the House version”); Wilson, *supra* note 33, at 235 (describing this decision as reflective of “profound” level of “Congressional hostility to Commission involvement with guns”).

<sup>46</sup> H.R. REP. NO. 92-1593, at 37.

<sup>47</sup> Jack Fitzpatrick & National Journal, *The Issue That Divides the Dingells*, THE ATLANTIC (July 30, 2015), <https://www.theatlantic.com/politics/archive/2015/07/the-issue-that-divides-the-dingells/443385> [<https://perma.cc/MQ8F-YBJA>]; Zack Stanton, *You’re Living in the America John Dingell Made*, POLITICO (Feb. 8, 2019), <https://www.politico.com/magazine/story/2019/02/08/john-dingell-obituary-funeral-politics-analysis-224929/> [<https://perma.cc/GT9X-CQ32>].

<sup>48</sup> *Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000 to Amend the Consumer Product Safety Commission, to Authorize New Appropriations, and for Other Purposes Before the Subcomm. for Consumers of the S. Comm. on Commerce*, 94th Cong. 134 (1975) (statement of Representative Dingell that he had “caused [the language] to be inserted” in the House Commerce Committee report three years earlier).

<sup>49</sup> *Gun Owners Score Gains on Federal, State Fronts*, AM. RIFLEMAN, July 1975, at 42.

would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954 . . . or any component of any such article.”<sup>50</sup> The sole “articles” covered by this arcane excise-tax provision are firearms and ammunition.<sup>51</sup> Although Congress’s intent to bar Commission jurisdiction was clear, former Commission Acting Chairman<sup>52</sup> Robert S. Adler noted that Congress’s choice to couch the exclusion in “highly technical language . . . undoubtedly obscured” what Congress was doing.<sup>53</sup> The impact of the exclusion was likely overshadowed by wider debates on the CPSCA, including the new agency’s structure.<sup>54</sup>

During the House debate on the CPSCA, Representative Jonathan Bingham, a New York Democrat, sought to strike the firearms exclusion and restore the Senate language.<sup>55</sup> He distinguished product safety regulation from gun control, noting that his proposal was “not a gun control amendment” but “simply and purely a safety amendment,” aimed at preventing accidental injury and death without addressing “the question of who might buy guns or under what conditions.”<sup>56</sup> Representative Bingham noted that “firearms are an important ‘consumer product,’” citing the approximately six million firearms then sold annually in the United States and the nation’s high accidental gun death rate.<sup>57</sup> Displaying a toy gun on the House floor, he noted that a defective

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<sup>50</sup> H.R. REP. NO. 92-1593, at 2–3, 37.

<sup>51</sup> 26 U.S.C. § 4181.

<sup>52</sup> I use “chairman” throughout this Article because it is the term used in the CPSCA and each woman who has served as the CPSC chairman or acting chairman—Ann Brown, Inez Tenenbaum, Ann Marie Buerkle—has used that title. *See, e.g.*, Press Release, CPSC, *U.S. Consumer Product Safety Commission Chairman Ann Brown Resigns* (Nov. 1, 2002), <https://www.cpsc.gov/Newsroom/News-Releases/2003/US-Consumer-Product-Safety-Commission-Chairman-Ann-Brown-Resigns> [<https://perma.cc/C27B-N2WJ>]. Alexander Hoehn-Saric, in a break from his predecessors, uses “chair.” *See* Alexander Hoehn-Saric, CPSC, <https://www.cpsc.gov/About-CPSC/Chairman/Alexander-Hoehn-Saric> [<https://perma.cc/NAS3-Z6PH>].

<sup>53</sup> *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Commerce of the H. Comm. on Energy & Commerce*, 116th Cong. 1 n.1 (2019) [hereinafter “Adler 2019 Stmt.”] (CPSC Commissioner Robert Adler’s response to questions from Representative Robin L. Kelly).

<sup>54</sup> The debates within Congress focused more on whether the Commission should “be an independent, collegial body,” or a single-administrator agency within the Department of Health and Human Services (“HHS”), and thus more directly subject to presidential control. Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 82–83 (1989); *see also* MICHAEL PERTSCHUK, *WHEN THE SENATE WORKED FOR US: THE INVISIBLE ROLE OF STAFFERS IN COUNTERING CORPORATE LOBBIES* 145–49 (2017).

<sup>55</sup> 118 CONG. REC. 31,406 (1972) (statement of Rep. Bingham) (offering amendment to strike the carve-out and noting that “firearms were included within” the Senate version of the bill).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

spring-operated pellet pistol would be subject to CPSC regulation, but an actual gun would not: “a topsy-turvy arrangement.”<sup>58</sup>

The Bingham Amendment, however, faced significant opposition from members of Congress who asserted that the carve-out was necessary to prevent the Commission from imposing regulations that would intrude upon gun rights.<sup>59</sup> After a brief debate,<sup>60</sup> the Bingham Amendment was defeated by voice vote.<sup>61</sup>

The CPSA thus left only two categories of consumer product exempt from meaningful federal safety regulation: firearms and ammunition and tobacco products. Every other exclusion from CPSA jurisdiction was made because Congress had conferred safety-regulatory jurisdiction to another agency.<sup>62</sup> For example, the Act excluded drugs, medical devices, and cosmetics from the definition of “consumer product,” because those items are already regulated by the FDA;<sup>63</sup> excluded motor vehicles and motor vehicle equipment, regulated by the National Highway Traffic Safety Administration (“NHTSA”);<sup>64</sup> excluded food, regulated by the FDA and the United States Department of Agriculture (“USDA”);<sup>65</sup> excluded aircraft and aviation materials, regulated by

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<sup>58</sup> *Id.*; see also *id.* (statement of Rep. Bingham) (“[I]f this were the real McCoy, . . . something that could blow up in your face and kill you or with which you could kill other people, it would not be covered.”).

<sup>59</sup> See *id.* at 31,406–07 (statements of Reps. Wiggins and Randall); see also *id.* at 31,388 (statement of Rep. Roncalio); *id.* at 31,373 (statement of Rep. Smith of California) (arguing fervently that creating a powerful product safety agency could lead to future gun regulation even *with* the carve-out). Other members opposed adopting the amendment on procedural or tactical grounds. See, e.g., *id.* at 31,406 (statement of Rep. Moss) (fearing consequences if Congress “suddenly [adopted] a firearms act without any kind of history as to what we intended” and believing the issue to be “important enough . . . to be dealt with as a separate subject”); *id.* at 31,407 (statement of Rep. Holifield) (opposing amendment because its adoption could jeopardize bill’s chances of passage in the Senate). Representatives Moss and Holifield’s positions were understandable. By choosing in 1967 to exclude firearm defects from the National Commission on Product Safety’s study, Congress left the 1972 debate bereft of key facts. See *supra* notes 35–38 and accompanying text. And the CPSA’s chief architects undoubtedly did not want gun issues to imperil the passage of the CPSA, given the urgent need to address an array of product safety hazards, ranging from dangerously defective appliances to highly flammable clothing. See, e.g., 118 CONG. REC. 31,375 (statement of Rep. Staggers) (discussing the urgent goal of establishing comprehensive consumer product regulation).

<sup>60</sup> The debate on the Bingham Amendment and firearms issues spans only a few pages in the Congressional Record. 118 CONG. REC. 31,373, 31,388, 31,406–07 (1972).

<sup>61</sup> See *id.* at 31,407.

<sup>62</sup> See H.R. REP. NO. 92-1153, at 27 (1972) (House Commerce Committee excluded “from the definition of consumer product” subject to CPSC regulation “certain product categories which are either regulated under other safety laws or which the Committee has yet to determine should be subjected to safety regulation of the type envisioned in this bill”).

<sup>63</sup> See 15 U.S.C. § 2052(a)(5)(H).

<sup>64</sup> See *id.* § 2052(a)(5)(C).

<sup>65</sup> *Id.* § 2052(a)(5)(I).

the Federal Aviation Administration;<sup>66</sup> excluded pesticides, regulated by the Environmental Protection Agency (“EPA”);<sup>67</sup> and excluded certain boating and maritime items, regulated by the Coast Guard.<sup>68</sup> Tobacco products, also carved out from CPSC jurisdiction,<sup>69</sup> were for years not subject to safety regulation by any federal agency.<sup>70</sup> In 2009, however, Congress enabled FDA to regulate tobacco products.<sup>71</sup> This leaves firearms and ammunition as the sole consumer products immune from federal product-safety law.<sup>72</sup>

### C. *Widening the Carve-Out: The 1976 Amendment*

The postenactment history of the CPSA slammed the door further on Commission regulation of guns and ammunition. While the original 1972 CPSA made no mention of ammunition,<sup>73</sup> CPSC Chairman Richard Simpson suggested in a conference speech soon after the Commission’s formation that the regulator “could probably ban bullets” under its FHSA authority.<sup>74</sup> After Chairman Simpson’s glib comment caused an outcry, CPSC General Counsel Michael A. Brown issued letters noting that the FHSA authorized the Commission to ban a product only when cautionary labeling was insufficient and the public interest could only be served by removing a product from commerce.<sup>75</sup> Mr. Brown made clear that “no ordinary ammunition has been determined to be a

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<sup>66</sup> *Id.* § 2052(a)(5)(F).

<sup>67</sup> *Id.* § 2052(a)(5)(D).

<sup>68</sup> *Id.* § 2052(a)(5)(G).

<sup>69</sup> Congress excluded “tobacco and tobacco products” from the Act’s definition of “consumer products.” 15 U.S.C. § 2052(a)(5)(B); *see also id.* § 1261(f)(2) (barring the CPSC from deeming tobacco or tobacco products “hazardous products” under FHSA).

<sup>70</sup> The Federal Cigarette Labeling and Advertising Act required cigarette packages and advertisements to carry certain health warning statements directed by the Federal Trade Commission but provided for no further safety regulation. Pub. L. No. 89-92, § 4, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1341).

<sup>71</sup> Family Smoking Prevention and Tobacco Control Act (“FMPTCA”), Pub. L. No. 111-31, 123 Stat. 1776 (2009). FMPTCA was enacted in response to the Supreme Court’s rejection of the FDA’s 1996 assertion that the Federal Food, Drug, and Cosmetic Act gave it jurisdiction over tobacco products. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146–61 (2000). The FMPTCA’s enactment is a relatively recent example of Congress mustering the will to close regulatory gaps and save lives.

<sup>72</sup> As discussed previously, the ATF does not regulate the safety of firearms as products. *See supra* note 19; *see also infra* Section V.D.

<sup>73</sup> Adler 2019 Stmt., *supra* note 53, at 1; *see also* Wilson, *supra* note 33, at 232–33. The FHSA was initially administered by the FDA; the CPSA transferred responsibility for administering FHSA to the Commission. CPSA, Pub. L. No. 92-573, § 30, 86 Stat. 1207, 1231 (codified as amended at 15 U.S.C. § 2079).

<sup>74</sup> Letters from Michael Brown, CPSC General Counsel, to Neal Knox, Dave Wolfe Pub. Co. (Dec. 20, 1973) and to Russell I. Jenkins (Jan. 2, 1974) (labeled as CPSC General Counsel Ops. No. 54 & 58).

<sup>75</sup> *Id.*

banned hazardous substance,” and made no suggestion that the CPSC intended to introduce new regulations over guns.<sup>76</sup>

When the CPSA was enacted, a labeling requirement for small-arms ammunition containers was already in effect. FDA, which enforced the FHSA prior to CPSC’s creation, had adopted the regulation in 1961.<sup>77</sup> Neither FDA nor the Commission had ever proposed a “ban” on ammunition. Nevertheless, some gun activists found Mr. Brown’s letters “ominous,” fearing that the CPSC would attempt to ban ammunition, or some form of ammunition, by declaring it unusual rather than “ordinary.”<sup>78</sup> The ensuing firestorm of controversy<sup>79</sup> intensified in 1974, when the Committee for Hand Gun Control, Inc. (“CHGC”) petitioned the Commission to ban the sale of most handgun bullets.<sup>80</sup> Following advice from its general counsel, the Commission swiftly denied the petition on a 4–1 vote, concluding that, although ammunition was “within the literal meaning of the definition of a ‘hazardous substance’ under the FHSA,” the petitioners’ requested ban would have the “practical effect” of imposing a handgun ban, which the Commission clearly lacked authority to do.<sup>81</sup>

CHGC appealed, and a federal district court set aside the Commission’s dismissal of the petition.<sup>82</sup> Judge Flannery, an appointee of President Nixon, applying a textualist analysis, determined that the Commission did have jurisdiction under the FHSA.<sup>83</sup> The court found that the FDA had, by adopting its labeling requirement, determined that ammunition was “a hazardous substance,” and thus the Commission was required to consider CHGC’s petition “according to the rules and procedures of the FHSA,” although it was obviously not required

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<sup>76</sup> *Id.* Under the FHSA, hazardous household substances must bear a “conspicuous” warning label. 15 U.S.C. § 1261(p)(1)–(2), (n).

<sup>77</sup> In response to an industry petition, FDA adopted a regulation that exempted “[s]mall-arms ammunition packaged in retail containers” from FHSA labeling requirements, “provided that such containers bear” certain specific label statements. Small-Arms Ammunition; Exemption from Labeling Requirements, 26 Fed. Reg. 12,035 (Dec. 15, 1961) (codified at 21 C.F.R. § 191.63). After the CPSA transferred FHSA authorities to the CPSC, the Commission recodified the rule, in substantially similar form. Revision and Transfer, 38 Fed. Reg. 27,022 (Sept. 27, 1973) (codified at 16 C.F.R. § 1500.83(a)). The rule required ammunition containers to have labels bearing: “(i) The common or usual name of the ammunition in the container; (ii) The statement ‘Warning—Keep out of the reach of children,’ or its practical equivalent; and (iii) The name and place of business of the manufacturer, packer, seller, or distributor.” *Id.*

<sup>78</sup> See Wilson, *supra* note 33, at 233.

<sup>79</sup> See *id.* at 232–33, nn.36–40.

<sup>80</sup> Comm. for Hand Gun Control, Inc. v. Consumer Prod. Safety Comm’n, 388 F. Supp. 216, 218–19 (D.D.C. 1974) (discussing filing, consideration, and denial of petition, designated HP 75–2); Adler 2019 Stmt., *supra* note 53, at 1 (discussing how the petition and subsequent developments “ignited a major public outcry—almost exclusively from opponents of gun control”).

<sup>81</sup> Comm. for Hand Gun Control, Inc., 388 F. Supp. at 218–19.

<sup>82</sup> *Id.* at 219–21.

<sup>83</sup> *Id.* at 220.



to grant the petition.<sup>84</sup> The CPSC complied with the court's order and invited public comments on CHGC's petition.<sup>85</sup> Despite the petition's obscurity and its essentially nonexistent chances of being granted by the Commission, some commentators depicted the petition as a "'national referendum' on gun control."<sup>86</sup> The CPSC was flooded by public comment letters.<sup>87</sup>

Before the Commission could rule upon the petition, Congress intervened, passing the Consumer Product Safety Commission Improvements Act of 1976.<sup>88</sup> A proposed Senate Commerce Committee amendment to the 1976 Act would have allowed limited CPSC regulation of ammunition by making clear that the CPSC could not "ban ammunition as a 'hazardous substance'" but could take action on specific, hazardous defects that caused ammunition to "fail[] to perform in a normal or reasonably foreseeable manner."<sup>89</sup> That amendment would also have allowed the CPSC to "continue to establish and enforce . . . cautionary labeling requirements" that reminded users of proper methods for storing ammunition "in or around the household."<sup>90</sup> In sum, the proposed amendment would have precluded the CPSC from regulating for gun control, yet empowered the CPSC to protect users from unexpected and unintended hazards in ammunition.<sup>91</sup>

The NRA's newly created lobbying arm, the Institute for Legislative Action, asked Senator James McClure of Idaho to propose a competing amendment that would ensure, in the words of one NRA official, "No CPSC regulations. Ever."<sup>92</sup> Although Senator McClure and his allies acknowledged that firearm safety was "a consumer issue," they claimed that gun owners simply did not care about defects and desired to eliminate the possibility of any CPSC regulation.<sup>93</sup> Heavy NRA lobbying spurred a "media frenzy" that framed any CPSC regulation as a live-or-die fight for gun rights.<sup>94</sup> An amendment sponsored

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<sup>84</sup> *Id.*

<sup>85</sup> Hand Gun Ammunition: Solicitation of Written Public Comments, 40 Fed. Reg. 6818 (Feb. 14, 1975).

<sup>86</sup> Peschin et al., *supra* note 7, at 10.

<sup>87</sup> *Id.* at 11; Adler 2019 Stmt., *supra* note 53, at 2.

<sup>88</sup> Consumer Product Safety Commission Improvements Act, Pub. L. No. 94-284, 90 Stat. 503 (1976).

<sup>89</sup> 1976 U.S.C.C.A.N. 993, 994, 998.

<sup>90</sup> *Id.* at 994.

<sup>91</sup> *See id.*

<sup>92</sup> Peschin et al., *supra* note 7, at 10–11.

<sup>93</sup> 121 CONG. REC. 23,569 (1975) (statement of Sen. McClure) (acknowledging that gun defects were "indeed a consumer issue," but claiming that "the consumers of [guns] have made their wishes to be left alone abundantly clear"); *id.* at 23,586 (statement of Sen. Stevens) ("I know of no portion of the consuming public that is using firearms or firearms ammunition that seeks the protection of [CPSC].").

<sup>94</sup> Peschin et al., *supra* note 7, at 10–11.

by Senator McClure and Senator Ted Stevens of Alaska, providing that the CPSC “shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition,” passed by voice vote and was included in the 1976 Act.<sup>95</sup>

The amendment mooted the CHGC petition,<sup>96</sup> which would almost certainly have been voted down by the Commission, even if the amendment had not passed.<sup>97</sup> More importantly, by barring all CPSC activity on ammunition, the 1976 act forced the Commission to rescind the ammunition-labeling requirement that had been in effect for fifteen years.<sup>98</sup> The contrast between the boogeyman concocted by supporters of the carve-out (sweeping, repressive gun restrictions) and the reality of actual product-safety rulemaking (a simple cautionary labeling instruction) was stark. Gun politics within Congress forced the repeal of a regulation that had been in effect for years with little burden on manufacturers, and no perceptible impact on gun rights.<sup>99</sup>

#### D. Key Flaws in the 1970s Debates

Several factors stymied the 1970s debates. First, the congressional proponents of the carve-out ignored the procedural, substantive, and structural constraints that the CPSC places on the Commission’s authority. Even in the absence of the carve-out, these constraints make it highly unlikely that the Commission would intrude on gun rights.<sup>100</sup> Carve-out proponents also inaccurately suggested that the CPSC was on the cusp of banning firearms or ammunition. For example, in 1975, Representative Larry McDonald accused CPSC commissioners of being “zealots” on the verge of seeking gun and ammunition bans,<sup>101</sup> even though the Commission had never proposed such a ban, had

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<sup>95</sup> 121 CONG. REC. 23,575–76 (1975); Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (1976) (appending this statement as “note” to 15 U.S.C. § 2080).

<sup>96</sup> See Peschin et al., *supra* note 7, at 11.

<sup>97</sup> See *Protecting Americans from Dangerous Products*, *supra* note 53, at 1.

<sup>98</sup> Hazardous Substances and Articles Administration and Enforcement Regulations; Revocation of Ammunition Labeling Provisions, 44 Fed. Reg. 42,677–78 (July 13, 1979) (deleting 16 C.F.R. § 1500.83(a)(6)).

<sup>99</sup> At least one state (Wisconsin) enacted, in 1978, an ammunition-labeling provision analogous to the repealed federal rule. See WIS. ADMIN. CODE ATCP § 139.06(7). The Wisconsin provision has apparently never been challenged.

<sup>100</sup> See *infra* Parts II, V.

<sup>101</sup> *Firearms Legislation, Hearings Before Subcomm. on Crime of the H. Judiciary Comm.*, 94th Cong. 1890–92 (1975) (statement of Rep. McDonald), <https://www.govinfo.gov/content/pkg/CHRG-94hhrg52557p6/pdf/CHRG-94hhrg52557p6.pdf> [<https://perma.cc/WB7H-XY8F>]; see also 121 CONG. REC. 18,910–911 (1975) (extension of remarks from Rep. Symms, placing in record an identical statement from Rep. McDonald, published in May 1975 issue of the John Birch Society’s *American Opinion* magazine).

recently voted to deny consideration of the CHGC petition seeking ammunition restrictions, and was near-certain to deny the petition on the merits.<sup>102</sup> Regulators do sometimes assert jurisdiction they initially disavowed.<sup>103</sup> Yet fears of regulatory overreach hardly justify an entire industry's absolute immunity from all safety regulation, especially since Congress could cabin CPSC's authority to exclude gun-control measures from the agency's remit.<sup>104</sup>

Moreover, Senator McClure and Representative McDonald inaccurately depicted CPSC regulation as inimical to the interests of gun owners. Certainly, gun owners were vocally opposed to firearm or ammunition bans.<sup>105</sup> But those who favored the carve-out furnished no evidence that gun owners desired to deprive themselves of a right to be notified of defective guns or ammunition, or to be offered a remedy for such defects.<sup>106</sup> Nor did these congressmen provide any evidence that gun owners wanted gun manufacturers to be treated differently from other consumer-product manufacturers—including producers of holsters and gun safes.<sup>107</sup> They thus failed to grapple with the implication of their position: a sacrifice of gun *owners'* rights as consumers, and the public's right to protection from defective and dangerously unpredictable guns, in favor of gun *manufacturers'* privileges.<sup>108</sup>

### *E. Proposals to Close the Regulatory Gap*

Since the 1970s, members of Congress, commentators, and various CPSC commissioners have sporadically proposed closing the safety-regulatory gap for firearms and ammunition. None of these proposals have advanced.

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<sup>102</sup> CHGC “candidly admitted” that it was unlikely to obtain the relief it requested, given the breadth of its request and “the extensive findings that must be made to justify such a ban.” *Comm. for Hand Gun Control*, 388 F. Supp. at 220–21. CHGC’s extreme proposal did not remotely approach the exacting standard required for an FHSA ban. See 15 U.S.C. § 1262(a), (f)–(i).

<sup>103</sup> *E.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–27 (2000) (FDA asserted jurisdiction over tobacco products in 1996, reversing agency’s previous stance).

<sup>104</sup> See *infra* Part V.

<sup>105</sup> See, e.g., Peschin et al., *supra* note 7, at 10–11 (describing the 400,000 responses the CPSC received, “almost all of which opposed the handgun ammunition ban”).

<sup>106</sup> See *supra* note 93 and accompanying text.

<sup>107</sup> See *infra* Section V.A (discussing CPSC’s regulation of gun-adjacent products).

<sup>108</sup> Even if supporters of gun-industry immunity *had* provided evidence that industry immunity was embraced by a preponderance of gun owners, they failed to show why this preference should supersede the rights of *other* gun owners, or the public, to be protected by death or injury from defective firearms (or the right of other gun owners to have functional arms). Nor did the supporters of industry immunity consider that safer guns better protect gun owners by averting accidental deaths or injuries (to themselves or to bystanders); see also Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1214–44 (2000) (discussing how courts have resolved legal questions in suits alleging harms arising from negligent gun storage).

In the early 1990s, Senator Howard Metzenbaum asked GAO to study accidental firearm injuries and deaths, and whether particular safety devices could prevent them.<sup>109</sup> In its 1991 report, GAO estimated that nearly a third of all accidental firearm deaths “could have been prevented by either a childproof device or a loading indicator device.”<sup>110</sup> The number of injuries that could be averted by such safety features could be much larger.<sup>111</sup> Moreover, the GAO study probably undercounted the deaths and injuries that could be avoided by modest product-safety oversight: GAO did not attempt to estimate the safety impacts of requiring gun manufacturers to follow normal CPSC defect reporting and recall requirements, did not seek to quantify deaths and injuries caused by defects in guns, and did not study the prospective effect of safety features other than childproofing devices and load indicators.<sup>112</sup> After the report was issued, Senator Metzenbaum introduced legislation to eliminate the gun industry’s CPSA carve-out, with the proviso that the Commission could not declare a firearm a “banned hazardous product.”<sup>113</sup> The bill did not advance.<sup>114</sup>

Several bills in subsequent congressional sessions also unsuccessfully proposed some form of federal product-safety regulation of guns and ammunition. Many bills proposed lifting the firearms industry’s immunity by striking the exclusion of guns and ammunition from the “consumer product” definition, without adding a Metzenbaum-style proviso.<sup>115</sup> Other bills would have repealed the ban on Commission safety oversight and added unrelated gun-control provisions.<sup>116</sup> Still other proposals would have directed the Department of Justice

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<sup>109</sup> 1991 GAO Report, *supra* note 15, at 1–5.

<sup>110</sup> *Id.* at 4.

<sup>111</sup> *See id.* at 4, 27–30 (imperfect available data suggested that there were 105 nonfatal unintentional-firearm injuries for every unintentional firearm death).

<sup>112</sup> *See id.* at 4 (GAO did not count as “preventable” deaths caused “by a gun that discharges when it is accidentally dropped or falls from its storage location”).

<sup>113</sup> *See* Gun Safety Act of 1991, S. 892, 102d Cong. (1991) (proposing to eliminate the carve-out but adding that 15 U.S.C. § 2057, the CPSA provision allowing the CPSC to ban certain hazardous products, could not be used to ban firearms); *see also* 137 CONG. REC. 8898–907 (Apr. 23, 1991) (statement of Sen. Metzenbaum) (inserting the 1991 GAO Report into the record and introducing S. 892, saying that “like any consumer product, it is possible to make firearms in such a way so that the risk of injury to the person using the gun is diminished”).

<sup>114</sup> Gun Safety Act of 1991, S. 892, 102d Cong. (1991).

<sup>115</sup> *Compare id.*, with, e.g., Firearm Safety Act of 2019, H.R. 1115, 116th Cong. (2019); Firearm Safety Act of 2021, H.R. 880 (117th Cong.) (2021); Defective Firearms Protection Act, H.R. 3989 (117th Cong.) (2021). *See also* Memorandum from Rep. Carolyn B. Maloney, Chairwoman, House Comm. on Oversight & Reform, The Committee’s Investigation into Gun Industry Practices and Profits (July 27, 2022), <https://docs.house.gov/meetings/GO/GO00/20220727/115024/HHRG-117-GO00-20220727-SD005.pdf> [<https://perma.cc/3PMS-E4CC>] (noting that gun manufacturers’ lack of defect-monitoring responsibilities “stands in stark contrast with other consumer product industries”).

<sup>116</sup> *See, e.g.*, H.R. 2007, 106th Cong. (1999).

(“DOJ”)—rather than the CPSC—to promulgate regulations governing firearm design, manufacture, and performance, and to oversee recalls of defective firearms.<sup>117</sup> None of these proposals gained traction, an unsurprising outcome consistent with the fate of most federal gun bills in the last three decades.<sup>118</sup>

The lack of product safety oversight of firearms has received some attention from commentators.<sup>119</sup> Some have catalogued publicly known firearm defects;<sup>120</sup> proposed treating gun defects under the rubric of public health, without advocating for a specific regulatory approach;<sup>121</sup> suggested lifting or loosening the ban on Commission jurisdiction; or recommended granting product-safety power to some other agency.<sup>122</sup>

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<sup>117</sup> See, e.g., Firearms Safety and Consumer Protection Act of 1998 (“FSCPA”), S. 2627, 105th Cong. (1997); S. 534, 106th Cong. (1999); H.R. 920, 106th Cong. (1999); S. 330, 107th Cong. (2001); H.R. 671, 107th Cong. (2001); S. 1224, 108th Cong. (2003); H.R. 2403, 108th Cong. (2003). The pre-2003 bills would have vested authority in the Treasury Department because ATF was then housed within Treasury. ATF was moved to DOJ as part of the post-September 11 government reorganization. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111, 116 Stat. 2135, 2271 (2002). These bills seeking to vest power in ATF would have created recall and safety-regulation standards significantly different from the CPSA framework. See Wilson, *supra* note 33, at 263 (CPSA “establishes a much higher threshold of product hazard to justify a recall than” FSCPA would).

<sup>118</sup> The Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022) (codified in scattered titles of U.S.C.), was “the most significant firearms legislation in nearly 30 years.” George Wright & Matt Murphy, *Congress Passes First Gun Control Bill in Decades*, BBC NEWS (June 24, 2022), <https://www.bbc.com/news/world-us-canada-61919752> [<https://perma.cc/M65L-DNTK>].

<sup>119</sup> See, e.g., Klein, *supra* note 19, at 90, 120–21 (noting bills in Congress to lift firearms industry immunity); Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1203 (2000) (noting that “Congress could choose to lift the restrictions it imposed on the CPSC and allow that agency to exercise regulatory authority over firearms,” without advocating for that course); 1991 GAO Report, *supra* note 15, at 5, 42 (recommending CPSA amendments “to clearly establish that the [Commission] can regulate the risk of injury associated with firearms”); Amanda L. LeSavage, Note, *American Gun Violence: An Information Asymmetry Problem*, 4 U. PA. J.L. & PUB. AFF. 313, 348 (2019) (similar); Jennifer Kim & Christa Nicols, *America’s Gun Violence Epidemic: A Colossal, But Correctable, System Failure*, 77 N.Y.U. ANN. SURV. AM. L. 199, 217–18 (2022) (similar); see also Dru Stevenson, *The Urgent Need for Legal Scholarship on Firearm Policy*, 67 BUFF. L. REV. 1449, 1497 (2019) (noting a “dearth of scholarly commentary on administrative law issues related to firearm regulation”).

<sup>120</sup> E.g., Peschin et al., *supra* note 7, at 38–52; Gary Klein, *Misfire: The Gun Industry’s Lack of Accountability for Defective Firearms*, VIOLENCE POL’Y CTR. 2–9 (Mar. 2021), <https://vpc.org/wp-content/uploads/2021/03/Misfire.pdf> [<https://perma.cc/Z6VZ-G6MC>] [hereinafter *Misfire*].

<sup>121</sup> See, e.g., Vernick & Teret, *supra* note 119, at 1194.

<sup>122</sup> E.g., *id.* at 1203 (“Another regulatory option might be to create an entirely new agency”); Klein, *supra* note 19, at 120–21 (“[A] federal agency should be empowered to mandate, supervise and regulate the dissemination of information about recalls. . . . If nothing else, a federal agency should be designated to accept, log and publish complaints about defects and safety concerns from gun owners.”). Conversely, this Article argues that the CPSC, not a new agency, is the appropriate safety regulator. See discussion *infra* Section V.D.

At least two CPSC commissioners have also challenged the firearms industry's immunity from Commission jurisdiction. In the early 1990s, Chairman Ann Brown and her staff contemplated a push for CPSCA amendments to allow the Commission to regulate safety defects in guns, but dropped the issue after the NRA and members of Congress objected.<sup>123</sup> In retirement, Brown continued to push for broad CPSC jurisdiction over guns and ammunition.<sup>124</sup> Similarly, in 2016, Commissioner Marietta Robinson urged Congress to define guns and ammunition as consumer products and to provide resources to allow the Commission to reduce unintentional gun injuries and deaths.<sup>125</sup>

Congress did not act on any of these requests. And past proposals—by members of Congress, commentators, and CPSC commissioners—did not set forth a specific scope of Commission authority, situate the proposal within the wider consumer product safety framework, or evaluate the constitutionality of applying Commission safety-regulatory jurisdiction.<sup>126</sup> This Article fills that gap.<sup>127</sup>

## II. DISTINGUISHING BETWEEN FIREARM PRODUCT SAFETY AND GUN CONTROL

The 1970s congressional debates and the intermittent dialogue that followed are overshadowed by a failure to fully distinguish between firearm product safety and gun control. Even where a distinction was acknowledged, it was assumed that the two were so intertwined that no regulator could or should treat one without encroaching on the other. For example, many gun rights advocates opposed all CPSC regulation of the firearms industry on the assumption that Commission regulation would inexorably expand.<sup>128</sup> And some gun control advocates, such as the CHGC, advocated for broad Commission jurisdiction *because* they hoped the CPSC could be an avenue for gun control.<sup>129</sup> These

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<sup>123</sup> Wilson, *supra* note 33, at 236–37, n.59 (account of former CPSC staffer).

