

2014

Regulating Firearms through Litigation Symposium Article

Patrick Luff

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Luff, Patrick, "Regulating Firearms through Litigation Symposium Article" (2014). *Connecticut Law Review*. 248.

https://opencommons.uconn.edu/law_review/248

CONNECTICUT LAW REVIEW

VOLUME 46

MAY 2014

NUMBER 4

Article

Regulating Firearms Through Litigation

PATRICK LUFF

As a result of relatively weak regulation, firearm use leads to massive negative externalities. Efforts to minimize these social costs via legislation have been unsuccessful, which have led individuals and government entities to seek regulation through another avenue: litigation. This use of the courts as a regulatory gap-filler raises vital questions, among which perhaps the most vital is whether courts are effective at performing this role. This Article seeks to answer that question by comparing the courts as an institution with other institutions, such as markets, legislatures, and administrative agencies. I consider a number of factors that can be used to measure institutional effectiveness, and argue that courts are the optimal (albeit imperfect) institution for dealing with firearm-related externalities. I then consider a number of remedies that could be used to address the firearm-related externalities, concluding that damage awards are appropriate to remedy these social costs, while at the same time creating market-based incentives to reduce future externalities.

ARTICLE CONTENTS

I. INTRODUCTION.....	1583
II. COMPARATIVE INSTITUTIONAL RESPONSES TO FIREARMS	1585
A. FIREARMS AND EXTERNALITIES	1585
B. COMPARATIVE INSTITUTIONAL RESPONSES TO FIREARM REGULATION	1586
III. COMPARING INSTITUTIONS	1596
IV. OPTIMAL INSTITUTIONAL RESPONSES TO FIREARM REGULATION	1600
A. THE CASE FOR MARKET-BASED REGULATION OF FIREARMS.....	1601
B. MEANS OF MARKET-BASED REGULATION	1602
C. THE COMPLEMENTARY ROLE OF THE ELECTED BRANCHES	1606
V. CONCLUSION	1607



Regulating Firearms Through Litigation

PATRICK LUFF*

I. INTRODUCTION

There is little—if any—regulation that seeks to account for the social costs associated with gun use. For the most part, regulation of these social costs is merely a byproduct of crime-control legislation. This regulatory vacuum has led both individuals and local governments to seek regulation through another avenue: litigation against the gun industry.¹ Although the passage of the Protection of Lawful Commerce in Arms Act in 2005 limited the viability of such lawsuits,² the damages this litigation sought could have significantly reduced firearm externalities. First, the damage awards would have shifted some costs to producers and distributors, causing these parties to internalize the costs of firearm-related injuries.³ Second, the internalization would have the subsidiary effect of deterring future costs by incentivizing producers to create safer products and to distribute them more responsibly.⁴ But for now, at least, the use of litigation as a means of regulating these costs has stalled.

The potential use of courts as a means of regulating firearms raises two vital and related questions. First, which institution—markets, legislatures, agencies, or courts—is the most effective at dealing with the regulatory problems firearms present? Second, if courts are to play a regulatory role, under what circumstances is it legitimate for them to do so? I have addressed the latter question in a previous article,⁵ and accordingly, this contribution focuses on answering the former question.

I approach the question of which institution would be most effective at

* Visiting Assistant Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. I owe my thanks to the participants in the *Connecticut Law Review's* Symposium for their helpful comments.

¹ See Philip J. Cook & Jens Ludwig, *Litigation as Regulation: Firearms*, in REGULATION THROUGH LITIGATION 67, 67 (W. Kip Viscusi ed., 2002) (assessing the ways in which local government lawsuits against the gun industry have changed the relevant regulatory perspective); *infra* Part II.B.2 (discussing individual lawsuits against the gun industry).

² See Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified as amended at 15 U.S.C. §§ 7901–7903 (2012)) (prohibiting qualified civil liability actions from being brought against gun manufacturers in federal and state court); *infra* notes 66–71 and accompanying text.

³ See *infra* Part IV.A.

⁴ See *infra* Part IV.A.

⁵ See Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519, 552–53 (arguing that courts are legitimate policymakers when judicial decisions align more closely with the public interest when compared with legislative measures).

regulating firearms through a comparative institutional analysis.⁶ Rather than viewing courts, agencies, or markets in isolation, I compare the institutions based on a number of criteria that are necessary for effective regulation. Accordingly, this Article builds on the work of Timothy Lytton⁷ and Peter Schuck,⁸ both of whom have undertaken comparative institutional analyses of firearms regulation. My analysis, however, differs from these authors in a number of ways.

First, Lytton's methodology is to demonstrate the deficiencies of markets, legislatures, and agencies,⁹ but this comparative analysis is incomplete. Although Lytton identifies weaknesses of these institutions that are not shared by the courts,¹⁰ he does not undertake a global comparison of these institutions based on their costs and benefits. Schuck attempts to do precisely that by positing a number of general factors that are necessary for good regulation,¹¹ and I follow his analysis to the extent that he identifies these indicia of good regulation. My analysis diverges from Schuck's in taking issue with a number of factors he identifies as necessary to effective regulation, at least with respect to regulation of firearms, and by disagreeing with many of his conclusions on the factors on which we agree. Ultimately, in contrast with Schuck, I conclude that courts would be able to effectively deal with the main regulatory problems that firearms present. Nevertheless, I recognize that for complicated regulatory problems, such as those presented by firearms, effective regulation must be multi-institutional.

This Article proceeds in three subsequent parts. In Part II, I discuss social costs and, relatedly, deterrence of social-cost creation as the main aims of firearms regulation. Next, I discuss how two institutions—

⁶ Cf. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 232–55 (1994) (exemplifying the judiciary as a singular institution with its respective tools to carry out the complex and multifaceted venture of constitutional interpretation).

⁷ Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000).

⁸ Peter H. Schuck, *Why Regulating Guns Through Litigation Won't Work*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 225 (Timothy D. Lytton ed., 2005).

⁹ See Lytton, *supra* note 7, at 1249–54 (discussing the shortfalls of market, legislative, and administrative regulation in effectively controlling gun violence).

¹⁰ See *id.* (noting that externalities permeate the gun market, that legislatures are easily influenced by the lobbying efforts of powerful minority interest groups, that administrative agencies tasked with regulating firearms lack resources, and that these agencies also are vulnerable to the influence of the gun industry).

¹¹ See Schuck, *supra* note 8, at 230 (“In order for an institution to make and implement policy effectively, it must (1) generate the technocratic information needed for gun-related policy-making; (2) generate the political information needed to frame an acceptable policy; (3) mobilize the array of different policy instruments necessary to establish and implement the policy; (4) promote social learning (short feedback loops) and flexible adaptation to new conditions; (5) generate predictable rules; and (6) secure and sustain the policy’s legitimacy.”).

legislatures and agencies on the one hand, and courts on the other—could deal with these problems, and whether they have done so in practice. In Part III, I posit criteria for comparing these institutions as firearms regulators and then analyze the institutions based on those criteria. In contrast to Schuck’s analysis, I conclude that courts could be effective firearm regulators. Finally, in Part IV, I discuss the optimal responses of the institutions to the regulatory problems of firearms, arguing that courts are the institution best suited to regulate firearm-related social costs. I then briefly discuss the complementary interaction between courts and markets in regulating the social costs of firearms, and the residual regulatory role of legislatures and agencies.

II. COMPARATIVE INSTITUTIONAL RESPONSES TO FIREARMS

A. *Firearms and Externalities*

An externality is a cost that is not reflected in the price of the good sold; neither the buyer nor the seller is the party who bears the cost, so the cost is external to the transaction.¹² Many environmental regulations are justified on such grounds.¹³ Consider, for example, a factory where a byproduct of the production process is a harmful chemical. The cheapest means of disposing of the chemical may be to dump it in the local river, but doing so might cause a variety of harms. For example, fish might die in the polluted water, or the water may no longer be safe to drink. Both of these results impose costs on the public, but fail to impose costs on the factory or the purchasers of the factory’s products. In contrast, imagine that the EPA enforces a policy that prevents such dumping.¹⁴ Now, the factory has to dispose of the byproduct safely or face fines. The factory will either have to pay for the disposal cost out of its profits or pass the cost on to the consumer in the form of higher prices.¹⁵ Thus, these costs would become internal to the transaction.

