The Truth about Torts:

Regulatory Preemption at the Consumer Product Safety Commission

By William Funk, Thomas McGarity, Nina Mendelson, Sidney Shapiro, David Vladeck, and Matthew Shudtz

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This white paper is a collaborative effort of the following member scholars and staff of the Center for Progressive Reform: William Funk is a Professor of Law at Lewis & Clark Law School in Portland, Oregon and a Member Scholar of the Center for Progressive Reform. Thomas McGarity holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin, is a member of the board of directors of the Center for Progressive Reform, and the immediate past president of the organization. Nina Mendelson is a Professor of Law at the University of Michigan Law School and is a Member Scholar of the Center for Progressive Reform. Sidney Shapiro holds the University Distinguished Chair in Law at the Wake Forest University School of Law, is the Associate Dean for Research and Development, and a member of the board of directors of the Center for Progressive Reform. David Vladeck is a Professor of Law and Co-Director of the Institute for Public Representation at Georgetown University Law Center and a Member Scholar of the Center for Progressive Reform. Matthew Shudtz, J.D., is a Policy Analyst with the Center for Progressive Reform.

For more information about the authors, please see page 21.

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www.progressivereform.org

Direct media inquiries to Matthew Freeman at mfreeman@progressivereform.org.

For general information, email info@progressivereform.org.

Executive Summary

The Consumer Product Safety Commission (CPSC) bears responsibility for protecting American consumers from unreasonable risks posed by "consumer products," a term that encompasses everything from bicycles to disposable lighters. But as recent media reports and congressional hearings have shown, the agency is hobbled by weak statutory authority and a lack of resources, making it ill-equipped to fulfill its obligation to protect the public from dangerous products. Lead paint and other contaminants in Chinese products are the most widely discussed problems of late, but failures in CPSC's regulatory work have come to light regularly since it was created in the early 1970s: power lawnmowers, three-wheeled all-terrain vehicles, and portable baby cribs, all with serious design flaws, caused avoidable deaths and injuries to hundreds of American consumers long before CPSC was sufficiently motivated to take regulatory action. And yet, the agency has supported the defense bar's argument that the mere existence of federal safety standards – regardless of their demonstrable ineffectiveness – should extinguish injured consumers' right to sue in state courts. If regulatory preemption takes hold at CPSC, manufacturers will be left with the best of both worlds (weak regulation, and no fear of tort liability), while consumers will be left at risk.

This paper is the fifth in the Center for Progressive Reform's "Truth about Torts" series. Previously, in *Using Agency Preemption to Undercut Consumer Health and Safety* (Sept. 2007), we presented an overview of the preemption movement that has taken root in federal regulatory agencies during the George W. Bush Administration. That paper recounts how the Food and Drug Administration, National Highway Traffic Safety Administration, and Consumer Product Safety Commission have led a government-wide initiative to claim that new regulatory standards preempt state tort law, regardless of the background law. It explains the constitutional underpinnings of the preemption doctrine and provides a brief history of the Supreme Court's preemption analysis. This paper is the second of three papers in which we will take an in-depth look at why specific agencies' regulatory preemption initiatives create dangerous public policy. Our last paper, *Regulatory Preemption at the National Highway Traffic Safety Administration* (June 2008), examined regulatory preemption in the vehicle safety context.

Our analysis of regulatory preemption at CPSC begins with an overview of the agency, its structure, and the laws that govern how CPSC regulates product safety. After explaining the law on preemption as it relates to consumer product safety, we present the policy arguments that lead to the conclusion that federal preemption of state common law through CPSC regulation is unwise and unsafe. The main arguments we present in favor of retaining the historically beneficial state common law are:

- *Congress has clearly indicated that it means to preserve tort law:* In the statute creating CPSC, Congress included a savings clause that expressly preserves manufacturers' liability in tort, regardless of their compliance with any CPSC-created safety standard. As recently as July 2008, Congress reiterated its belief that consumers are best protected by the complementary workings of tort law and CPSC regulation. The Consumer

If regulatory preemption takes hold at CPSC, manufacturers will be left with weak regulation and no fear of tort liability, while consumers will be left at risk.