<sup>124</sup> Ann Brown, *Guns Are Consumer Products. They Should Be Regulated as Such*, WASH. POST (Jan. 12, 2013, 4:24 PM), <https://www.washingtonpost.com/opinions/2023/01/12/guns-child-deaths-consumer-safety/> [<https://perma.cc/792M-ZAYQ>]; Ann Brown, *We Regulate Lead Paint, So Why Not Lead Bullets?*, COM. APPEAL (Jan. 24, 2016), <https://archive.commercialappeal.com/opinion/analysis/ann-brown-we-regulate-lead-paint-so-why-not-lead-bullets-28c5d218-3a11-68b4-e053-0100007f0f5f-366283401.html> [<https://perma.cc/6FU3-PF4U>].

<sup>125</sup> Marietta Robinson, *Let Us Make Guns Safer*, FORMER COMM'R ROBINSON'S BLOG (July 12, 2016), <https://leadership.cpsc.gov/robinson/2016/07/12/the-robinson-report-24-let-us-make-guns-safer/> [<https://perma.cc/YPN9-GEJY>].

<sup>126</sup> See *supra* notes 113–25 and accompanying text.

<sup>127</sup> See *infra* Parts V–VI.

<sup>128</sup> See, e.g., 118 CONG. REC. 31,373 (1972) (statement of Rep. Smith of California); *id.* at 31,388 (statement of Rep. Roncalio).

<sup>129</sup> See, e.g., Wilson, *supra* note 33, at 234 (describing activist group's attempt to sharply limit handgun access).



approaches reflected the increasing polarization of the gun debate starting in the mid-1970s.<sup>130</sup>

There were brief glimmers of understanding from legislators who acknowledged, with varying levels of clarity, a difference between firearm product safety legislation and gun control legislation.<sup>131</sup> But both supporters and opponents of CPSC safety regulation of firearms failed to fully draw out this point. The debates did not engage with how key CPSA terms and concepts—such as “defect,” “recall,” and “substantial product hazard”—might have been accurately applied in the context of guns.<sup>132</sup> The result was members of Congress talking past each other. While Representative Bingham accurately described his proposal as geared toward safety rather than gun control, he did not offer precise legislative text delineating the Commission’s authority or Congress’s intent.<sup>133</sup> More specificity would not have mollified the most fervid opponents of any CPSC oversight over the firearms industry, but it might have persuaded other skeptics in Congress that the CPSC could regulate the safety of guns as products without risk of a “runaway” Commission.<sup>134</sup>

For their part, opponents of Commission jurisdiction eagerly conflated product safety regulation with gun control. The NRA defaulted to an absolutist stance: that any safety regulation of the firearms industry constituted gun control. Its in-house magazine, *The American Rifleman*, framed “[t]he issue on consumer safety agency regulation in the

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<sup>130</sup> See DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT 87 (2009) (“The parties’ positions on gun issues” were initially “not sharply defined,” but by the mid-1970s “became more partisan.”).

<sup>131</sup> See *supra* note 93.

<sup>132</sup> Although the word “recall” is used at various points in the CPSA, the Act’s provisions framing the Commission’s general power to order mandatory recalls do not use the word “recall.” CPSA, Pub. L. No. 92-573, § 15(c)–(f), 86 Stat. 1207, 1221 (1972) (codified at 15 U.S.C. § 2064(c)–(f)). Instead, the CPSA describes the agency’s mandatory-recall authority in specific functional terms, providing that the Commission, after a hearing by an independent administrative law judge, may order companies to halt distribution of defective or noncompliant products, *id.* § 2064(c)(1)(A)–(B), to notify product users, other parties, and the public of the hazard and corrective action, *id.* § 2064(c)(1)(C)–(F), and to provide a remedy to owners (such as repair, replacement, or refund), *id.* § 2064(d). As required by a 2008 congressional directive, the CPSC has adopted specific guidelines and requirements for mandatory recall notices. 16 C.F.R. §§ 1115.23–.29 (rule implementing directive of the Consumer Product Safety Improvement Act (“CPSIA”) of 2008, § 214, Pub. L. No. 110-314, 122 Stat. 3016, 3052 (2008) (codified at 15 U.S.C. § 2064(i))). The Commission at one point also proposed a rule establishing guidelines for voluntary recalls (which make up the vast majority of consumer product recalls in the United States). Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices, 78 Fed. Reg. 69,793 (Nov. 21, 2013). However, this rule was never promulgated.

<sup>133</sup> See *supra* notes 55–61 and accompanying text.

<sup>134</sup> See Adler, *supra* note 54, at 89, n.161 (writing, decades after 1970s debates, that “the only recourse for Congress in the face of a runaway agency would be to pass a law overruling the agency’s action”).

firearms field” as a question of “whether the Congress or administrative agencies should in effect shape gun control policy.”<sup>135</sup> The carve-out’s supporters never acknowledged either the benefits of product safety regulation or the long history of safety regulation of firearm manufacturers, which dates back to early modern England and early America and developed alongside the right to keep and bear arms.<sup>136</sup>

Congressional debates notwithstanding, there is a workable distinction between product safety regulation of guns and gun control. In tort, courts and commentators have long distinguished between (1) harms caused by a design or manufacturing defect in a product when used as intended, (2) harms caused by foreseeable misuse of a product, (3) harms caused by unforeseeable misuse of a product, and (4) harms inherent or intrinsic to a product’s nature.<sup>137</sup> Broadly generalizing, liability for manufacturers and sellers exists for the first category, and sometimes for the second category, but almost never for the third and fourth categories.<sup>138</sup> In tort cases against gun manufacturers, courts have applied these distinctions for generations.<sup>139</sup>

The CPSC, taking cues from tort law, has recognized that “not all products which present a risk of injury are defective.”<sup>140</sup> The Commission has recognized that a product’s “potential for causing injury” does not render it defective; for example, a knife must have a sharp blade to perform its intended function<sup>141</sup> and is thus not defective for reason of

<sup>135</sup> *Gun Owners Score Gains on Federal, State Fronts*, AM. RIFLEMAN, July 1975, at 42.

<sup>136</sup> See *infra* Section VI.A.3.

<sup>137</sup> See generally Richard C. Ausness, “*Danger Is My Business*”: *The Right to Manufacture Unsafe Products*, 67 ARK. L. REV. 827, 830–34 (2014) (discussing the relationship between product safety and product liability).

<sup>138</sup> See *id.* at 828, 871 (arguing that “defective product[s]” and “unsafe products” are not identical; various tort doctrines correctly “protect manufacturers from liability even though their products are not particularly safe”); Sarah L. Olson & Anne G. Kimball, *The Limits on the Use of Tort Law to Encourage Consumer Safety*, 12 LOY. CONSUMER L. REV. 178, 179 (2000) (“A product is not defective based solely on the fact that it can be used—criminally, intentionally or accidentally—to inflict injury.”). Proposals for broad “product category liability,” most prominently articulated by Professor Ellen Wertheimer, have been roundly rejected by courts. Richard C. Ausness, *Gun Control Through Tort Law*, 68 FLA. L. REV. F. 101, 101–02 (2017) (describing courts’ rejection of “product category liability” theory articulated in Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1454 (1994)).

<sup>139</sup> See, e.g., *Favo v. Remington Arms Co.*, 73 N.Y.S. 788, 789 (N.Y. App. Div. 1901) (“A manufacturer and dealer in dangerous articles intended for use, such as a gun, is liable . . . for damages resulting from his negligence in using defective materials, or from want of proper care and skill in manufacturing.”); *Langridge v. Levy*, 150 Eng. Rep. 863 (Exch. Ct. 1837) (gun manufacturer who falsely represented firearm as “good, safe, and secure,” when it was actually “unsafe, ill-manufactured and dangerous,” was liable on misrepresentation theory; gun burst upon discharge, killing purchaser’s child), *aff’d*, 150 Eng. Rep. 1458 (Exch. Ch 1838).

<sup>140</sup> 16 C.F.R. § 1115.4 (2022).

<sup>141</sup> *Id.*

its sharpness, “because the risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury.”<sup>142</sup> Under this commonsensical approach, the Commission has regulated intrinsically dangerous products, ranging from crossbows to all-terrain vehicles (“ATVs”), in a way that reduces deaths and injuries without infringing on personal freedoms or micro-managing the marketplace.<sup>143</sup>

Moreover, in the product liability context, Congress has already acknowledged and solidified this distinction by enacting the Protection of Lawful Commerce in Arms Act of 2005 (“PLCAA”),<sup>144</sup> a partial liability shield for arms manufacturers.<sup>145</sup> The PLCAA distinguishes between actions arising from “criminal or unlawful misuse” of firearms or ammunition, where “the product functioned as designed and intended”<sup>146</sup> and harms arising from design or manufacturing defects.<sup>147</sup> The Act bars many tort suits against manufacturers, distributors, dealers, and importers of firearms or ammunition,<sup>148</sup> but specifically preserves plaintiffs’ right to sue for wrongful death or personal injury “resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except . . . where the discharge of the product was caused by a volitional act that constituted a criminal offense.”<sup>149</sup> The PLCAA thus codified a distinction that Congress feared would be eroded by judges and juries.<sup>150</sup> The CPSC regulation of the firearms industry would thus draw on distinctions that Congress has already made in the product-liability context, providing strong evidence of its workability.

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<sup>142</sup> *Id.* (defining “defect” as “fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function”). The Commission recognizes that not all “defects” are “substantial product hazards” that trigger the defect-reporting obligation or require a recall. *See* 15 U.S.C. § 2064(a) (defining when a “defect” becomes a “substantial product hazard”).

<sup>143</sup> *See infra* Section V.A; *All-Terrain Vehicle Safety*, CPSC, <https://www.cpsc.gov/safety-education/safety-guides/sports-fitness-and-recreation/all-terrain-vehicle-safety> [<https://perma.cc/2TNA-MGQJ>] (describing CPSC’s role in regulating ATVs).

<sup>144</sup> Pub. L. No. 109-92, 119 Stat. 2097 (2005) (codified as amended at 15 U.S.C. § 7901 (2018)).

<sup>145</sup> *Id.*

<sup>146</sup> 15 U.S.C. § 7901(b)(1).

<sup>147</sup> *Id.* § 7903(5)(A).

<sup>148</sup> *Id.* §§ 7902(a), 7903(5)(A).

<sup>149</sup> *Id.* § 7903(5)(A)(v); *see also id.* § 7903(5)(A)(iv) (preserving ability to sue for breach of contract or warranty).

<sup>150</sup> Whether the distinction really was eroding is up for debate. Alden Crow, Comment, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. REV. 1813, 1819–24 (2006) (stating that the varied opinions on whether PLCAA was practically or legally necessary “seem[] almost wholly dependent upon one’s feelings about guns in general,” rather than on the pre-PLCAA behavior of courts).

### III. SAFETY FAILURE: THE SCOPE OF THE FIREARM-DEFECT PROBLEM

Supporters of the firearms industry's immunity from federal product safety law often claim that firearms are invariably safe when used as intended. They assert that harm cannot occur in the absence of a user's culpable misconduct—i.e., intentional or negligent acts—and that guns cannot suffer from safety defects. For example, in 1975, Senator Stevens asserted that “no substantial . . . evidence” showed that “defective” or “malfunctioning” firearms or ammunition had ever created a problem “to the extent of creating a risk to the user,”<sup>151</sup> or at least there was no “instance of defective manufacture of guns on a wholesale scale.”<sup>152</sup> Industry-aligned influencers have repeated this talking point for decades.<sup>153</sup> For example, Ted Nugent, who spent twenty-six years on the NRA's board and once wrote a track titled “I Am the NRA,”<sup>154</sup> claimed in a 2001 book: “there is no such thing as an accidental discharge, only negligent discharges. It is never a hardware problem, always a human mistake. Period.”<sup>155</sup>

These pervasive claims, echoing historic deflection tactics used by other industries,<sup>156</sup> are wrong. While many unintentional firearm injuries are due to carelessness beyond mere user error, hazard-creating defects in firearms—and the failure of the firearms industry to adopt readily available safety features—have repeatedly killed and injured gun users and bystanders.

#### A. *Assessing the Scope of the Problem*

In 2021, there were at least 549 unintentional firearm fatalities in the United States.<sup>157</sup> About 1% or 2% of firearm deaths in the United

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<sup>151</sup> 121 CONG. REC. 23,587 (1975).

<sup>152</sup> *Id.*

<sup>153</sup> See, e.g., Klein, *supra* note 120, at 6 (“The gun industry’s public position is that unintentional shootings almost always are caused by human error.”).

<sup>154</sup> Neil Weinberg, *Ted Nugent Resigns from NRA Board Over ‘Scheduling Conflicts,’* BLOOMBERG NEWS (July 30, 2021, 11:36 AM), <https://www.bloomberg.com/news/articles/2021-07-30/ted-nugent-resigns-from-nra-board-on-scheduling-conflicts> [<https://perma.cc/HYD9-BHHZ>].

<sup>155</sup> TED NUGENT, *GOD, GUNS & ROCK ‘N’ ROLL* 210 (2001).

<sup>156</sup> See, e.g., MARION NESTLE, *SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM* 112 (2003) (meat industry); Steve Calandrillo & Nolan Kobuke Anderson, *Terrified by Technology: How Systemic Bias Distorts U.S. Legal and Regulatory Responses to Emerging Technology*, 2022 U. ILL. L. REV. 597, 633–34 (automotive industry in mid-20th century).

<sup>157</sup> See *Injury Facts: Safety Topics: Guns: Data Details*, NAT’L SAFETY COUNCIL, <https://injuryfacts.nsc.org/home-and-community/safety-topics/guns/data-details/> [<https://perma.cc/P3ZL-WGYR>] (tallying 549 “preventable/accidental” gun deaths in U.S. in 2021, 535 in 2020, and 486 in 2019). Earlier tallies included 776 in 2000, 789 in 2005, 606 in 2010, and 489 in 2015. *Id.*

States are unintentional,<sup>158</sup> and the nation's unintentional firearm death rate is four times higher than the rate of other high-income nations.<sup>159</sup> Beyond the death toll are a vast number of unintentional firearm injuries: an average of nearly 44,000 are treated in hospital emergency departments each year.<sup>160</sup> And both unintentional firearm deaths<sup>161</sup> and unintentional firearm injuries are undercounted to some degree.<sup>162</sup>

Many unintentional firearm injuries and deaths are caused by reckless handling, such as playing with a gun, often under the influence of drugs or alcohol.<sup>163</sup> Yet deaths, injuries, and frightening near-misses caused by gun *defects* have persisted for decades.<sup>164</sup> In addition,

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<sup>158</sup> Lena Rothstein, *Unintentional Firearm Injury*, BULLETPOINTS, <https://www.bullet-pointsproject.org/unintentional-injury/> [<https://perma.cc/MM7M-BR9V>] (unintentional firearm deaths constitute “1–2%” of total firearm deaths, but “half of all nonfatal firearm injuries are unintentional”).

<sup>159</sup> Sara J. Solnick & David Hemenway, *Unintentional Firearm Deaths in the United States 2005–2015*, 6 *INJ. EPIDEMIOLOGY* at 1 (2019).

<sup>160</sup> Elinore J. Kaufman et al., *Epidemiologic Trends in Fatal and Nonfatal Firearm Injuries in the US, 2009–2017*, 181 *JAMA INTERNAL MED.* 237, 237–38 (2020) (from 2009 to 2017, an average of 43,729 unintentional, nonfatal firearm injuries were treated in U.S. hospital emergency departments each year; and 36.9% of all firearm-related emergency department visits related to unintentional injuries); accord Faiz Gani, Joseph V. Sakran & Joseph K. Canner, *Emergency Department Visits for Firearm-Related Injuries in the United States, 2006–14*, 36 *HEALTH AFFS.* 1732, 1732–33 (2017) (finding 35.3% of “patients who presented alive to the [emergency department] for a firearm-related injury” suffered unintentional injuries and the proportion increased in later portion of the study period).

<sup>161</sup> Catherine Barber, David Hemenway, Jenny Hochstadt & Deborah Azrael, *Underestimates of Unintentional Firearm Fatalities: Comparing Supplementary Homicide Report Data with the National Vital Statistics System*, 8 *INJ. PREVENTION* 252, 252–54 (2002) (suggesting based on “growing body of evidence” that unintentional firearm deaths are undercounted, given incomplete or inaccurate death certificates); Ryan Foley, Larry Fenn & Nick Penzenstadler, *Chronicle of Agony: Gun Accidents Kill at Least 1 Kid Every Other Day*, USA TODAY (Oct. 14, 2016, 3:03 AM), <https://www.usatoday.com/story/news/2016/10/14/ap-usa-today-gun-accidents-children/91906700/> [<https://perma.cc/5M37-2ZZ4>] (up to one-third of unintentional gun deaths among children are not reflected in U.S. Centers for Disease Control and Prevention (“CDC”) data).

<sup>162</sup> Elinore J. Kaufman & M. Kit Delgado, *Tracking All Injuries from Firearms in the US*, 329 *JAMA* 514–15 (2023) (emergency departments likely “underestimate total injuries” to unknown extent, and “minor injuries that receive either no medical care or medical care in an outpatient setting” are often untracked). *But see* Matthew Miller, Deborah Azrael, Ravali Yenduri, Catherine Barber, Andrew Bowen, Erin MacPhaul, Stephen J. Mooney, Li Zhou, Eric Goralnick & Ali Rowhani-Rahbar, *Assessment of the Accuracy of Firearm Injury Intent Coding at 3 US Hospitals*, 5 *JAMA NETWORK OPEN*, at 1 (2022) (some hospital discharge data miscodes gun assaults as gun accidents).

<sup>163</sup> *E.g.*, Solnick & Hemenway, *supra* note 159, at 1 (“Certain circumstances, such as consuming alcohol, playing with the gun, and hunting, are common settings for unintentional firearm deaths.”). Tort plaintiffs wounded by gunshot may be entitled to a *res ipsa loquitur* instruction that the discharge arose from defendant’s negligence if the gun was exclusively within the defendant’s control and there is no evidence of defect. *E.g.*, *Sutor v. Rogotzke*, 194 N.W.2d 283, 285, 286 (Minn. 1972); *Walker v. McClanahan*, 494 P.2d 725, 727 (Ariz. Ct. App. 1972).

<sup>164</sup> Peschin et al., *supra* note 7, at 4, 22, 52, 87–102 (describing the scope of accidental gun deaths from gun defects and compiling a list of recalls and warnings related to gun defects).

unintentional firearm injuries and deaths may result from foreseeable good-faith errors that some gun users will inevitably make—such as dropping the gun or handling a gun without realizing it is loaded—and failing to manually check.<sup>165</sup> Regardless of whether these actions or omissions are negligent or merely inattentive, nondefective and reasonably well-designed products—i.e., those with feasible, readily available safety features—can prevent these errors from having deadly consequences, and sometimes can prevent these errors from happening at all.<sup>166</sup>

Reported deaths and injuries attributed to firearm defects likely represent a small proportion of the problem.<sup>167</sup> Additional unintentional discharges likely go unreported because of luck: neither the user nor a bystander happens to be harmed.<sup>168</sup> The occurrence of defects in firearms is unsurprising. Like other complex mechanical devices, firearms can fail due to a defect in design, manufacturing, or materials, or the failure of a component part.<sup>169</sup> Thus, some firearm models and units suffer from safety defects, just as other products, including gun safes, handgun holsters, bows, and crossbows, suffer occasional defects.<sup>170</sup>

No available data quantifies the frequency of gun defects or other safety problems in the consumer market.<sup>171</sup> Researchers, gun owners, and the public thus cannot be sure how often defects are present in guns, how frequently such defects manifest, or how the firearm defect rate compares to the other consumer products' defect rates. There is no way to know how many unintentional discharges are caused by defects; how many incidents of jamming or failure to fire are caused by defects; how many deaths and injuries have been caused by firearm defects; whether such problems are most likely to arise in handguns, shotguns, or rifles; and how these metrics have increased or decreased over time.

Why this lack of solid data? Gun companies do not publish data on complaints received.<sup>172</sup> Not all incidents, or even injuries, are reported.<sup>173</sup>

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<sup>165</sup> *Id.* at 31–34 (listing “common and foreseeable” errors by firearms users).

<sup>166</sup> Robert S. Adler & Andrew F. Popper, *The Misuse of Product Misuse: Victim Blaming at Its Worst*, 10 WM. & MARY BUS. L. REV. 337, 350–55 (2019) (describing CPSC’s authority and responsibility “to act in instances of reasonably foreseeable product misuse.”).

<sup>167</sup> See discussion *infra* Section III.B (case studies of firearm defects).

<sup>168</sup> Klein, *supra* note 19, at 8 (many unintentional firings go unreported because they “cause no deaths, injuries or property damage.”).

<sup>169</sup> HAL W. HENDRICK, PAUL PARADIS & RICHARD J. HORNICK, *HUMAN FACTORS ISSUES IN HANDGUN SAFETY AND FORENSICS* 129 (2007) (firearms may “fail due to manufacturer defect, incorrect repair or modification, and normal wear”).

<sup>170</sup> See *infra* Section V.A.

<sup>171</sup> See Peschin et al., *supra* note 7, at 6 (the limited available data on “unintentional shooting deaths and injuries . . . does not delineate deaths from defective firearms.”).

<sup>172</sup> See also *id.* at 85 (“Confidentiality agreements . . . are a prime example of how the gun industry actively conceals information about injuries and fatalities connected with its products.”).

<sup>173</sup> See generally Klein, *supra* note 19.



Moreover, the CPSC is largely barred from collecting statistical data on gun-related injuries.<sup>174</sup> CPSC's public SaferProducts.gov database—which compiles information submitted by consumers, healthcare providers, and others—contains reports on defective air rifles, BB guns, gun accessories, knives, sheaths, and dart guns—but nothing on defective conventional guns or ammunition.<sup>175</sup> Thus, the available data on gun defects is limited to reports from gun owners, information from consumer watchdog groups, and civil litigation filings.<sup>176</sup> It is similarly difficult to assess the number of deaths and injuries averted by safety features and devices, although some analyses have attempted to do so.<sup>177</sup> To justify the gun industry's immunity from product safety regulation on the lack of solid data would be bizarrely circular when the immunity itself is largely to blame for the lack of data.

Some commentators have downplayed the risk of unintentional firearm injury. They emphasize that firearm deaths occur at a lower rate compared to falls, car crashes, drowning, and fire,<sup>178</sup> and claim “that many people have an exaggerated intuition” about the risks of accidental firearm death.<sup>179</sup> But this does not justify the firearms industry's immunity from federal product safety law. First, it does not appear to

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<sup>174</sup> See Marietta S. Robinson, *The NRA's Hidden Handcuffs on Government*, MEDIUM (May 3, 2021), <https://mariettasrobinson.medium.com/the-nras-hidden-handcuffs-on-government-84fafae8d745> [<https://perma.cc/48ZT-EZ2A>] (gun industry immunity impedes collection of data to “understand the patterns of incidents and their possible causes”).

<sup>175</sup> See *SaferProducts.gov: Public Search*, CPSC, <https://saferproducts.gov/PublicSearch> [<https://perma.cc/5TH3-QXGH>]; see also *infra* Section IV.3 (discussing key data-gathering efforts cut off by firearms industry's immunity); *infra* note 413 (discussing how SaferProducts.gov was created pursuant to Congress's mandate in CPSIA of 2008).

<sup>176</sup> See Klein, *supra* note 19, at 64 (drawing conclusions about firearms defects “based on the substantial anecdotal evidence . . . in various news reports, court filings, testimony and in occasional poorly publicized voluntary disclosures”).

<sup>177</sup> *E.g.*, 1991 GAO Report, *supra* note 15, at 4 (estimating number of U.S. deaths in 1988 that could have been prevented by “child-proof device” or “loading indicator device”); Vernick & Teret, *supra* note 119, at 1205 (lack “of effective firearm-injury surveillance systems makes it difficult to determine more precisely the likely effects of various safer gun designs.”); J.S. Vernick, M. O'Brien, L.M. Hepburn, S.B. Johnson, D.W. Webster & S.W. Hargarten, *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 INJ. PREVENTION 307, 307 (2003) (442 U.S. deaths “might have been prevented in 2000 had all guns been equipped with . . . safety devices.”).

<sup>178</sup> NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 23 (2014) [hereinafter JOHNSON ET AL. 2014]; NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 22 (2d ed. 2018) [hereinafter JOHNSON ET AL. 2018] (contending that “accident[al] risk” associated with guns is “quite small” and that “[a]ccidental firearms deaths among children have also declined sharply and are far less common than many people believe”); accord NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT REGULATION, RIGHTS, AND POLICY, 836–37, 849, 893 (1st ed. 2012) (similar).

<sup>179</sup> JOHNSON ET AL. 2014, *supra* note 178, at 23.

account for variable exposure. If more people are exposed daily to cars than firearms, for example, accidental death rates would partly reflect increased exposure.<sup>180</sup>

Second, exclusively focusing on fatalities ignores the huge impacts of nonfatal firearm injuries.<sup>181</sup> Nonfatal firearm injuries outnumber fatal firearm injuries by approximately two to one;<sup>182</sup> if we limit the universe to *unintentional* firearm injuries and deaths, the ratio is much starker.<sup>183</sup> Nonfatal firearm injuries increase survivors' vulnerability to mental health problems and substance abuse, impose health care costs on victims and society, and inflict significant economic productivity losses.<sup>184</sup>

Third, even if hazard-creating defects occur in a small proportion of firearms sold, and even if those defects rarely kill or injure, this does not justify immunizing an entire industry from safety regulation. Rather, it means that there may be few occasions for *exercising* product safety regulatory authority over that product category (for example, a regulator adopting a safety standard or requiring a manufacturer to conduct a recall). Notably, in many cases, Congress has allowed—or even required—the CPSC to address hazards that cause relatively few deaths and injuries.<sup>185</sup> For example, Congress directed the CPSC to regulate

<sup>180</sup> There are some 282 million registered cars in the United States as of 2021, compared to some 393 million guns as of 2018. *Highway Statistics 2021*, FED. HIGHWAY ADMIN., Mar. 2023 (chart DV-1C), <https://www.fhwa.dot.gov/policyinformation/statistics/2021/dv1c.cfm> [<https://perma.cc/2FGV-TH3T>]; *Global Firearms Holdings*, SMALL ARMS SURV. (Mar. 29, 2020), <https://www.smallarmssurvey.org/database/global-firearms-holdings> [<https://perma.cc/MC2D-X3TD>]. But many guns are used infrequently. See *infra* note 255 and accompanying text. About 16 million adults carry loaded handguns in public at least once a month. Ali Rowhani-Rahbar, Amy Gallagher, Deborah Azrael & Matthew Miller, *Trend in Loaded Handgun Carrying Among Adult Handgun Owners in the United States, 2015–2019*, 112 AM. J. PUB. HEALTH 1783, 1787 (2022). By contrast, at least 115 million cars and trucks are driven on U.S. roads each day for commuting and work. Adie Tomer, *America's Commuting Choices: 5 Major Takeaways From 2016 Census Data*, BROOKINGS INST. (Oct. 3, 2017), <https://www.brookings.edu/articles/americans-commuting-choices-5-major-takeaways-from-2016-census-data/> [<https://perma.cc/2S84-KWGJ>].

<sup>181</sup> Kaufman & Delgado, *supra* note 162, at 514 (“[F]ocusing nearly exclusively on fatal firearm injuries neglects the magnitude, impact, and variation of nonfatal injuries.”).

<sup>182</sup> *Id.*

<sup>183</sup> See 1991 GAO Report, *supra* note 15, at 27–30 (estimating 105 nonfatal unintentional firearm injuries for every one unintentional firearm death). Although the estimate is dated, the ratio may be similar today. Cf. Philip J. Cook et al., *Constant Lethality of Gunshot Injuries from Firearm Assault: United States, 2003–2012*, 107 AM. J. PUB. HEALTH 1324, 1327 (2017) (finding that the “case–fatality rate for firearm assault injuries remained stable” during study period from 2003 to 2012).

<sup>184</sup> See, e.g., Zirui Song et al., *Changes in Health Care Spending, Use, and Clinical Outcomes After Nonfatal Firearm Injuries Among Survivors and Family Members*, 175 ANNALS INTERNAL MED. 795, 800–02 (2022) (describing the “economic and clinical implications for survivors” of “[n]onfatal firearm injuries” and noting that the “direct costs [are] largely borne by society through” insurance and Medicare).

<sup>185</sup> For a downloadable dataset of recent recalls and the corresponding number of reported deaths and injuries, see *Recalls*, CPSC, <https://www.cpsc.gov/Recalls> [<https://perma.cc/YM44-HSJU>].

hazardous pool drains based on eleven suction-entrapment deaths from 1999 to 2008—a nationwide death rate of slightly over one per year.<sup>186</sup>

### B. Case Studies in Firearm Defects

Several examples—by no means exclusive—give a sense of the seriousness and scope of defects in widely distributed firearms.<sup>187</sup> Although many types of firearm design defects exist,<sup>188</sup> these related to firearm discharge are the most serious. One of the most documented defects, referenced in dozens of gunmaker-issued warnings and safety notices, is “drop fire[]”: some firearms are prone to discharge when dropped, bumped, or tapped, causing the gun’s firing pin to touch the cartridge.<sup>189</sup> Such “uncommanded” discharges have also occurred even when the user does not touch the trigger and the gun is not dropped, and sometimes even when the safety is engaged.<sup>190</sup> And some firearms have the opposite defect—a persistent *failure* to discharge even when the user pulls the trigger and the safety is disengaged.<sup>191</sup>

#### 1. Remington 700 Series: Trigger Defect

Remington has sold millions of its Model 700 series rifles, making it among the country’s most popular bolt-action rifles.<sup>192</sup> For decades,

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<sup>186</sup> Asa Eslocker, *Parents of Kids Killed in Pool Drain Accidents Outraged by Federal Rethink of Safety Law*, ABC NEWS (Mar. 30, 2010, 10:26 AM), <https://abcnews.go.com/Blotter/parents-children-killed-pool-drain-accidents-outraged-federal/story?id=10241722> [<https://perma.cc/YM6U-8VC5>] (reporting eleven deaths and sixty-nine injuries due to suction entrapment recorded from 1999–2008, though the actual number “may be much higher”); *see also* Virginia Graeme Baker Pool and Spa Safety Act, Pub. L. No. 110-140, § 1404, 121 Stat. 1492, 1795 (2007) (codified at 15 U.S.C. § 8003).

<sup>187</sup> Beyond the illustrative examples provided in this Section, other guns have various known defects. These include Glock pistols, Peschin et al., *supra* note 7, at 37–39; Klein, *supra* note 19, at 75–81; “Saturday night special” or “junk” handguns, Peschin et al., *supra* note 7, at 43–44; Klein, *supra* note 19, at 98; Sturm, Ruger & Co. Mark IV pistols and “Old Model” revolvers, Peschin et al., *supra* note 7, at 45–46; Klein, *supra* note 19, at 85–86; and Chinese-made SKS rifles, Peschin et al., *supra* note 7, at 44–49.

<sup>188</sup> Peschin et al., *supra* note 7, at 87–102 (cataloguing types of firearm defects); *see also* Thomas Scolaro, *Investigating Gun Defect Cases*, TRIAL, June 2019, at 44 (explaining flaws in lock mechanisms); BRIAN J. HEARD, HANDBOOK OF FIREARMS AND BALLISTICS: EXAMINING AND INTERPRETING FORENSIC EVIDENCE 141–42 (1997) (same).