Firearms create a number of negative externalities.¹⁶ In 2010, the use

¹² See generally ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 35–38 (1994) (discussing externalities).

¹³ Cf. STEPHEN BREYER, REGULATION AND ITS REFORM 23 (1982) (“A considerable amount of regulation is justified on the ground that the unregulated price of a good does not reflect the true cost to society of producing that good.”).

¹⁴ See, e.g., 33 U.S.C. § 1311(f) (2012) (prohibiting the discharge of chemical waste into navigable waters).

¹⁵ Incidentally, the latter approach transmits some information to the consumer. See *infra* Part IV.A.

¹⁶ For the purposes of this Article, when I refer to “firearm-related externalities” or “social-costs,” I refer to negative externalities.

of firearms led to the loss of over one million years of potential life.¹⁷ On top of this, firearm-related injuries lead to significant healthcare costs,¹⁸ and firearm violence generates substantial public safety costs.¹⁹ In total, firearms contribute to social costs of around \$100 billion per year.²⁰ While some of these costs are borne by gun owners, manufacturers, or distributors, the vast majority of these costs are borne by third parties.²¹ Firearm-related injuries result in considerable productivity losses for the national economy as well as non-pecuniary harms that victims, and their families and friends, must suffer. In addition, the medical costs of firearm-related injuries are borne by private or, more commonly, public insurance schemes.²² In economic terms, these costs are negative externalities that affect neither the producer nor the consumer of the product.²³

B. Comparative Institutional Responses to Firearm Regulation

1. Firearm Legislation

Legislative efforts to regulate firearms generally take the form of command-and-control regulation, that is, regulation via “promulgation of legal rules prohibiting specified conduct, underpinned by coercive

¹⁷ Homicides resulted in the loss of 370,474 years of potential life before the age of 65, and suicide resulted in the loss of 344,232 years of potential life before the age of 65. *Years of Potential Life Lost (YPLL) Reports, 1999–2010*, CDC, <http://webappa.cdc.gov/sasweb/ncipc/ypll110.html> (under Advanced Options select “Specific Injury Category”; then select “Homicide”; then select “Firearm”; then click “Submit Request”; repeat steps but substitute “Suicide” for “Homicide”) (last visited Apr. 15, 2014). In the same year, unintentional deaths from firearms resulted in the loss of 17,973 years of life before the age of 65. *Id.* (under Advanced Options select “Specific Injury Category”; then select “Unintentional”; then select “Firearm”; then click “Submit Request”). If we use the low end of life expectancy in the United States, which is 75, the numbers change to 479,100 years lost to homicide by firearm, 507,244 years lost to suicide by firearm, and 23,653 years lost to unintentional firearm death, for a total loss of 1,009,997 years. *Id.* (under Report Options, look to “Calculate YPLL Before Age” dropdown list and select “75”; repeat steps previously described in this footnote).

¹⁸ The figure was almost \$630 million in 2010. EMBRY M. HOWELL & PETER ABRAHAM, URBAN INST, *THE HOSPITAL COSTS OF FIREARM ASSAULTS* 1, 4 (2013), available at <http://www.urban.org/UploadedPDF/412894-The-Hospital-Costs-of-Firearm-Assaults.pdf>.

¹⁹ See PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* 7 (2002) (“[T]he cost of gun violence is not limited to the immediate damage but has broad consequences for peace of mind, private investment in protection and avoidance, and the expenditure of tax revenues.”).

²⁰ *Id.* at 115.

²¹ See Lytton, *supra* note 7, at 1250 (“[T]he costs of gun violence fall heavily on victims who are not themselves gun consumers.”).

²² Because the majority of firearm-related injuries are the result of intentional use, they will not be covered under private insurance schemes. Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265, Part II.C (2014). If neither Medicaid nor the individual responsible for the injury pay the medical costs, they will be borne by the treating facility, which will then pass these costs on to third parties through higher prices for medical care.

²³ See *supra* text accompanying note 12.

sanctions . . . if the prohibition is violated.”²⁴ Although states have also passed gun control measures, state laws can be ineffective because, unless there are uniform standards, weak gun controls in one state can undermine stronger gun control efforts in other states.²⁵ Accordingly, this Subsection focuses on federal gun control laws.

A number of statutes in the 1920s and 1930s constituted the first major national efforts to regulate firearms. The first substantial statute was the Mailing Firearms Act of 1927.²⁶ This Act prohibited the mailing of concealable firearms through the United States Postal Service,²⁷ but its prohibitions could be evaded through the use of private express companies.²⁸ A short time later, Congress enacted the National Firearms Act of 1934,²⁹ which was intended to reduce gangster-style weapons³⁰ and covered firearms like machine guns, silenced weapons, short-barreled rifles, and short-barreled shotguns.³¹ The Act taxed these items heavily and required them to be registered and bear serial numbers.³² Additionally, it required firearms dealers who sold these weapons to register and pay taxes.³³ Next, Congress passed the Federal Firearms Act of 1938,³⁴ which expanded licensing requirements for firearm manufacturers and dealers, as well as the definition of firearm.³⁵ However, this Act was rendered relatively toothless because the criminal provisions of the bill, which made it illegal to sell stolen weapons or sell to convicted criminals and fugitives from justice, were altered to prohibit only those sales in which the seller knew or had reason to know that the buyer met those conditions.³⁶ It was

²⁴ BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION 80 (2007).

²⁵ See Michael de Leeuw, *Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson*, 45 CONN. L. REV. 1637, 1642–43 (2013) (describing “the relative ease and anonymity with which people can purchase handguns in one state and then transport them elsewhere to sell on the street”)

²⁶ Act of Feb. 8, 1927, Pub. L. No. 69-583, 44 Stat. 1059 (1927) (codified as amended at 18 U.S.C. § 1715 (2012)).

²⁷ *Id.*

²⁸ Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 136 (1975).

²⁹ Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801, 5849).

³⁰ See Brian L. Frye, *The Peculiar Story of U.S. v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 61–63 (2008) (discussing the legislative history of the National Firearms Act); see also Jana R. McCreary, “Mentally Defective” Language in the Gun Control Act, 45 CONN. L. REV. 813, 832 (2013) (describing the National Firearms Act of 1934 as reactionary legislation that was enacted due to concerns about gangsters and organized crime).

³¹ § 1, 48 Stat. at 1236.

³² *Id.* §§ 3, 5(a), 8, 48 Stat. at 1237, 1238, 1239.

³³ *Id.* § 2(a), 48 Stat. at 1237.

³⁴ Pub. L. No. 75-785, 52 Stat. 1250, *repealed by* Pub. L. No. 90-351, § 906, 82 Stat. 197, 234 (1968).

³⁵ *Id.* §§ 1(3), 3, 52 Stat. at 1250, 1251–52.

³⁶ 79 CONG. REC. 11974 (1935).

almost impossible to achieve a conviction based on such language.³⁷ According to Robert Spitzer:

From the 1930s to the 1960s, fewer than 100 arrests were made under the terms of this law. In addition, the low licensing fee encouraged private citizens to acquire dealer licenses to obtain dealer benefits, such as lower prices. When dealer license fees were raised in the 1990s by the Brady Law, the number of dealers dropped precipitously.³⁸

It would be another thirty years before Congress passed another influential firearms law, which took the form of the Gun Control Act of 1968.³⁹ Originally only introduced to restrict mail-order firearm sales after the assassination of President John F. Kennedy in 1963,⁴⁰ the Act finally passed in 1968 after the murders of Martin Luther King, Jr. and Senator Robert F. Kennedy.⁴¹ It expanded the meaning of “dealer” to cover more sales⁴² and required dealers to keep more records on the guns in circulation.⁴³ It also prohibited private interstate sales and sales to minors, the mentally ill, and nonresidents of the state in which the dealer was located.⁴⁴ Yet this too was a relatively limited Act—which was at least partially attributable to the involvement of firearm manufacturers, who were involved in drafting the legislation.⁴⁵ The bill’s sponsor, Senator Thomas Dodd, was from Connecticut, the home of several firearm manufacturers,⁴⁶ and the manufacturers sought to limit competition from small-scale operations that imported, modified, and sold military surplus.⁴⁷

In 1986, the Firearms Owners’ Protection Act⁴⁸ amended the 1968 Act in a way that reflected both the country’s ideological turn to the right and

³⁷ Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919–38*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 55 (1981).