Product Safety Improvement Act of 2008 specifically instructed CPSC to refrain from interpreting its statutory authority as preempting state tort law.

- *CPSC is a weak agency:* Even after the recent reauthorization act, CPSC lacks both the power and the resources to institute strong safety standards – or even to enforce the weak standards already in place. Tort law can fill these gaps by creating incentives for manufacturers to be constantly searching for ways to improve product safety.
- *Tort law doesn't suffer from agency capture:* Unlike CPSC, the tort system cannot be captured by special interests. Neutral decisionmakers, informed by information presented through neutral processes, determine whether products are reasonably safe for consumers.
- *Tort law provides corrective justice:* Simply put, tort law provides a service to society that federal regulations can never replace: a fair process for ensuring accountability when a product harms someone. Consumers should not be left to foot the bill when manufacturers produce dangerous products.
- *Tort law opens new avenues for information production:* The courts have powers to elicit information from litigants in product safety lawsuits that outstrip CPSC's statutory authority to compel data disclosure. Preservation of the product liability system is essential to helping CPSC fill its data gaps.

Background

Congress established CPSC in 1972 as a "conspicuously independent Federal regulatory agency,"[1] designed to be a powerful consumer protection organization led by a bipartisan group of five commissioners appointed by the president and confirmed by the Senate. CPSC's organic statute, the Consumer Product Safety Act (CPSA), granted the agency a broad array of powerful regulatory tools – from mandatory safety standards to product recalls. The CPSA also transferred to CPSC the regulatory powers previously held by other agencies under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act, the Flammable Fabrics Act, and the Refrigerator Safety Act. CPSC's jurisdiction covers tens of thousands of products in the U.S. marketplace.

Shifting attitudes about government regulation of product manufacturers have led to legislation that first limited CPSC's power to craft mandatory product safety standards, then slashed agency resources, and finally eliminated two commissioners' positions. What remains is a weakened agency that relies primarily on negotiated product recalls, consumer education initiatives, and voluntary, industry-crafted product safety standards. CPSC rarely issues product safety standards,[2] but when it does, the defense bar has argued that the mere existence of those standards – no matter how lax or outdated – preempts injured consumers' right to sue product manufacturers.

The remainder of this section will outline the legal framework surrounding preemption at CPSC.

Preemption Under the Consumer Product Safety Act

Congress did not attempt to re-invent the wheel when it drafted the preemption provisions found in the CPSA. On the advice of the National Commission on Product Safety, Congress included in the CPSA a savings clause and preemption clause that were virtually identical to those found in the National Traffic and Motor Vehicle Safety Act of 1966. The CPSA preemption clause states:

> Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.[3]

The savings clause reads:

> Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person.[4]

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The National Commission on Product Safety suggested copying the Motor Vehicle Safety Act language specifically because the Commission interpreted the two clauses to protect the availability of state tort law for plaintiffs injured by products, whether or not they were subject to CPSC standards.[5]

CPSA Preemption in the Courts

The courts have recognized the obvious parallel between the preemptive powers of the CPSA and the Motor Vehicle Safety Act. In assessing product manufacturers' claims that CPSC regulations preempt common law claims for product liability, breach of warranty, and failure to warn, the courts have employed the analytical framework utilized by the Supreme Court in *Geier v. American Honda*.[6]

Alexis Geier was injured in an automobile collision and sued Honda on a defective design theory because her 1987 Honda Accord was equipped only with manual shoulder and lap belts, not airbags or other passive restraints. Honda argued that either the Vehicle Safety Act's express preemption clause or the National Highway Traffic Safety Administration's passenger restraint standard preempted Geier's lawsuit. The Supreme Court held that the Motor Vehicle Safety Act's express preemption clause only preempts state positive law and regulation. However, the Court also held that the savings clause only ensures the continued viability of state common law claims to the extent that they do not actually conflict with federal law under traditional theories of implied preemption. Since Congress obviously did not intend to occupy the field of vehicle safety (as evidenced by the existence of a savings clause and the fact that public safety is traditionally the province of the states) and it would not be physically impossible to comply with both a federal safety standard and a more stringent common law duty, the only implied preemption argument that might be viable is that operation of state common law would stand as an obstacle to Congress's objectives.