<sup>189</sup> *See* Peschin et al., *supra* note 7, at 31 (“Even with the most rigorous training, human error ensures that guns will be dropped from time to time. However, with the implementation of simple available designs, a dropped gun does not have to lead to injury or death.”); Klein, *supra* note 19, at 87–99.

<sup>190</sup> *See* Complaint at 10–11, *Colwell v. Sig Sauer, Inc.*, No. 21-cv-1200 (N.D.N.Y. Nov. 2, 2021), ECF No. 1 (alleging that SIG Sauer’s P320 had the potential for uncommanded discharges); Peschin et al., *supra* note 7, at 94, 101 (listing examples of uncommanded discharges).

<sup>191</sup> *See infra* Section III.3.

<sup>192</sup> Lesley Stahl, *Popular Remington 700 Rifle Linked to Potentially Deadly Defect*, CBS NEWS (Feb. 19, 2017, 7:07 PM), <https://www.cbsnews.com/news/popular-remington-700-rifle-linked-to-potentially-deadly-defects/> [<https://perma.cc/H7MD-NQLV>].

however, the Remington 700 has been plagued by trigger-mechanism defects.<sup>193</sup> Thousands of users complained.<sup>194</sup> Many reported the same alarming problem: after the user moved the safety to “off” position, the rifle immediately fired, sometimes killing or injuring the user or a bystander.<sup>195</sup> Remington rifles with the “Walker trigger” design<sup>196</sup> were the subject of approximately 150 suits alleging death or injury due to a trigger flaw.<sup>197</sup>

Remington blamed user error for the deaths and injuries.<sup>198</sup> In many cases, the company failed to produce relevant documents in discovery, burying evidence on how unintentional discharges occurred and what the company knew about it.<sup>199</sup> Remington documents showed that the company was aware of the problem “as early as 1979,” and even considered a recall, but took no action.<sup>200</sup> Any rifle with the Walker trigger could suffer from the defect, which is “latent” and very difficult for a consumer to discover, predict, or prevent.<sup>201</sup> Remington settled one suit in 1994, paying \$17 million to a rifle owner who suffered a foot injury.<sup>202</sup> A class action, launched in 2013, was settled after Remington agreed to provide a retrofitted trigger replacement or voucher to the owners of approximately 7.5 million firearms with the Walker trigger.<sup>203</sup> The lackluster settlement-notice program<sup>204</sup> led to just 0.29% of affected guns receiving the retrofit; the district court, although troubled by the low

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<sup>193</sup> *Id.*; see also Peschin et al., *supra* note 7, at 39–42 (describing how Remington 700 rifles “have discharged unexpectedly when the safety control is moved to ‘Off’ from a position of ‘Safe,’” as well as upon bolt closing and opening).

<sup>194</sup> Peschin et al., *supra* note 7, at 41 (“[B]y the year 2000, more than 1,500 customer defective product complaints had been received by Remington.”).

<sup>195</sup> *Id.* at 39–41.

<sup>196</sup> Pollard v. Remington Arms Co., 320 F.R.D. 198, 216 (W.D. Mo. 2017).

<sup>197</sup> Stahl, *supra* note 192.

<sup>198</sup> Klein, *supra* note 19, at 70–71 (Remington claimed for years in product liability litigation that deaths or injuries were attributable to trigger pull, “owner misuse,” or improper cleaning of trigger mechanism, rather than defect).

<sup>199</sup> *Id.* at 71 (noting that courts found Remington “failed to meet its discovery obligations” in at least fifteen cases). Other gun manufacturers have resisted similar discovery. See, e.g., Trask v. Olin Corp., 298 F.R.D. 244, 264 (W.D. Pa. 2014) (compelling manufacturer to produce documents showing when it became aware of reports that rifle fired without trigger pull).

<sup>200</sup> O’Neal v. Remington Arms Co., 817 F.3d 1055, 1058 (8th Cir. 2015) (Remington had “estimated that at least 1% of the two million Model 700 rifles it had manufactured prior to 1975—or 20,000 rifles—would inadvertently fire merely by releasing the safety . . . without pulling the trigger”).

<sup>201</sup> *Id.* at 1060–61; see also Peschin et al., *supra* note 7, at 39 (explaining that the trigger defect affected “Remington 700, 721, 722, 40X, and 600 series bolt-action rifles”); Pollard, 320 F.R.D. at 203 (complaint was amended to include all rifles using the Walker trigger).

<sup>202</sup> Stahl, *supra* note 192.

<sup>203</sup> See Pollard, 320 F.R.D. at 203–05 (describing terms of settlement).

<sup>204</sup> See *id.* at 204–05 (describing a settlement notice plan that included postcards and magazine publication).

repair rate, granted final approval to the class settlement.<sup>205</sup> Throughout the process, including in its settlement notice to owners, Remington denied that any defect existed.<sup>206</sup>

In 2006, Remington introduced a new rifle-trigger design.<sup>207</sup> It, too, was defective.

Hundreds of consumers complained of discharge without a trigger pull.<sup>208</sup> By early 2010, Remington was confronted with videos demonstrating the problem, but the company dismissed the complaints.<sup>209</sup> The next year, two children were killed, allegedly due to the defect.<sup>210</sup> In 2011, sixteen-year-old Jasmine Thar was killed in the front yard of her relative's home after a shot from a Model 700 flew through a closed window of a neighbor's home, sailed across the street, and struck her in the chest.<sup>211</sup> The neighbor, a former Marine and experienced gun user, testified that he never touched the trigger; after an investigation and an FBI test of the rifle, prosecutors brought no charges against the neighbor.<sup>212</sup> Remington settled a suit brought by Jasmine's family on undisclosed terms without admitting wrongdoing.<sup>213</sup> Three years later, twelve-year-old Shellsea Lefebvre-Schiel was killed by gunfire from a Remington 700 rifle while on a hunting trip with her father.<sup>214</sup> In 2014, Remington finally recalled 1.3 million rifles with its new "X-Mark Pro" triggers,<sup>215</sup> but the company neither vigorously advertised the corrective action nor admitted that the triggers were defective.<sup>216</sup> Remington's belated announcement echoed its earlier, limited 2002 "recall which applied only to certain rifles made before 1982" and failed to eliminate deadly malfunctions.<sup>217</sup>

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<sup>205</sup> *Id.* at 214 (expressing "concern[]" about low claims rate, but granting final approval based on adequacy of class notice and presumption that class members chose "not to participate for reasons only they may understand").

<sup>206</sup> *See, e.g.,* Klein, *supra* note 19, at 71–72 (finding that, in settlement notices, "Remington continued to deny that there was any problem at all, obviously undermining safety concerns").

<sup>207</sup> Stahl, *supra* note 192.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*; Niven, *supra* note 1.

<sup>212</sup> Niven, *supra* note 1.

<sup>213</sup> Stahl, *supra* note 192.

<sup>214</sup> Shellsea's family sued; the district court granted summary judgment to Remington, finding insufficient expert testimony to establish causation. *Lefebvre v. Remington Arms Co.*, 415 F. Supp. 3d 748, 749–52 (W.D. Mich. 2019). The appeal was dismissed before it could be heard, indicating a likely settlement. No. 19-2455, 2020 WL 1320644, at \*1 (6th Cir. Jan. 31, 2020).

<sup>215</sup> *Remington Arms Announces Voluntary Recall Affecting Model 700 and Model Seven Rifles*, OUTDOOR NEWS (Apr. 14, 2014), <https://www.outdoornews.com/2014/04/14/remington-arms-announces-voluntary-recall-affecting-model-700-and-model-seven-rifles/> [https://perma.cc/VJH2-WQ4X]; Stahl, *supra* note 192.

<sup>216</sup> Stahl, *supra* note 192.

<sup>217</sup> Peschin et al., *supra* note 7, at 41–42.

## 2. *SIG Sauer P320 and Taurus Polymer Pistols: Unintentional Discharge*

SIG Sauer introduced its SIG P320 semiautomatic pistol in 2014.<sup>218</sup> Adopted as a service weapon by many police departments, hundreds of thousands of civilians also purchased the P320.<sup>219</sup> In January 2017, the company won a U.S. Army contract.<sup>220</sup> During pre-approval testing in April 2016, the Army detected a drop-fire defect.<sup>221</sup> SIG Sauer fixed the defect in the version supplied to the Army—a condition to win the contract—but failed to disclose the defect or fix it in the civilian version.<sup>222</sup> Only in August 2017 did SIG Sauer announce a “voluntary upgrade” program, allowing consumers to obtain a free repair to avoid the risk of a drop discharge.<sup>223</sup>

By the launch of the 2017 “upgrade” program, SIG Sauer had sold more than a half-million P320s.<sup>224</sup> The Houston Police Department had documented the pistol’s propensity to discharge during drop tests, and information about the defect had spread among gun enthusiasts by a popular gun review website and by word of mouth.<sup>225</sup> Despite marketing its product under the tagline “Safety Without Compromise,”<sup>226</sup> SIG Sauer insisted that the unrepaired gun was safe, even after announcing its “voluntary upgrade” plan online.<sup>227</sup> The company did not launch a recall or tell users that the repair was necessary to avoid serious risk.<sup>228</sup> Nor did SIG Sauer directly notify individual P320 owners. Instead, the company relied on an announcement posted on its website.<sup>229</sup> The company did not even use the word “repair,” instead describing the program as an “update” or “upgrade” to “enhance[]” the pistol.<sup>230</sup> SIG Sauer even sued a plaintiffs’ attorney who represented several P320 users in

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<sup>218</sup> Jose Pagliery, *Trigger Warning*, CNN (June 6, 2018), <https://www.cnn.com/interactive/2018/06/investigates/sig-sauer-p320-drop-fire/> [<https://perma.cc/Z2FP-LDUS>].

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* The updates to the civilian P320 included a “lighter trigger and modified sear fixes.” *Ortiz v. Sig Sauer, Inc.*, 448 F. Supp. 3d 89, 95 (D.N.H. 2020). But while “[t]he military variant of the P320 includes a manual thumb safety,” as of 2023, only a single “civilian-branded model of the P320” has a manual thumb safety. Barton & Jackman, *supra* note 12.

<sup>224</sup> *Ortiz*, 448 F. Supp. 3d at 95.

<sup>225</sup> Pagliery, *supra* note 218.

<sup>226</sup> *Guay v. Sig Sauer, Inc.*, No. 20-cv-736, 2022 WL 4103294, at \*7 (D.N.H. Sept. 8, 2022).

<sup>227</sup> *Id.* at \*4.

<sup>228</sup> *Id.*

<sup>229</sup> *Gordon v. Sig Sauer, Inc.*, No. H-19-585, 2019 WL 4572799, at \*3 (S.D. Tex. Sept. 20, 2019).

<sup>230</sup> Pagliery, *supra* note 218.



negligent design suits; the company claimed the lawyer's online video on the defect was defamatory.<sup>231</sup>

Before and after SIG Sauer launched its "voluntary upgrade" campaign, many users reported unintentional P320 discharges, sometimes when the user's hands were not near the weapon.<sup>232</sup> By mid-2018, at least nine incidents of unintentional P320 discharges were reported.<sup>233</sup> By 2023, approximately 100 reports of unintended P320 discharges had been made, including reports of at least eighty injuries<sup>234</sup> and at least one death.<sup>235</sup> Nearly three dozen episodes involved P320s that had been retrofitted or had the new design, suggesting that the "upgrade" may not have fully fixed the problem.<sup>236</sup> And many plaintiffs who suffered injury from P320 discharges without a trigger pull were experienced users, including police officers, federal agents, and military veterans.<sup>237</sup>

Some of the allegations in the pleadings are harrowing: One Virginia deputy sheriff's P320 discharged as she removed her pistol from its holster, shattering her femur and rendering her unable to walk.<sup>238</sup> A painter who purchased a P320 for self-defense suffered serious thigh and leg injuries after the pistol fired as he walked downstairs at home.<sup>239</sup> A P320 carried by twenty-four-year veteran of the Philadelphia transit police discharged in its holster at a busy train station; the bullet narrowly

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<sup>231</sup> See *Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC*, No. 22-cv-78, 2022 WL 2704254, at \*1 (D.N.H. 2022) (dismissing defamation suit for lack of personal jurisdiction).

<sup>232</sup> Pagliery, *supra* note 218; Barton & Jackman, *supra* note 12.

<sup>233</sup> Pagliery, *supra* note 218.

<sup>234</sup> Barton & Jackman, *supra* note 12.

<sup>235</sup> Complaint at 7–8, *Hulet v. SIG Sauer Inc.*, No. 21-ca-9783 (Fla. Cir. Ct. Dec. 9, 2021) (alleging that the 15-year-old friend of a son of a Tampa Police Department officer was killed by a P320 that "fired without the trigger being pulled"). A different SIG Sauer handgun is also the subject of a wrongful death suit alleging a defect. Complaint at 8–13, *Harrell v. Sig Sauer Inc.*, No. 23-cv-104 (Ga. Super. Ct. June 6, 2023) (alleging that P938 pistol fired after falling from car door onto parking lot, killing twenty-one-year-old man).

<sup>236</sup> *Id.* ("At least 35 shootings . . . involved guns with the new design or older guns that were sent back to SIG Sauer for upgrades.").

<sup>237</sup> See, e.g., Complaint at 4, *Armendariz v. Sig Sauer, Inc.*, No. 1:22-cv-536 (D.N.H. Nov. 30, 2022), ECF No. 1 (filed by 20 plaintiffs including "federal law enforcement agents, police officers, combat veterans, detectives, firearms instructors, and civilians who have dedicated significant portions of their lives to the safe use of weapons"); see also Complaint at 2, *Slatowski v. Sig Sauer, Inc.*, No. 2:21-cv-729, 2021 WL 6199076 (E.D. Pa. Feb. 17, 2021), ECF No. 1 (ICE agent alleged that P320 discharged without trigger being touched, causing serious injuries).

<sup>238</sup> Pagliery, *supra* note 218, at 2. SIG Sauer subsequently settled, midtrial, a suit brought by the sheriff's deputy. *Vadnais v. Sig Sauer, Inc.*, No. 1:18-cv-540 (E.D. Va. June 16, 2019), ECF Nos. 175, 177, 178 (filed July 5, 2019).

<sup>239</sup> Catherine Dunn, *Like A 'Ticking Bomb': Lawsuit Claims Sig Sauer P320 Fired Unintentionally Inside a Philly Home*, PHILA. INQUIRER (June 15, 2022, 5:00 AM), <https://www.inquirer.com/business/sig-sauer-p320-unintentional-discharge-lawsuit-20220615.html> [https://perma.cc/Z5TZ-D6JL] (recounting additional cases).

missed the officer's knee and nearly hit a bystander.<sup>240</sup> An upstate New York police officer was shot by his P320 while training; the bullet blasted through his leg, thigh, and knee.<sup>241</sup> In 2022, the Milwaukee police union sued the city, alleging that police department-issued P320s discharged without a trigger pull at least five times.<sup>242</sup> The union dropped the suit once the city agreed to replace the P320 service weapons with Glock pistols,<sup>243</sup> although some Glock models have faced their own serious defect reports.<sup>244</sup> At least five other law enforcement agencies dropped the P320 over the safety defect.<sup>245</sup>

Polymer striker-fired handguns manufactured by the Brazilian gun-maker Taurus suffer from a remarkably similar defect. In 2013, an Iowa sheriff's deputy alleged that his Taurus pistol discharged after it fell to the ground while he was chasing a suspect.<sup>246</sup> The deputy sued, contending that Taurus failed to disclose or address two defects known to the company: (1) the pistol's propensity to discharge when dropped from a normal height and (2) a "false safety defect" that sometimes caused the pistols to unintentionally fire "even when the manual safety lever is in the 'on' or 'safe' position."<sup>247</sup> In 2015, Taurus reached a class settlement covering more than 955,000 pistols across nine models, agreeing to pay up to \$30 million to owners and carry out a "repair/replacement scheme for all owners who choose to dispose of this potential safety hazard."<sup>248</sup> Although the class settlement provided some relief for owners, it involved no formal recall.<sup>249</sup>

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<sup>240</sup> Catherine Dunn, *What Happened When a SEPTA Officer's Handgun Spontaneously Fired in Philly's Suburban Station*, PHILA. INQUIRER (Feb. 27, 2021, 5:05 AM), <https://www.inquirer.com/business/sig-sauer-guns-septa-ice-misfiring-suits-police-20210227.html> [<https://perma.cc/AWM9-6ZXL>].

<sup>241</sup> Complaint at 2–5, *Colwell v. Sig Sauer, Inc.*, No. 21-cv-1200 (N.D.N.Y. Nov. 2, 2021), ECF No. 1.

<sup>242</sup> Complaint at 4–7, *Maritato v. City of Milwaukee*, No. 22-cv-5941 (Wis. Cir. Ct. Sept. 19, 2022) (No. 2).

<sup>243</sup> Evan Casey, *Milwaukee Police Could Get New Handguns Next Year Following Lawsuit*, WIS. PUB. RADIO (Nov. 1, 2022, 4:30 PM), <https://www.wpr.org/milwaukee-police-could-get-new-handguns-next-year-following-lawsuit> [<https://perma.cc/5YFS-UPTT>].

<sup>244</sup> See, e.g., Klein, *supra* note 120, at 5–6 (describing lawsuits from police officers shot while following Glock's disassembly protocol); *Johnson v. Glock, Inc.*, No. 3:20-cv-8807, 2021 WL 6804234, at \*1 (N.D. Cal. Sept. 22, 2021) (denying Glock's motion to dismiss complaint alleging "kaboom" defect in handgun chamber, which caused brass casings to "dangerously blow apart").

<sup>245</sup> See *Barton & Jackman*, *supra* note 12.

<sup>246</sup> *Carter v. Forjas Taurus S.A.*, No. 13-cv-24583, 2016 WL 3982489, at \*1 (S.D. Fla. July 22, 2016).

<sup>247</sup> *Id.* at \*2.

<sup>248</sup> *Id.* at \*3–5, \*11.

<sup>249</sup> *Id.* at \*11 (granting final approval of Taurus class settlement, and denying objections filed by class members who sought "more lucrative deal with different terms," including "a recall and admission of liability").

### 3. *SIG Sauer P229: Failure to Discharge*

Not all defects involve a discharge without a trigger pull. Other firearm defects pose the opposite hazard: a *failure* of a loaded gun to discharge when the user pulls the trigger and the safety is disengaged. Virtually all guns jam at some rate, but some jam unusually frequently, even when properly maintained. In 2017, for example, the New Jersey Attorney General's Office sued SIG Sauer, alleging that 3,000 P229 semiautomatic pistols purchased as service weapons for the New Jersey State Police were prone to jam.<sup>250</sup> New Jersey alleged that the pistols were “unfit for police use because a Trooper may be unable to fire more than one round of ammunition in a life-threatening situation” and SIG Sauer had failed to resolve the reliability problem despite sixteen months of testing prompted by the state's complaint.<sup>251</sup>

New Jersey returned the pistols, switched to Glock models, and sued SIG Sauer for breach of contract, breach of warranty, and breach of the covenant of good faith and fair dealing, seeking a refund of the \$1.657 million paid for the P229s, plus compensation for holsters purchased for them.<sup>252</sup> SIG Sauer settled in 2020, agreeing to “repurchase” the pistols and holsters from New Jersey for \$2 million, without admitting liability.<sup>253</sup>

### C. *Firearm Defects Present Heightened Hazards*

Firearm defects obviously create a deadly hazard because of the nature of the product. But two less apparent characteristics also heighten the risks. First, defective firearms may be most likely to fail or cause unintended harm just when the user needs to operate them most: under stressful, hurried conditions.<sup>254</sup> Indeed, many consumers own guns for use in emergency situations—e.g., when an occasion for self-defense arises.<sup>255</sup> A user whose gun jams or unexpectedly discharges due to a defect, despite normal maintenance and use, is thus deprived of the exact protection he or she expects.

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<sup>250</sup> Complaint at ¶¶ 5, 8, *New Jersey v. Sig Sauer, Inc.*, No. L-896-7 (N.J. Super. Ct., Mercer Cnty. Apr. 27, 2017).

<sup>251</sup> *Id.* at ¶¶ 8, 22–26.

<sup>252</sup> *Id.* at ¶¶ 10, 14, 25–34.

<sup>253</sup> Settlement Agreement Between State of New Jersey & SIG Sauer, Inc., at 1, 4 (signed Mar. 4, 2020) (on file with Author).

<sup>254</sup> Peschin et al., *supra* note 7, at 23 (“[T]he emotional stress and adrenaline rush associated with using a gun, especially in lawful self-defense, makes any potential defect in design or manufacturer doubly hazardous.”).

<sup>255</sup> See KIM PARKER, JULIANA HOROWITZ, RUTH IGIELNIK, BAXTER OLIPHANT & ANNA BROWN, PEW RSCH. CTR. AMERICA'S COMPLEX RELATIONSHIP WITH GUNS 17 (2017) <https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns/> [<https://perma.cc/CH4B-ACAT>] (sixty-seven percent of gun owners cite protection as a “major reason they personally own a gun.”).

Second, firearms are durable goods. They typically function for decades and are often resold.<sup>256</sup> Defects can thus manifest decades after manufacture.<sup>257</sup> They may not be readily discovered, especially because many gun owners rarely handle or fire their gun.<sup>258</sup> Notably, defective firearms are also the type of products most likely to see higher consumer recall participation rates if formal, appropriately publicized recalls occur: Consumer recall participation increases in proportion to a product's price and average useful lifespan.<sup>259</sup>

#### IV. AN UNACCEPTABLE STATUS QUO

The firearms industry's immunity from CPSC safety regulation is unacceptable. First, it deprives consumers and the public of common-sense product-safety protections, including corporate defect-reporting requirements, recall monitoring, safety standards, data collection on deaths and injuries, and whistleblower protections. Second, voluntary one-off actions by individual companies, and firearms industry self-regulation through the Sporting Arms and Ammunition Manufacturers Institute, Inc. ("SAAMI"), have failed to protect consumers or the public. Third, existing remedies for gun defects—such as tort, warranty, or contract claims—are ineffective substitutes for federal product-safety regulation. Finally, state-specific firearm-safety regulations are rare, inconsistent, contain substantive and procedural limitations that constrain their ability to prevent harm, and fail to address the vast discrepancy in power between injured consumers—and bystanders—and the powerful gun industry.

##### A. Industry Immunity from Product Safety Protections

"Consumer product" is the key statutory term delineating the limits of the Commission's authority.<sup>260</sup> Almost any item commonly found

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<sup>256</sup> See Peschin et al., *supra* note 7, at 86 (describing the "long useful life of firearms").

<sup>257</sup> *Id.*; see also Carol Cave, Blake Rose, Shelby Mathis & Tanya Topka, *Consolidated Discussion Notes: What is an Effective Recall?*, CPSC Recall Effectiveness Workshop (July 25, 2017), [https://www.cpsc.gov/s3fs-public/Recall\\_Effectiveness\\_Workshop-Consolidated%20Notes\\_2018.pdf](https://www.cpsc.gov/s3fs-public/Recall_Effectiveness_Workshop-Consolidated%20Notes_2018.pdf) [<https://perma.cc/8F9N-2UUH>] ("[a]ctual use" and "expected life of product" are relevant in assessing whether a recall is effective).

<sup>258</sup> See PARKER ET AL., *supra* note 255, at 34 (nearly half of gun owners "rarely" or "never" go shooting or to a gun range, and two-thirds "rarely" or "never" hunt).

<sup>259</sup> See, e.g., CPSC, *Order No. CPSC-F-02-1391: Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior*, XL ASSOCS./HEIDEN ASSOCS. (July 2003), at 4, <https://www.cpsc.gov/s3fs-public/RecallEffectiveness.pdf> [<https://perma.cc/G3EC-GH9W>] [hereinafter 2003 Recall Effectiveness Study] (consumers are more likely to take advantage of a recall remedy, such as repair, replacement, or refund, if the product is costly or durable).

<sup>260</sup> See *supra* notes 62–72 and accompanying text.

in homes, used by consumers, or “enjoyed by” consumers is considered a “consumer product” under the CPSA.<sup>261</sup> The statutory definition excludes only guns and ammunition; products subject to safety regulation by another agency—such as FDA or NHTSA;<sup>262</sup> and industrial products.<sup>263</sup> Although guns and ammunition are clearly consumer products in the real-world meaning of the phrase,<sup>264</sup> the explicit statutory exclusion, by carving out these products from the CPSA definition of “consumer products,” deprives consumers of protection across five key areas: defect reporting and recall oversight, CPSC enforcement power, CPSC information collection, whistleblower protection, and consumer product safety rulemaking.

### 1. Defect-Reporting and Recall Requirements

Defect reporting requirements are central to the CPSA framework.<sup>265</sup> Section 15(b) of the Act requires a manufacturer, importer, distributor, or retailer<sup>266</sup> to promptly report to the CPSC upon obtaining information “reasonably support[ing] the conclusion” that its consumer product fails to comply with a consumer product safety rule, “contains a defect which could create a substantial product hazard,” or “creates an unreasonable risk of serious injury or death,” unless the company knows that the CPSC is already “adequately informed” of the problem.<sup>267</sup> Companies must also report to the CPSC if a particular consumer product model is subject to three product liability settlements or judgments “for death or grievous bodily injury” in a two-year period.<sup>268</sup>

These reporting requirements are linked to the recall obligation. After reporting a defect to the CPSC, companies often voluntarily implement a recall, either on their own initiative or at the agency’s request.<sup>269</sup> In undertaking a recall, the company agrees to notify owners

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<sup>261</sup> See *supra* notes 62–72 and accompanying text.

<sup>262</sup> S. REP. NO. 92-749, at 12 (1972). ATF regulates commercial licensees and firearm imports but does not regulate the safety of guns as products. See *supra* note 19; see also *infra* Section V.D.

<sup>263</sup> 15 U.S.C. § 2052(a)(5)(A).

<sup>264</sup> See *infra* Section V.B.

<sup>265</sup> See 15 U.S.C. § 2064(b); see also Schwartz & Adler, *supra* note 26, at 430 (Section 15(b) is “the Commission’s favorite enforcement tool, its use far eclipsing the issuance of safety standards and product bans.”).

<sup>266</sup> See 15 U.S.C. § 2052(a)(7)–(11), (13).

<sup>267</sup> *Id.* § 2064(b).

<sup>268</sup> 15 U.S.C. § 2084(a); see also 16 C.F.R. § 1116.3 (“Persons who must report under section 37”).

<sup>269</sup> Not all section 15(b) reports lead to a recall. CPSC Compliance Office staff sometimes determine that no CPSC-monitored recall is necessary where the defect or noncompliance is not a “substantial product hazard.” 15 U.S.C. § 2064(a). For example, when very few units were distributed in commerce, the defect creates a low safety risk, most or all products have already been repaired, or the company can directly contact all consumers, a formal recall may not be required.

or users of the product, provide a free remedy to consumers—e.g., a refund, a like-for-like replacement product without the defect, or a free repair—and take other appropriate action.<sup>270</sup> Specific remedial actions and other recall details—ranging from the wording of the press release to the form and scope of notice to consumers—are typically negotiated between the CPSC and the company.<sup>271</sup> Although the vast majority of recalls are voluntary, the CPSC may also seek to compel a company to address a safety defect.<sup>272</sup> In these rare cases, where a company declines to conduct a recall or impasses with an agency on recall scope, the Commission can seek a mandatory recall or other remedial action,<sup>273</sup> through a formal agency adjudicative hearing,<sup>274</sup> or suit in federal court.<sup>275</sup>

Despite some level of corporate noncompliance with defect reporting requirements, and low rates of consumer participation in many recalls,<sup>276</sup> these requirements are crucial to effectively alerting consumers and remediating hazardous defects. The gun industry's immunity from these obligations thus allows even serious defects to go unchecked.<sup>277</sup>

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<sup>270</sup> See 15 U.S.C. § 2064(d)(1).

<sup>271</sup> See CPSC, PRODUCT SAFETY PLANNING, REPORTING, AND RECALL HANDBOOK 13, 21 (2021) [hereinafter 2021 CPSC Handbook], <https://www.cpsc.gov/s3fs-public/CPSCRecallHandbookAugust2021.pdf> [<https://perma.cc/FX6S-TKD6>] (recalling company should “expeditiously” remediate defect, provide “refund, replacement, or repair,” and jointly announce recall with the CPSC, clearly describing the “remedy available to the consumer.”).

<sup>272</sup> See CPSA, Pub. L. No. 92-573, § 15(c)–(d), 86 Stat. 1207, 1221 (1972) (codified at 15 U.S.C. § 2064(c)–(d)); Anita Bernstein, *Voluntary Recalls*, 2013 U. CHI. LEGAL F. 359, 361 (arguing that product recalls reflect “communal voluntarism,” which is “a blend of individualism and conformity manifest in the national culture of the United States”); James T. O'Reilly, *Product Recalls & the Third Restatement: Consumers Lose Twice from Defects in Products and in the Restatement Itself*, 33 U. MEM. L. REV. 883, 891 (2003) (“most recalls are negotiated settlements, or . . . voluntary actions.”).

<sup>273</sup> Compare 16 C.F.R. § 1115.20 (“Voluntary remedial actions”), with *id.* § 1115.21 (“Compulsory remedial actions”).

<sup>274</sup> See *id.* § 1115.21(a) (Commission may issue an “adjudicated Commission Order,” directing a company to take remedial action on defective products, but only after a full hearing before a neutral administrative law judge in accordance with Administrative Procedure Act, 5 U.S.C. § 554, and Commission’s Rules of Practice for Adjudicative Proceedings, 16 C.F.R. part 1025).

<sup>275</sup> See 15 U.S.C. §§ 2071, 2061 (describing procedures for the Commission to pursue civil action in federal court).

<sup>276</sup> See Kenneth Ross, *CPSC Gets Aggressive About Failure to Report*, IN COMPLIANCE (May 1, 2023), <https://incompliancemag.com/article/cpsc-gets-aggressive-about-failure-to-report/> [<https://perma.cc/H2QF-W3LV>] (noting CPSC civil settlements with companies over CPSA violations, such as a failure to timely report safety-related defects); 2003 Recall Effectiveness Study, *supra* note 259, at 16–23 (describing consumer behavior in evaluating the benefits and costs of participating in a recall).

<sup>277</sup> See *supra* Part III.



## 2. *Enforcement Power*

The CPSA provides for civil and criminal penalties for specific corporate conduct that endangers consumers, such as failing to timely report safety defects, selling goods subject to a mandatory or voluntary recall, selling goods with an unauthorized registered safety certification mark, selling goods that fail to comply with an applicable mandatory standard, or making material misrepresentations to the CPSC.<sup>278</sup> The firearms industry's statutory immunity means that manufacturers can engage in any of this conduct without triggering enforcement action from a safety regulator.

## 3. *CPSC Research and Information Collection*

In the Consumer Product Safety Improvement Act ("CPSIA") of 2008, Congress directed the CPSC to maintain an "Injury Information Clearinghouse" to "collect, investigate, analyze, and disseminate" information relating to deaths and injuries "associated with consumer products."<sup>279</sup> The exclusion of firearms and ammunition from the statutory definition of "consumer products," however, effectively bars the CPSC from collecting gun-related data, including data related to gun defects, even if such data would reveal patterns that could identify design or manufacturing problems and save lives.<sup>280</sup>

## 4. *Whistleblower Provisions*

The 2008 CPSIA also added antiretaliation protections for consumer-product safety whistleblowers.<sup>281</sup> Importers, manufacturers, distributors, and retailers are barred from taking adverse action against an employee because he or she provided information on potential CPSA violations to the company or to government investigators.<sup>282</sup> Employees and former employees who allege retaliation for product-safety whistleblowing have an administrative form of redress.<sup>283</sup> The firearms industry's immunity from Commission authority thus deprives gun industry insiders of an inducement to report known safety defects that a company refuses to correct. Employees of gun manufacturers

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<sup>278</sup> 15 U.S.C. §§ 2068–2070.

<sup>279</sup> *Id.* § 2054(a)(1).