³⁸ ROBERT J. SPITZER, GUN CONTROL: A DOCUMENTARY AND REFERENCE GUIDE 256 (2009).

³⁹ Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 (2012)).

⁴⁰ See Zimring, *supra* note 28, at 146 (noting that Senator Dodd introduced a bill five days after President John F. Kennedy’s assassination that ultimately stalled in the Senate Commerce Committee but nevertheless helped set in motion “the forces leading to the adoption of the Gun Control Act of 1968”). Lee Harvey Oswald shot President Kennedy using a rifle that was purchased and shipped via interstate mail. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 30 (1998).

⁴¹ Zimring, *supra* note 28, at 148.

⁴² § 102, 82 Stat. at 1216.

⁴³ *Id.* § 102, 82 Stat. at 1223.

⁴⁴ *Id.* § 102, 82 Stat. at 1218, 1220.

⁴⁵ See David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 595 (1987) (“[T]he early forms of the Gun Control Act were drafted with the assistance and encouragement of firearms manufacturers.”).

⁴⁶ Zimring, *supra* note 28, at 145–46.

⁴⁷ Hardy, *supra* note 45, at 596.

⁴⁸ Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. § 922 (2012)).

the growing political power of the National Rifle Association (NRA).⁴⁹ In a major revision, the 1986 Act changed the definition of “engaged in the business” to mean devoting “time, attention, and labor” to manufacturing or selling firearms as “a regular course of trade or business with the principal objective of livelihood and profit,”⁵⁰ thereby limiting the scope of the 1968 Act’s application. In addition, the 1986 Act specifically exempted hobbyist traders and those who casually repaired or modified firearms.⁵¹

Seven years later, the pendulum apparently swung in the other direction when Congress passed the Brady Handgun Violence Prevention Act.⁵² According to one scholar, it was “this generation’s most important federal gun control law . . . and, at the moment of its passage, [was] praised . . . as a major turning point in the politics of gun control and crime control.”⁵³ Another scholar observed, however, that the limitations of the Brady Act were actually modest, seeking:

[F]irst, to prevent felons, those judged mentally incompetent or others otherwise unqualified to own handguns to make such a purchase; and second, to provide for a waiting period between the time of the purchase and the customer’s actual acquisition of a handgun in order to provide a “cooling off” period for those who might seek a handgun in a fit of temper or rage.⁵⁴

The Act also mandated that the waiting period be replaced with a national instant background check system within five years,⁵⁵ although portions of the background check provision, which required local law enforcement officials to perform certain duties, were invalidated in *Printz v. United States*.⁵⁶ Moreover, the Act increased the federal licensing fees,⁵⁷ resulting in a decrease in the number of licensees by more than 60,000 in a year’s time.⁵⁸ But it is easy to overestimate the significance of this

⁴⁹ SPITZER, *supra* note 38, at 266.

⁵⁰ § 101, 100 Stat. at 450 (codified as amended at 18 U.S.C. § 921(a)(21)(A), (C)).

⁵¹ *Id.* (codified as amended at 18 U.S.C. § 921(a)(21)(C)–(D)).

⁵² Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–922).

⁵³ JAMES B. JACOBS, CAN GUN CONTROL WORK?, at x (2002).

⁵⁴ SPITZER, *supra* note 38, at 276; *see also* § 102, 107 Stat. at 1538 (codified as amended at 18 U.S.C. § 922(d)(4)) (requiring a transferee to state that he or she “has not been adjudicated as a mental defective or been committed to a mental institution”); *id.* § 102, 107 Stat. at 1537 (outlining a five business day waiting period).

⁵⁵ § 103, 107 Stat. at 1541.

⁵⁶ 521 U.S. 898, 935 (1997).

⁵⁷ *See* § 303, 107 Stat. at 1546 (setting fees at “\$200 for 3 years, except that the fee for renewal of a valid license shall be \$90 for 3 years”).

⁵⁸ U.S. GOV’T ACCOUNTING OFFICE, GAO/GGD-96-22, GUN CONTROL: IMPLEMENTATION OF THE BRADY HANDGUN VIOLENCE PREVENTION ACT 19 (1996).

number, as this fee increase mostly discouraged individuals “who were not really gun dealers, but who got the formerly cheap licenses to obtain discounts and other advantages” from obtaining licenses.⁵⁹

The following year, Congress passed the Public Safety and Recreational Firearms Use Protection Act,⁶⁰ which banned all assault weapons and magazines or ammunition clips holding or easily modified to hold more than ten rounds.⁶¹ The Act defined assault weapons as specific firearms or copies of them, as well as weapons with at least two listed features, such as folding stocks, threaded barrels (to which silencers and the like can be attached), pistol grips, and bayonet mounts.⁶² However, it specifically exempted possession or transfer of guns already in circulation in 1994.⁶³ Most significantly, the Act was allowed to expire in 2004;⁶⁴ attempts to revive it have been unsuccessful, even after the Newtown shooting.⁶⁵

The most recent piece of significant federal firearms legislation, and the one most relevant to this Article, is the Protection of Lawful Commerce in Arms Act of 2005.⁶⁶ This Act exempts “manufacturers, distributors, dealers, or importers of firearms or ammunition . . . [from liability] for the harm solely caused by the criminal or unlawful misuse of [their] products by others when the product functioned as designed and intended.”⁶⁷ The Act does allow claims against sellers for negligent entrustment or negligence per se,⁶⁸ and claims against manufacturers for breach of warranty,⁶⁹ design defects,⁷⁰ or knowingly violating statutory requirements related to firearm sales.⁷¹ Part of this Act, independently known as the Child Safety Lock Act of 2005,⁷² requires handguns to be sold with a “gun storage or safety device”⁷³ and prohibits armor-piercing rounds.⁷⁴ But this

⁵⁹ SPITZER, *supra* note 38, at 276. Not surprisingly, those who received NRA campaign contributions were statistically more likely to vote against the bill. Jody Lipford, *The Political Economy of Gun Control: An Analysis of Senatorial Votes on the 1993 Brady Bill*, 12 J. FIREARMS & PUB. POL’Y 33, 44–45 (2000).

⁶⁰ Pub. L. No. 103-322, tit. XI, 108 Stat. 1996 (1994).

⁶¹ *Id.* §§ 110103, 110105, 108 Stat. at 1998–2000.

⁶² *Id.* § 110102(b), 108 Stat. at 1997–98.

⁶³ *Id.* § 110102(a), 108 Stat. at 1997.

⁶⁴ *Id.* § 110105(2), 108 Stat. at 2000.

⁶⁵ Jonathan Weisman, *Gun Control Drive Blocked in Senate, Obama, in Defeat, Sees “Shameful Day,”* N.Y. TIMES, Apr. 18, 2013, at A1.

⁶⁶ Pub. L. No. 109-92, 119 Stat. 2095 (codified as amended at 15 U.S.C. §§ 7901–7903, 18 U.S.C. § 922 (2012)).

⁶⁷ 15 U.S.C. § 7901(b).

⁶⁸ *Id.* § 7902(5)(A)(ii).

⁶⁹ *Id.* § 7902(5)(A)(iv).

⁷⁰ *Id.* § 7902(5)(A)(v).

⁷¹ *Id.* § 7902(5)(A)(iii).

⁷² Pub. L. No. 109-92, 119 Stat. 2099, 2099 (codified as amended at 18 U.S.C. § 922 (2012)).

⁷³ 18 U.S.C. § 922(z)(1).

legislation was a direct reaction to the litigation discussed in the following Subsection, and is not shy about making its attack on these lawsuits explicit. As a result, this Act precludes the types of litigation that would be necessary in order for courts to be an effective institution for regulating firearm-related externalities.