Following this model, courts deciding CPSA preemption cases post-*Geier* focus primarily on the lawsuit's potential to stand as an obstacle to the congressional objectives underlying the CPSA. Their analysis is simplified by Congress's clear statement of its objectives in the CPSA. The objectives are:

1. to protect the public against unreasonable risks of injury associated with consumer products;
2. to assist consumers in evaluating the comparative safety of consumer products;
3. to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
4. to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.[7]

The first and third goals – protecting the public from unreasonable risks of injury and developing uniform safety standards and regulations – are directly implicated in preemption cases. The courts generally agree that tort suits help advance Congress's goal of protecting

the public because tort liability provides immediate incentives to design and distribute safer products.[8]

However, the courts have differing opinions regarding the effect of tort law on Congress's goals of developing "uniform safety standards" and minimizing conflicting regulations. Some courts support the view offered by the defense bar that common law duties imposed on manufacturers create a "patchwork" of state-by-state standards that contradict Congress's intention.[9] But other courts focus on the precise words Congress used in the statute. Thus, the Ninth Circuit found that Congress's intent was to promote uniformity of state positive law ("standards" and "regulations") while leaving open the potential for differing requirements to arise out of state common law duties.[10]

Even if we accept the less textually precise view of Congress's "uniformity" goal (i.e., if we assume, for the sake of argument, that Congress intended for there to be uniform national requirements for product safety, both in positive and common law), it still is not a strong argument for preemption. State common law is, in fact, remarkably uniform across the country: the "reasonable person" standard is applied by every court hearing a negligence claim, and product liability decisions are typically guided by uniform laws and restatements.[11] So the defense bar's real concern is not a lack of uniformity in the law, but rather a lack of uniformity in the application of the law by juries. But this argument, too, is weak because application of federal standards is not necessarily more uniform than application of state common law. When the government brings an enforcement action, the judge or jury deciding that case is no more predictable than the judge or jury who would decide a tort case.

In response to the uniformity argument, courts should also take into account the fact that, with product safety, a regulatory regime that cuts off tort liability can quickly stifle developments in safety protection. Even if fully staffed, CPSC cannot react swiftly the changes in the regulatory environment, and out-of-date regulations become an obstacle to public safety. As Senator Daniel Inouye put it in response to a recently adopted mattress flammability rule, "I would hazard to guess that after this rule is finalized, the issue of home fire safety may not be addressed for several more decades, while science and the ability to make mattresses even safer will continue to evolve. Removing a significant incentive for industries to improve outside of meeting the federal standard may have a chilling effect on industries integrating new safety technology into their products."[12]

Preemption Under the 'Transferred Acts'

In addition to regulating the safety of consumer products under the CPSA, CPSC has jurisdiction over a number of other categories of products, authority that was taken from other agencies and vested in CPSC upon its creation in 1972. Collectively referred to as the "transferred acts," the Federal Hazardous Substances Act of 1960, the Flammable Fabrics Act of 1953, the Poison Prevention Packaging Act of 1970, and the Refrigerator Safety Act of 1956 grant CPSC the authority to ensure public safety through a variety of regulatory means including labeling requirements and prohibitions on the manufacture and sale of dangerous products.

Although the Refrigerator Safety Act does not address preemption, the other three transferred acts contain similarly structured preemption clauses. Much like the CPSA, they expressly preempt some state law that is designed to protect against the same risk as the federal law if the state law is not identical to federal law, but give states leeway to create more stringent laws when regulating products intended for use by the state itself or when granted an exemption by CPSC.[13] But unlike the CPSA, none of these statutes contains a savings clause and each statute uses unique language in its preemption clause, making it less clear what state law Congress intended to preempt.