<sup>280</sup> *See supra* Sections III.A, V.C (explaining how the CPSC tracks injuries and incidents related to consumer products but, with one exception, does not collect data on incidents, injuries, or deaths related to guns or ammunition).

<sup>281</sup> 15 U.S.C. § 2087.

<sup>282</sup> *Id.* § 2087(a).

<sup>283</sup> *Id.* § 2087(b).

who blow the whistle on corporate misconduct are thus unprotected by federal law.<sup>284</sup>

### 5. Consumer Product Safety Rules

When other remedies and voluntary standards have proved ineffective, the CPSC may issue “consumer product safety rules,” which are industry-binding regulations promulgated under a notice-and-comment process.<sup>285</sup> CPSC’s rulemaking power is tightly circumscribed by the CPSA,<sup>286</sup> and the Commission has historically used its power sparingly but effectively.<sup>287</sup> The firearms industry’s immunity from even the possibility of consumer product safety rules removes a key inducement for the industry to make safe firearms.

#### B. Insufficiency of Industry Self-Regulation

Because neither the CPSC nor any other federal agency is responsible for regulating the safety of guns and ammunition, the sole avenue for addressing product hazards *ex ante* is self-regulation. Yet self-regulation by the industry’s consortium—Sporting Arms and Ammunition Manufacturers’ Institute (“SAAMI”)—and individual companies has failed. SAAMI’s voluntary standards have been weak, narrow, and self-interested. Lacking any enforcement mechanism, the group has served as a lobbying shop rather than a credible standard-setting body. Efforts by individual gun manufacturers confronted with defects have also proved insufficient. Gunmakers have frequently ignored defects, blamed consumers, or quietly settled claims without resolving underlying problems in their products.

##### 1. SAAMI Standards

The firearms industry has developed a handful of standards through SAAMI, which consists of fifty-three member companies, all of which are industry participants.<sup>288</sup> Some SAAMI members are the

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<sup>284</sup> Previous gun industry whistleblowers have focused on dangerous marketing practices, rather than product safety hazards. *See, e.g.,* Ryan Busse, *I Testified to Congress About the Gun Industry. It Rattled Me to My Core*, THE GUARDIAN (Aug. 5, 2022, 6:18 AM), <https://www.theguardian.com/commentisfree/2022/aug/05/us-gun-control-congress-weapons-republicans> [https://perma.cc/7XR9-WH97].

<sup>285</sup> 15 U.S.C. §§ 2052(a)(6), 2058.

<sup>286</sup> *See infra* Section VI.B.

<sup>287</sup> *See* Robert S. Adler, *Reflections of an Unapologetic Safety Regulator*, 11 REGUL. REV. 31, 33 (2022) (noting that over the past half-century, “CPSC has seen substantial declines in death and injury” caused by product hazards, even as population has grown).

<sup>288</sup> SAAMI requires its voting members to be domestic primary manufacturers of firearms, ammunition, and propellants for sporting ammunition. *Membership Requirements*, SPORTING ARMS

same companies that ignored—and, in some cases, concealed—defects in their products for years.<sup>289</sup> SAAMI’s minimal standards include a very limited voluntary drop-test standard for guns,<sup>290</sup> and ammunition-standardization regulations that promote interchangeability and govern “pressure and velocity” to prevent ammunition cartridge explosions inside gun barrels.<sup>291</sup> Yet SAAMI’s industry-driven standards provide no other useful safety protections for gun users and those around them. Three key factors make SAAMI standards insufficient.

First, the SAAMI standards are voluntary. Adherence is not required of SAAMI members, let alone nonmembers, and there is no enforcement mechanism or penalty for deviations.<sup>292</sup> Although the American National Standards Institute (“ANSI”) recognizes each SAAMI standard as an “American National Standard” (“ANS”),<sup>293</sup> ANSI “does not evaluate a standard’s technical content,” and ANS approval only “relates to procedural compliance” of the standard with ANSI rules on ANS development.<sup>294</sup> Even SAAMI’s procedural practices are atypical: unlike other standard-setting bodies, SAAMI does not meaningfully involve consumers in voluntary standards development.<sup>295</sup>

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& AMMUNITION MFRS.’ INST., <https://saami.org/membership/membership-requirements/> [<https://perma.cc/6V8G-AZET>].

<sup>289</sup> See *supra* Section III.B; *Member Companies*, SPORTING ARMS & AMMUNITION MFRS.’ INST., <https://saami.org/membership/member-companies/> [<https://perma.cc/RNX7-GHQY>] (member companies include Glock and SIG Sauer, as well as Taurus’s U.S. entity).

<sup>290</sup> See SPORTING ARMS & AMMUNITION MFRS.’ INST., VOLUNTARY INDUSTRY PERFORMANCE STANDARDS CRITERIA FOR EVALUATION OF NEW FIREARMS DESIGNS UNDER CONDITIONS OF ABUSIVE MISHANDLING FOR THE USE OF COMMERCIAL MANUFACTURERS 2–3 (SAAMI Z299.5 2016), <https://saami.org/wp-content/uploads/2019/01/SAAMI-Z299.5-Abusive-Mishandling-Approved-3-14-2016.pdf> [<https://perma.cc/4H6D-W997>].

<sup>291</sup> See SPORTING ARMS & AMMUNITION MFRS.’ INST., VOLUNTARY INDUSTRY PERFORMANCE STANDARDS FOR PRESSURE AND VELOCITY OF CENTERFIRE RIFLE AMMUNITION FOR THE USE OF COMMERCIAL MANUFACTURERS 3 (SAAMI Z299.4 2015), <https://saami.org/wp-content/uploads/2019/02/ANSI-SAAMI-Z299.4-CFR-Approved-2015-12-14-Posting-Copy.pdf> [<https://perma.cc/D7XE-WF8K>].

<sup>292</sup> Peschin et al., *supra* note 7, at 5 n.6.

<sup>293</sup> *Approved American National Standards*, AM. NAT’L STANDARDS INST. 794 (Jan. 26, 2023), <https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Approved%20and%20Proposed%20ANS%20Lists/Approved%20ANS.pdf> [<https://perma.cc/4F4F-8EPM>]; see also Cary Coglianese & Gabriel Scheffler, *Private Standards and the Benzene Case: A Teaching Guide*, 71 ADMIN. L. REV. 353, 368–70 (2019) (explaining ANS process).

<sup>294</sup> Email from Sr. Director, Procedures & Standards Admin., ANSI (Jan. 31, 2023) (on file with Author).

<sup>295</sup> Compare Olivia Li, *Cars, Toys, and Aspirin Have to Meet Mandatory Safety Standards. Guns Don’t. Here’s Why.*, THE TRACE (Jan. 19, 2016), <https://www.thetrace.org/2016/01/gun-safety-standards/> [<https://perma.cc/V6DT-E7YK>] (SAAMI “does not solicit feedback from the public” or “ask gun owners how to improve safety features on firearms”), with Am. Nat’l Standards Inst., *ANSI Essential Requirements: Due Process Requirements for American National Standards* 4 (Jan. 2022), [https://share.ansi.org/Shared%20Documents/About%20ANSI/Current\\_Versions\\_Proc\\_Docs\\_for\\_Website/ER\\_Pro\\_current.pdf](https://share.ansi.org/Shared%20Documents/About%20ANSI/Current_Versions_Proc_Docs_for_Website/ER_Pro_current.pdf) [<https://perma.cc/U2DV-48PY>] (requiring ANS

Second, SAAMI not only lacks the “authority to regulate or control” its members, but also has chosen not to monitor, or even advise, its members on the “design, manufacture, assembly, importation, distribution, sales or marketing of firearms.”<sup>296</sup> In fact, SAAMI says it has never even *considered* establishing best practices or recommendations on safety-design features.<sup>297</sup>

Third, SAAMI’s voluntary regulations are minimal. Other than velocity and pressurization standards to prevent ammunition cartridge explosions inside gun barrels, its only safety standard is a “drop test” for guns that is exceedingly generous to manufacturers.<sup>298</sup> SAAMI frames this as a test of “conditions where abusive mishandling could possibly result in accidental discharge.”<sup>299</sup> This presupposes that a user who drops a gun must invariably have “abusively mishandled” it.<sup>300</sup>

Yet dropping of a gun is a fairly common mishap, and it should not cause the gun to discharge.<sup>301</sup> That type of highly predictable human error is precisely the kind that can be readily anticipated and for which safety features are readily available.<sup>302</sup> SAAMI’s voluntary standard also calls for the gun to be dropped from a low height (four feet) onto a one-inch rubber mat.<sup>303</sup> This test does not account for real-world conditions, such as guns falling on hard surfaces (e.g., concrete, hardwood, asphalt), guns being jostled, or guns falling from a height of more than four feet (e.g., racks to keep guns out of reach

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standard-setting to meet ten “essential requirements,” including openness to all interested parties and “balance,” i.e., participation by nonindustry stakeholders).

<sup>296</sup> See *James v. Nat’l Shooting Sports Found., Inc.*, No. A–3101–01T3, 2003 WL 1843975, at \*2 (N.J. Super. Ct. App. Div. Mar. 11, 2003) (quoting SAAMI’s then chief executive).

<sup>297</sup> *People v. Arcadia Mach. & Tool, Inc.*, No. 4095, 2003 WL 21184117, at \*15 (Cal. Super. Ct. Apr. 10, 2003) (“SAAMI indicates it has never considered establishing recommended practices” for “design features” such as “chamber loaded indicators, magazine disconnects and internal locks.”).

<sup>298</sup> See *supra* notes 290–91 and accompanying text.

<sup>299</sup> SAAMI Z299.5-2016, *supra* note 290.

<sup>300</sup> Klein, *supra* note 19, at 95.

<sup>301</sup> Data on how frequently gun owners drop guns is not readily available; anecdotal reports suggest it is not uncommon. See, e.g., DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 228 (new ed. 2017) (tallying “a tiny sample of news articles . . . concerning firearm accidents”). Gun drops are usually only reported if the gun discharges and causes injury, if the setting of the incident is unusual, or if the carrier is atypically prominent. E.g., Bente Birkeland, *A State Lawmaker Dropped His Firearm Inside the Capitol While Hurrying to a Vote*, COLO. PUB. RADIO (Mar. 14, 2022, 5:41 PM), <https://www.cpr.org/2022/03/14/colorado-capitol-richard-holtorf-drops-firearm/> [<https://perma.cc/N85N-NLMV>].

<sup>302</sup> Cf. Robert S. Adler, *Redesigning People Versus Redesigning Products: The Consumer Product Safety Commission Addresses Misuse*, 11 J.L. & POL. 79, 127 (1995) (“No one gets through life without error and the regulatory system should not be cast as a mechanism of natural selection . . .”).

<sup>303</sup> SAAMI Z299.5-2016, *supra* note 290, at 2.

of children).<sup>304</sup> The sole court to address the issue has suggested that a gun's compliance with the SAAMI standard does not preclude a negligent-design claim.<sup>305</sup> And outside this minimal drop test, SAAMI has apparently not even considered the costs or benefits of other prospective quality or safety standards.<sup>306</sup>

Instead of setting meaningful standards that benefit consumers, SAAMI's main function is industry advocacy. In the past, SAAMI and the National Shooting Sports Foundation ("NSSF"), a manufacturer lobbying group, have shared an address, phone number, and president and CEO.<sup>307</sup> Consistent with economic rather than safety motives, SAAMI takes the position that "ultimate responsibility for firearms safety rests with the firearms user and owner," a stance that seems to absolve gun-makers of any responsibility for making safe, functional products.<sup>308</sup> In a 2003 brochure rejecting GAO's criticism of the industry's safety record, SAAMI implicitly denied the existence of firearm defects, claiming that "firearms accidents *invariably* occur because a very small minority of firearms owners and users ignore" gun safety rules and that virtually all firearms accidents are the result of user error.<sup>309</sup>

Of course, consumer behavior causes or averts many avoidable firearm injuries and deaths, just as consumer behavior causes or averts other product-related injuries or deaths. Nobody can sensibly contest the need for gun users to adhere to basic principles of safe gun handling—such as always assuming a firearm is loaded, not relying solely on the firearm's internal or external safeties, pointing the muzzle in a

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<sup>304</sup> See Klein, *supra* note 19, at 95–96 (questioning whether the SAAMI standard "is attempting to create a meaningful safety standard requiring a legitimate test for drop fire or to generate a basis for exculpatory evidence in court cases").

<sup>305</sup> *Tosseth v. Remington Arms Co.*, 483 F. Supp. 3d 659, 666–83 (D.N.D. 2020) (noting expert criticisms of SAAMI standard). Remington later settled the case. Notice of Settlement, *Tosseth v. Remington Arms Co.*, No. 18-cv-00230 (D.N.D. Aug. 8, 2020), ECF Nos. 83, 86, 87.

<sup>306</sup> See Klein, *supra* note 19, at 97 (SAAMI standard-setting process lacks "mechanism for considering the efficacy and public safety value of various widely available security features such as loaded chamber indicators, magazine safety disconnects, external manual safeties, or integrated gun locking mechanisms."). SAAMI has also not undertaken standardization efforts in other safety-related contexts. *Cf.* HENDRICK ET AL., *supra* note 169, at 71 ("human factors/ergonomic safety design factors" applicable to handguns include safety switches that "differ in coding, location, and movement on otherwise similar semiautomatics," meaning that "similar-looking safeties can operate differently").

<sup>307</sup> *City of Boston v. Smith & Wesson Corp.*, No. 99-02590, 2000 WL 34018326, at \*5 (Mass. Super. Ct. Nov. 21, 2000); see also Klein, *supra* note 19, at 94–95 (NSSF has repeatedly challenged "even minimal" firearm regulation and serves as gun manufacturers' advocacy group "rather than simply a neutral arbiter of gun safety standards.").

<sup>308</sup> See generally *A Responsible Approach to Firearms Safety*, SAAMI (2003), [https://web.archive.org/web/20180509091544/http://www.saami.org/specifications\\_and\\_information/publications/download/SAAMI\\_ITEM\\_223-A\\_Responsible\\_Approach\\_to\\_Firearms\\_Safety.pdf](https://web.archive.org/web/20180509091544/http://www.saami.org/specifications_and_information/publications/download/SAAMI_ITEM_223-A_Responsible_Approach_to_Firearms_Safety.pdf) [<https://perma.cc/4JVF-G7T8>].

<sup>309</sup> *Id.* at 4 (emphases added).

safe direction, keeping the finger off the trigger and outside the trigger guard until ready to fire, knowing the target and what lies beyond it, using eye and hearing protection, and securely storing weapons when not in use.<sup>310</sup> But it does not follow to say that just because users have responsibility, manufacturers have none. And SAAMI's implicit denial that gun defects occur is simply belied by the facts.<sup>311</sup>

## 2. Individual Company Efforts

In the absence of safety guidance from SAAMI, it falls to individual gun companies to choose how to deal with product-safety hazards as they arise. As the Remington and Sig Sauer defects suggest, gun companies—immune from defect reporting obligations or recall and public disclosure obligations—often fail to adequately address product defects.<sup>312</sup>

Absent a class settlement, almost any action a gun manufacturer takes to correct defects in its products is voluntary and unmonitored. A gun company may choose to provide consumers with a full remedy, partial remedy, or no remedy at all. A company might ignore a problem entirely, or simply issue a “safety alert” that identifies a problem without correcting it.<sup>313</sup> By contrast, manufacturers of consumer products subject to CPSC jurisdiction face penalties for not promptly reporting and addressing a problem.<sup>314</sup> Moreover, even if a gun company chooses to act, it can engage in gamesmanship that the CPSC would never allow in a CPSC-overseen recall. For example, a gun company conducting a voluntary market withdrawal may unilaterally identify the population of units subject to a recall without providing a basis for its decision. Companies conducting recalls overseen by the CPSC, however, must typically justify the recall scope and provide a full remedy to affected consumers in the form of a refund, replacement with a similar but non-defective unit, or repair that fixes the defect.<sup>315</sup>

Firearm companies also have no regulatory obligation to track the progress of any voluntary action they undertake, allowing them to follow through poorly or not at all.<sup>316</sup> In these unilateral, unmonitored

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<sup>310</sup> See, e.g., *id.* at 3–4.

<sup>311</sup> See *supra* Part III.

<sup>312</sup> See *supra* Section III.B.

<sup>313</sup> See *infra* notes 316–18 and accompanying text.

<sup>314</sup> 15 U.S.C. § 2068(a)(2), (4)–(5), (11) (prohibited acts); *id.* §§ 2069, 2070 (civil and criminal penalties for prohibited acts, such as attempted cover-ups).

<sup>315</sup> 2021 CPSC Handbook, *supra* note 271, at 3–5, 30 (corrective action plan may include “any type of remedial action taken by a company,” including a “cash refund or a replacement product,” sometimes predicated on the return of the defective unit to the manufacturer, repair of the product, or some combination of measures “necessary to protect consumers”).

<sup>316</sup> By contrast, the CPSC monitors the progress of CPSC-overseen recalls. See *id.* at 26 (monthly progress reports).



recalls, gun companies may choose to rely solely on Web postings without sending direct notice to consumers or dealers, even if they have contact information from email lists or other records.<sup>317</sup> A failure to alert known affected consumers of the hazard and tell them how they may take advantage of the recall remedy is significant, because direct notice is the most effective form of recall notice.<sup>318</sup> And public notice is also lacking: unlike CPSC-monitored recalls, gun companies taking corrective action may avoid issuing a press release,<sup>319</sup> bury notice deep on a corporate website,<sup>320</sup> or fail to mention the recall on social media accounts.<sup>321</sup>

This regulatory immunity harms consumers. For example, manufacturers who take voluntary action on a defective gun often use vague, confusing, or hazard-minimizing language in communicating with consumers, something the CPSC does not permit in CPSC-monitored recalls.<sup>322</sup> One study tallied twenty-four “retrofit/recall programs” voluntarily undertaken by firearm companies between 1982 and 2002.<sup>323</sup> Many made it difficult or inconvenient for gun owners to participate in the recall. Fewer than half of notices included photos or illustrations to help consumers identify whether their firearm was defective.<sup>324</sup> At least one-third of notices minimized the hazard, contained language that suggested that the consumer might be to blame for any problem, or both.<sup>325</sup> These techniques undercut a notice’s effectiveness by increasing

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<sup>317</sup> *Id.* at 18–19 (“notice to consumers who are known to have the product” is typically required in CPSC-overseen recalls).

<sup>318</sup> *See, e.g.*, Recall Effectiveness: Announcement of Request for Information Regarding the Use of Direct Notice and Targeted Notices During Recalls, 83 Fed. Reg. 29,102 (June 22, 2018); U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-56, CONSUMER PRODUCT SAFETY COMMISSION: ACTIONS NEEDED TO IMPROVE PROCESSES FOR ADDRESSING PRODUCT DEFECT CASES 29 (2020), <https://www.gao.gov/assets/gao-21-56.pdf> [<https://perma.cc/M7AW-3F4G>].

<sup>319</sup> By contrast, CPSC-overseen recalls include a public press release or “recall alert.” Both types of announcements follow “a standardized format” meant to easily convey information to “consumers, media, and other interested parties.” 2021 CPSC Handbook, *supra* note 271, at 20, 22.

<sup>320</sup> *Id.* at 23 (the CPSC generally requires companies to place clear recall announcements in a sufficiently prominent place on company’s consumer-facing website).

<sup>321</sup> *Cf. id.* at 23–24, app. D (in CPSC-overseen recalls, companies usually must post notices on their social media accounts and mobile platforms and are encouraged to also use paid web ads to advertise recalls).

<sup>322</sup> Compare Klein, *supra* note 19, at 103–06 (even when gun manufacturers undertake voluntary recalls, they “frequently weaken the effectiveness of their warnings” by cagily using “eupulatory language”), with 2021 CPSC Handbook, *supra* note 271, at 17 (“CPSC staff will not approve news releases that downplay the hazard or that use language that would make a consumer less likely to participate in the recall. In general, risks and injuries should be described with clarity and not euphemistically.”).

<sup>323</sup> Stephen C. Heiden, *An Evaluation of Notices Used in Firearm Recalls: 1982–2002*, 4 No. 11 ANDREWS GUN INDUS. LITIG. REP. 11 (2003).

<sup>324</sup> *Id.* at 2.

<sup>325</sup> *Id.* at 3 (eight out of twenty-four notices had language “undermining the hazard severity or accident consequences”).

the likelihood that it will be ignored.<sup>326</sup> In more than 83% of notices, gun manufacturers failed to explain whether or how consumers would be reimbursed for shipping costs, and 16% of notices failed to instruct users not to use the firearm until retrofitted.<sup>327</sup> Only one gun manufacturer offered financial incentives to encourage participation in a retrofit or voluntary recall program.<sup>328</sup>

Effective self-regulatory product-safety systems, especially those developed “in the shadow” of regulation, exist.<sup>329</sup> But the gun industry, comfortable in its immunity from federal product-safety law, has little incentive to effectively self-regulate. This fails gun owners and the public.<sup>330</sup>

### C. *Insufficiency of Tort Law*

Tort law is also insufficient to control firearm safety defects. Product liability litigation has advanced incremental changes to gun industry behavior, and individual plaintiffs injured by defective guns have won favorable decisions on design-defect and failure-to-warn theories.<sup>331</sup> Tort avenues of accountability, however, are not substitutes for CPSC authority for several reasons. First, the CPSA generally complements tort law rather than supplanting it. Just as FDA approval of a drug does

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<sup>326</sup> *Id.* at 1 (qualifier-laden notices that focus on user error, rather than product’s flaws, are less likely to “galvanize users into action”).

<sup>327</sup> *Id.* at 4–5.

<sup>328</sup> *Id.*

<sup>329</sup> *E.g.*, Stephen J. Hanway & Gregory B. Rodgers, *Impact of the Voluntary Safety Standard for Liquid Laundry Packets on Child Injuries Treated in US Hospital Emergency Departments, 2012–2018*, 110 AM. J. PUB. HEALTH 1242, 1242 (2020).

<sup>330</sup> See Chelsea Parsons, Eugenio Weigend Vargas & Rukmani Bhatia, *The Gun Industry in America: The Overlooked Player in a National Crisis*, CTR. FOR AM. PROGRESS, at 1 (Aug. 6, 2020), <https://www.americanprogress.org/wp-content/uploads/2020/08/GunIndustry-report.pdf> [<https://perma.cc/W5CN-MH4P>].

<sup>331</sup> This includes both victories in pretrial decisions as well as favorable verdicts. On the former, see, for example, *O’Neal v. Remington Arms Co.*, 817 F.3d 1055, 1056 (8th Cir. 2015) (reversing grant of summary judgment in defendant’s favor because plaintiff presented “sufficient circumstantial evidence” of defect in Remington rifle that killed hunter); *Weeks v. Remington Arms Co.*, 733 F.2d 1485, 1490 (11th Cir. 1984) (reasonable jury could find Remington negligent for failing to warn users of shotgun’s known propensity to discharge with safety engaged); *Tosseth v. Remington Arms Co.*, 483 F. Supp. 3d 659, 671–83 (D.N.D. 2020) (allowing strict liability and negligent-design claims to proceed to trial; pistol discharged without trigger pull, killing fourteen-year-old girl). On the latter, see, for example, *Campbell v. Remington Arms Co.*, 958 F.2d 376, 1–3 (9th Cir. 1992) (unpublished memorandum opinion) (affirming \$724,000 verdict to plaintiff injured by defectively designed rifle); *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530, 1532–38 (10th Cir. 1986) (affirming \$2.05 million verdict against manufacturer who failed to adopt “feasible” repair or redesign despite being aware of defect; plaintiff’s revolver discharged after it dropped); *DiFrancesco v. Excam, Inc.*, 642 A.2d 529, 530–34 (Pa. Super. Ct. 1994) (affirming \$125,000 verdict and jury’s conclusion that pistol that discharged in plaintiff’s pocket was defectively designed and manufactured), *app. dismissed as improvidently granted*, 674 A.2d 214 (Pa. 1996).

not shield a manufacturer from product liability under state law,<sup>332</sup> compliance with CPSC consumer product safety rules or standards does not displace state-law tort or statutory remedies.<sup>333</sup> CPSC jurisdiction thus works best in tandem with tort law.

Second, tort claims are principally backward-looking. Their chief strength is compensating for defects already uncovered, and deaths and injuries already suffered. To be sure, product-liability litigation plays an important role in changing gun industry behavior and in shaping safety outcomes, especially over the medium and long terms.<sup>334</sup> Unintentional firearm deaths have declined over time in the United States,<sup>335</sup> and this is partially attributable to litigation against the gun industry, ranging from broadside attacks on industry practices to product liability suits targeting specific defective guns.<sup>336</sup> But CPSC safety regulation more directly aims to *avoid* harm, by reviewing defect reports and overseeing voluntary recalls, more rarely by seeking mandatory recalls, and (rarer still) by implementing mandatory product safety standards.<sup>337</sup> As Vice

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<sup>332</sup> *Wyeth v. Levine*, 555 U.S. 555, 558–59 (2009).

<sup>333</sup> 15 U.S.C. § 2074(a) (compliance with CPSC rules does not “relieve any person from liability at common law or under State statutory law to any other person”). Conversely, a lack of Commission action with respect to a particular product is not admissible in evidence in product-related litigation. *Id.* § 2074(b). This is appropriate given CPSC’s limited resources, *see infra* notes 554–56 and accompanying text, and constraints on its enforcement power, *see infra* Section VI.B.

<sup>334</sup> *See, e.g.*, 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, 558 (2004) (safety litigation can highlight issues for legislators, regulators, and the public; change the way issues are perceived; generate media attention; mobilize advocates, and expose, via discovery, information previously hidden by industry).

<sup>335</sup> *See* Solnick & Hemenway, *supra* note 159, at 1 (“Unintentional firearm deaths decreased in the United States for all ages from 2000 to 2012 and among children from 2002 to 2014.”) (internal citations omitted); Shannon Frattaroli, Daniel W. Webster & Stephen P. Teret, *Unintentional Gun Injuries, Firearm Design, and Prevention: What We Know, What We Need to Know, and What Can Be Done*, 79 J. URB. HEALTH 49, 49 (2002) (“Unintentional gun deaths have been declining since at least 1920, yet the reasons for this downward trend are not understood.”). Of course, the degree of this decline should not be overstated. *Id.* at 54 (“Some of the observed decline in unintentional firearm deaths” is attributable to historical miscoding of firearm suicides as “unintentional” due to “religious taboos, social stigma, and/or concern about loss of life insurance benefits”); *see also supra* notes 161–62 and accompanying text (citing studies suggesting undercounting of unintentional firearm deaths/injuries).

<sup>336</sup> Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1843–47 (2008) (contending that although major litigation against the gun industry was “counterproductive” in that it culminated in the enactment of liability shields like the PLCAA, it did increase “salience” of “gun safety and responsible marketing” issues among industry players); JOHNSON ET AL. 2018, *supra* note 178, at 22 (arguing that product liability lawsuits have also probably reduced the number of firearm accidents because “[p]oorly made guns that are genuinely defectively designed (e.g., a gun that would readily discharge when dropped) have been greatly reduced in the market because of the cost of paying successful plaintiffs.”).

<sup>337</sup> *See infra* Sections IV.C–V.B.

President Humphrey stated before the CPSC's enactment, this framework deliberately "step[s] away from a defensive position," aiming to anticipate and prevent tragedy rather than waiting for it to occur.<sup>338</sup>

Third, relying primarily on private plaintiffs to deter and redress corporate misconduct asks too much of injured consumers. Even when plaintiffs' counsel works on contingency, a suit requires plaintiffs to spend time and exert effort. CPSC enforcement can close the massive resources gap between the gun industry and ordinary consumers.<sup>339</sup> While plaintiffs injured by defective guns can gain redress through effective counsel, product liability suits also cannot neatly substitute for Commission jurisdiction.<sup>340</sup> The Commission, for example, can conduct investigations, launch inquiries, and issue administrative subpoenas.<sup>341</sup> And although many incidents or injuries are too small to make the case attractive to lawyers working on contingency fees, the CPSC has an incentive to investigate reports of incidents that involve little or no injury, because such reports are sometimes harbingers of future deaths or injuries.<sup>342</sup>

Fourth, product liability plaintiffs must show factual and legal causation.<sup>343</sup> Even when a firearm was defective, and that defect caused or contributed to a plaintiff's injuries, the plaintiff may find it difficult to prove defect and causation by a preponderance of the evidence, especially if there were no witnesses and the manufacturer claims that the injury was caused by user error or poor maintenance.<sup>344</sup> Moreover,

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<sup>338</sup> Hubert H. Humphrey, Remarks at the Swearing-In Ceremony of National Commission on Product Safety (May 15, 1968), <http://www2.mnhs.org/library/findaids/00442/pdfa/00442-02547.pdf> [<https://perma.cc/K7HC-352D>].

<sup>339</sup> Hanway & Rodgers, *supra* note 329, at 6 (explaining gun industry concentration: fifty-eight percent of pistols were produced by three manufacturers and forty-five percent of rifles were produced by three other manufacturers).

<sup>340</sup> There are, of course, aspects of private litigation that helpfully fill gaps that the CPSC cannot. *Compare, e.g.,* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 97–98 (2008) (discussing "parajournalist" role of plaintiffs' attorneys who publicly identify misconduct), *with* 15 U.S.C. § 2055(b) (restricting the Commission's ability to publicly disclose manufacturer-identifying information).

<sup>341</sup> 15 U.S.C. §§ 2068–2071 (CPSC civil, criminal, and injunctive remedies); *id.* §§ 2054, 2065; 16 C.F.R. § 1118.1–.8 (2022) (CPSC's investigative authorities and procedures).

<sup>342</sup> Of course, CPSC's limited resources mean that the Commission can only monitor a tiny percentage of product safety hazards in the marketplace. *Cf.* Lytton, *supra* note 334, at 1849 (tort liability incentivizes industry "to comply with regulations where [ATF's] enforcement resources are limited," as ATF "is able to inspect only a fraction of the tens of thousands of licensed gun dealers").

<sup>343</sup> Factual and legal causation are also known as "but for" and "proximate" causation. *E.g.,* Ingham v. Johnson & Johnson, 608 S.W.3d 663, 712 (Mo. Ct. App. 2020); Red Hed Oil, Inc. v. H.T. Hackney Co., 292 F. Supp. 3d 764, 773 (E.D. Ky. 2017).

<sup>344</sup> *Compare* Cappel v. Savage Indus., Inc., 691 So. 2d 876, 881–82 (La. Ct. App. 1997) (affirming judgment in favor of defendant gun manufacturer when plaintiff and defendant proffered competing witness testimony about gun repairs), *with* Guay v. Sig Sauer, Inc., 610 F. Supp. 3d 423,

even if a defect is established or assumed, a plaintiff cannot recover if the defect was not the legal cause of the injuries: for example, if some superseding cause occurred.<sup>345</sup> Denying recovery on these grounds may be perfectly appropriate as a matter of tort law. But this outcome makes safety regulatory oversight even more crucial: even if tort recovery is precluded in a given case, gun manufacturers should take note of alarming reports to investigate and resolve defects before they can injure additional consumers.

Fifth, the injury requirement generally precludes product liability suits based on dangerous defects that cause no damage. Consider a fire-arm that discharges without a trigger pull. The bullet just misses the victim. Many such near-misses presumably go unreported. Would-be victims may complain to friends, make a warranty claim to a manufacturer, or even report the issue on a gun-enthusiast blog or social media. But they are unlikely to raise legal claims for mere fright, no matter how distressing. And even a would-be victim who suffers serious emotional harm may not succeed on a negligent infliction of emotional distress claim.<sup>346</sup> This heightens the need for consumer product-safety regulation: such “near misses,” even if not actionable in tort, should prompt companies to identify and remediate the defect to prevent future tragedy. This principle underpins the CPSA’s defect-reporting and recall framework.