2. *Firearm Litigation*

Before discussing firearm litigation, it is necessary to distinguish two separate types of injuries caused by guns. One group of injuries results from intentionally violent gun use, of which a large component is suicide.⁷⁵ Cases relating to such injuries allege either negligent entrustment against gun dealers or harmful marketing and sales practices against gun distributors and manufacturers. The other group of injuries results from the misuse—or accidental use—of guns. Cases relating to these injuries involve either straightforward products liability claims against manufacturers when guns malfunction, which are often successful,⁷⁶ or design defect claims against manufacturers or distributors. The marketing and design cases have been the focus of the gun litigation controversy.⁷⁷

Among the negligent entrustment cases, *Gallara v. Koskovich*⁷⁸ is typical. In *Gallara*, the court held that a sporting goods store that sold firearms had a duty to take reasonable measures to ensure that guns would not be stolen and subsequently used for criminal activity.⁷⁹ Notably, the court announced that “those who profit from the sale of firearms have a special responsibility to the public to adhere to state mandated security regulations that require responsible firearm storage in order to prevent lethal weapons from winding up in the wrong hands.”⁸⁰ However, this hardly represents a universal position in negligent entrustment claims.⁸¹ At least some courts do, however, hold distributors liable when they violate statutes that prohibit the sale of firearms to certain people, such as the clearly mentally impaired or felons whom they know are ineligible to

⁷⁴ *Id.* § 922(a)(7).

⁷⁵ See *supra* note 17 (observing that suicides resulted in the loss of 344,232 years of potential life in 2010).

⁷⁶ Timothy D. Lytton, *Introduction* to *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS*, *supra* note 8, at 1, 5.

⁷⁷ *Id.*

⁷⁸ 836 A.2d 840 (N.J. Sup. Ct. App. Div. 2003).

⁷⁹ *Id.* at 843.

⁸⁰ *Id.* at 851.

⁸¹ See, e.g., *Valentine v. On Target, Inc.*, 727 A.2d 947, 948, 950 (Md. 1999) (holding that a dealer owed no special duty to a murder victim where there were no “circumstances that increased the probability that a thief would steal guns from its retail store and that a third unknown party would obtain one of those stolen guns and use it in a criminal manner”).

purchase a firearm.⁸²

In contrast, the marketing and sales/distribution cases proceed on the assumption that “one is generally under no duty to prevent even foreseeable injuries where the risk of injury arises out of the conduct of a third party.”⁸³ We can see this principle animating cases such as *Grunow v. Valor Corp. of Florida*,⁸⁴ in which a Florida appellate court held that Florida law “does not recognize a cause of action for negligent distribution of a non-defective firearm.”⁸⁵ Courts have relaxed this general principle, however, where the defendant has a unique ability to control the risk. With respect to gun litigation, the question is whether regulation of marketing and sales practices would reduce gun violence, although some courts have not analyzed the question in this way.⁸⁶

In *Hamilton v. Accu-Tek*,⁸⁷ a federal district court cited New York law to explain that a defendant’s duty is “determined in a given case by reference to a variety of factors including reasonableness in the light of public risk-shifting policies in a modern economy.”⁸⁸ Likewise, the court noted that New York state courts have “repeatedly emphasized the policy oriented nature of the duty determination.”⁸⁹ It further observed concerns about third-party duties of care grounded in the fear of crippling liability and the inability of the third-party to prevent the harm.⁹⁰ But the court noted that these concerns could be overcome “where a relationship between the defendant and either the plaintiff or the third party wrongdoer provides the defendant with the ability to minimize the risk,”⁹¹ which the court found was present with respect to the manufacturers.⁹² While on appeal to the Second Circuit, the duty of care question was certified to the

⁸² See, e.g., *Sogo v. Garcia’s Nat’l Gun, Inc.*, 615 So. 2d 184, 186 (Fla. Dist. Ct. App. 1993) (finding that the gun purchaser was “within the class intended to be protected by the ordinance” and the seller had “knowledge of the . . . ordinance and the risk that it was designed to guard against”); *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 271–72 (Fla. Dist. Ct. App. 2001) (holding a pawnshop strictly liable for injuries attributable to the violation of a Florida statute prohibiting firearm sales to those of “unsound mind”).

⁸³ Lytton, *supra* note 76, at 8.

⁸⁴ 904 So. 2d 551 (Fla. Dist. Ct. App. 2005).

⁸⁵ *Id.* at 554.

⁸⁶ Lytton categorizes these cases either as claims of “oversupply,” “overpromotion,” or “failure to supervise retail dealers.” *Id.* at 9–11; see also *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1064 (N.Y. 2001) (considering oversupply practices of weapons as an answer to reduction of gun violence).

⁸⁷ 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *vacated sub nom*, *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001).

⁸⁸ *Id.* at 819.

⁸⁹ *Id.*

⁹⁰ *Id.* at 819–20.

⁹¹ *Id.* at 820.

⁹² *Id.* at 821.

New York Court of Appeals,⁹³ which disagreed with the district court's conclusion that the manufacturers were in the best position to prevent the harm and accordingly ruled that the manufacturers did not owe the plaintiffs a duty of care.⁹⁴

In an overpromotion case, *Merrill v. Navegar, Inc.*,⁹⁵ a California appellate court held that a manufacturer "owed [plaintiffs] a duty to exercise reasonable care not to create risks above and beyond those inherent in the presence of firearms in our society."⁹⁶ The Supreme Court of California reversed, however, holding that this sort of suit was precluded by statute.⁹⁷ Subsequently, California's legislature amended its statute to allow these types of suits.⁹⁸ Courts have also allowed public nuisance claims to proceed in overpromotion cases on the theory that manufacturers' and distributors' sales practices have created a public nuisance.⁹⁹

The products liability cases proceed on the theory that producers and distributors have a general duty to consumers buying their products.¹⁰⁰ Products may be defective either because of manufacturing errors, unsafe designs, or inadequate labeling.¹⁰¹ According to the *Restatement (Third) of Torts: Products Liability*:

⁹³ *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 39 (2d Cir. 2000). Federal courts sitting in diversity, in which they perform the role of state courts, can request that a state court clarify points of state law. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1072 (6th ed. 2009).

⁹⁴ *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061–62, 1066 (N.Y. 2001).

⁹⁵ 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

⁹⁶ *Id.* at 152.

⁹⁷ *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001).

⁹⁸ See CAL. CIV. CODE § 1714(a) (West 2009) ("The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section.").

⁹⁹ See *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1215 (9th Cir. 2003) (reversing a district court's ruling that granted a firearms manufacturer's motion to dismiss a public nuisance claim and reasoning that "the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and the plaintiffs in particular" can give rise to a public nuisance claim); *James v. Arms Tech., Inc.*, 820 A.2d 27, 51 (N.J. Super. Ct. App. Div. 2003) (agreeing with the trial court that it was "premature to dismiss the nuisance count in light of the definition of public nuisance" because the distributors' conduct, as pleaded, presented an unreasonable interference with the right of the general public and a significant effect on the public); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141–44 (Ohio 2002) (finding that the plaintiffs adequately pleaded that a gun manufacturer "created and maintained a public nuisance by manufacturing, marketing, distributing, and selling firearms in ways that unreasonably interfere[d] with the public health"); see also Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 MICH. J.L. REFORM 1, 23–37 (2004) (discussing cases that allowed plaintiffs to bring public nuisance claims against gun manufacturers).

¹⁰⁰ See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

¹⁰¹ *Id.* § 2.

A product: (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.¹⁰²

So, for example, in *Cincinnati v. Beretta U.S.A. Corp.*,¹⁰³ the Supreme Court of Ohio held that a plaintiff could bring a failure-to-warn claim because the risk that a gun could hold a bullet in its chamber even without a magazine installed was not “open and obvious.”¹⁰⁴

While products liability cases alleging a failure to warn have been successful, the argument that manufacturers should be held strictly liable because the manufacture, distribution, and sale of firearms is an abnormally dangerous activity has been largely rejected.¹⁰⁵ One exceptional case imposed strict liability on manufacturers of a “Saturday Night Special,” which are often defined as “small, cheap handgun[s] used in criminal activity.”¹⁰⁶ However, in a show of the strength of the industry lobby, the Maryland legislature overturned the rule of strict liability for such manufacturers and created a review board that would regulate handguns likely to be used in criminal activities.¹⁰⁷

¹⁰² *Id.*

¹⁰³ 768 N.E.2d 1136.

¹⁰⁴ *Id.* at 1147.

¹⁰⁵ Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 777 (1994).