- *The Flammable Fabrics Act* (FFA) expressly preempts any state "flammability standard or other regulation" not identical to the federal "standard or other regulation."[14] Here, Congress repeatedly used the phrase "standard or other regulation," without variation.
- *The Federal Hazardous Substances Act* (FHSA) expressly preempts any state "cautionary labeling requirement" not identical to a CPSC-designed "requirement."[15] In this statute, the preemption clause refers exclusively to federal and state "requirements."
- *The Poison Prevention Packaging Act* (PPPA) expressly preempts "any standard for special packaging (and any exemption therefrom and requirement related thereto) which is not identical to the standard established [by CPSC]."[16]

Although Congress varied the language it used in each of these statutes to describe the state law preempted by CPSC enactments, it is clear that Congress's focus was on inconsistent state positive law. The texts of the FFA and PPPA prohibit states from "establish[ing] or continu[ing] in effect" non-identical "standards" or "regulations." Historically, these are terms used to describe state positive law. As for the FHSA, Congress prohibited the states from "establish[ing] or continu[ing] in effect" non-identical "requirements." Although the Supreme Court has since held that Federal courts should read "requirements" to encompass state tort verdicts, Congress could not have foreseen such a decision at the time.

The legislative history of the preemption language in the FFA, FHSA, and PPPA provides further evidence that Congress intended for the statutes to preempt only state positive law. All three statutes were amended in the 1976 Consumer Product Safety Commission Improvements Act to include the language cited above.[17] The bill was drafted well before the line of Supreme Court cases that established the interpretive rule for federal courts whereby the term "requirements" is read to include common law duties.[18] In addition, the conference report that accompanied the final legislation states repeatedly that the preemption provisions of the three statutes are intended to be "uniform."[19] And it fails to indicate that the conferees considered preemption of common law: the examples they provide of safety standards that would be preempted under the proposed legislation are all examples of positive law. Taken together, these facts indicate that Congress did not mean to preempt state common law in the transferred acts.

Notwithstanding this legislative history, the courts have interpreted the transferred acts differently in terms of their preemptive effect on state common law. While the courts have generally

found that the FHSA preempts state common law,[20] the opposite is true of the FFA,[21] and the cases are mixed with respect to preemption of common law under the PPPA.[22] The importance of the courts' interpretation of the preemptive effect of the transferred acts is underscored by the fact that the only recent mandatory standards CPSC has promulgated have been based on its regulatory authority derived from a transferred act, not the CPSA. CPSC published flammability standards for mattresses[23] and clothing textiles,[24] both of which were promulgated under the Flammable Fabrics Act. While CPSC argued in its preamble to the mattress flammability rule that the federal regulations preempt state common law,[25] the agency did not repeat its argument in the more recent clothing textile rulemaking. One possible reason for CPSC's reluctance to repeat the preemption argument is that courts have repeatedly held, since the early 1970s, that the Flammable Fabrics Act does not preempt state tort law.[26]

The First Circuit's 1996 decision in *Wilson v. Bradlees of New England* regarding the preemptive effect of the Flammable Fabrics Act presents an analysis which is noteworthy for its frankness and honesty. The court begins by stating what is rarely admitted so openly:

> courts are often asked to resolve statutory issues where the legislature had no specific intent on the precise point at issue. Language, precedent and policy remain pertinent – more to provide a reasonable solution than to discover a largely fictional legislative intent.[27]

The court's analysis of all three resources – the text, history of, and policy behind the statute – results in no clear indication, one way or the other, about Congress's intent to preempt state tort law through application of the Flammable Fabrics Act.[28] So to resolve the case, the court turns to a discussion of "what result makes the most sense, or, more formally, how Congress would have decided the issue if Congress had squarely confronted it."[29]

Ailsa DeBold suffered severe burns when her clothing caught fire, despite the fact that the clothing complied with a relevant federal safety standard. The standard, devised by the clothing industry, was so lenient that newspaper passed the compliance test with a 48-percent margin of safety.[30] When Ailsa's mother sued the clothing manufacturer, wholesaler, logo printer, and retailer, they claimed that compliance with the federal flammability standard should insulate them from common law liability. A federal district court agreed, but the First Circuit reversed the decision, explaining:

> Industry standards serve many useful purposes, but we do not think that Congress, if squarely asked to address the issue, would say that such a standard should extinguish a common-law claim of design defect. If the defendants want to show that they met a prevailing industry standard, fine; but this should not preclude a plaintiff from showing that industry should have done more under certain conditions.[31]

The First Circuit's decision follows an approach to interpreting the preemptive effect of consumer safety laws that recognizes that wise policy depends on complementary common law and regulatory systems.