Sixth, product liability plaintiffs face short statutes of limitations that may cut them off from relief.<sup>347</sup> By contrast, CPSC recalls and rulemakings take note of patterns of defects that manifest over time.<sup>348</sup>

Seventh, product liability actions present opportunities for settlement gamesmanship that CPSC safety oversight can effectively counter. The CPSA requires companies that settle three cases alleging “death

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434 (D.N.H. 2022) (denying manufacturer’s motion for summary judgment, holding that plaintiffs’ experts did not need to testify that they were “100 percent certain” that defect caused injury; a reasonable jury could conclude, based on “sufficient evidence in the record . . . , that Guay did not pull the P320’s trigger and that the gun discharged because of the design or manufacturing defects”).

<sup>345</sup> *E.g.*, *Rodriguez v. Glock, Inc.*, 28 F. Supp. 2d 1064, 1072 (N.D. Ill. 1998); *Eichstedt v. Lakefield Arms Ltd.*, 849 F. Supp. 1287, 1292 (E.D. Wis. 1994).

<sup>346</sup> *Cf.* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 809–18 (2007) (explaining that forty-eight states allow plaintiff recovery for negligent infliction of emotional distress, but most require some “physical manifestation” of emotional distress, and at least six follow “impact rule”).

<sup>347</sup> *See, e.g.*, *Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 218 (W.D. Mo. 2017) (finding approval of class settlement with Remington to be in class’s best interests, because “the vast majority of statutes of limitations for product liability claims range from two to six years” and many class members’ claims would be time-barred absent settlement approval).

<sup>348</sup> *E.g.*, *United States v. Spectrum Brands, Inc.*, 924 F.3d 337, 349 (7th Cir. 2019) (holding that manufacturer’s failure to timely report dangerous coffeemaker defect to the CPSC constituted “a continuing violation of its statutory reporting obligation” and a civil penalty is thus not barred by five-year statute of limitations).

or grievous bodily injury” in a particular model of a CPSC-regulated consumer product in a twenty-four month period to report these settlements to the Commission.<sup>349</sup> The CPSC might request that the company with such a high rate of serious product liability claims agree to a voluntary recall or face an agency adjudication seeking a mandatory recall.<sup>350</sup> By contrast, the gun industry’s immunity from Commission jurisdiction allows gunmakers to settle an unlimited number of tort cases and use confidentiality clauses to shield the resolutions from public view.<sup>351</sup> Even if critical information is revealed during discovery, this evidence is often subject to restrictive confidentiality orders. Gun owners, the public, regulators, and even industry are thus all left in the dark, deprived of information that, if revealed, could impel action to improve firearms safety and prevent death or injury.<sup>352</sup>

#### *D. Insufficiency of Contract, Warranty, and Business Practices Law*

Breach of contract, misrepresentation, or breach of warranty claims, as well as state consumer-protection statutes barring unfair or deceptive trade practices, may provide relief for gun purchasers aggrieved by defective weapons. But, like tort, their limitations make them a poor substitute for CPSC oversight.

Injured consumers, or decedents’ survivors, typically bring claims only after becoming aware of the breach or misrepresentation. Many gun owners are unaware of a defect until an incident, such as a discharge without a trigger pull, occurs. And, in the absence of injury, even a consumer aware of a defect in his or her gun is unlikely to pursue legal remedies.<sup>353</sup> Contract remedies are thus a good fit for mass purchasers of defective weapons—such as the New Jersey State Police and Milwaukee Police Department—but not for ordinary consumers.<sup>354</sup> Similarly, debarment from government contracting and False Claims Act suits are

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<sup>349</sup> See *supra* Section IV.A.1.

<sup>350</sup> See *supra* Section IV.A.1.

<sup>351</sup> Peschin et al., *supra* note 7, at 59 (fifty settlements against Glock over eight years, all incorporating confidentiality provisions); Klein, *supra* note 19, at 115 (noting that manufacturers “typically insist on settlement confidentiality”).

<sup>352</sup> Such information could include, for example, complaint or incident data suggestive of a defect, and information on the environmental or handling conditions under which a defect might manifest. See also CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 Fed. Reg. 87,023, 87,024 (Dec. 2, 2016) (discouraging litigants in product liability cases from seeking “blanket” protective orders that deprive the CPSC of critical information).

<sup>353</sup> E.g., Pollard v. Remington Arms Co., 320 F.R.D. 198, 218 (W.D. Mo. 2017) (“[I]t is unlikely an individual class member will incur enough damage to make pursuit of his or her claim worthwhile.”).

<sup>354</sup> See *supra* Section III.B.3.



prospective remedies that are only helpful for military or government purchasers buying from a repeat player.<sup>355</sup>

Contract remedies are especially unhelpful in cases alleging gun defect-inflicted injuries to a bystander, because bystanders are neither in privity with the manufacturer or seller, nor intended beneficiaries of the gun purchase.<sup>356</sup> Seeking to use contract law to make up for the gaps in products law, or vice versa, is thus unhelpful in the vast majority of cases.<sup>357</sup>

Putative class actions, including those based on state business practices law, also have disadvantages. Manufacturers of defective firearms often argue that plaintiffs lack standing where the defect manifests on an unpredictable or sporadic basis, or where the manufacturer's misrepresentations were received out of state.<sup>358</sup> Plaintiffs may also be unable to show specific evidence of economic loss caused by the defect.<sup>359</sup> CPSC-monitored recalls give consumers a less cumbersome way to obtain compensation and avoid injury: companies negotiate the remedy with CPSC staff, and then offer the agreed-upon remedy, such as a refund, replacement, or repair/retrofit, to consumers, who choose whether to take advantage of it.

### *E. Insufficiency of State-Specific Product Safety Regulations*

A handful of states have adopted specific safety requirements for firearms. These come in two forms: requirements for affirmative safety *features* and safety *performance* standards. Affirmative safety feature requirements typically apply to new models of certain firearm types. Safety performance standards generally require new models to meet

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<sup>355</sup> See, e.g., FAR 9.401–02 (debarment criteria and procedure); United States *ex rel.* Beauchamp v. Academi Training Ctr., Inc., 220 F. Supp. 3d 676, 677–78 (E.D. Va. 2016) (FCA relator alleged that contractor had “submitted false weapons qualifications reports” to the government”).

<sup>356</sup> See, e.g., Hicks v. Metro. Edison Co., 665 A.2d 529, 535–36 (Pa. Commw. Ct. 1995) (bystander electrocuted by collapsed electrical wire as he attempted to rescue car crash victims was not third-party beneficiary to pole inspection contract).

<sup>357</sup> See, e.g., E. River S.S. Corp. v. Transam. Delaval Inc., 476 U.S. 858, 870–71 (1986) (emphasizing “the need to keep products liability and contract law in separate spheres”); Howes v. Hansen, 201 N.W.2d 825, 830 (Wis. 1972) (noting that “essentially contractual” arguments are “foreign to strict liability in tort”); Caruth v. Mariani, 463 P.2d 83, 85 (Ariz. Ct. App. 1970) (same).

<sup>358</sup> See O’Neil v. Simplicity, Inc., 574 F.3d 501, 503 (8th Cir. 2009) (class plaintiffs must allege that the product “actually exhibited the alleged defect”; mere claim that “a product line contains a defect or that a product is at risk for manifesting [a] defect” is insufficient); see also Armendariz v. Sig Sauer, Inc., No. 22-cv-00536, 2023 WL 4204666, at \*3–4 (D.N.H. June 27, 2023) (dismissing state Consumer Protection Act claims brought by twenty “owners or users” of P320 because SIG Sauer’s alleged misrepresentations were “received outside of New Hampshire”).

<sup>359</sup> Cf. Ortiz v. Sig Sauer, Inc., 448 F. Supp. 3d 89, 95–98 (D.N.H. 2020) (plaintiff had standing to pursue claims against SIG Sauer for breach of warranty, civil fraud, and violation of state consumer protection statutes, and adequately pleaded economic loss in the form of overpayment or diminished resale value).

specific quality or performance benchmarks, with compliance typically verified based on premarket testing.<sup>360</sup> But relatively few states have such laws.<sup>361</sup> And such state standards are not sufficient substitutes for CPSC authority: unlike the CPSA framework, state standards are inconsistent and contain no provisions on recalls or corrective action.<sup>362</sup>

A few states, such as California and New York, require certain new firearms sold to have specific safety features.<sup>363</sup> Semiautomatic pistols manufactured or sold in California must have a loaded chamber indicator and a magazine safety disconnect.<sup>364</sup> Under regulations adopted under its state Unfair Business Practices Act,<sup>365</sup> Massachusetts has similarly required semiautomatic handguns sold in the state to have a load indicator *or* magazine safety disconnect.<sup>366</sup>

Many of the same states have safety performance standards. Five states have melting-point laws, which require new handguns to withstand specific temperatures, thus barring poorly constructed handguns with lower quality metal alloys.<sup>367</sup> California, Massachusetts, and New York require endurance (“sustained fire”) testing of firearm models, which ensures that they can properly discharge a specified number of rounds without a malfunction, and drop testing.<sup>368</sup>

These state firearm product-safety statutes have proven to be workable, including in some of the most populous states.<sup>369</sup> And safety standards adopted in states with large firearms markets, such as California, likely

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<sup>360</sup> See *Design and Safety Standards*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://gif-fords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/design-safety-standards/> [<https://perma.cc/LR5C-DS3L>].

<sup>361</sup> Klein, *supra* note 19, at 97–98 (noting that a “handful of states” have set firearm design safety standards, mostly for handguns); Sclaro, *supra* note 188, at 43 (“only seven states and the District of Columbia” have “gun safety and design standards”).

<sup>362</sup> Compare CPSA, § 12 (codified at 15 U.S.C. § 2061), with CAL. PENAL CODE § 31910, and N.Y. COMP. CODES R. & REGS. tit. 9 § 482.5(f).

<sup>363</sup> CAL. PENAL CODE § 31910; N.Y. COMP. CODES R. & REGS. tit. 9, § 482.5(f).

<sup>364</sup> CAL. PENAL CODE § 32010.

<sup>365</sup> MASS. GEN. LAWS ch. 93A.

<sup>366</sup> 940 MASS. CODE REGS. § 16.05(3) (2014).

<sup>367</sup> Klein, *supra* note 19, at 98 n.159 (citing New York, Minnesota, Hawaii, Massachusetts, and Illinois laws, which vary in specifics, including temperature to which guns are subjected in testing). The gun industry and NRA have vociferously opposed melting-point laws. Peschin et al., *supra* note 7, at 17. South Carolina enacted a melting-point law in 1968 but repealed it in 2012 after NRA lobbying. See, e.g., H.B. 4494 (S.C. 2012) (repealing article 3, chapter 31, title 23 of 1976 Code); *South Carolina: Governor Signs Essential Pro-Gun Reform Legislation into Law*, NRA INST. OF LEG. ACTION (July 9, 2012), <https://www.nraila.org/articles/20120709/south-carolina-governor-signs-essential-pro-gun-reform-legislation-into-law> [<https://perma.cc/AS4A-W2G2>].

<sup>368</sup> Klein, *supra* note 19, at 98 nn.160–61 (citing statutes and regulations in states). Endurance testing is analogous to a historic antecedent: the gun “proofing” process. See *infra* Section VI.A.3.

<sup>369</sup> See Peschin et al., *supra* note 7, at 12–17 (discussing “several successful attempts” in states to regulate firearms as products “despite well-organized efforts by the NRA and the gun industry” against such efforts).

have helpful spillover effects, boosting safety in other states.<sup>370</sup> Yet state-level regulations to avoid deaths and injuries from defective firearms are not a substitute for CPSC oversight. Most states lack any firearm safety performance standards.<sup>371</sup> In the states that do have such standards, the requirements vary substantially.<sup>372</sup> Consumers in some states thus receive far greater protection than consumers in neighboring states. Allowing the Commission to address safety defects in firearms would thus provide a measure of uniformity in safety expectations. Moreover, while state laws can provide a useful adjunct to CPSC regulation, proposed Commission safety standards go through a rigorous evaluation process very distinct from *ad hoc* state lawmaking processes.<sup>373</sup>

Finally, no state regulates recalls or corrective actions for guns determined to contain safety defects. This is unsurprising, given the interstate nature of most commerce and the federal government's dominant role in overseeing recalls.<sup>374</sup> This inability of states to effectively oversee recalls provides another reason why CPSC oversight is crucial.

## V. A PATH FORWARD: A PROPOSED ROLE FOR THE CPSC

Congress can and should authorize the CPSC to protect the public from hazard-creating defects in firearms and ammunition, without granting the Commission authority to regulate gun control. The ordinary CPSA framework should be applied to the gun industry. Firearms and ammunition companies would, like other consumer-product industries, be obligated to report safety defects in their products to the CPSC, and when necessary, conduct a CPSC-overseen voluntary or mandatory recall.<sup>375</sup> Finally, if the CPSC determined that voluntary industry

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<sup>370</sup> Cf. DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 248 (1995) (describing the “California effect”).

<sup>371</sup> For example, the state melting-point statutes set different temperature limits. *Compare* HAW. REV. STAT. ANN. § 134-15(a) (2022) (800 degrees Fahrenheit), *with* N.Y. COMP. CODES R. & REGS. tit. 9, § 482.5(a) (2022) (1,000 degrees Fahrenheit). State standards for drop testing of firearms also vary considerably. *See* Klein, *supra* note 19, at 95–96 & n.148 (noting that some drop-test state standards call for testing on a concrete floor, while other states do not specify the test surface).

<sup>372</sup> *See supra* note 361 (explaining that although California, Massachusetts, and New York all have design and safety standards for handguns, California is the only state that requires handguns to have a chamber load indicator and a magazine safety disconnect).

<sup>373</sup> *See infra* Section VI.B.

<sup>374</sup> *Compare In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 942–47 (S.D. Ind. 2001) (noting that “states have never assumed a significant role in recalls related to vehicle safety,” and state-law claims seeking court-ordered recall are preempted by federal vehicle-equipment recall scheme), *with* *Chamberlan v. Ford Motor Co.*, 314 F. Supp. 2d 953, 959–65 (N.D. Cal. 2004) (deeming *Bridgestone’s* reasoning “unpersuasive” and holding that Plaintiffs’ state-law request for a recall-like injunctive remedy was not federally preempted).

<sup>375</sup> *See supra* note 269 (noting that not all reportable defects are substantial product hazards requiring a recall).

standards were insufficient to protect users and the public, it could propose mandatory product-safety standards.<sup>376</sup> Such rules would be subject to the ordinary CPSA notice-and-comment procedure, which requires a rigorous weighing of the safety impact and necessity for any proposed rule and the effects of the rule on products' utility, cost, or availability. This blueprint would not give the CPSC freewheeling authority over gun policy in America: the Commission would remain barred from setting rules unrelated to the safety of guns as products, such as rules aimed to control gun crime or prevent gun suicides.

This Section describes and justifies the proposed role for the Commission in light of (1) CPSC's experience and expertise, including its track record of effectively regulating "gun-adjacent" products, (2) the common real-world understanding that firearms and ammunition are "consumer products," (3) the CPSA's proven framework, and (4) the unsuitability of other possible regulators, such as ATF, to effectively handle product safety.

#### A. CPSC's Oversight of Gun-Adjacent Products

For a half-century, the CPSC has exercised regulatory jurisdiction over nonfirearm weapons used for hunting or recreation, such as knives, bows and crossbows, and air guns. The Commission has also exercised regulatory jurisdiction over products used in conjunction with firearms, such as gun safes, gun locks, holsters, and body armor. There is little reason to include nonfirearm weapons and firearm-adjacent products in the Commission's jurisdiction yet immunize the firearms industry itself from federal safety regulation.

Commission activity over gun-adjacent products has included both public education campaigns and recall oversight. For example, the CPSC has issued public advisories about proper use of air guns and paintball guns, including precautionary advice mirroring elementary gun-safety principles.<sup>377</sup> The CPSC has also overseen the voluntary recalls of more than a dozen air guns and at least six paintball guns for defects that often echo defects in "real" firearms, such as a propensity to discharge without a trigger pull.<sup>378</sup>

The Commission has also overseen recalls of many defective crossbows and bows. In some cases, these products unexpectedly discharged

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<sup>376</sup> See *supra* Section IV.E; see also *infra* Section VI.A.1 (examples of possible safety-feature or safety-performance criteria for newly manufactured firearms).

<sup>377</sup> *Safety Alert No. 5089: BB Guns Can Kill*, CPSC (Jan. 20, 2012), <https://www.cpsc.gov/s3fs-public/5089.pdf> [<https://perma.cc/G8AD-PR9A>]; Press Release, CPSC, No. 04-105: CPSC Issues New Safety Warning for Paintball Guns (Mar. 24, 2004), <https://www.cpsc.gov/Newsroom/News-Releases/2004/CPSC-Issues-New-Safety-Warning-for-Paintball-Guns> [<https://perma.cc/3ZCF-DP8W>].

<sup>378</sup> See *infra* Appendix Tables 1–2.

without the user activating the trigger. In other cases, a materials failure caused the crossbow's or bow's limbs to break apart suddenly; bolts broke apart when fired, risking injury to "unintended targets"; or the crossbow abnormally recoiled, creating a hazard to the user.<sup>379</sup> Similarly, the Commission has overseen recalls of defective knives, such as 1.1 million folding knives with a flawed locking mechanism that could mutilate a user.<sup>380</sup>

The Commission also exercises authority over gun safes and "non-integral" gun locks. The Commission's general counsel determined that gun locks purchased separately from the firearm itself do not fall within the statutory definition of firearms, thus allowing the CPSC to regulate their safety.<sup>381</sup> Gun locks and safes that are easily circumvented by children or persons with dementia have therefore been subject to recall.<sup>382</sup> Other products designed to either facilitate gun use or protect from gunfire are also within the Commission's existing jurisdiction. For example, the CPSC has overseen at least five recalls of defective holsters that caused handgun safeties to switch on or off without the user's knowledge.<sup>383</sup> And in 2016, the CPSC oversaw the recall of about 10,000 pieces of body armor marketed as "Level III" that failed to meet Level III performance requirements, "allowing a bullet to penetrate," and presenting "a risk of gunshot injury or death."<sup>384</sup>

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<sup>379</sup> See *infra* Appendix Table 3.

<sup>380</sup> See *infra* Appendix Table 4.

<sup>381</sup> See CPSC, Opinion Letter on Commission Jurisdiction Over Separate Firearm Trigger Locks, Advisory Opinion, No. 316, at 1–2 (July 12, 2000), [https://www.cpsc.gov/s3fs-public/pdfs/blk\\_media\\_316.pdf](https://www.cpsc.gov/s3fs-public/pdfs/blk_media_316.pdf) [<https://perma.cc/P6B6-PRSM>] (a "separate" or nonintegral handgun trigger locking device is not a "component part" of the firearm and thus are within Commission jurisdiction). On Commissioner Robinson's initiative, the Commission (on a 3–2 vote) directed CPSC staff to monitor voluntary-standards development for non-integral gun locks and "Youth-Resistant Firearm Security Containers." UCPSC, *Minutes of Commission Meeting 2* (Oct. 19, 2016), <https://www.cpsc.gov/s3fs-public/MinutesCommissionMeetingFiscal2017OperationsPlan.pdf> [<https://perma.cc/SK6U-SGWQ>].

<sup>382</sup> See *infra* Appendix Table 5 (three gun lock recalls collectively covering 2.3 million units); Appendix Table 6 (four gun safe recalls collectively covering 61,000 units, including an October 2023 recall of a defective biometric lock safe). Various members of Congress have introduced bills to direct the CPSC to establish federal safety standards for firearm locks and firearm safes; none have been successful. *E.g.*, Safe Gun Storage Act of 2021, S. 1825, 117th Cong. (2021); Safe Gun Storage Act of 2021, H.R. 3509, 117th Cong. (2021); Safe Gun Storage Act of 2019, S. 3065, 116th Cong. (2019).

<sup>383</sup> See *infra* Appendix Table 7.

<sup>384</sup> Recall No. 16-192, *AR500 Armor Recalls Level III Body Armor Due to Risk of Gunshot Injury or Death*, UCPSC (June 9, 2016), <https://www.cpsc.gov/Recalls/2016/AR500-Armor-Recalls-Level-III-Body-Armor> [<https://perma.cc/P5A4-B7YH>]. Body armor ratings refer to levels of ballistic resistance. See NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, BODY ARMOR GUIDE: SELECTION & APPLICATION GUIDE TO BALLISTIC-RESISTANT BODY ARMOR 13 (2014), <https://www.ojp.gov/pdffiles1/nij/247281.pdf> [<https://perma.cc/PGX2-C6BX>].

This CPSC activity over decades shows that the Commission has been able to effectively protect consumers—and likely avert deaths and injuries—from hazards created by defective gun-adjacent products, including at least some products that arguably fall into the category of “bearable arms.”<sup>385</sup> There is no evidence that CPSC safety oversight over these products hampered consumer choice, infringed upon rights, drove up prices, or invidiously targeted an industry.

These recalls also show CPSC’s capacity to address varied defects and root causes, including defects that affirmatively cause harm, such as a crossbow that fires without warning; defects that cause harm by rendering a safety precaution useless, such as holsters that switched off a handgun’s safety without the user’s knowledge; and defects that involve a failure of a product that is itself made for protection, such as defective body armor, gun safes, and gun locks.<sup>386</sup> Each category has parallels to safety issues that arise in conventional guns, such as unexpected discharge or failure of a safety mechanism. These gun-adjacent, CPSC-overseen recalls demonstrate that the Commission can regulate the safety of guns as products without infringing upon gun rights or intruding on the authority of Congress or the states.

### B. *Guns and Ammunition as “Consumer Products”*

The carve-out of guns and ammunition from the CPSA’s “consumer product” definition is also at odds with the real-world understanding that guns are consumer products. Firearms and ammunition are found in millions of American homes, and consumers reasonably expect that these commercially available products will be safe when used as intended.

Absent the CPSA carve-out, guns would fit under each factor considered by courts in determining whether a product is a “consumer product.” Consumers are “exposed to” the products,<sup>387</sup> have “control and possession” of them,<sup>388</sup> and “use and enjoy” them, both directly and

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<sup>385</sup> Compare *Teter v. Lopez*, 76 F.4th 938, 949 (9th Cir. 2023) (“bladed weapons” such as butterfly knives are bearable arms); *Maloney v. Singas*, 351 F. Supp. 3d 222, 234 (E.D.N.Y. 2018) (nunchakus are bearable arms), and *Zaitzeff v. City of Seattle*, 484 P.3d 470, 475–76 (Wash. Ct. App. 2021) (twenty-four inch sword is a bearable arm), with *City of Seattle v. Evans*, 366 P.3d 906, 912–15 (Wash. 2015) (kitchen paring knife is not a bearable arm), and *People v. Williams*, 106 N.Y.S.3d 738, 741 (N.Y. Cnty. Ct. 2019) (metal “knuckle knife” may not constitute a bearable arm).

<sup>386</sup> “Failure of a safety feature” recalls are common across product categories, from life-safety equipment (e.g., defective carbon monoxide detectors, smoke/fire alarms, fire extinguishers, and fire sprinklers) to other protective devices (e.g., flawed child safety latches/locks) and appliances without required built-in safety features (e.g., hair dryers without electrocution-prevention device). See *Recalls*, CPSC, <https://www.cpsc.gov/Recalls> [<https://perma.cc/NU9N-UTJR>].

<sup>387</sup> *United States v. One Hazardous Prod. Consisting of a Refuse Bin*, 487 F. Supp. 581, 584–85 (D.N.J. 1980).

<sup>388</sup> *Robert K. Bell Enters., Inc. v. Consumer Prod. Safety Comm’n*, 645 F.2d 26, 29 (10th Cir. 1981).



indirectly.<sup>389</sup> They are “customarily sold or otherwise distributed to consumers,”<sup>390</sup> and consumers are exposed to risks from defects in these products.<sup>391</sup>

Like CPSC-regulated products such as appliances, furniture, tools, and sporting equipment, guns and ammunition are produced, distributed, marketed, and sold on a massive scale. In 2019, approximately 19.9 million guns were sold in the U.S. market, and Americans owned about 46% of the global supply of civilian firearms.<sup>392</sup> In the United States, about 22% of adults,<sup>393</sup> and 44% of households, own at least one firearm.<sup>394</sup> Given their ubiquity, most Americans, if asked, would likely agree that firearms and ammunition are “consumer products.” Even a gun-industry marketing report described gun owners as “consumers.”<sup>395</sup> And the reasons why consumers choose gun ownership—such as personal protection, hunting, and recreation—are similar to the reasons consumers own many products currently subject to CPSC jurisdiction, from knives to body armor to bicycle helmets.<sup>396</sup>

Given the product safety protections applicable to virtually all other household products, most gun owners likely assume—understandably but wrongly—that gunmakers must notify consumers, or a regulator, of known defects that could kill or maim.<sup>397</sup> And consumers likely expect

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<sup>389</sup> *Kaiser Aluminum & Chem. Corp. v. Consumer Prod. Safety Comm’n*, 574 F.2d 178, 180 (3d Cir. 1978).

<sup>390</sup> *Consumer Prod. Safety Comm’n v. Anaconda Co.*, 593 F.2d 1314, 1322 (D.C. Cir. 1979).

<sup>391</sup> *Consumer Prod. Safety Comm’n v. Chance Mfg. Co.*, 441 F. Supp. 228, 232 (D.D.C. 1977).

<sup>392</sup> For comparison, Americans make up about 4% of the global population. Christopher Ingraham, *There Are More Guns Than People in the United States, According to a New Study*, WASH. POST (June 19, 2018, 10:31 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/> [https://perma.cc/FEY5-GANP].

<sup>393</sup> Deborah Azrael, Lisa Hepburn, David Hemenway & Matthew Miller, *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCIS. 38, 39, 43 (2017) (gun ownership is increasingly concentrated: as of 2015, approximately 14% of gun owners, or 3% of the U.S. adult population, own more than half of the nation’s gun stock); Christopher Ingraham, *The Average Gun Owner Now Owns 8 Guns—Double What It Used to Be*, WASH. POST (Oct. 21, 2015, 9:34 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/10/21/the-average-gun-owner-now-owns-8-guns-double-what-it-used-to-be/> [https://perma.cc/SA9D-5XNW] (“average gun-owning household” owned 4.2 guns” in 1994 but 8.1 firearms in 2013).

<sup>394</sup> Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Nov. 13, 2020), <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx> [https://perma.cc/3M9F-4YAX].

<sup>395</sup> *2020 Firearm Consumer Personas Phase I Report*, SOUTHWICK ASSOCS. (Feb. 21, 2021, 12:45 PM), <https://www.nssf.org/wp-content/uploads/2021/02/NSSF-Consumer-Segmentation-Report-Phase-I.pdf> [https://perma.cc/QDV3-42LL] (consultants’ report commissioned by NSSF).

<sup>396</sup> See, e.g., Azrael et al., *supra* note 393, at 41–44 (summarizing survey of gun owners on primary reasons for choosing gun ownership).

<sup>397</sup> See Kate Gibson, *People Mistakenly Assume Consumer Products Are Safe, Top Regulator Says*, CBS NEWS (Feb. 2, 2022, 12:45 PM), <https://www.cbsnews.com/news/consumer-product-safety-commission-regulator/> [https://perma.cc/HV5Q-P5UF].

that when defects become known, they are entitled to receive a remedy from the manufacturer to mitigate the risk and compensate them for the lost value—and utility—of the defective weapon. Like manufacturers in other industries, the firearms industry invites these consumer expectations.<sup>398</sup> Many gun manufacturers market their guns as being reliable and safe—even when they turn out to have defects that render them unreliable and unsafe.<sup>399</sup> The gun industry’s immunity from federal product safety law thus frustrates users’ reasonable expectations to receive products free from dangerous, and often latent, defects. Aligning the real-world definition of “consumer product” to the CPSA definition of “consumer product” would thus repair a major aberration in what is otherwise an effective remedial statute.

### C. *Wisdom of Applying the CPSA Framework*

The CPSA framework is a proven approach that could effectively close the product safety regulatory gap for firearms. Leveraging this existing statutory scheme would protect gun owners, and those around them, from deaths and injuries in a way that other avenues of accountability cannot.

The CPSA’s defect-reporting requirement would push the firearms industry to improve the safety of its products and to resolve defects promptly after learning of them. The industry could no longer simply ignore credible defect reports and quietly settle claims.<sup>400</sup> Similarly, the CPSC recall oversight would also protect the public and make consumers economically whole. It would compel the firearms industry to promptly inform users of dangerous defects, and to offer a remedy<sup>401</sup> for consumers who choose to take advantage of it.<sup>402</sup> And it would prevent gun manufacturers from downplaying the hazard or making recall participation burdensome and inconvenient for consumers.<sup>403</sup>

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<sup>398</sup> See also *NSF International Consumer Product Concerns Survey*, NSF INT’L 20 (Apr. 2019), [https://d2evkimvhatqav.cloudfront.net/documents/nsf\\_consumer\\_concerns\\_survey\\_2019.pdf](https://d2evkimvhatqav.cloudfront.net/documents/nsf_consumer_concerns_survey_2019.pdf) [<https://perma.cc/7ELX-BXL6>] (70% of U.S. consumers trust claims made by manufacturers or brands).

<sup>399</sup> *Hartley v. Sig Sauer, Inc.*, No. 4:18-cv-267, 2019 WL 11639620, at \*1, \*6–7 (W.D. Mo. Mar. 25, 2019); *Hartley v. Sig Sauer, Inc.*, 2020 WL 3473652, at \*1–5 (W.D. Mo. June 25, 2020); *Ortiz v. Sig Sauer, Inc.*, 448 F. Supp. 3d 89, 107–08 (D.N.H. 2020).

<sup>400</sup> See *supra* Sections III.B, IV.B.2.

<sup>401</sup> See *supra* Section III.C (discussing heightened harms from defects); Section IV.A (discussing CPSC recall procedure).

<sup>402</sup> See also *Carter v. Forjas Taurus, S.A.*, No. 13-cv-24583, 2016 WL 3982489, at \*13 (S.D. Fla. July 22, 2016) (rejecting constitutional objection to class settlement with Taurus over defective handguns because “[w]hile Class Members have the option to return their Class Pistol for cash payment or a replacement pistol, Class Members are also free to keep their Pistol as if this settlement never took place”), *aff’d*, 701 F. App’x 759, 768 (11th Cir. 2017) (per curiam).

<sup>403</sup> See *supra* Section IV.B.2.

The availability of mandatory safety-standard rulemaking would also discourage industry from persistently distributing shoddy products, or refusing to adopt readily available features that would improve safety without meaningfully impairing weapon functionality or availability. And it would create a uniform “floor” for firearms product safety, in contrast to disparate and inconsistent state-specific standards.<sup>404</sup>

The CPSA framework also serves as a crucial equalizer. While individual tort, warranty, and contract suits place the onus on the injured consumer to seek a remedy for harms suffered, Commission regulation mitigates the power imbalance between consumers and industry,<sup>405</sup> supplementing gaps in tort law.<sup>406</sup> And the CPSA framework is fair to industry: it makes companies responsible for hazardous defects in their products in a way that is reasonably cost-effective and proportionate to the prospective harm. The Commission’s Fast Track Recall Program, for example, reduces the time gap between a company’s defect report and the launch of a recall, diminishing burdens on business.<sup>407</sup> And although compliance with a CPSC safety standard does not relieve a manufacturer from otherwise viable tort claims,<sup>408</sup> the availability of a CPSC-monitored recall process may provide some defenses in litigation.<sup>409</sup>

Moreover, lifting the firearms industry’s immunity from product safety regulations would allow the CPSC to gather, track, and publish vital data on unintentional firearm incidents, injuries, and deaths.<sup>410</sup> Currently, no dataset provides comprehensive data about unintentional firearm injuries and deaths in the United States, let alone reports of incidents in which no one was harmed.<sup>411</sup> Without aggregated data, regulators, gun owners, and researchers will continue to struggle to (1) ferret out whether certain models are likely to contain defects, such as a propensity to discharge without a trigger pull and (2) find common

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<sup>404</sup> See *supra* Section IV.E.