¹⁰⁶ *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1153 n.8 (Md. 1985), *superseded by statute*, MD. CODE ANN. PUB. SAFETY § 5-402 (West 2013), *as recognized in Copier ex rel. Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 836 n.3 (10th Cir. 1998). One study found that banning “Saturday Night Specials” in Maryland reduced the firearm homicide rate by around eleven percent. Daniel W. Webster, Jon S. Vernick & Lisa M. Hepburn, *Effects of Maryland’s Law Banning “Saturday Night Special” Handguns on Homicides*, 155 AM. J. EPIDEMIOLOGY 406, 409 (2002).

¹⁰⁷ MD. CODE ANN. PUB. SAFETY §§ 5-402, 5-404. The manufacturer nevertheless stopped selling the gun that was the subject of the litigation, showing that the litigation had at least some regulatory effect. *See Lytton, supra* note 76, at 6 (recognizing that as a result of courts imposing strict

The unsafe design cases proceed either by performing risk-utility analyses or by arguing that the manufacturers should be liable because there are reasonable alternative designs, but these claims have been unsuccessful.¹⁰⁸

The only significant win in the firearms litigation came in 2000, when Smith & Wesson agreed to settle suits with the federal government, New York, Connecticut, and a number of municipal governments.¹⁰⁹ The company vowed to change its distribution practices and make its firearm designs safer by ensuring, for example, that they will not accidentally discharge when dropped and that children under the age of six cannot fire them.¹¹⁰ This result was significant because it “undercut the gun industry’s traditional position that gun manufacturers have neither the ability nor the responsibility to design guns to reduce the risk of misuse.”¹¹¹ However, due to a change in federal administrations and backlash from the industry and the NRA, the settlement deal unraveled—with the result that only one city, Boston, actually resolved its suit with Smith & Wesson.¹¹²

On the whole, this litigation has had a limited effect on manufacturer and distributor behavior. One major exception has been Colt, which changed its business practices by discontinuing certain product lines and selling more to police departments and the military.¹¹³ Colt felt that these changes were necessary in light of the gun litigation, which made it difficult for the company to secure loans given the potential for such lawsuits to bankrupt the company.¹¹⁴ In 2002, Colt Defense split off from Colt Manufacturing, with the former being expected to cater to the government market.¹¹⁵ (As of 2013, these sister companies were

liability on manufacturers in *Kelley v. R.G. Industries*, they “ceased production and sale of Saturday Night Specials”).

¹⁰⁸ See, e.g., *Matthews v. Remington Arms Co., Inc.*, 641 F.3d 635, 641 (5th Cir. 2011) (holding that under the Louisiana Products Liability Act, a reasonable alternative design argument is only relevant if the user was performing a reasonably anticipated use of the product); *Dix v. Beretta U.S.A. Corp.*, No. A093082, 2002 WL 187397, at *1 (Cal. Ct. App. Feb. 6, 2002) (explaining that the jury in the lower court returned a verdict in favor of the gun manufacturer under a risk-utility analysis because the gun was not defective “as a result of a risk in its design that outweigh[ed] the benefits of that design”); *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1158–59 (Md. 2002) (choosing to apply the consumer expectation test over a risk-utility test and finding no cause of action in the case).

¹⁰⁹ Dennis A. Henigan, *Smith & Wesson Settlement Agreement*, in 1 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND THE LAW 542 (Gregg Lee Carter ed., 2002).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Cf. Schuck, *supra* note 8, at 240 (attributing Smith & Wesson’s decision not to go through with the settlement agreements to the belief that it was “literally fighting for its economic life and must resist compliance as strenuously and resourcefully as it can”).

¹¹³ Mike Allen, *Colt’s to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999, at A1.

¹¹⁴ *Id.*

¹¹⁵ *Colt Makers Reunited in \$60.5M Merger*, HARTFORDBUSINESS.COM (July 16, 2013), <http://www.hartfordbusiness.com/ARTICLE/20130716/NEWS01/130719947>. It is worth noting that

rejoined.)¹¹⁶ Similarly, litigation or the threat of litigation led several smaller gun companies to seek bankruptcy protection in the mid- to late-1990s. For example, Lorcin Engineering, a manufacturer of “Saturday Night Specials,” declared bankruptcy in 1996 and went out of business in 1999,¹¹⁷ and both Davis Industries and Sundance Industries filed for bankruptcy protection in 1999.¹¹⁸

Thus far, then, efforts by both legislatures and litigants to regulate firearms have been largely ineffective. Since the main regulatory problems associated with firearms are largely unaddressed, it is worth considering how we might optimize the institutional arrangements for regulating these problems, so that future efforts can be appropriately channeled. The remainder of the Article addresses this issue.

III. COMPARING INSTITUTIONS

This Part supports the claim that courts are institutionally better at regulatory policymaking in the realm of firearms when compared to the elected branches of government. Peter Schuck has suggested six factors to evaluate the regulatory effectiveness of the courts in firearm litigation compared to the elected branches’ responses to the social problems firearms create.¹¹⁹ Schuck argues that elected branches are more effective and legitimate than the courts; in contrast, I argue that both in theory and in the context of the firearm litigation, it is actually the courts that are superior on both counts.

First, effective policymaking institutions must be capable of producing or procuring the necessary technocratic information. Indeed, according to Schuck, “[a] legal system’s ability to mobilize high-quality policy-relevant facts for the lawmakers at a relatively low cost is perhaps the most

gun litigation was only one factor contributing to Colt’s distress in the time leading up to the 2002 split. Calls for a grassroots boycott of Colt began in 1998 when then-CEO Ron Stewart committed the outrageous sin of admitting that greater gun regulation might be inevitable. Henry Goldman, *Colt’s Chief Stands Up For Federal Control*, PHIL. INQUIRER (July 13, 1998), http://articles.philly.com/1998-07-13/news/25738137_1_gun-control-proposals-gun-control-federal-gun.

¹¹⁶ *Colt Makers Reunited in \$60.5M Merger*, *supra* note 115.

¹¹⁷ Sharon Walsh, *Insurers Are Bailing Out on Gun Industry*, WASH. POST, Nov. 26, 1999, at A1.

¹¹⁸ Paul M. Barrett, *Some Small California Gun Firms File Under Bankruptcy Code as Cities Sue*, WALL. ST. J., Sept. 13, 1999, at B10. Many of these companies were spinoffs of Raven Arms. Bob Port, *Prepare to Meet Thy Gunmaker*, New York, N.Y. DAILY NEWS, Nov. 17, 2002, at 34; *Hot Guns: Ring of Fire “Families,”* FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/guns/ring/families.html> (last visited Jan. 30, 2014).

¹¹⁹ See Schuck, *supra* note 8, at 230 (“In order for an institution to make and implement policy effectively, it must (1) generate the technocratic information needed for gun-related policy-making; (2) generate the political information needed to frame an acceptable policy; (3) mobilize the array of different policy instruments necessary to establish and implement the policy; (4) promote social learning (short feedback loops) and flexible adaptation to new conditions; (5) generate predictable rules; and (6) secure and sustain the policy’s legitimacy.”).

important precondition for the effectiveness of its policies.”¹²⁰ While the statutory and rulemaking procedure in the elected branches are theoretically designed to allow widespread democratic input, procedural rules limit the availability of certain types of information in the courts. A first step, therefore, in determining the informational basis of decision making has to take into account the procedural rules governing the decision-making process. In addition to the theoretical capacity for an institution to produce information, it is also important to consider whether the incentive structure of the participants is designed to bring forward the respective information.

Agencies are often touted for their ability to generate information.¹²¹ The statutory and rulemaking procedures available to the elected branches allow widespread democratic input; theoretically, anyone can offer their opinion to legislators and administrative agencies,¹²² which should lead to agencies having more and better information. In contrast, procedural rules limit the availability of certain types of information in the courts, as well as who may contribute that information.¹²³ These two institutions also have different incentive structures for participants to bring forward the respective information. Whereas in the process of elected branch policymaking all interested parties are presumed to be motivated to volunteer their knowledge to influence the regulatory outcome, the judicial process can disincentivize the dissemination of information.¹²⁴ Yet the potentially large damages awards create an incentive for attorneys to produce and share technocratic information; even if a defendant party lacks the incentive to produce potentially damaging information, plaintiffs do have that incentive.

More importantly, this is only true for regulatory problems that are technocratic. One way to limit firearms-related social costs is through command-and-control regulation that requires particular designs,

¹²⁰ *Id.* at 231.

¹²¹ See Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 696 (2007) (“Contemporary analysts generally take for granted the ‘fact’ that regulatory agencies enjoy far greater access to information . . . than their judicial counterparts.”); see also Schuck, *supra* note 8, at 232 (discussing which institutions are best equipped to minimize informational deficits in regards to specific policy problems).

¹²² In cases of informal rulemaking, § 553(c) of the Administrative Procedure Act allows “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(c) (2012). In the rare instances of formal rulemaking, § 556(d) provides the opportunity to submit one’s views. *Id.* § 556(d).

¹²³ See, e.g., FED. R. APP. P. 29 (restricting the participation of non-state amici curiae); FED. R. EVID. 402 (excluding irrelevant evidence); FED. R. EVID. 802 (excluding hearsay evidence); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (discussing constitutional standing requirements); cf. Schuck, *supra* note 8, at 233 (“[D]iscovery can be notoriously aggressive and intrusive . . . [b]ut this access to existing files hardly translates into providing the decision maker . . . with the kind of information she would want . . .”).

¹²⁴ Schuck, *supra* note 8, at 233–34.

distribution patterns, and the like. But the damages-based solution proposed in Part IV obviates the need for regulators to generate such information because the market would be incentivized to create this information itself. As a result, it is court-based regulation that will in fact produce the relevant information on such things as optimal safety designs.

Second, effective policymaking requires “political information needed to frame an acceptable policy.”¹²⁵ This includes data such as voter preferences and their intensity, levels of support and opposition for particular policies among both policymakers and those affected by them, and potential media reactions to policies.¹²⁶ Surely, Schuck correctly identifies the importance of voter preferences and, to a point, the intensity of such preferences. But much of the political information Schuck sees as relevant—for example, potential reactions of lobbyists and the ability to sway vital political actors—is only important when the policymaking process is, for lack of a better term, political. Democratic support is an important tool to measure the legitimacy and effectiveness of regulation. Thus, the statutory process was originally seen as suitable to determine the politically most-supported outcome. However, the increasing number of veto gates as well as political horse-trading and private-interest capture undermine the causal connection between public support and legislative outcome.¹²⁷ These political realities influence the regulatory decisions made by the elected branches. Policymaking in the courts is advantageous in part precisely because the forum allows policymaking to take place without political obstruction. Additionally, while Schuck is correct that interest groups can often present at least a crude picture of voter preferences and preference intensity, this is not empirically correct within the realm of firearm regulation. For example, studies repeatedly show that the NRA, which dominates the political landscape of firearm regulation, rarely represents the policy preferences of its members.¹²⁸ In addition, as with the previous factors, the market-based regulatory solution this Article recommends creates a system in which preferences are revealed through market behavior.

Third, Schuck argues that effective policymaking also requires

¹²⁵ *Id.* at 230.

¹²⁶ *Id.* at 236.

¹²⁷ Tanya Bagashka, *Unpacking Corruption: The Effect of Veto Players on State Capture and Bureaucratic Corruption*, 20 POL. RES. Q. 1–3 (2013).

¹²⁸ See, e.g., Colleen L. Barry et al., *After Newtown—Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1077 (2013) (finding 74% of NRA members favor universal background checks); Michael Cooper & Dalia Sussman, *Massacre Sways Public in Way Others Did Not*, N.Y. TIMES, Jan. 18, 2013, at A16 (finding 85% of households containing an NRA member favor universal background checks for gun purchasers); see also David Kairys, *Self-Defense and Gun Regulation*, 45 CONN. L. REV. 1669, 1682 (2013) (hypothesizing that Americans support the NRA despite favoring many regulations opposed by the NRA solely because the NRA supports and protects gun ownership).

regulators to have a variety of means through which they can “create and shape the incentives necessary to secure compliance.”¹²⁹ The fact that courts “possess few instruments for securing compliance, and they tend to be weak, inflexible, or both,” he asserts, makes them comparatively poor policymakers.¹³⁰ As Schuck himself admits, however, the “damage remedy . . . is often perfectly adequate for the purpose of inducing defendants’ straightforward compliance,” although this power can be limited when the target of the suit is a relatively small-scale manufacturer or distributor.¹³¹ Thus, compared to the elected branches, courts may be limited as a general matter. Nevertheless, courts are sufficiently able to react flexibly and effectively in the face of firearm-related risk-regulatory challenges. While court-based remedies may lack flexibility in the face of changed circumstances, this is only an issue when the regulatory problem and legal standards need flexibility. Changes in technology and scientific knowledge warrant flexibility with respect to standard-setting in environmental regulation, for example. In contrast, it does not appear that the types of regulations commonly discussed in firearm litigation, such as changes in distribution practices or design changes, warrant the same level of flexibility. Should modification of a particular remedy be warranted, moreover, parties have the ability to petition the court and explain why the remedy is unexpectedly onerous or why new information shows the remedy to be unavailing or perverse.¹³² Likewise, court remedies may not have the industry-wide effect that an agency-based approach can have. But to criticize courts on such a basis is to compare apples to oranges; to do so is akin to saying that an individual enforcement action by an administrative agency does not have systemic effect. Importantly, the series of lawsuits constitutes a system of regulatory governance just as a series of enforcement actions by an administrative agency would. Additionally, this ignores the potential of multiparty litigation and the extent to which litigation against the industry leaders can have industry-wide or at least substantial effects.¹³³ Finally, to reiterate, the market-based effects of social-cost internalization would be systemic.

Fourth, Schuck argues that “[p]erhaps no resource is more essential to

¹²⁹ Schuck, *supra* note 8, at 238.

¹³⁰ *Id.*

¹³¹ *Id.* at 239.

¹³² See, e.g., FED. R. CIV. P. 60(b) (outlining the circumstances when a court may relieve a party or its legal representative from a final judgment, order, or proceeding).

¹³³ Three brands—Sturm, Ruger & Co.; Smith & Wesson; and Remington—account for forty-one percent of domestic firearm sales in the United States. Jurgen Brauer, *The U.S. Firearms Industry: Production and Supply* 12 (Small Arms Survey, Working Paper No. 14, 2013), available at <http://www.smallarmsurvey.org/fileadmin/docs/F-Working-papers/SAS-WP14-US-Firearms-Industry.pdf>. In 2012, the top eight brands manufactured around seventy percent of the nation’s pistols and rifles and nearly one hundred percent of the nation’s revolvers and shotguns. *Id.* at 50 fig.7.

a society's policy wisdom than its capacity to learn and to adapt swiftly and creatively to changing conditions."¹³⁴ This observation is susceptible to the same observations as his third argument; that is, flexibility is only useful for policy problems warranting flexible solutions, such as those made upon in the face of scientific uncertainty. Such flexibility can be achieved through price changes made by manufacturers and distributors.

Fifth, Schuck notes the importance of predictability.¹³⁵ This criterion is assailable on two counts. First, it has the potential to prove too much. If "[t]ort rules are much less determinate and transparent than regulations, other things being equal,"¹³⁶ and the question is always one of comparison with administrative agencies, then it is not clear that tort law is valuable at all, which surely must be false. More importantly, this line of argument makes predictability an end in itself, which is also problematic. The substantive result is much more important—a stable and predictable policy that clearly under-deters wrongful conduct seems inferior to an unstable one that optimally deters. Additionally, predictability is at odds with the flexibility that Schuck also extols.¹³⁷ Policies that take account of changed circumstances, variable social attitudes, or additional information are unpredictable. The substantive result we should expect from a system that accounts for changed circumstances is modified legal obligations. Nevertheless, a system that is too unpredictable is surely undesirable, and perhaps incremental change is the preferred outcome.

I have discussed Schuck's final criterion—the institution's ability to "secure and sustain the policy's legitimacy"—in a previous work.¹³⁸ It is precisely the systemically skewed policymaking system of the elected branches (especially the legislature) that makes the courts superior policymakers with respect to legitimacy. On the basis of these observations, it seems that the courts are generally the best institution for regulating firearm-related social costs. As a result, courts, rather than legislatures and agencies, are the preferred institution for dealing with the regulatory problems this Article discusses. This conclusion is further bolstered by the market-driven system of regulation I suggest in the following Part.