<sup>405</sup> But see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67–72 (2010) (arguing that understaffing and underfunding of the CPSC renders agency ineffective at protecting “dispersed consumer interests” against “highly organized, fully funded” manufacturers).

<sup>406</sup> See *supra* Section IV.C.

<sup>407</sup> *CPSC Fast Track Recall Program*, CPSC, <https://www.cpsc.gov/Business—Manufacturing/Recall-Guidance/CPSC-Fast-Track-Recall-Program> [<https://perma.cc/Q8F2-8ZJW>].

<sup>408</sup> 15 U.S.C. § 2074(a).

<sup>409</sup> Bernstein, *supra* note 272, at 374 (“failure to cooperate with an announced recall can also fulfill the elements of a plaintiff’s-conduct defense”); see also *Winzler v. Toyota Motor Sales USA, Inc.*, 681 F. 3d 1208, 1209–15 (10th Cir. 2012) (Gorsuch, J.) (plaintiff’s requests for court-ordered equitable fund to pay for repairs to defective car, and for court-ordered notice to other car owners, were prudentially moot, because manufacturer had agreed to NHTSA-overseen recall).

<sup>410</sup> See Peschin et al., *supra* note 7, at 4.

<sup>411</sup> *Id.* at 4–5.

patterns of unintentional injury that could be remediated by user instructions, education campaigns, or safety features.<sup>412</sup>

The CPSC is well-suited to engage in this data-collection effort.<sup>413</sup> It maintains at least three relevant databases. SaferProducts.gov, established in 2011 pursuant to congressional mandate, allows consumers, healthcare providers, and others to report product-safety incidents to the CPSC and include them in a public database.<sup>414</sup> The National Electronic Injury Surveillance System (“NEISS”), established in 1972 to provide statistical data on product injuries to the CPSC, draws from a representative sample of hospital emergency departments nationwide.<sup>415</sup> The Medical Examiners and Coroners Alert Project, established in 1976, collects data on consumer product-linked deaths.<sup>416</sup> Of these, only NEISS currently tracks firearm injuries, and only as part of an interagency agreement with CDC.<sup>417</sup> Allowing normal data collection on unintentional firearm deaths, injuries, and incidents would allow CPSC’s Directorate for Epidemiology and the public to identify and remediate emerging defects. Ideally, this extension of data collection and research on gun product safety would mirror recent strides in data collection and research on gun violence.<sup>418</sup>

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<sup>412</sup> *Id.* at 5.

<sup>413</sup> Federal agencies often have a comparative advantage in data collection. *Cf.* TIMOTHY D. LYTTON, *OUTBREAK: FOODBORNE ILLNESS AND THE STRUGGLE FOR FOOD SAFETY* 184–86 (2019) (discussing CDC/USDA monitoring of foodborne illness).

<sup>414</sup> *About SaferProducts.gov*, CPSC, <https://saferproducts.gov/About> [<https://perma.cc/58LQ-NSUH>]. SaferProducts.gov satisfied a congressional directive to the CPSC to “establish and maintain” a public Web database on CPSC-regulated products, containing *defect* reports in searchable format. CPSIA 2008, § 6, *codified at* 15 U.S.C. § 2055a. Congress granted manufacturers the right to respond to consumer complaints before publication in the database, so that complaint and response appear together. *Id.* § 2055a(c).

<sup>415</sup> CPSC, NEISS CODING MANUAL 1–3 (2021), [https://www.cpsc.gov/s3fs-public/2019\\_NEISS\\_Coding\\_Manual.pdf](https://www.cpsc.gov/s3fs-public/2019_NEISS_Coding_Manual.pdf) [<https://perma.cc/WXR9-8V9M>].

<sup>416</sup> Directorate for Epidemiology, CPSC, *General Information*, MECAP NEWS, at 1–2, [https://www.cpsc.gov/s3fs-public/MECAP\\_News\\_General\\_Info.pdf](https://www.cpsc.gov/s3fs-public/MECAP_News_General_Info.pdf) [<https://perma.cc/HW9H-BFXZ>] (urging medical examiners and coroners to report “product-related fatalities” to MECAP, excluding firearm-related injuries).

<sup>417</sup> The NEISS Firearm Injury Surveillance Study began in 1993 as part of an agreement between the CPSC and the CDC; it tracks nonfatal firearm-related injuries treated in the hospital emergency departments that contribute data to NEISS’s nationally representative sample. U.S. Dep’t of Health & Hum. Servs., Ctr. for Disease Control & Prevention & Nat’l Ctr. for Injury Prevention & Control, *Firearm Injury Surveillance Study, 1993–2018*, Nov. 29, 2021, <https://www.icpsr.umich.edu/web/NACJD/studies/38287> [<https://perma.cc/KAQ6-PTKS>].

<sup>418</sup> The CDC’s National Violent Death Reporting System launched in 2002 and achieved nationwide coverage in 2018. *See CDC’s National Violent Death Reporting System*, CDC, [https://www.cdc.gov/violenceprevention/pdf/nvdrs/NVDRS-Overview\\_factsheet.pdf](https://www.cdc.gov/violenceprevention/pdf/nvdrs/NVDRS-Overview_factsheet.pdf) [<https://perma.cc/W4CZ-ZCPE>]. Similarly, the “Dickey Amendment,” an NRA-backed budget rider, prevented the CDC from researching gun violence for twenty-five years; the CDC resumed research in 2021. Sheryl Gay Stolberg, *Can New Gun Violence Research Find a Path Around the Political Stalemate?*,

#### D. *Superiority of CPSC Versus Other Regulators*

Various members of Congress and commentators have proposed granting safety-regulatory authority over firearms and ammunition to ATF, FDA, EPA, or a hypothetical new agency.<sup>419</sup> But only the CPSC has the expertise and statutory framework equipping it to be a fair, efficient safety regulator for the firearms industry.

DOJ lacks the requisite experience to effectively regulate the firearms industry. ATF, the relevant DOJ component, issues federal firearms licenses to commercial importers, manufacturers, and dealers.<sup>420</sup> But ATF lacks product safety experience. It regulates gun safety only through a narrow slice of its import-supervision role. Safety features are one factor that ATF has set in determining whether a firearm has a “sporting purpose[]” and may thus be imported from abroad.<sup>421</sup> This creates some safety incentive, but only for imported firearms,<sup>422</sup> which make up fewer than a third of U.S. gun market.<sup>423</sup> Unlike the CPSC, the ATF does not oversee recalls,<sup>424</sup> and lacks experience in adopting product safety regulations, assessing defects, negotiating corrective actions with companies, or collecting injury and incident data. And ATF suffers from low levels of public trust among all sides in gun debates.<sup>425</sup>

Alternatively, Professor Lars Noah recently proposed that the FDA use its “device” authority under the Federal Food, Drug, and Cosmetic Act to regulate guns and ammunition.<sup>426</sup> Although creative, the major questions doctrine would almost certainly bar such an extension of the

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N.Y. TIMES (Mar. 27, 2021), <https://www.nytimes.com/2021/03/27/us/politics/gun-violence-research-cdc.html> [<https://perma.cc/5RQD-BKGY>].

<sup>419</sup> See *supra* Section I.E.

<sup>420</sup> 18 U.S.C. §§ 922(a), (b), 923.

<sup>421</sup> *Factoring Criteria for Weapons (ATF Form 4590)*, ATF, <https://www.atf.gov/firearms/docs/form/factoring-criteria-weapons-atf-form-4590/download> (Feb. 2020) [<https://perma.cc/Q67G-9D32>]. Unless some other exception applies, only firearms “generally recognized as “particularly suitable for or readily adaptable to sporting purposes” may be imported. 18 U.S.C. §§ 922(r), 925(d). If an imported gun meets that test, ATF must authorize its import. *Id.* § 925(d).

<sup>422</sup> Wilson, *supra* note 33, at 229–30; Vernick & Teret, *supra* note 119, at 1196–97.

<sup>423</sup> Polly Mosendz, Paul Barrett & Mira Rojanasakul, *How Foreign Guns Invaded the U.S.*, BLOOMBERG NEWS (Nov. 27, 2018), <https://www.bloomberg.com/graphics/2018-us-gun-imports/> [<https://perma.cc/Q397-MTBF>].

<sup>424</sup> On one occasion, ATF ordered a seller “to recall and give refunds for” a gun that ATF deemed a “machine gun” within the meaning of the National Firearms Act. *York v. Sec’y of Treasury*, 774 F.2d 417, 419–21 (10th Cir. 1985).

<sup>425</sup> ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 227–28 (8th ed. 2021) (NRA and allies have persistently attacked ATF as overbearing or oppressive; gun control advocates and experts view ATF as “weak and “relatively ineffective”).

<sup>426</sup> Lars Noah, *Time to Bite the Bullet? How an Emboldened FDA Could Take Aim at the Firearms Industry*, 53 CONN. L. REV. 787, 792 (2022).

FDA's power,<sup>427</sup> especially given that the FDA has twice disavowed jurisdiction over the firearms industry under its existing authorities, and Congress has declined to explicitly grant the FDA such authority.<sup>428</sup>

Even putting these obstacles aside, the FDA is not an appropriate body for firearms product safety jurisdiction. While the FDA has regulated a few “devices” that could be considered consumer products, such as indoor tanning equipment, it almost exclusively focuses on food, drugs, medical devices, biologics, and cosmetics.<sup>429</sup> The FDA lacks CPSC's vast experience in the consumer-goods market and has no experience with gun-adjacent products.

Nor are other regulators appropriate. The Commerce Department has little experience in product safety.<sup>430</sup> The U.S. Fish and Wildlife Service regulates lead ammunition on some public lands to protect wildlife,<sup>431</sup> but it has no expertise in the safety of consumer products for human use. And it would not make sense to hand product safety oversight over ammunition to EPA, as some have proposed, yet hand oversight over the gun industry to a different regulator.<sup>432</sup> Creating a

<sup>427</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–10 (2022) (major questions doctrine applies when an agency claims “‘to discover in a long-extant statute an unheralded power’ . . . to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself,” even if the agency’s reading of statute has “textual plausibility” (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

<sup>428</sup> Noah, *supra* note 426, at 804. The FDA and its parent agency, HHS, also have lowest trust ratings among fifteen key groups in health. *The Public's Perspective on the United States Public Health System*, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH 5 (May 2021), [https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2021/05/RWJF-Harvard-Report\\_FINAL-051321.pdf](https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2021/05/RWJF-Harvard-Report_FINAL-051321.pdf) [<https://perma.cc/Y44D-CCVH>].

<sup>429</sup> The distinction between CPSC-regulated “consumer products” and FDA-regulated “devices” is perhaps blurriest for “general wellness” products: those that are (1) intended only for “maintaining or encouraging a general state of health or a healthy activity” (without making any reference to diseases or health conditions) and (2) present little or no safety risk. U.S. FOOD & DRUG ADMIN., GENERAL WELLNESS: POLICY FOR LOW RISK DEVICES: GUIDANCE FOR INDUSTRY AND FOOD AND DRUG ADMINISTRATION STAFF 3–5 (2019), <https://www.fda.gov/media/90652/download> [<https://perma.cc/ZQ7M-7BZ7>]. Exercise equipment is an example. *Id.*

<sup>430</sup> The only relevant Commerce Department regulations affect toy guns. 15 U.S.C. § 5001; see also 15 C.F.R. pt. 272 (2023) (prohibiting manufacture, transport, or receipt of “toy, look-alike, or imitation” guns without a blaze-orange plug).

<sup>431</sup> See 2022–2023 Station-Specific Hunting and Sport Fishing Regulations, 87 Fed. Reg. 35,136, 35,136 (June 9, 2022) (declining to allow greater use of lead ammunition and tackle on National Wildlife Refuges due to their “negative impacts” on “wildlife and human health”); 2022–2023 Station-Specific Hunting and Sport Fishing Regulations, 87 Fed. Reg. 57,108, 57,108 (Sept. 16, 2022) (to be codified at 50 C.F.R. pt. 32) (similar).

<sup>432</sup> The Toxic Substances Control Act (“TSCA”) excludes ammunition from the definition of a “chemical substance” that EPA may regulate. See TSCA, Pub. L. No. 94-469, § 3(2)(B)(v), 90 Stat. 2003, 2004 (1976) (codified at 15 U.S.C. § 2602(2)(B)(v)). EPA has twice rejected petitions from environmentalist groups asking it to regulate lead bullets and shot. Lead Fishing Sinkers; Disposition of TSCA Section 21 Petition, 75 Fed. Reg. 70,246 (Nov. 17, 2010); Letter from James J. Jones, Acting Asst. Admin’r for Chem. Safety & Pollution Prevention, EPA, to Jeff Miller,



new regulatory body, as others have suggested,<sup>433</sup> is also inadvisable. The new standalone agency would require a separate organic statute, budget, and organizational structure. Its creation would unhelpfully signal that gun product-safety defects are fundamentally different from defects in other consumer products, despite the adequacy of the CPSA framework. And a specialized agency that regulates only a single product category is more vulnerable to regulatory capture.<sup>434</sup>

In contrast to the ATF, the FDA, or a new agency, the CPSC has decades of relevant experience and a regulatory framework tailored to consumer products.<sup>435</sup> Put differently, product safety is CPSC's core mission.<sup>436</sup> Moreover, as a bipartisan commission focused exclusively on product safety, the CPSC is more likely to retain public trust. Agencies such as ATF and FDA are a part of the DOJ and HHS, respectively.<sup>437</sup> These executive departments are headed by a member of the President's Cabinet and responsible for implementing a wide array of policies unrelated to consumer safety. By contrast, the CPSC is an independent body with commissioners from both major parties.<sup>438</sup> Standing conspicuously apart from more polarizing agencies, the CPSC may be better able to retain consumer trust.

## VI. RESPONDING TO OBJECTIONS

Some gun-rights advocates will oppose extending jurisdiction over the firearms industry to the CPSC, contending that *any* CPSC safety-regulatory oversight of the industry would violate the Second Amendment. Others may concede the appropriateness of granting the CPSC powers over specific defective firearms and ammunition—such as requiring defect reports and overseeing recalls—but object to extending the Commission's typical safety-standard rulemaking power to firearms and ammunition, asserting that this would invite agency overreach. Conversely, some critics will contend that CPSC authority over the firearms industry should not be limited to product safety regulation as traditionally understood but should extend to measures

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Ctr. for Bio. Diversity (Apr. 9, 2012), [https://www.epa.gov/sites/default/files/2015-10/documents/response\\_4.9.12.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/response_4.9.12.pdf) [<https://perma.cc/KTU7-U93H>].

<sup>433</sup> See *supra* note 122 and accompanying text.

<sup>434</sup> HUGH STRETTON, *ECONOMICS: A NEW INTRODUCTION* 355 (1999) (regulatory capture “is commonest where a single-purpose agency exists to regulate a single industry”).

<sup>435</sup> See generally CPSC, *Strategic Plan 2023–2026*, at 4–5, <https://www.cpsc.gov/s3fs-public/Strategic-Plan-2023-2026.pdf> [<https://perma.cc/FRP7-6AHV>] (providing agency overview).

<sup>436</sup> See Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 555–58, 569–72 (2016) (arguing that “core mission model” is “outdated” and “not very useful for today’s regulatory dialogues,” but conceding some benefits of limiting an agency’s tasks to its area of “institutional competence”).

<sup>437</sup> 28 U.S.C. § 599A(a)(1) (ATF is within DOJ); 21 U.S.C. § 393(a) (FDA is within HHS).

<sup>438</sup> See *infra* note 541 and accompanying text.

aimed at preventing gun homicide and suicide. Both arguments—that this Article’s proposal is too broad and that it is too narrow—fail for the following reasons.

A. *Responding to Constitutional Objections*

CPSC product-safety regulation of the firearms industry would be fully compatible with the Second Amendment. First, analogous state firearm-safety standards were consistently upheld under the means-end scrutiny analysis that prevailed after *District of Columbia v. Heller*<sup>439</sup> and before *New York State Rifle & Pistol Association v. Bruen*.<sup>440</sup> Second, there are substantial reasons to believe that *Bruen* historical-analogy analysis would not apply to CPSC product-safety regulation of firearms or ammunition. Third, even if *Bruen* historical-analogy analysis does apply, CPSC firearm product-safety regulations meet the test, because such modern regulations would be analogous to product-safety regulations imposed on firearms manufacturers in both early modern England and early America.

1. *Passes Old Means-End Scrutiny Test*

In *District of Columbia v. Heller*, the Supreme Court concluded that the Second Amendment protects “an individual right unconnected with militia service” to keep and use arms for “traditionally lawful purposes.”<sup>441</sup> But the Court explicitly identified “laws imposing conditions and qualifications on the commercial sale of arms” among a nonexhaustive list of “presumptively lawful regulatory measures” consistent with that individual right.<sup>442</sup> After *Heller*, but before *Bruen*, the prevailing test for evaluating Second Amendment challenges was heightened means-end scrutiny.

Traditional gun control laws are often subject to Second Amendment challenge.<sup>443</sup> But challenges to gun product safety regulations are rare, probably because these regulations exist in only a handful of states; are relatively less controversial than gun control laws; and affect manufacturers or sellers without meaningfully burdening gun users. These characteristics perhaps diminish the pool of potential plaintiffs with the desire, or standing, to challenge such regulations.

Nevertheless, California’s and Massachusetts’s firearm safety-feature requirements were targeted in a series of unsuccessful

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<sup>439</sup> 554 U.S. 570 (2008).

<sup>440</sup> 142 S. Ct. 2111 (2022).

<sup>441</sup> *Heller*, 554 U.S. at 570–72, 582.

<sup>442</sup> *Id.* at 571, 625–27 & n.26.

<sup>443</sup> See, e.g., Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1451–52, 1455 (2018).

pre-*Bruen* challenges. These decisions applied a two-step framework that every court of appeals then used to assess Second Amendment claims.<sup>444</sup> Step one assessed whether the “regulate[d] activity” or “regulated conduct” fell “outside the scope of the right as originally understood.”<sup>445</sup> If so, the measure was upheld. If the historical evidence was “inconclusive or suggest[ed] that the regulated activity [was] *not* categorically unprotected,” the courts proceeded to step two: assessing the degree to which the law burdened the right to keep and bear arms, whether the law was justified by a compelling or substantial governmental interest, and whether the law was appropriately tailored to serve that interest.<sup>446</sup>

Under this framework, state safety regulations on guns as products were upheld. In *Draper v. Healey*<sup>447</sup> and *Granata v. Healey*,<sup>448</sup> federal courts rejected challenges to a Massachusetts regulation adopted in 1998.<sup>449</sup> The Massachusetts regulation declared it “an unfair or deceptive practice for a handgun-purveyor to transfer or offer to transfer to any customer” handguns that lack “a load indicator or magazine safety disconnect.”<sup>450</sup> A chamber load indicator (“CLI”) “plainly indicates that a cartridge is in the firing chamber,”<sup>451</sup> providing a “readily perceptible signal that a loaded gun is loaded.”<sup>452</sup> A magazine safety disconnect, or magazine detachment mechanism (“MDM”), is “a device that prevents the firing of the handgun when the magazine is detached from the handgun.”<sup>453</sup> Under the Massachusetts regulation, handguns without at least one of these safety features are generally “unmerchantable.”<sup>454</sup> The *Draper* and *Granata* courts determined that the regulation did not violate the Second Amendment.<sup>455</sup> The regulation “comfortably” fit into the category of lawful conditions on the commercial sale of arms.<sup>456</sup> And

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<sup>444</sup> See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); see also *Bruen*, 142 S. Ct. at 2126–27 (describing the “two-step test that Courts of Appeals . . . developed to assess Second Amendment claims”); *id.* at 2174–75 (Breyer, J., dissenting) (noting that every Court of Appeals to have addressed the question” applied two-step “consensus framework”).

<sup>445</sup> *Bruen*, 142 S. Ct. at 2126–27.

<sup>446</sup> *Id.* (courts applied strict scrutiny when regulation implicated “core Second Amendment right . . . to self-defense *in the home*,” but otherwise applied intermediate scrutiny); accord *id.* at 2174–75 (Breyer, J., dissenting) (same).

<sup>447</sup> 98 F. Supp. 3d 77 (D. Mass. 2015), *aff’d on other grounds*, 827 F.3d 1 (1st Cir. 2016) (Souter, J.).

<sup>448</sup> 603 F. Supp. 3d 8 (D. Mass. 2022), *app. docketed*, No. 22-1478 (1st Cir. Nov. 14, 2022).

<sup>449</sup> *Draper*, 98 F. Supp. 3d at 85; *Granata*, 603 F. Supp. 3d at 17.

<sup>450</sup> 940 MASS. CODE REGS. § 16.05(3). This requirement “applies only to handguns that have a mechanism to load cartridges via a magazine.” *Id.* § 16.05(4).

<sup>451</sup> *Id.* § 16.01.

<sup>452</sup> *Draper*, 827 F.3d at 4.

<sup>453</sup> 940 MASS. CODE REGS. § 16.01.

<sup>454</sup> *Draper*, 98 F. Supp. 3d at 84.

<sup>455</sup> *Id.* at 84–85; *Granata*, 603 F. Supp. 3d at 10–17.

<sup>456</sup> *Draper*, 98 F. Supp. 3d at 85; *Granata*, 603 F. Supp. 3d at 13–15 (both quoting *Heller*).

even if the regulation implicated the Second Amendment, it withstood any standard of scrutiny because there was a substantial relationship between the regulation and the important government objective it serves: protecting citizens from unintentional gun injury or death.<sup>457</sup> The court cited the 1991 GAO study concluding that CLIs could have prevented many unintentional firearm deaths.<sup>458</sup>

The Ninth Circuit in *Pena v. Lindley*<sup>459</sup> rejected a constitutional challenge to portions of California’s Unsafe Handgun Act (“UHA”).<sup>460</sup> Since 2007, the UHA has required new models of semiautomatic pistols sold within California to come equipped with a CLI *and* a MDM.<sup>461</sup> The court found it unnecessary to determine whether the UHA regulations qualified as “presumptively lawful . . . conditions and qualifications on the commercial sale of arms” under *Heller*, because the regulation “is constitutional irrespective of that determination.”<sup>462</sup> The court noted that the CLI and MDM requirements “place almost no burden on the physical exercise of Second Amendment rights,” and the safety-feature requirements actually facilitate the exercise of lawful self-defense by giving information to users and preventing unintentional discharge.<sup>463</sup> Even Judge Bybee, who dissented from the court’s upholding of a separate UHA provision, concurred that the CLI and MDM requirements were constitutional.<sup>464</sup>

## 2. *Product Safety Regulation Does Not Trigger Bruen Historical-Analogical Analysis*

In *Bruen*, a divided Supreme Court rejected the previously dominant means-ends framework, holding that—where a regulation implicates a Second Amendment right—the government must “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms” under an “analogical inquiry” test.<sup>465</sup>

Under *Bruen* step one, courts determine whether “the Second Amendment’s plain text covers an individual’s conduct.”<sup>466</sup> If so, “the Constitution presumptively protects that conduct,” and the court

<sup>457</sup> See *Draper*, 98 F. Supp. 3d at 85; *Granata*, 603 F. Supp. 3d at 13–15.

<sup>458</sup> See *Granata*, 603 F. Supp. 3d at 16.

<sup>459</sup> 898 F.3d 969 (9th Cir. 2018).

<sup>460</sup> See *id.* at 973–74 (challenging CAL. PENAL CODE § 31910(b)(5)).

<sup>461</sup> See *id.*

<sup>462</sup> See *id.* at 976.

<sup>463</sup> See *id.* at 978.

<sup>464</sup> *Id.* at 987–88 (Bybee, J., concurring in part and dissenting in part) (agreeing with majority’s upholding of CLI and MDM provisions but dissenting from decision to uphold UHA’s micro-stamping provision).

<sup>465</sup> *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127–33 (2022).

<sup>466</sup> *Id.* at 2126 (noting that first step is consistent with pre-*Bruen* doctrine).

proceeds to *Bruen* step two: determining whether the challenged “modern firearms regulation[]” is “consistent with the Second Amendment’s text and historical understanding.”<sup>467</sup> To assess whether “modern regulations that were unimaginable at the founding” are permissible, the government must “identify a well-established and representative historical analogue.”<sup>468</sup> A “historical twin” is not required; a regulation “may be analogous enough to pass constitutional muster” even if “not a dead ringer for historical precursors.”<sup>469</sup> The *Bruen* majority did not “survey . . . the features that render regulations relevantly similar” but pointed to “at least” two “considerations” deemed “central”: (1) “whether modern and historical regulations impose a comparable burden on the right of armed self-defense” and (2) “whether that burden is comparably justified.”<sup>470</sup>

In *Bruen*, the Court struck down New York’s discretionary scheme for granting concealed-carry permits.<sup>471</sup> The Court said that its historical-inquiry test should apply to Second Amendment challenges to both “restrictions on the ownership and use of handguns” and other “firearm regulations.”<sup>472</sup> The Court did not define “firearm regulation,” and the Second Amendment, of course, says nothing about recalls or firearm safety features.<sup>473</sup> As examined below, there are strong reasons to believe that the *Bruen* analysis would not apply to CPSC product-safety regulation of firearms or ammunition.

#### a. *Burdens on Manufacturers, Without Burdens on Users*

Under *Bruen*, historical-analogical analysis applies only if the challenged regulation implicates “an individual’s conduct” and that conduct is “cover[ed]” by “the Second Amendment’s plain text.”<sup>474</sup> Put differently, if a regulation does not implicate individual firearm ownership

<sup>467</sup> *Id.* at 2126, 2131.

<sup>468</sup> *Id.* at 2132–33 (emphasis omitted).

<sup>469</sup> *Id.* at 2133 (emphasis omitted).

<sup>470</sup> *Id.* at 2132–33 (emphasis omitted).

<sup>471</sup> *Id.* at 2143, 2155.

<sup>472</sup> *Id.* at 2142, 2167.

<sup>473</sup> See generally *id.* See *Pena v. Lindley*, 898 F.3d 969, 969, 973 (9th Cir. 2018) (“Unsurprisingly, the Second Amendment says nothing about modern technology adopted to prevent accidental firearm discharges . . .”).

<sup>474</sup> *Bruen*, 142 S. Ct. at 2129–30 (“When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must *then* justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”) (emphasis added). The Court did not explicate what “cover an individual’s conduct” means, but later seemed to implicitly equate “cover[ing] an individual’s conduct” with imposing a “burden” on gun-owning citizens. See *id.* at 2132–33 (at the second phase—applying the historical analogue test—Court considers “how and why the regulations burden a law-abiding citizen’s right to armed self-defense” and whether “modern and historical regulations impose a comparable burden on the right of armed self-defense”).

or possession, the inquiry ends at *Bruen* step one without a need to proceed to *Bruen* step two.<sup>475</sup> CPSC regulation of firearms as products—whether in the form of requiring defect reporting, overseeing recalls of defective guns, setting achievable safety-performance standards, or requiring readily available safety features—would not regulate the conduct of individuals, let alone conduct covered by the Second Amendment’s plain text.<sup>476</sup> To the contrary, such CPSC regulation would affect arms manufacturers and importers without regulating the *users* of arms.<sup>477</sup> CPSC safety regulation of the firearms industry would thus be similar to other regulations sustained on *Bruen* step one, including restrictions on the ownership of “ghost gun” manufacturing equipment by persons without a manufacturing or importation license,<sup>478</sup> as well as regulations on the commercial sale of arms.<sup>479</sup>

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<sup>475</sup> *United States v. Sitladeen*, 64 F.4th 978, 987 (8th Cir. 2023) (“*Bruen* tells us to begin with a threshold question: whether the person’s conduct is ‘covered by’ the Second Amendment’s ‘plain text.’”); *Def. Distributed v. Bonta*, No. 22-cv-6200, 2022 WL 15524977, \*1–4 (C.D. Cal. Oct. 21, 2022) (plaintiffs challenging regulation must establish that statute regulates Second Amendment-covered conduct as a “necessary threshold” and may not “jump ahead in the analysis to a historical/tradition assessment”), *tentative ruling adopted as final decision*, 2022 WL 15524983 (Oct. 24, 2022); *Nat’l Ass’n for Gun Rts., Inc. v. City of San Jose*, 618 F. Supp. 3d 901, 914 (N.D. Cal. 2022) (“If the conduct at issue is covered by the text of the Second Amendment, the burden then shifts to the government to show why the regulation is consistent with the Nation’s historical tradition of firearm regulation.” (emphasis added)).

<sup>476</sup> In fact, CPSC regulation of guns as products would simultaneously protect the public and *facilitate* the exercise of the Second Amendment right by ensuring that arms are functional for lawful self-defense. See *supra* note 463 and accompanying text.

<sup>477</sup> See, e.g., *Nat’l Ass’n for Gun Rts.*, 618 F. Supp. 3d at 915 (holding that “conduct is covered by the Second Amendment’s plain text” if it is triggered by ownership or possession of firearm (citing *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2134 (2022))); *Def. Distributed*, 2022 WL 15524977, at \*4 (Second Amendment’s plain text covers “rights concerning the acquisition or purchase of ‘arms’”).

<sup>478</sup> Compare *Def. Distributed*, 2022 WL 15524977, at \*1 (statute prohibiting persons, other than federally licensed firearms manufacturers or importers, “from using, possessing, selling, or transferring a computerized numerical code (‘CNC’) milling machine that has a sole or primary purpose of manufacturing firearms,” does not implicate rights protected by Second Amendment’s plain text), with *Nat’l Ass’n for Gun Rts.*, 618 F. Supp. 3d at 915–16 (tentatively concluding that a law requiring owners or possessors of firearms to carry liability insurance regulates “covered” conduct protected by the Second Amendment).

<sup>479</sup> For example, the Second Circuit recently rejected a Second Amendment challenge to a New York law that requires firearms dealers to securely store firearms, install store security alarm systems, conduct monthly inventory checks, bar minors from gun shops unless accompanied by a parent or guardian, and sets a minimum age of twenty-one for gun-shop employees. *Gazzola v. Hochul*, No. 22-cv-3068, 2023 WL 8494188, at \*2, \*6 (2d Cir. Dec. 8, 2023). The court acknowledged that “commercial regulations on firearms dealers . . . cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms,” because dealers’ services “are necessary to a citizen’s effective exercise of Second Amendment rights,” but found no evidence that New York’s regulation of commercial dealers “will impose such burdensome requirements on firearms dealers that they restrict protections conferred by the Second Amendment.” *Id.* at \*5–6.



b. *Presumptively Lawful “Conditions and Qualifications on the Commercial Sale” of Arms and Restrictions on “Dangerous and Unusual” Weapons*

*Heller* determined that “laws imposing conditions and qualifications on the commercial sale of arms” were “presumptively lawful.”<sup>480</sup> *Bruen* did not disturb this holding, and Chief Justice Roberts and Justice Kavanaugh, writing in concurrence, expressly reiterated the *Heller* language affirming the presumptive constitutionality of such laws.<sup>481</sup>

When citing the opaqueness of the “conditions and qualifications on the commercial sale of arms” language, many courts have chosen to assume, without deciding, that a challenged regulation “does burden conduct protected by the Second Amendment rather than parse whether the law falls into that exception.”<sup>482</sup> Yet manufacturer-level product-safety regulations plainly falls into the category of “conditions and qualifications” on “commercial sale of arms” because such regulations control industry behavior without meaningfully impinging on the right of citizens to exercise the right to keep and bear arms.<sup>483</sup>

*Bruen* also reaffirmed that prohibitions on the “carrying of dangerous and unusual weapons” are among the “reasonable, well-defined restrictions” to which the arms-bearing right is subject.<sup>484</sup> Neither *Heller* nor *Bruen* spoke to whether the *manufacture* of firearms that are defective, pose unexpected or latent hazards, or lack safety features fit into this category of “dangerous and unusual weapons.”

c. *“Gun-Neutral” Regulation*

Some CPSC regulations—such as consumer product safety standards—are specific to a product category.<sup>485</sup> Yet most regulations set forth by the CPSA, such as the defect-reporting and recall requirements, apply to all consumer-product manufacturers and importers. *Bruen* did not say whether Second Amendment scrutiny, and the “historical analogue” analysis, applies to such “gun-neutral” regulations: those

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<sup>480</sup> District of Columbia v. *Heller*, 554 U.S. 570, 626–27 & n.26, 635 (2008).

<sup>481</sup> 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (adding that *Bruen* still “allows a ‘variety’ of gun regulations” (quoting *Heller*, 554 U.S. at 636 (2008))). *But see also id.* at 2174 (Breyer, J., dissenting) (critiquing new test as a “rigid history-only approach”).

<sup>482</sup> *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) (explaining that courts have “often” followed this course).

<sup>483</sup> *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 687 (9th Cir. 2017) (en banc) (noting that “restrictions on a commercial actor’s ability to enter the firearms market” sometimes “have little or no impact on the ability of individuals to exercise their Second Amendment right”); *Gazzola*, 2023 WL 8494188, at \*5 (finding *Teixeira* “persuasive”).

<sup>484</sup> *Bruen*, 142 S. Ct. at 2156; *id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626–27).

<sup>485</sup> *See, e.g.*, 15 U.S.C. § 2056.

regulations that affect both firearms and nonfirearm products. If the firearms industry's immunity is lifted, do such generally applicable rules trigger Second Amendment scrutiny? And, if so, do such rules trigger application of the *Bruen* "historical analogue" test?

In a post-*Heller*, pre-*Bruen* article, Joseph Blocher and Darrell Miller examined whether "gun-neutral laws of general applicability" implicate the Second Amendment.<sup>486</sup> Drawing from other constitutional rights, they argued that the level of scrutiny for incidental burdens should be determined by (1) existing institutional arrangements, (2) "history and tradition," (3) the extent of the burden, and (4) whether the regulation is truly "content-neutral."<sup>487</sup> At least the last three prongs suggest that "gun-neutral" forms of product-safety regulation of the firearms industry should not implicate the Second Amendment. There is a long history of manufacturer-side safety regulation of firearms.<sup>488</sup> CPSC safety regulation would impose minimal, if any, burdens on consumers. And any Commission-overseen recalls or regulations would be "focused on harms, not on guns"<sup>489</sup> and could control firearm defects in both directions: guns that fire without a trigger pull, and guns that persistently *fail* to fire when they should.

#### d. *Constitutionality of Product-Safety Regulation*

Safety regulation of nonfirearm products is also routine, even when use of such products is constitutionally protected. For example, there is a constitutional right to use contraceptives.<sup>490</sup> FDA regulations ensure that contraceptives are safe and effective for their intended purposes,<sup>491</sup>

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<sup>486</sup> Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control?: Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 296, 333–46 (2016).

<sup>487</sup> *Id.*

<sup>488</sup> See *infra* Section VI.A.3.

<sup>489</sup> Blocher & Miller, *supra* note 486, at 346. Analogously, extension of a generally applicable state sales tax to cable and satellite television does not violate First Amendment, because such a tax "does not single out the press" or "threaten to hinder the press as a watchdog of government activity." *Leathers v. Medlock*, 499 U.S. 439, 447–53 (1991). But see Lars Noah, *Must Courts Recalibrate Tort Law Governing Firearms in Light of the Second Amendment?*, 92 U. CIN. L. REV. 412 (forthcoming Dec. 2023). Professor Noah suggests that even "generally applicable tort doctrines"—i.e., those that do not "plainly single out firearms for relatively unfavorable treatment"—may come under increased constitutional scrutiny if applied to guns, particularly if the Supreme Court analogizes Second Amendment claims to free exercise claims. *Id.* at 433–38; see also *id.* at 444–50 (discussing whether Second Amendment constrains even those tort claims against sellers that are not barred by PLCAA).

<sup>490</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 447–54 (1972).

<sup>491</sup> See, e.g., 21 C.F.R. § 310.501 (1978) (FDA requirement that contraceptive manufacturers and distributors provide package inserts explaining their safe and effective use); *id.* §§ 210, 211 (FDA's "Good Manufacturing Practices" setting controls for manufacturing, processing, and packing facilities, to ensure that drugs are safe and accurately labeled).

thus facilitating—rather than infringing—the constitutional right to use contraceptives. Another parallel is the fundamental constitutional right to engage in interstate travel.<sup>492</sup> NHTSA and the Federal Motor Carrier Safety Administration impose prescriptive standards on motor vehicle design safety and interstate trucking safety, respectively.<sup>493</sup> These standards directly affect automakers and trucking companies, and have some downstream effects on consumer travel. For example, the vehicle-safety regulations that protect motorists and other road users bar the manufacture, import, and sale of some unsafe cars.<sup>494</sup> Yet such safety standards do not burden, or even implicate, the right to travel.<sup>495</sup>

### 3. *Product Safety Regulation Would Easily Pass Bruen Analysis*

Even if *Bruen* does apply, CPSC product-safety regulations would pass the historical-analogy test.<sup>496</sup> Although *Bruen*'s standard is amorphous,<sup>497</sup> the historical record reveals product safety regulations imposed on arms manufacturers that parallel proposed CPSC regulation.

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<sup>492</sup> E.g., *Saenz v. Roe*, 526 U.S. 489, 500 (1999). This subsection assumes, for the sake of argument, that the right to travel includes at least some right to drive, although this proposition is not settled. Compare 16A C.J.S. *Constitutional Law* § 796 (“The right to drive, as opposed to the right to travel, is not a fundamental constitutional right.”), with *Adams v. City of Pocatello*, 416 P.2d 46, 48 (Idaho 1966), and *Zaba v. Motor Vehicle Div.*, 516 P.2d 634, 637 (Colo. 1973) (both suggesting that there is some constitutional right to drive or use highways).

<sup>493</sup> 49 C.F.R. pt. 571 (Federal Motor Vehicle Safety Standards); 49 C.F.R. pts. 356–99 (FMCSA regulations).

<sup>494</sup> 49 U.S.C. § 30112 (“a person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce, or import into the United States” a noncompliant motor vehicle).

<sup>495</sup> See *Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (holding that a law “implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right”) (citations omitted); *Michael C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642, 655 (3d Cir. 2000) (holding that an “otherwise constitutional law that incidentally discourages migration is not necessarily rendered suspect or invalid merely because of such incidental effect”).

<sup>496</sup> I do not address here the merits of the historical-analogy test. Others have vigorously canvassed that area, both before and after *Bruen*. Compare Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1106 (2009) (arguing that new originalists’ practice of reading history is “totally inconsistent with Founding-era practice”), with William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019) (heralding originalism’s “positive turn” to history).

<sup>497</sup> Compare *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2142–45 (2022) (dismissing state’s reliance on three “colonial laws,” finding that they did not establish “tradition of public-carry regulation” and were insufficiently analogous to modern New York statute), with *id.* at 2179–80 (Breyer, J., dissenting) (critiquing majority’s “many and varied reasons” to “discount seemingly relevant historical evidence,” giving judges “ample tools to pick their friends out of history’s crowd”). *Bruen* contains almost no guidance on which historical predicates are “representative” versus “outliers” for purposes of the historical-analogy test. Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 60–78. Categorizing historical examples thus creates risks of lack of rigor and transparency. *Id.*

Although English practice “cannot be indiscriminately attributed to the Framers of our own Constitution,” regulations in early modern England are relevant to the historical-analogy test.<sup>498</sup> In 1581, English gunmakers petitioned the Privy Council to incorporate them as a company, complaining that a surge of poorly made guns was killing and maiming soldiers and civilians.<sup>499</sup>

A renewed petition was granted in 1637 by King Charles I, and the royal charter was formally enrolled in 1657.<sup>500</sup>

The charter’s first paragraph documents the product-safety rationale driving the group’s creation. It complains of a surge of “inexpert” tradesmen who had begun to manufacture guns “after their unskilfull way,”<sup>501</sup> inflicting “much harm and danger . . . to sundry” citizens.<sup>502</sup> To address this problem, the charter established the gunmakers as “One Body Corporate and Politick” to limit gun manufacture to “the hands of skilful Artists alone.”<sup>503</sup> The charter granted the new organization an array of powers over the gun industry,<sup>504</sup> making it analogous to a modern-day “state actor.”<sup>505</sup> All London-area gunmakers were obligated to comply with the company’s ordinances,<sup>506</sup> and the company had the power to punish the makers of “unmerchantable” or “bad” guns or components.<sup>507</sup>

Guns were clearly recognized as a product category that demanded an elevated degree of attention to safe design and manufacture.<sup>508</sup> The

<sup>498</sup> Bruen, 142 S. Ct. at 2136.

<sup>499</sup> LOIS G. SCHWOERER, *GUN CULTURE IN EARLY MODERN ENGLAND* 18–19 (2016); see also Walter M. Stern, *Gunmaking in Seventeenth-Century London*, 1 J. ARMS & ARMOUR SOC’Y 55, 56 (1954) (“the safety of soldiers and sailors as well as civilian marksmen could be gravely jeopardized by badly made firearms”).

<sup>500</sup> Soc’y for Army Hist. Rsch., *The Charter of the Company of Gunmakers, London*, 6 J. SOC’Y FOR ARMY HIST. RSCH. 79 (1927) [hereinafter *Gunmakers’ Charter*]; SCHWOERER, *supra* note 499, at 22–25.

<sup>501</sup> *Gunmakers’ Charter*, *supra* note 500, at 79.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 79–81 (company was to “uphold” and “advance” the gunmaking industry “by reducing it into the hands of skilful Artists”).

<sup>504</sup> *Id.* at 82 (empowering company to establish “such reasonable acts[,] orders,” “Decrees” and “Ordinances” that “shall seem good[,] wholesome[,] profitable[,] honest[,] and necessary according to their discretions”).

<sup>505</sup> See also PRIYA SATIA, *EMPIRE OF GUNS: THE VIOLENT MAKING OF THE INDUSTRIAL REVOLUTION* 28 (2018) (Gunmakers’ Company “was a corporate entity related to the state”).

<sup>506</sup> *Gunmakers’ Charter*, *supra* note 500, at 89 (“requir[ing] and command[ing] all” gunmakers, “within our City of London and the Liberties thereof or within ten miles thereof,” to “be subject and obedient unto all such lawful and reasonable Orders and Ordinances” made by Company of Gunmakers).

<sup>507</sup> *Id.* at 83 (power “for the punishment and Reformation of such Abuses and Deceits,” including those posing the risk that “our Loving Subjects may be damnified [sic] or endangered”).

<sup>508</sup> See Stern, *supra* note 499, at 78 (apprenticeship and proofpiece-submission requirements would have been sufficient precautions “in other trades,” but gunmaking “required individual view and proof of each barrel in the interest of users’ safety.”).

company had “the full power of search[,] view[,] gage[,] proof[,] trial and marking of all manner of” handguns and pistols, “and all and every part or parcell [sic] of them,” including those “made in London or the Suburbs” and those “imported from foreign parts.”<sup>509</sup> The company was directed to “wholly and utterly reject and forbear to mark” and “destroy” guns found to be “insufficient” or “unserviceable.”<sup>510</sup>

After the charter’s enrollment, safety regulation became an enduring feature of the gun industry. The company exercised its powers to establish and operate a “proving house” to “prove” (i.e., test) and mark firearm barrels.<sup>511</sup> And it punished merchants who sold defective guns.<sup>512</sup> Manufacturer-level firearm safety regulation continued to be referenced in various pieces of British legislation in the ensuing centuries. The need to ensure the quality, safety, and performance of firearms was so well-understood that even when the British government circumvented the company’s proofing process to meet military or economic needs, it continued to require that firearms be “proved” by other means.<sup>513</sup>

Product safety regulation of firearms and ammunition also developed in early America. For example, in 1794, Pennsylvania—finding that gunpowder had “frequently been found to vary much in its strength, and sometimes of inferior qualities, and its defects not discovered until brought into actual use”—enacted a mandatory testing law to protect “the purchaser and consumers . . . against fraud and imposition.”<sup>514</sup> Similarly, a Massachusetts statute enacted in 1805 subjected firearms manufacturers within the Commonwealth to proof requirements to “prevent” the introduction of firearms “which are unsafe” and thus endangered “the lives of the Citizens.”<sup>515</sup> The need to ensure the quality and safety of private arms, and to guard against defective or unpredictable arms, was presumably heightened because personal weapons were often used in militia service.<sup>516</sup>

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<sup>509</sup> *Gunmakers’ Charter*, *supra* note 500, at 87.

<sup>510</sup> *Id.* at 89–90.

<sup>511</sup> *Id.*; SCHWOERER, *supra* note 499, at 25 (Gunmakers’ Company secured “recognition that Gunmakers alone had the right to prove all handguns in 1663”); *see also Returns of the Gunmakers’ Company*, in 3 CITY OF LONDON LIVERY COS.’ COMM’N 503, 507 (1884); SATIA, *supra* note 505, at 28 (gunmakers “stood proof (a test of the barrel’s soundness), and met a minimum standard of inspection”).

<sup>512</sup> *See* SCHWOERER, *supra* note 499, at 41 (describing Company’s 1692 and 1693 searches targeting shopkeepers who illegally “sold defective or unproved guns”); *see also* SATIA, *supra* note 505, at 42 (describing Company’s searches and seizures in the 1730s targeting shopkeepers who “sold foreign unproved and unserviceable guns”).

<sup>513</sup> *See* SATIA, *supra* note 505, at 52.

<sup>514</sup> An Act for Providing for the Inspection of Gunpowder, 1795 Pa. Laws 346.

<sup>515</sup> 1804 Mass. Acts 111, available at <https://archive.org/details/actsresolvespass180405mass/page/n7/mode/2up> [<https://perma.cc/H7YK-NE3B>].

<sup>516</sup> *United States v. Miller*, 307 U.S. 174, 179 (1939) (“[O]rdinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”).

Under the Massachusetts act, all gunmakers were required to submit their products for safety and quality testing to state-appointed “provers of firearms.”<sup>517</sup> The Massachusetts act imposed penalties on those who produced, sold, or purchased unproved arms, as well as proof-mark forgers.<sup>518</sup> In the earliest codification of Massachusetts laws after independence, the act was placed alongside other consumer-protection laws, such as those addressing product testing, misbranding, adulteration, and weights and measures.<sup>519</sup> This placement is telling: it suggests that early American legislators and revisors saw safety standards for firearms as analogous to protections applicable to other consumer products.<sup>520</sup> In short, firearms were understood as consumer products that were properly subject to manufacturer-level safety regulation.

Separate from state “proof” laws, historian Lindsay Schakenbach Regele notes that the guns available and commonly used in America in the first hundred years after independence were products of extensive “federal subsidization and regulation.”<sup>521</sup> Inseparable from this federal patronage was intervention, monitoring, and regulation by the War Department and Army Ordnance Department to ensure the quality and safety of weapons purchased for military use.<sup>522</sup>

Contractors’ arms were required to be examined by a government proof master, the government regularly inspected contractors’ premises, and the government conditioned arms contracts on satisfactory safety testing.<sup>523</sup> Regele notes, for example, that to win Army contracts in the 1830s, Samuel Colt was forced “to adapt to safety standards” set by the ordinance board, which pointed to “several features of new revolvers” that “caused safety risks, namely ‘the possibility of two or more chambers going off at the same time’ and the ‘deafening sharpness . . . which must injure the hearing of those who use them.’”<sup>524</sup> Most guns manufactured and sold into the U.S. civilian market, which had ballooned by the mid-19th century, thus reflected strong influences from firearms manufactured for military use, including the safety standards that the federal government had fostered.<sup>525</sup>

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<sup>517</sup> 1804 Mass. Acts 111, § 1.

<sup>518</sup> *Id.* §§ 2–4.

<sup>519</sup> MASS. GEN. LAWS ch. 28, §§ 63–68 (1836) (placed within chapter on “inspection of provisions and other merchandize; and regulations respecting the sale thereof”).

<sup>520</sup> Regulations on the *carrying* of arms were placed elsewhere. *E.g.*, MASS. GEN. LAWS ch. 85, § 24; *id.* ch. 134, § 16. This suggests that the distinction between “firearm product safety” regulation and “gun control” regulation was understood at an early date.

<sup>521</sup> Lindsay Schakenbach Regele, *A Different Constitutionality for Gun Regulation*, 46 HASTINGS CONST. L.Q. 523, 529–30 (2019).

<sup>522</sup> *Id.* at 525–28.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 528 (quoting S. Rep. No. 14, at 3 (1840)).

<sup>525</sup> *Id.* at 529–30 (“Guns that were produced and purchased [for the civilian market] reflected the influence of government intervention”).



These historical analogues meet *Bruen*'s test. CPSC regulation of guns as products also poses a low "burden on the right of armed self-defense"—one of the "'central' considerations" within the test.<sup>526</sup> Because recalls are specific to defects in specifically defined populations of units, they impose minimal—and clearly justified—burdens upon industry. Moreover, as with all CPSC recalls, consumer participation is optional. The recalling company is required to notify consumers of the hazard and to offer a remedy, but consumers ultimately choose whether to participate.<sup>527</sup> Mandatory CPSC product safety standards would have broader applicability but would also not burden consumers' right to armed self-defense. Consumers would not be bereft of arms since the CPSC, in considering proposed safety standards, must weigh the proposed standard's effects on commerce and on products' "utility, cost, or availability."<sup>528</sup> Moreover, CPSC action would *facilitate* lawful self-defense, by granting consumers protection against guns prone to inflict unanticipated injury, whether by jamming at a moment of need, discharging without a trigger pull, or discharging when a safety is engaged.

### B. Responding to Overregulation Concerns

Even strong gun-rights advocates may concede that the firearms industry's absolute immunity from federal product safety law is inappropriate. They might acknowledge the appropriateness of allowing the CPSC to oversee gun-manufacturer recalls of specific defective products, to ensure that companies effectively alert consumers and offer an appropriate remedy. Some critics may part ways, however, with allowing the Commission to apply its usual consumer product safety rulemaking power to the firearms industry—for example, by requiring safety features, such as CLIs or MDMs on new handguns, or to set drop-test standards.

Some commentators have invoked "slippery slope" arguments, contending that gun regulations can be a predicate to, or even a pretext for, reducing or eliminating the availability of guns.<sup>529</sup> Like members of Congress in the 1970s, some gun-rights commentators have depicted

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<sup>526</sup> *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

<sup>527</sup> See also CPSC Advisory Op. 149 at 2 (Nov. 4, 1974), [https://www.cpsc.gov/s3fs-public/pdfs/blk\\_media\\_149.pdf](https://www.cpsc.gov/s3fs-public/pdfs/blk_media_149.pdf) [<https://perma.cc/3ARR-DUDC>] (Commission's "remedial powers" are limited to action "against manufacturers, distributors, and retailers"); 2021 CPSC Handbook, *supra* note 271, at 16.

<sup>528</sup> See *infra* Section VI.B; 15 U.S.C. § 2058(f)(1); *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 844 (5th Cir. 1978).

<sup>529</sup> See, e.g., Michael P. O'Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping*

the absolute exclusion of guns from CPSC jurisdiction as necessary to protect against excessive Commission regulation. David Kopel, for example, contends that the Bingham Amendment would have “giv[en] the CPSC authority to ban firearms” and described the CPSA as granting “extremely broad powers” to the Commission “to outlaw any consumer product it deemed to be too risky.”<sup>530</sup>

These characterizations misapprehend the statutory framework governing the Commission’s authority over consumer products. The CPSA created three major constraints on the Commission’s power that allay fears of overregulation or Commission overreach: (1) a preference for product-specific recalls over rulemaking, (2) substantive and procedural limitations on the Commission’s rulemaking authority, and (3) the Commission’s independent, multimember, bipartisan structure.

First, the CPSC addresses safety defects primarily through recalls, rather than mandatory consumer product safety rules. The overwhelming majority of recalls overseen by the CPSC are voluntarily undertaken by companies in response to a specific defect in a specific product.<sup>531</sup>

Second, the procedural requirements for the CPSC to adopt consumer product safety standards are unusually stringent. The CPSC must follow substantive and procedural rules that are significantly stricter than baseline APA rulemaking requirements,<sup>532</sup> or ATF rules.<sup>533</sup> The Commission may promulgate a consumer product safety rule *only* if “voluntary consumer product safety standards” fail to “adequately reduce the risk of injury” or “substantial compliance with such voluntary standards” is unlikely.<sup>534</sup>

To promulgate a rule, the CPSC must extensively consult with the public, explain why existing or proposed alternative approaches are

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*Legislation*, 46 CONN. L. REV. 1381, 1387–88 (2014); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1033–34 (2003).

<sup>530</sup> David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1553 (2012).

<sup>531</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-56, CONSUMER PRODUCT SAFETY COMMISSION: ACTIONS NEEDED TO IMPROVE PROCESSES FOR ADDRESSING PRODUCT DEFECT CASES 15 (2020) (noting that “between 2016 and 2019, CPSC had 1,000 active product defect investigations, 131 of which resulted in voluntary corrective actions” but brought only “six administrative cases for mandatory recalls” from 2010 to 2019 (citation omitted)).

<sup>532</sup> See 5 U.S.C. § 553; see also *Finnbin, LLC v. Consumer Prod. Safety Comm’n*, 45 F.4th 127, 135 (D.C. Cir. 2022) (CPSA rules require more “rigorous cost-benefit analysis” than rules adopted under the APA); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 75–76 (2015) (“agency-specific procedural requirements” for CPSC rulemaking go beyond generally applicable APA requirements).

<sup>533</sup> 18 U.S.C. § 926(a).

<sup>534</sup> See 15 U.S.C. § 2056(b); see also *Aqua Slide ‘N’ Dive Corp. v. Consumer Prod. Comm’n*, 569 F.2d 831, 844 (5th Cir. 1978) (private voluntary standards “may tend to show the reasonableness of similar Commission standards,” but “do not prove the need for such provisions” (emphasis omitted) (quoting *Forester v. Consumer Prod. Safety Comm’n*, 559 F.2d 774, 793 (D.C. Cir. 1977))).

insufficient, and consider not only the safety benefits of the rule but also the rule’s likely effect on the product’s “utility, cost, or availability,” as well as on the persons “likely to receive the benefits and bear the costs” of the rule.<sup>535</sup> The CPSC thus cannot make rules without producing a rigorous, evidence-based analysis.<sup>536</sup> Given the intensive effort required, rulemaking proceedings are very rare.<sup>537</sup> And the courts have closely scrutinized Commission safety standards for conformity with the tight CPSC requirements.<sup>538</sup>

These stringent requirements for rulemaking undercut the claim that CPSC safety regulation of the firearms industry would lead to overreaching or poorly justified regulation. Moreover, these requirements mean that the Commission’s rules would probably *not* be on the leading edge of firearms-safety technology.<sup>539</sup> Rather, CPSC rules would likely focus on the lowest-hanging fruit: protecting consumers by requiring the firearms industry to design new products that comply with basic safety and quality rules—such as drop-test performance standards and requirements to include readily available safety features that do not materially increase cost or decrease functionality. Such rules would protect the public and be most likely to successfully survive the gauntlet of notice-and-comment rulemaking and judicial review.

Finally, CPSC’s structure limits the likelihood of Commission overreach. Congress diffused power within the agency. It created the Commission as an independent five-member body, rather than a component of a Cabinet department, and imposed a “partisan balance” requirement: no more than three commissioners “shall be affiliated

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<sup>535</sup> 15 U.S.C. § 2058(f).

<sup>536</sup> *Id.* § 2058(f)(4).

<sup>537</sup> Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission be Redeemed?*, 41 ADMIN. L. REV. 61, 71 (1989) (CPSA makes it “virtually impossible to set standards at other than a snail’s pace”); Terrence M. Scanlon & Robert A. Rogowsky, *Back-Door Rulemaking: A View From the CPSC*, 8 REGUL. 27, 28 (1984) (“[I]nformal consensus in the agency is that rulemaking is dead; it simply takes too much effort.”); Robert Adler, Chairman, CPSC, Statement of Acting Chairman Robert Adler on Petition Requesting Rulemaking on Commercially Bred Dogs Sold to Consumers (July 27, 2021), <https://www.cpsc.gov/About-CPSC/Commissioner/Robert-Bob-S-Adler/Statement/Statement-Of-Acting-Chairman-Robert-Adler-On-Petition-Requesting-Rulemaking-On-Commercially-Bred-Dogs-Sold-To-Consumers> [https://perma.cc/JPF6-RBSJ] (“[E]stablishing jurisdiction is . . . separate . . . from setting priorities for rulemaking.”).

<sup>538</sup> Courts have vacated all or part of CPSC safety standards held to be insufficiently justified. *See, e.g., Aqua Slide*, 569 F.2d at 835–44 (pool slides); *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d 1141, 1148–54 (10th Cir. 2016) (rare-Earth magnets); *Forester v. Consumer Prod. Safety Comm’n*, 559 F.2d 774, 789–98 (D.C. Cir. 1977) (bicycles).

<sup>539</sup> *Cf. Dru Stevenson, Smart Guns, the Law, and the Second Amendment*, 124 PENN ST. L. REV. 691, 691 (2020) (noting that first-generation smart guns “foundered on problems with the reliability of the technology” and backlash-inducing “legislative misstep that would have banned all other guns as soon as smart guns appeared in the retail market”).

with the same political party.”<sup>540</sup> The CPSA establishes fixed seven-year terms for commissioners, protects commissioners from removal by the President for any reason except “neglect of duty or malfeasance in office,”<sup>541</sup> and requires almost all Commission actions to be approved by a majority vote, limiting the chairman’s power.<sup>542</sup> These mechanisms insulate the Commission from outside political pressure, promote continuity between presidential administrations,<sup>543</sup> and provide built-in checks against ill-considered rules. In sum, rather than giving the CPSC unfettered authority over any product, the CPSA channels and constrains the Commission’s authority. A “gun exceptionalist” approach that immunizes the firearms industry from ordinary safety regulation is thus not justified by fears of Commission overreach.

### C. Responding to Underregulation Concerns

An opposite critique challenges the limits of this Article’s proposal by asking why CPSC standards for firearms and ammunition should be limited to requiring safety features or setting safety-performance requirements. Why should the Commission not be permitted to regulate to reduce gun lethality and prevent murders and suicides? If the Commission can ban lawn darts,<sup>544</sup> why not large-capacity magazines or bump stocks?<sup>545</sup> Several key reasons support applying the limited authority the Commission exercises over other categories of consumer products to firearms and ammunition, without going further.

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<sup>540</sup> 15 U.S.C. § 2053(a), (c).

<sup>541</sup> *Id.* § 2053(a)–(b)(1); *see also* Consumers’ Rsch. v. Consumer Prod. Safety Comm’n, 2024 WL 177326, \*1–9 (5th Cir. Jan. 17, 2024) (CPSA provision that allows president to remove CPSC commissioners only “for cause” does not infringe upon “president’s constitutional power over the executive branch”; only the Supreme Court may revisit *Humphrey’s Executor*, whether by “reaffirming it, overruling it, or narrowing it”).

<sup>542</sup> *See* 15 U.S.C. § 2053(f); 16 C.F.R. §§ 1000.8, 1009.8(b), 1013.5(a)(1)(ii) (2022).

<sup>543</sup> *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67 (2010) (arguing that “CPSC checks all the boxes of traditional independent design” but is underresourced).

<sup>544</sup> 16 C.F.R. § 1500.18(a)(4) (lawn dart ban); Pub. L. No. 100-613, 102 Stat. 3183, 3183 (1988) (directing the CPSC to revoke regulatory exemption for “lawn darts and other similar sharp-pointed toys,” unless Commission “finds that such products do not have the potential for causing puncture wound injury”).

<sup>545</sup> ATF banned bump stocks via regulation, determining that they constitute “machine guns” within the meaning of the Gun Control Act and National Firearms Act. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018). Three courts of appeals rejected petitions to enjoin the ban. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 898 (6th Cir. 2021) (en banc); *Aposhian v. Barr*, 958 F.3d 969, 974 (10th Cir.), and *vacated for en banc reh’g*, 973 F.3d 1151 (10th Cir. 2020), and *reinstated sub nom.* *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc); *Guedes v. ATF*, 920 F.3d 1, 6 (D.C. Cir. 2019). Two disagreed, and the Supreme Court has agreed to consider the issue. *See Cargill v. Garland*, 57 F.4th 447, 447 (5th Cir. 2023) (en banc), *cert. granted*, No. 22-976 (U.S. Nov. 3, 2023).

First, CPSC's mandate is limited to its area of expertise: consumer product safety. The Commission has expertise in overseeing companies' recalls; examining defect and hazard reports; tracking death and injury data; encouraging industry voluntary standards development; and setting mandatory product-safety standards.<sup>546</sup> CPSC's authority over guns should thus come within these limits. This jurisdictional scope would recognize that the Commission lacks expertise in preventing gun crime, assessing the lethality and value (for sporting or self-protection) of different features of firearms or ammunition, or preventing suicide.<sup>547</sup>

Second, and relatedly, the CPSC is ill-suited to make sweeping social policy decisions. The Commission has historically acknowledged this: it has rightly been careful to distinguish between harm arising from a product and harm created by a user's intentional or reckless use of a product. For example, as discussed earlier, the Commission has recognized that a knife is *not* defective by reason of its sharpness, yet a foldable knife with a locking mechanism that fails to engage as expected *is* defective.<sup>548</sup> The Commission's handling of product defects has largely tracked traditional tort notions of defect, which is unsurprising given that product-liability principles have influenced CPSC decisionmaking. Continuing to place gun control proposals outside CPSC's jurisdiction—while allowing the CPSC to exercise product-safety oversight over firearms—thus aligns best with the Commission's areas of competence.<sup>549</sup>

Third, beyond CPSC's mere lack of expertise, Congress and the states are best positioned to address the cavalcade of suffering created by gun violence and suicide. Compared to other developed countries, America has a significantly higher gun homicide rate,<sup>550</sup> overall homicide

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<sup>546</sup> See *supra* Section IV.A.

<sup>547</sup> See also Quoc Trung Bui & Margot Sanger-Katz, *How to Prevent Gun Deaths? Where Experts and the Public Agree*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/interactive/2017/01/10/upshot/How-to-Prevent-Gun-Deaths-The-Views-of-Experts-and-the-Public.html> [<https://perma.cc/L3UD-DNMM>] (expert survey gauging views on effectiveness of twenty-nine possible policies “in reducing firearm homicide deaths,” showed substantial agreement in some areas, but disagreement in others).

<sup>548</sup> See *supra* notes 140–42 and accompanying text (discussing knife example); see also *supra* note 379 and accompanying text (discussing parallel example of CPSC-overseen recalls of defective crossbows); 16 C.F.R. § 1115.4 (2022) (highlighting “whether the risk of injury associated with a product is the type of risk which will render the product defective”).

<sup>549</sup> See, e.g., ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 15 (2021) (“Using the word ‘competence’ clarifies that administrative law must ensure that public administration has both legitimate authority and the necessary capacity to accomplish its mission.”); *id.* at 21–22 (arguing that “the substance of public administration,” and “ensuring [that] public administration is competent for the purposes assigned to it by Congress,” should be central focuses of administrative law).

<sup>550</sup> *A Senseless Slaughter*, THE ECONOMIST (May 25, 2022), <https://www.economist.com/united-states/2022/05/25/the-spate-of-gun-violence-shows-american-exceptionalism-at-its-worst> [<https://perma.cc/L35A-FG88>].

rate,<sup>551</sup> and suicide rate.<sup>552</sup> Legislators are best positioned to address these issues through the political process, within constitutional limits. Legislators, rather than the Commission, can consider wider questions implicit in gun policy, such as the interplay between individual gun rights and public safety, as well as local conditions. Moreover, given the lack of a nationwide political consensus on gun issues, transferring powers over gun policy to the CPSC would be a dodge.<sup>553</sup> It would allow legislators to evade their political and moral responsibilities to address gun violence and suicide.<sup>554</sup>

Fourth, the Commission's limited resources make it crucial to allocate to the CPSC only the powers and duties it has the capacity to handle. Although the Commission regulates thousands of product categories,<sup>555</sup> Congress has consistently underfunded the CPSC relative

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<sup>551</sup> Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015*, 123 PREVENTIVE MED. 20, 20 (2019) (U.S. homicide rate, then "7.5 times higher than the homicide rate in the other high-income countries combined," is "largely attributable to a firearm homicide rate that was 24.9 times higher").