IV. OPTIMAL INSTITUTIONAL RESPONSES TO FIREARM REGULATION

We have seen that the main regulatory problems for firearms are social-cost externalities. Courts are better at dealing with these problems

¹³⁴ Schuck, *supra* note 8, at 241.

¹³⁵ *Id.* at 242.

¹³⁶ *Id.* at 243.

¹³⁷ *See id.* at 238 (describing current inflexibility involved in judges' recourse in tort cases).

¹³⁸ *See* Luff, *supra* note 5, at 553–54 (comparing the stability of the judiciary with the legislature while describing both as relatively secure entities).

than the elected branches because they have been more successful at generating technocratic information, and because these regulatory problems could be dealt with adequately through the courts' ability to grant injunctions and damages awards. Courts are also able to act freely, without the need for congressional delegations of power—which are often denied because of the NRA's influence in the legislative process.¹³⁹ This Part focuses on three possible ways of dealing with the social costs of firearms: (1) taxation; (2) compensation funds; and (3) individual or enterprise liability. A brief final Section then discusses the role that legislature and agencies should play in regulating firearm-related injuries.

A. *The Case for Market-Based Regulation of Firearms*

In a market-based regulation regime, the costs or potential costs of litigation are charged to the firearms manufacturers, which distribute the costs among themselves, distributors, and the purchasers.¹⁴⁰ These market effects will, in turn, have behavioral effects on manufacturers and distributors. First, all other things being equal, more dangerous products will produce greater social costs, which will be charged back to the manufacturers through litigation.¹⁴¹ This will cause the price of the product to better reflect its risk and also discourage people from buying this now more expensive product. As a result, forcing manufacturers to internalize the social costs of their products will deter consumers from purchasing dangerous products. Second, this process means that more dangerous products will be at a market disadvantage, which will create an incentive for the manufacturers to design safer products, as well as to compete to find optimally safe designs.¹⁴²

In the case of firearms distribution, if particular distributors and stores sell those guns that account for a large amount of social costs, the manufacturers, distributors, and stores have incentives to change their distribution practices. Specifically, the manufacturers will have an

¹³⁹ See Bruce Rogers, *NRA Winning the Influence Battle Over Gun Control*, FORBES (Feb. 1, 2013), <http://www.forbes.com/sites/brucerogers/2013/02/01/nra-winning-the-influence-battle-over-gun-control/> (analyzing the success of NRA's influence upon legislation). The NRA has even used its political influence to convince Congress not to fund research into the causes and prevention of gun violence. Andrew Jay McClurg, *Firearms Policy and the Black Community: Rejecting the "Wouldn't You Want a Gun If Attacked?" Argument*, 45 CONN. L. REV. 1773, 1798 (2013).

¹⁴⁰ See Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines and Motor Vehicles*, 97 AM. J. PUB. HEALTH 1991, 1996 (2007) (stating that most industries pass the costs of the threat of litigation onto consumers and it would be a reasonable response by firearm industry).

¹⁴¹ See Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOLOGIC REVS. 90, 90 (2003) (describing how process of litigation transfers the costs of injuries onto entities that could have prevented injuries).

¹⁴² See *id.* at 90–91 (discussing the impact discovery and publicity related to litigation can have in producing product modifications).

incentive not to supply particular distributors, and the distributors will have an incentive not to supply particular stores. Moreover, this will give the manufacturers and distributors the incentive to produce information evaluating which stores account for larger amounts of social costs so that they can take corrective action.

Social-cost internalization would also create an incentive for both manufacturers and consumers to support such programs as national mandatory background checks—to which they (and the NRA) have traditionally been opposed—as background checks are likely to reduce social costs.¹⁴³ Background checks are intended to weed out purchasers who are likely to misuse firearms from the market, with a particular focus on potential purchasers with violent tendencies. Preventing these purchasers from buying firearms is not currently in manufacturers', distributors', or stores' interests because they bear few or no costs when their products are misused.¹⁴⁴ If they bore these costs, however, they would have the incentive to support background checks, since the checks could reasonably be expected to reduce social costs. Finally, social cost internalization would lead to support for changes in the sales practices at gun shows and on the Internet, which currently represent a big gap in the national background check system. That is, manufacturers would have the incentive to ensure their guns are being sold to responsible individuals.¹⁴⁵ As a result, social-cost internalization would create market incentives leading not just to a decreased public burden represented by the social costs of firearms, but also to safer firearm designs and distribution practices. The remainder of this Part discusses how best to achieve this internalization.

B. Means of Market-Based Regulation

1. *Ex Ante Taxation*

One possible means of dealing with the social costs of firearms is

¹⁴³ See Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *FORDHAM L. REV.* 589, 594–95 (2004) (asserting gun possession by criminals poses higher social costs and that background checks minimize those costs).

¹⁴⁴ See *supra* text accompanying notes 66–67. Manufacturers, distributors, and stores only bear costs to the extent that they are emotionally upset by their products' misuse, or when they suffer negative media attention and consumer disapproval—the latter of which is questionable—as a result of their products' misuse. See Wayne Drash, *At Colt's Connecticut Factory, No Apologies for Arming America*, CNN (June 8, 2013), <http://www.cnn.com/2013/06/08/us/colt-factory-gun-debate/> (describing various public reactions as well as a gun manufacturer's reaction to the Newtown shooting).

¹⁴⁵ One residual problem is used firearms, the sales of which will not reflect their social costs under this model. One possibility is to implement an enterprise liability system, *infra* Part IV.B.3, which would apportion costs to manufactures based on their market share. Since there are thousands of firearms dealers, however, a modified version of enterprise liability might exempt manufacturers that fall below some threshold of sales or number of firearms sold—a number obtainable from ATF records.

through taxation.¹⁴⁶ As we have seen, some amount of firearms taxation has been present for nearly a century at the federal level.¹⁴⁷ Taxation as a means of dealing with firearm-related costs seems promising initially. It would be easy to collect—taxes can simply be charged on a per-unit basis, and collected at the point of sale. But taxation as a means of remedying social costs is ineffective for a number of reasons. First, taxation is relatively inflexible. If taxes are intended to remedy social costs, tax rates must be responsive to changes in these costs. These costs will change over time based on a variety of factors, such as the costs and effectiveness of medical care and differences in the prevalence of firearm-related violence and accidents.¹⁴⁸ Such changes require legislation that can range from difficult to impossible to enact. As discussed in the previous Parts, the legislature has been susceptible to capture in regulating firearms, and tax increases—especially for firearms—will inevitably face strong opposition. Difficulty in changing tax-related legislation means that firearm taxes would rarely, if ever, reflect the actual social costs of firearm ownership.

2. Administrative Compensation Systems

Another means of dealing with firearm-related externalities is to create a compensation system run by an administrative agency. Although such systems are generally thought of as insurance schemes, the effect of such systems can be to force producers to internalize the costs of some activities.¹⁴⁹ For example, the Black Lung Benefits Act¹⁵⁰ allows coal miners affected by pneumoconiosis and their families to receive disability benefits as well as payment for their medical costs.¹⁵¹ Similarly, the Longshore and Harbor Workers' Compensation Act¹⁵² provides similar benefits for workers injured in the course of maritime employment.¹⁵³ As a means of forcing social-cost internalization, an administrative compensation system would function quite well.¹⁵⁴ But such a system is

¹⁴⁶ See generally ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

¹⁴⁷ See *supra* text accompanying note 32.

¹⁴⁸ The current tax rate would have to estimate a future social cost.

¹⁴⁹ In fact, the Black Lung Benefits Act uses precisely this language in authorizing the creation of an insurance system for coal mine operators. 30 U.S.C. § 943 (2012).

¹⁵⁰ *Id.* §§ 901–944.

¹⁵¹ See *id.* § 932(a) (requiring operators to compensate any employee due to death or total disability from pneumoconiosis arising from employment within a mine if not covered by state workmen's compensation).

¹⁵² 33 U.S.C. § 901–950 (2012).

¹⁵³ *Id.* § 903(a).