<sup>552</sup> Roosa Tikkanen & Melinda K. Abrams, *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?* COMMONWEALTH FUND (Jan. 2020), [https://www.commonwealthfund.org/sites/default/files/2020-01/PDF\\_Tikkanen\\_US\\_hlt\\_care\\_global\\_perspective\\_2019\\_OECD\\_exhibits\\_v2.pdf](https://www.commonwealthfund.org/sites/default/files/2020-01/PDF_Tikkanen_US_hlt_care_global_perspective_2019_OECD_exhibits_v2.pdf) [<https://perma.cc/9DG8-C3X4>] (United States has highest suicide rate among ten high-income countries); *see also Means of Suicide*, SUICIDE PREVENTION RES. CTR., <https://sprc.org/scope/means-suicide> [<https://perma.cc/9PNF-K679>] ("Firearms are the most common means of suicide in the United States.").

<sup>553</sup> *See, e.g.*, Adam Carlson, *Why Gun Control Efforts in Congress Have Mostly Failed For 30 Years*, ABC NEWS (May 31, 2022, 11:12 AM), <https://abcnews.go.com/Politics/gun-control-efforts-congress-failed-30-years-timeline/story?id=84995465> [<https://perma.cc/5EQS-C5CP>].

<sup>554</sup> This argument is not predicated on staking out a specific position in the broader debates on the proper role of administrative law. *Compare, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 38–43 (2020) (proposing a set of principles for "making genuine administrative law . . . and perhaps even attractive and successful administrative law"), *with* PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 1, 12–13 (2014) (arguing that administrative law is "extralegal, supralegal, and consolidated, and thus a version of absolute power"), *and* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 106 (1993) ("In sum, accountability through the president matters less than accountability through Congress and, whatever the potential worth of presidential accountability might be, delegation diminishes its value."). After all, "critics of administration may grant congressional lawmaking more democratic credentials than it deserves," Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1, 12 (2023), and the administrative state, viewed through some lenses, may be seen as democracy-promoting. *E.g.*, Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 13–15, 94–95 (2022) (arguing that agonistic democratic theory furnishes "a legitimating perspective for many features of the administrative state that have troubled scholars and commentators in the past"). The point made here is that even if Congress *could* delegate more broadly than proposed in this Article, this does not mean that Congress *should* do so.

<sup>555</sup> *Oversight of the Consumer Prod. Safety Comm'n: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, Ins., & Data Sec. of the S. Comm. on Com.*, 114th Cong. 8 (2015) (statement of CPSC Commissioner Robert S. Adler).



to other major safety agencies,<sup>556</sup> and appropriations have always been insufficient for the CPSC to fulfill its mission.<sup>557</sup> Directing the CPSC to engage in broader gun policy would distract from CPSC's ability to address pressing hazards,<sup>558</sup> such as improving detection and interception of dangerously defective goods, such as lead-tainted toys from China, at the border.<sup>559</sup> Limiting CPSC oversight of the gun industry to the product-safety sphere would allow the agency to conserve more of its resources.

Finally, embroiling the CPSC in broader gun control debates would likely supercharge polarization. Turning the Commission into a forum for gun control debates would likely intensify conflicts within the Commission; between Congress and the CPSC; and between the CPSC and industry. Senate confirmations of CPSC nominees are already sluggish, leading to persistent vacancies and occasional gamesmanship that disrupts the Commission's work.<sup>560</sup> Intensified confirmation battles would bog down the Commission and lead to vacant Commission seats going unfilled for longer periods. This would impair the Commission's ability to fulfill its statutory mission, and could even deprive it of a quorum,

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<sup>556</sup> See Robert Adler, CPSC Acting Chair, ICPHSO 2021 Keynote Address: CPSC Acting Chair Robert Adler 2 (Feb. 24, 2021), <https://www.cpsc.gov/s3fs-public/ICPHSO-2021-Adler-Keynote-22421.pdf> [<https://perma.cc/L4PS-HEZ6>] (noting that CPSC's then-\$135 million budget was "by far, the smallest of the federal health and safety regulatory agencies" and that FDA's and NHTSA's budgets were "almost 44 times" and "over 7 times" larger than CPSC's budget).

<sup>557</sup> See LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 361 (2003) (CPSC has "never received the budget it needed to protect Americans properly from hazardous products"); see also Rena Steinzor, *The Truth About Regulation in America*, 5 HARV. L. & POL'Y REV. 323, 336 (2011) (CPSC's limited resources are compounded by offshoring of U.S. manufacturing "to Asian countries that have no effective regulatory systems").

<sup>558</sup> Adler 2019 Stmt., *supra* note 53 (fearing that "providing authority to CPSC even with greatly expanded resources" would force CPSC to "turn our attention almost exclusively to the regulation of firearms," to "the detriment of regulating the safety of the roughly 15,000 other product categories" under CPSC jurisdiction).

<sup>559</sup> CPSC, PUB. L. NO. 116-260, STAFF REPORT TO CONGRESS PURSUANT TO TITLE XX, SECTION 2001 OF THE CONSOLIDATED APPROPRIATIONS ACT, PORT SURVEILLANCE 8 (2021), <https://www.cpsc.gov/s3fs-public/CPSC-Report-to-Congress-Consolidated-Appropriations-Act-Port-Surveillance.pdf> [<https://perma.cc/3L38-YT79>] (discussing how the CPSC detects and intercepts dangerous products at the U.S. border); U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105445, CPSC: ACTION NEEDED TO IMPROVE PREPAREDNESS FOR PRODUCT EXAMINATION DISRUPTIONS 19-20 (2022), <https://www.gao.gov/products/gao-23-105445> [<https://perma.cc/SG8X-VHVM>].

<sup>560</sup> See, e.g., Todd C. Frankel, *GOP's Senate Delays Allowed Changes at Product Safety Regulator. Critics Say 'Power Grab' Puts Public at Risk*, WASH. POST (Oct. 27, 2021, 9:00 AM), <https://www.washingtonpost.com/business/2021/10/27/cpsc-vote-clash/> [<https://perma.cc/LXS7-G28Z>]; Dina ElBoghdady, *Partisan Gridlock Threatens Consumer Product Safety Commission Regulation*, WASH. POST (Nov. 14, 2011, 8:31 PM), [https://www.washingtonpost.com/business/economy/partisan-gridlock-threatens-consumer-product-safety-commission-regulation/2011/10/31/gIQAR-19OMN\\_story.html](https://www.washingtonpost.com/business/economy/partisan-gridlock-threatens-consumer-product-safety-commission-regulation/2011/10/31/gIQAR-19OMN_story.html) [<https://perma.cc/7W5R-CS9U>].

bringing the agency to a standstill.<sup>561</sup> If Congress allowed the Commission to enter the gun control debate, congressional oversight of the CPSC would also fixate on firearms issues, at the expense of other critically important consumer product safety issues—such as toxin risks, safe children’s products, battery safety, and recall effectiveness—that require attention on Capitol Hill.

Commission engagement in broader gun policy could also polarize public perceptions of the CPSC.<sup>562</sup> Entangling the CPSC in hot-button debates over access to guns or gun lethality, such as whether large-capacity magazines should be restricted, might thus reduce participation in recalls generally, and diminish the effectiveness of CPSC public information campaigns on an array of product safety risks.<sup>563</sup> A narrower CPSC focus on defects and product safety standards, by contrast, would appropriately treat guns as the consumer products they are, without enmeshing the CPSC in debates over gun violence and suicide.

### CONCLUSION

For more than a half-century, the firearms industry has singularly been excluded from federal safety regulation. This unique immunity from federal product safety law is untenable. The yawning regulatory gap causes avoidable deaths and injuries, and unjustifiably privileges the gun industry at the expense of both gun owners (i.e., consumers), and the public. Dropping this immunity and allowing the Commission to exercise safety oversight within its traditional scope of expertise—product safety—would remedy these failures and protect consumers without burdening gun owners and without conflicting with the Second Amendment.

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<sup>561</sup> Cf. Frankel, *supra* note 560 (noting that “sluggish pace of Senate confirmations” resulted in CPSC turmoil).

<sup>562</sup> There are apparently no studies that survey public awareness of, or sentiment toward, the CPSC specifically, but most scientific and technical federal agencies have relatively high approval ratings. See *Public Holds Broadly Favorable Views of Many Federal Agencies, Including CDC and HHS*, PEW RSCH. CTR. (Apr. 9, 2020), <https://www.pewresearch.org/politics/2020/04/09/public-holds-broadly-favorable-views-of-many-federal-agencies-including-cdc-and-hhs/> [https://perma.cc/VM8G-AWL2] (“Many agencies, including the IRS, are viewed favorably by majorities in both parties.”); PAUL HITLIN & NADZEYA SHUTAVA, A CLOSE LOOK AT PUBLIC PERCEPTIONS OF THE FEDERAL GOVERNMENT AND ITS EMPLOYEES 5 (P’SHIP FOR PUB. SRV. Mar. 23, 2022), <https://ourpublicservice.org/wp-content/uploads/2022/03/Trust-in-Government.pdf> [https://perma.cc/ZP4K-MDF7] (“Many well-known government agencies are seen favorably.”).

<sup>563</sup> Cf. Sotiropoulos, Kartik Kalaighan, Manpreet Gill & Paul D. Bliese, *Regulating Product Recall Compliance in the Digital Age: Evidence from the “Safe Cars Save Lives” Campaign*, 86 J. MKTG. 135, 135–50 (2022) (digital marketing campaign initiated by NHTSA was “effective at improving consumer recall compliance”).

Only a naïf would believe that this proposed reform will be achieved in the imminent future. Given congressional deadlock, divided government, and a hyperpolarized gun debate, securing *any* legislative progress, no matter how commonsensical or broadly supported, is extremely difficult.<sup>564</sup> CPSC's limited resources present an additional challenge. Even the modest proposal made here would require some increase in Commission appropriations, which are too low for even its current responsibilities.<sup>565</sup> Yet this Article's proposal has features that should rationally appeal to different sides in the broader gun debate.

First, the proposal is tailored to address a specific problem. Commission safety-regulatory authority over the firearms industry can avert injuries and deaths and leverage CPSC's existing expertise and authority. And applying ordinary product-safety regulation to guns, especially in the context of defects, has intuitive appeal, even for many Americans who oppose most gun reforms. Pro-consumer reforms have been achieved in the past. Experience shows that Congress typically steps in to remediate a consumer product safety hazard when the hazard is high-profile; the hazard typically affects children; and regulators, due to inertia or lack of jurisdiction, fail to act. Congress, for example, gave the FDA power to regulate tobacco after the Supreme Court held that the FDA could not do so under previous law.<sup>566</sup> Congress also stepped in to ensure safe sleeping products for infants and to protect children from gasoline burns and swimming-pool drowning.<sup>567</sup>

Second, recognizing that the interests of the gun industry and gun owners sometimes diverge is healthy for broader gun debates. Potential CPSC safety oversight, in the forms of defect reporting, recall oversight, and safety rulemaking, would place obligations on the firearms industry but clearly benefit gun owners and the public by making guns safer without materially increasing cost, reducing availability, or impairing functionality.

Finally, protecting gun owners from defects in firearms or ammunition affirms consumers' right to have functioning products—in this case, weapons that function as expected. This affirmation recognizes that most gun owners are lawful and responsible. It counters misconceptions

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<sup>564</sup> Cf. Jan E. Dizard et al., *Can We Live with Guns?*, in *GUNS IN AMERICA: A HISTORICAL READER* 447, 448 (Jan E. Dizard et al., eds., 1999) (not every gun policy promotes “sweeping hidden agenda” of either “gun confiscation” or “gun worship”); Walters, *supra* note 554, at 95 (“Doubling down on consensus in this polarized environment is bound to lead to disappointment.”).

<sup>565</sup> See Adler, *supra* note 555.

<sup>566</sup> See *supra* note 71 and accompanying text.

<sup>567</sup> Safe Sleep for Babies Act, Pub. L. No. 117-126, 136 Stat. 1208 (2022) (codified at 15 U.S.C. § 2057d-2057e); Children's Gasoline Burn Prevention Act, Pub. L. No. 110-278, 122 Stat. 2602 (2008) (codified as note to 15 U.S.C. § 2056); Virginia Graeme Baker Pool and Spa Safety Act (Title XIV of the Energy Independence and Security Act of 2007), Pub. L. No. 110-140, § 1404, 121 Stat. 1492, 1795 (2007) (codified at 15 U.S.C. §§ 8001–8007).

promoted by the firearms industry that all regulation aims to destroy gun rights.<sup>568</sup> To be sure, guns are uniquely polarizing. The powerful firearms industry, represented by NSSF and the NRA, have already misrepresented any CPSC oversight as a nefarious plot.<sup>569</sup> Some states and localities have taken increasingly extremist positions, such as denying the constitutionality of all gun laws or claiming to “nullify” federal law.<sup>570</sup> But while gun control regulations are hotly contested, this Article’s proposal should be recognized as neither “pro-gun” nor “anti-gun,” but pro-consumer.<sup>571</sup>

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<sup>568</sup> See, e.g., Claire Boine, Michael Siegel & Abdine Maiga, *The Effectiveness of Value-Based Messages to Engage Gun Owners on Firearm Policies: A Three-Stage Nested Study*, 9 INJ. EPIDEMIOLOGY 30 (2022).

<sup>569</sup> Lawrence G. Keane, Letter to the Editor, *Firearms Are the Only Constitutionally Protected Consumer Product*, WASH. POST (Jan. 20, 2023, 6:07 PM), <https://www.washingtonpost.com/opinions/2023/01/20/firearms-constitutionally-protected-consumer-product/> [https://perma.cc/8P3L-Y6JQ] (letter from NSSF official); *If the CPSC Would Ban Gas Stoves, Imagine How it Would Treat Guns*, NRA INST. FOR LEG. ACTION (Jan. 23, 2023), <https://www.nraila.org/articles/20230123/if-the-cpsc-would-ban-gas-stoves-imagine-how-it-would-treat-guns> [https://perma.cc/4VKX-NWF5].

<sup>570</sup> *United States v. Missouri*, No. 2:22-cv-4022, 2023 WL 2390677, at \*5–12 (W.D. Mo. Mar. 7, 2023) (striking down unconstitutional “nullification attempt that violates the Supremacy Clause”), *appeal docketed*, No. 23-1457 (8th Cir. Mar. 10, 2023), *motion for stay of judgment and injunction pending appeal denied*, 2023 WL 6543287 (8th Cir. Sept. 29, 2023), *application for stay denied*, No. 23A296, 2023 WL 6934588 (U.S. Oct. 20, 2023); Sam Zeff, *A Missouri County Won’t Work With the ATF, Claiming the Federal Agency Is ‘Unconstitutional,’* KCUR (Apr. 8, 2023, 4:00 AM), <https://www.kcur.org/news/2023-04-08/a-missouri-county-wont-work-with-the-atf-claiming-the-federal-agency-is-unconstitutional> [https://perma.cc/GQD5-CLFB] (county commissioner declaring “any and all federal firearms laws” to be “unconstitutional”).

<sup>571</sup> See Rebecca Tuhus-Dubrow, *Will Gun Owners Fight for Stronger Gun Laws?*, WASH. POST MAG. (Sept. 21, 2022, 10:00 AM), <https://www.washingtonpost.com/magazine/2022/09/21/97-percent-gun-owners-debate/> [https://perma.cc/82VK-B2VF] (discussing movement to “identify and expand areas of consensus” in gun debate).

## APPENDIX: CPSC RECALLS OF “GUN-ADJACENT” PRODUCTS

Table 1. Air Gun/BB Gun Recalls

Press Release No.	Date	Title	URL	Units Affected	Issue/Problem/Risk
77-111	Oct. 25, 1977	Crosman BB Pistol May Have Inoperative Safe	<a href="https://perma.cc/JA93-9APL">https://perma.cc/JA93-9APL</a>	25,000	Discharge when safety mechanism was engaged.
78-015	Mar. 2, 1978	Repair Program for Hazardous Pellet Pistols Announced	<a href="https://perma.cc/2YGD-YQGJ">https://perma.cc/2YGD-YQGJ</a>	35,000	Unexpected discharge.
79-014	Apr. 2, 1979	Daisy BB Guns Recalled	<a href="https://perma.cc/96YB-4CPE">https://perma.cc/96YB-4CPE</a>	19,100	Discharge when safety mechanism was engaged.
83-066	Dec. 1, 1983	CO2 Pistol Modification Announced by Smith & Wesson and Daisy	<a href="https://perma.cc/9WK2-BP9N">https://perma.cc/9WK2-BP9N</a>	200,000	Accidental firing when the gun is dropped.
92-140	Sept. 23, 1992	Benjamin-Sheridan Corp. Recalls CO2 and Pneumatic Airguns	<a href="https://perma.cc/8GU8-L67D">https://perma.cc/8GU8-L67D</a>	65,000	Discharge upon disengagement of safety.
97-140	June 9, 1997	CPSC and Gamo USA Announce Recall of BB Air Pistols	<a href="https://perma.cc/N7TP-YTBT">https://perma.cc/N7TP-YTBT</a>	1,335	Unexpected discharge.
04-001	Oct. 2, 2003	CPSC, Crosman Corporation Announce Recall of Air Rifles	<a href="https://perma.cc/29EA-69BC">https://perma.cc/29EA-69BC</a>	1,500	Unexpected discharge.
08-265	May 14, 2008	Air Pistols That Can Fire Unexpectedly Are Recalled by Umarex USA	<a href="https://perma.cc/AX3E-7KQN">https://perma.cc/AX3E-7KQN</a>	7,250	Unexpected discharge.

<b>Press Release No.</b>	<b>Date</b>	<b>Title</b>	<b>URL</b>	<b>Units Affected</b>	<b>Issue/Problem/Risk</b>
08-338	July 23, 2008	Champion's Choice Recalls Walther Air Cylinders for Air Pistols Due to Burst Hazard	<a href="https://perma.cc/7K2J-GRP8">https://perma.cc/7K2J-GRP8</a>	70	Air pistol's cylinders could burst in use or while being filled.
12-730	Apr. 18, 2012	Air Rifles Recalled by Air Venturi Due to Ability to Fire with Safety Switch On	<a href="https://perma.cc/3B3W-W8Z2">https://perma.cc/3B3W-W8Z2</a>	100	Failure of safety switch.
13-019	Oct. 24, 2012	Hatsan USA Recalls Striker Air Rifles Due to Injury Hazard; Rifle Can Fire Unexpectedly	<a href="https://perma.cc/L3X8-YU4M">https://perma.cc/L3X8-YU4M</a>	2,400	Unexpected discharge when closing action.
13-137	Mar. 12, 2013	Soft Air USA Recalls Swiss Arms Air Rifle Due to Injury Hazard; Sold Exclusively at Sports Authority	<a href="https://perma.cc/M4JG-VLU3">https://perma.cc/M4JG-VLU3</a>	2,400	Discharge when safety mechanism was engaged.
19-203	Sept. 10, 2019	Air Rifles Recalled by DIANA Can Unexpectedly Discharge; Risk of Serious Injury and Death	<a href="https://perma.cc/22HD-343C">https://perma.cc/22HD-343C</a>	1,400	Discharge when safety mechanism was engaged.



Table 2. Paintball Gun and Related Recalls

<b>Press Release No.</b>	<b>Date</b>	<b>Title</b>	<b>URL</b>	<b>Units Affected</b>	<b>Issue/Problem/Risk</b>
06-090	Feb. 15, 2006	Paintball Markers Recalled for Ejecting CO2 Cartridges, Hits Users	<a href="https://perma.cc/U5YL-DUR6">https://perma.cc/U5YL-DUR6</a>	243,000	Dangerous ejection of CO2 cartridges from rear of units.
08-320	July 2, 2008	Paintball Gun Adapters Recalled by RAP4 Due to Impact and Laceration Hazards	<a href="https://perma.cc/RP66-D8Y2">https://perma.cc/RP66-D8Y2</a>	2,000	“Remote line adapters” could burst when overtightened
09-153	Mar. 12, 2009	Tippmann® A-5® Paintball Markers Recalled for Repair Due to Risk of Injury	<a href="https://perma.cc/ZL3K-3YSG">https://perma.cc/ZL3K-3YSG</a>	13,000	End cap assembly breakage/ejection.
11-112	Jan. 27, 2011	KEE Action Sports Recalls Paintball Marker Due to Injury Hazard	<a href="https://perma.cc/V2PP-L2WZ">https://perma.cc/V2PP-L2WZ</a>	1,400	Unexpected ejection of CO2 cartridge when users closed lever to chamber.
15-750	Aug. 27, 2015	Tippmann Sports Recalls Paintball Markers Due to Impact Hazard	<a href="https://perma.cc/8WXC-WW33">https://perma.cc/8WXC-WW33</a>	6,500	Failure of safety mechanism.
16-243	Aug. 10, 2016	Shocker Paintball Recalls Paintball Markers Due to Risk of Injury	<a href="https://perma.cc/9CAR-DMYX">https://perma.cc/9CAR-DMYX</a>	5,200	Unexpected ejection of chamber part.

Table 3. Crossbow and Related Recalls

Press Release No.	Date	Title	URL	Units Affected	Issue/Problem/Risk
03-039	Nov. 19, 2002	CPSC, Bear Archery LLC Announce Recall of Compound Bows	<a href="https://perma.cc/329T-MZCJ">https://perma.cc/329T-MZCJ</a>	2,250	200 reports of bow limbs breaking during use, with 7 reported injuries.
06-213	July 14, 2006	Bear Archery Recalls Compound Crossbows Due to Faulty Trigger Mechanisms	<a href="https://perma.cc/PE4C-BRAR">https://perma.cc/PE4C-BRAR</a>	2,000	Crossbows could fire without a trigger pull upon disengagement of safety mechanism.
10-716	Jan. 19, 2010	Rifle Crossbow Recalled by Master Cutlery; Crossbow Can Discharge Unexpectedly	<a href="https://perma.cc/MAG4-QYEW">https://perma.cc/MAG4-QYEW</a>	300	Crossbows could fire without a trigger pull upon disengagement of safety mechanism.
11-039	Nov. 16, 2010	Beman Recalls Bowhunting Arrows; Arrows Can Break and Hit Unintended Targets	<a href="https://perma.cc/4WXZ-QF9Q">https://perma.cc/4WXZ-QF9Q</a>	11,300	Arrows prone to “break when launched and hit unintended targets.”
13-086	Jan. 2, 2013	Academy Sports + Outdoors Recalls Crossbow Cocking Ropes Due to Laceration Hazard	<a href="https://perma.cc/J2RJ-3BQT">https://perma.cc/J2RJ-3BQT</a>	6,300	Breakage of “crossbow cocking ropes,” causing recoil injuries.
13-220	June 19, 2013	Axis Arrows Recalled by Easton Due to Injury Hazard	<a href="https://perma.cc/E3FC-STC2">https://perma.cc/E3FC-STC2</a>	20,700	Arrows prone to “break when fired and hit unintended targets.”
13-724	Feb. 12, 2013	Bohning Recalls Hunting Crossbows Due to Injury Hazard; Can Fire Unexpectedly	<a href="https://perma.cc/6S7K-XCAM">https://perma.cc/6S7K-XCAM</a>	150	Discharge when safety mechanism was engaged.
14-154	Apr. 22, 2014	Excalibur Recalls Crossbows	<a href="https://perma.cc/3PAC-EGU4">https://perma.cc/3PAC-EGU4</a>	1,000	Discharge without trigger pull.

Press Release No.	Date	Title	URL	Units Affected	Issue/Problem/Risk
14-197	June 3, 2014	Mission Archery Recalls Crossbows	<a href="https://perma.cc/WV7J-4UDU">https://perma.cc/WV7J-4UDU</a>	9,500	Discharge without trigger pull.
15-136	May 18, 2015	TenPoint Crossbow Technologies Recalls Crossbows	<a href="https://perma.cc/G3CG-MUSS">https://perma.cc/G3CG-MUSS</a>	127,000	Discharge when safety mechanism was engaged.
16-230	July 21, 2016	Crosman Recalls Crossbow Rope Cocking Devices Due to Injury Hazard	<a href="https://perma.cc/EK7W-VDK5">https://perma.cc/EK7W-VDK5</a>	1,400	Failure of hooks attaching the rope cocking device posed risk of recoil injuries.
17-049	Dec. 8, 2016	Barnett Outdoors Recalls Crossbows Due to Injury Hazard	<a href="https://perma.cc/BZ7X-YQVZ">https://perma.cc/BZ7X-YQVZ</a>	3,300	Arrow-loading sensor malfunction causing unexpected discharge.
17-058	Dec. 20, 2017	Carbon Express Recalls Crossbows Due to Injury Hazard	<a href="https://perma.cc/2XP5-XRWS">https://perma.cc/2XP5-XRWS</a>	3,800	Discharge when safety mechanism was engaged.
17-185	July 17, 2017	TriggerTech Recalls Crossbow and Rifle Triggers Due to Injury Hazard	<a href="https://perma.cc/2VNH-PZHW">https://perma.cc/2VNH-PZHW</a>	2,000	Cracking of carbide rollers caused “discharge without trigger activation.”
18-038	Nov. 16, 2017	Precision Shooting Recalls Archery Crossbows Due to Injury Hazard	<a href="https://perma.cc/VZU9-3GHZ">https://perma.cc/VZU9-3GHZ</a>	17,000	Unexpected discharge.
18-057	Dec. 11, 2017	Ravin Crossbows Recalls Arrow Nocks Due to Injury Hazard <sup>572</sup>	<a href="https://perma.cc/G8J2-TQKE">https://perma.cc/G8J2-TQKE</a>	220,000	Bow discharged during renocking; 44 incidents, including 23 injuries.
76-022	Apr. 12, 1976	CPSC and Wham-O Manufacturing Company Warn of Possible Hazard in Crossbows	<a href="https://perma.cc/WRC6-G7YN">https://perma.cc/WRC6-G7YN</a>	15,000	Latch defect caused premature fire.

<sup>572</sup> Re-announced in August 2021 (No. 21-186) due to “28 new finger injuries reported since the original recall announcement.” See <https://perma.cc/GW6K-HWFG>.

Table 4. Knife Recalls

Press Release No.	Date	Title	URL	Units Affected	Issue/Problem/Risk
20-006	Oct. 4, 2019	Harbor Freight Tools Recalls Gordon Folding Knives Due to Laceration Hazard	<a href="https://perma.cc/J6TA-NMEM">https://perma.cc/J6TA-NMEM</a>	1.1 million	Failure of blade locking mechanism, creating laceration hazard.
12-119	Feb. 28, 2012	Greenlee Recalls Utility Knives Due to Laceration Hazard	<a href="https://perma.cc/Q7G6-MFTQ">https://perma.cc/Q7G6-MFTQ</a>	1,800	Failure of blade locking mechanism, creating laceration hazard.
10-088	Dec. 22, 2009	5.11 Tactical® Knives Recalled Due to Laceration Hazard	<a href="https://perma.cc/J8ZD-CLKS">https://perma.cc/J8ZD-CLKS</a>	19,000	Failure of blade locking mechanism, creating laceration hazard.

Table 5. Gun Lock Recalls

Press Release No.	Date	Title	URL	Units Affected	Issue/Problem/Risk
00-149	July 24, 2000	CPSC, Master Lock Co. Announce Recall to Replace Gun Locks	<a href="https://perma.cc/PT6S-HT24">https://perma.cc/PT6S-HT24</a>	752,000	Gun locks could separate without a key, giving children and others unauthorized access to a firearm.
01-078	Feb. 7, 2001	CPSC, National Shooting Sports Foundation Announce Recall to Replace Project HomeSafe (Now Project ChildSafe) Gun Locks	<a href="https://perma.cc/K5X5-5SNV">https://perma.cc/K5X5-5SNV</a>	400,000	Gun locks could open without a key, giving “unauthorized access to a firearm.”
01-148	May 9, 2001	CPSC, Sturm, Ruger & Company, Inc. Announce Recall to Replace Padlocks and Cable Gun Locks	<a href="https://perma.cc/N43B-TPWN">https://perma.cc/N43B-TPWN</a>	1.2 million	Locks could be opened without key; three reported incidents.

Table 6. Gun Safe Recalls

<b>Press Release No.</b>	<b>Date</b>	<b>Title</b>	<b>URL</b>	<b>Units Affected</b>	<b>Issue/Problem/Risk</b>
24-011	June 9, 2004	Fortress Safe Announces Recall of Biometric Gun Safes Due to Serious Injury Hazard and Risk of Death; One Death Reported	<a href="https://perma.cc/7H3P-ABHL">https://perma.cc/7H3P-ABHL</a>	61,000	The safe's biometric lock could appear to be engaged when it in fact was not. There were 39 reported incidents of "consumers reporting that their safes have been accessed by unpaired fingerprints," including one report of the death of a twelve-year-old boy.
18-203	Aug. 9, 2018	Harbor Freight Tools Recalls Handgun Safes Due to Serious Injury Hazard	<a href="https://perma.cc/XGK7-JYJY">https://perma.cc/XGK7-JYJY</a>	25,000	Electronic handgun safes could "open without the use of a key or combination upon impact and allow unintended access to the contents of the safe, posing a risk of serious injury to children and others."
19-087	Mar. 21, 2019	Alpha Guardian Recalls Stack-On Gun Safes Due to Lock Failure and Injury Hazard	<a href="https://perma.cc/UU77-ZCPB">https://perma.cc/UU77-ZCPB</a>	1,250	Bolt malfunction caused safes to open without key or combination.
16-191	June 9, 2016	Rhino Metals Recalls Handgun Security Safes Due to a Serious Risk of Injury	<a href="https://perma.cc/GM3Z-NPKG">https://perma.cc/GM3Z-NPKG</a>	400	Defect caused safes to open without combination.

Table 6. Gun Holster Recalls

Press Release No.	Date	Title	URL	Units Affected	Issue/Problem/Risk
04-155	June 9, 2004	CPSC, First Samco Inc. Announce Recall to Replace Gun Holsters	<a href="https://perma.cc/3PZG-SXZQ">https://perma.cc/3PZG-SXZQ</a>	3,200	Placement of “plastic or leather strap” on gun holster caused gun trigger to catch when inserted; eight reports of unintentional discharge, including an injury.
05-175	May 17, 2005	CPSC, Michaels of Oregon Announce Recall of Handgun Holsters	<a href="https://perma.cc/NX3B-TLHY">https://perma.cc/NX3B-TLHY</a>	8,000	Movement of “retention strap” out of position caused sudden discharge during reholstering; three reports of incidents.
20-010	Oct. 22, 2019	Federal Cartridge Recalls Blackhawk Gun Holsters Due to Injury Hazard	<a href="https://perma.cc/6P3C-UL23">https://perma.cc/6P3C-UL23</a>	3,100	Flawed design caused position of firearm safety switch to change without user’s knowledge.
20-076	Feb. 20, 2020	Browning Recalls Pistol Holsters Due to Injury Hazard	<a href="https://perma.cc/5MDH-2LPH">https://perma.cc/5MDH-2LPH</a>	1,265	Flawed design caused position of firearm safety switch to change without user’s knowledge.
20-708	Nov. 13, 2019	Mystery Ranch Recalls Holsters for Semi-Automatic Handguns Due to Injury Hazard	<a href="https://perma.cc/E49Y-EAQC">https://perma.cc/E49Y-EAQC</a>	500	“Quick Draw Side Arm Holster[s]” had a faulty retention strap that caused handguns to fall; forty-two reports of the strap disconnecting from the holster.