¹⁵⁴ As Hanson and Logue observe, however, such a system would produce a variety of other costs that are beyond the scope of this Article. See generally Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 *YALE L.J.* 1163, 1283–86 (1998) (describing the potential costs of an administrative compensation system for social costs associated with smoking).

unlikely as a political matter for a number of reasons. Legislation would be required to establish the compensation system, which seems improbable in the current political climate. Moreover, another powerful lobbying group, the plaintiff's bar, would foreseeably oppose an administrative system. Thus, although promising in theory, dealing with the social costs of firearm injuries through an administrative compensation scheme is institutionally inferior to a court-based solution because the former lacks a necessary condition for regulation—the power to act.

3. *Liability*

Another means of dealing with the social costs of firearms is individual or enterprise liability. In an enterprise liability scheme, those claiming harm from firearms—including consumers—would obtain damages for their injuries, which would be apportioned among firearm manufacturers based on their pro-rata share of the market.¹⁵⁵ Since manufacturers would presumably transfer some or most of the costs of liability to consumers by increasing prices, enterprise liability would have the effect of an *ex post* exercise tax scheme (or, from the perspective of firearms purchasers, an *ex-ante* insurance scheme).¹⁵⁶ In fact, by claiming restitution based on the public nuisance costs of firearm violence, the municipalities sought a legal remedy that had the effect of forcing the industry to internalize the costs of their commercial activities. Firearm use creates costs—healthcare needs and public-safety costs—that are not borne by the firearm's producer or consumer.¹⁵⁷ A damage payment would force the producer to bear that cost, rather than a third party (i.e., the state or individual taxpayers).

The main advantage of a liability scheme is that it is unaffected by many of the information problems that attend *ex ante* taxation. Such a system does not depend on *ex ante* information about the social costs of firearms; rather, it charges these costs to the firearm industry as they occur. Likewise, it is much more flexible than an *ex ante* system. When parties are directly or indirectly injured by firearms, they sue the firearm companies, thereby internalizing the social costs of firearms. The companies themselves can then decide how to apportion those costs between themselves and consumers by altering prices as necessary, creating a system that would work more fluidly than one in which a legislature would have to predict the costs of harms *ex ante*.

This is not to say, however, that a litigation-based regulatory scheme would be perfect. First, juries may be unable to accurately determine the

¹⁵⁵ This idea was explored admirably by Hanson and Logue. *Id.* at 1282–83.

¹⁵⁶ See Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 540 (1984) (outlining the process by which cost of risk is spread to consumers).

¹⁵⁷ See *supra* notes 18–19, 23 and accompanying text.

total social costs in particular cases. As is often the case with toxic torts and workplace exposure cases, there will always be questions of specific causation, even if general causation is established.¹⁵⁸ Not only will juries and judges draw incorrect conclusions about causation, they will also invariably make mistakes about monetary and nonmonetary harms. For example, individual claims for lost wages and nonmonetary damages will likely be more difficult to measure.¹⁵⁹ Furthermore, the availability of nonmonetary damages will create an incentive to overstate them.

Second, not all who are entitled to recover would do so. Lack of knowledge about the availability of compensation, or simply not wanting to trouble oneself with litigation, would prevent at least some proportion of those entitled to recoveries from obtaining them.¹⁶⁰ Moreover, recovery for some *types* of social costs—for example, the nonmonetary emotional costs associated with firearm-related injuries—would require a major change in the laws of most states.¹⁶¹

Third, the enforcement of a liability system would not be cost-free. The state would face increased administrative costs associated with providing a forum to hear the increased number of firearms-related claims, and both the firearm companies and plaintiffs would have to hire lawyers. From the standpoint of cost-internalization, the fees of plaintiffs' attorneys would not have an effect, since cost-internalization only requires that companies pay.¹⁶² The costs of defendants' attorneys, however, would be relevant, since these costs will also be apportioned between companies and

¹⁵⁸ See, e.g., Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 376–77 (1986) (“Proving the cause of injuries that remain latent for years, are associated with diverse risk factors, and occur at background levels even without any apparent cause, is the ‘central problem’ for toxic tort plaintiffs.” (footnotes omitted)).

¹⁵⁹ See, e.g., Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 87 (2006) (noting the difficulty of measuring such damages); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 908 (1989) (noting the difficulty of measuring such damages); Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness, and the Calculation of Compensatory Damages*, 37 J. LEGAL STUD. S217, S218 (2008) (noting the difficulty of measuring such damages).

¹⁶⁰ See William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837–38 (1995) (describing the obstacles that mass tort litigation encounters including lack of awareness of potential claimants).

¹⁶¹ Few states currently allow for recovery in cases of negligent infliction of emotional distress, which would presumably be the cause of action used to recover the nonmonetary social costs discussed here. See Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 237 (2008) (noting that “[p]ure hurt feelings . . . generally go uncompensated” and that “[i]n severe cases, a cause for action for . . . negligent infliction of emotional distress might arise but such cases are rare”). In contrast, liability for monetary costs of firearms merely requires application of ubiquitous tort doctrines.

¹⁶² Naturally, if the regulatory goal was compensation, the effect of attorneys' fees on plaintiff recoveries would be relevant.

consumers. This itself is a cost and, to the extent that there is an optimal level of firearm consumption, the increased cost of firearms as a result of attorneys' fees paid by defendants will reduce demand to some suboptimal level.

Yet another concern with liability is double recovery. In a world where individuals, insurers, and governments can all sue to recover firearm-related costs, it will be necessary to determine who is able to recover what costs. Perhaps most prominently, in order to avoid double recovery, it would be necessary to modify the collateral source rule, which generally bars defendants from introducing evidence that a plaintiff's injuries have been or will be covered by insurance.¹⁶³ Note, however, that from the perspective of social costs, the issue of double recovery only becomes an issue once the total aggregate recoveries by all plaintiffs (including individuals and insurers suing for the same injuries) reaches the total amount of social cost of firearms.¹⁶⁴

Despite these problems, however, litigation-based regulation seems to be the most promising approach to firearm-related externalities. Because they avoid the information, flexibility, and potential constitutional problems of command-and-control regulation, agency intervention, or Pigouvian taxation, while generating benefits unique to courts as an institution, litigation is therefore the best means of correcting these externalities.

C. *The Complementary Role of the Elected Branches*

Although courts should take the lead in dealing with the social costs of firearms, the elected branches still have a role to play in firearm regulation. Although this Article has focused on the correction of market failures, and particularly externalities, the elected branches are in a better position to prevent those externalities from occurring in the first place by discouraging misuse of firearms. Legislators and administrative agencies should continue to explore ways to decrease firearm related violence and ways to design firearms to limit accidental discharge. Since this is the type of issue for which new information will continually be generated, flexible responses will be vital, as will a variety of regulatory tools, suggesting that

¹⁶³ David Schap & Andrew Feeley, *The Collateral Source Rule: Statutory Reform and Special Interests*, 28 CATO J. 83, 84 (2008).

¹⁶⁴ Enterprise liability could raise a special problem—it might disincentivize companies from producing safer products. If the liability system only charged companies the costs caused by *their* products, those companies would at least have some incentive to determine whether safer firearm designs exist. Naturally, the companies might still decide that the costs of producing safer products—assuming such products are possible—outweigh the reductions in tort liability and any market benefits such products might cause. But assuming riskier products cost less to produce, enterprise liability might also create a prisoners' dilemma among producers in which each producer has an incentive to make their products less safe.

legislatures and administrative agencies are the preferred institution to deal with deterrence-based regulation.

V. CONCLUSION

This Article has advocated a means of regulating firearms that strays from the traditional path. Normally, firearm regulation is envisioned as command-and-control devices that dictate particular designs or limit access to firearms for some portion of the population. Similarly, firearm litigation is not often discussed in terms of its regulatory effects, much less its ability to force firearms manufacturers, suppliers, and purchasers to internalize the negative externalities of firearms. This Article will hopefully induce readers to think about firearm regulation—and firearm litigation—in a different way. While admittedly no single regulatory tool is without its attendant costs, social cost internalization through litigation is the optimal tool for dealing with the main regulatory problems that firearms present. At present, however, such a solution is preempted by the Protection of Lawful Commerce in Arms Act.¹⁶⁵ Since litigation would be an effective method of regulating firearms in a manner consistent with their social costs, the prohibition of this litigation represents a lost opportunity, suggesting the Act ought to be repealed.

¹⁶⁵ See *supra* text accompanying notes 66–67.