The Consumer Product Safety Improvement Act of 2008

A new law may alter the courts' analysis of preemption arguments under the CPSA, FHSA, FFA, and PPPA. The Consumer Product Safety Improvement Act of 2008,[32] designed to reform CPSC regulatory procedures and improve enforcement of federal safety standards, includes a new statement from Congress on preemption under the CPSA and the transferred acts. Although Congress's statement is directed at CPSC, not the courts, it could have an impact on the way courts respond to the defense bar's preemption claims. The relevant language has two pieces. First, it states:

> The provisions of [the CPSA, FHSA, FFA, and PPPA] establishing the extent to which those Acts preempt, limit, or otherwise affect any other Federal, State, or local law, any rule, procedure, or regulation, or any cause of action under State or local law may not be expanded or contracted in scope, or limited, modified or extended in application, by any rule or regulation thereunder, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any such rule or regulation.[33]

Although it is not a model of clarity in legislative drafting, this statement reiterates that CPSC lacks the legal authority to preempt state law beyond what Congress has authorized in earlier statutes.

The more interesting part of the new legislation is the second piece of § 231(a), which states:

> In accordance with the provisions of [the CPSA, FHSA, FFA, and PPPA], the Commission may not construe any such Act as preempting any cause of action under State or local common law or State statutory law regarding damage claims.[34]

This sentence seems to imply that Congress does not want CPSC to construe language like "standard or regulation" or "requirement" (as used in the various statutes' preemption clauses) to preempt state tort law. However, that argument is not made explicitly, and the introductory clause "[i]n accordance with the provisions of…" adds to the ambiguity of the bill.

The implication of this language may be as important as the actual verbiage. The language of the CPSA has not changed, so *Geier* still provides some insight and suggests that implied preemption analysis is still appropriate. However, courts attempting to divine Congress's intention regarding the preemptive effect of these statutes must now take into account the fact that Congress has prohibited CPSC from construing the statutes to preempt state tort law – a strong indication that courts, too, should be wary of finding preemption. Moreover, various aspects of the legislative history, including statements by sponsors and the House Energy and Commerce Committee's report on the original bill, suggest that legislators intended to stop regulatory preemption of state tort law in the consumer safety arena.

Consumers Are Best Protected by a Complementary System of Tort Law and Regulatory Standards

With its small staff and limited regulatory powers, CPSC can only be expected to prevent a fraction of unsafe products from entering the U.S. market. Shifting from the legal arguments against CPSC regulatory preemption, this section explains the policy arguments that support the conclusion that state common law is an essential component of consumer protection.

A Toothless Agency

CPSC is hamstrung in effectively using its regulatory power to minimize or eliminate the risks posed by consumer products. Excessive procedural requirements hinder the establishment of strong and mandatory design standards, slow the release of information regarding potential product hazards, prevent quick recall of dangerous or defective products, and stymie CPSC's ability to ban products. Tort law can protect consumers when CPSC drops the ball.

Safety Standards

Precautionary product safety standards developed by CPSC would be a powerful tool for preventing injuries caused by consumer products were it not for a manufacturer-friendly process used to design the standards. In 1981, changes to the CPSA pressed by advocates of deregulation created a system in which CPSC is required to rely on industry-developed voluntary safety standards to address product hazards any time a voluntary standard is an adequate means of addressing the hazard and enjoys significant compliance by the affected industry.[35] The 1981 amendments also require CPSC to halt the development of any new mandatory safety standard if manufacturers have crafted a new voluntary standard to fill a void or address inadequacies in the existing voluntary regime. In design and in practice, the 1981 amendments give manufacturers a right of first refusal to address product safety issues with a design standard. As a result, CPSC rarely undertakes the laborious process of crafting mandatory safety standards. From 1990 through 2007, CPSC "worked with industry and others to develop 390 voluntary safety standards while issuing only 38 mandatory rules."[36]

Product Recalls

CPSC's power to recall products that pose a substantial hazard is similarly weakened by statutory requirements that, in practice, give manufacturers significant power in setting the terms of the recall. Under the CPSA, CPSC may only issue an order mandating the recall of a product after providing interested parties with the opportunity to present their case against a recall in an administrative hearing.[37] CPSC does not have the time or resources to spend litigating complex recall order cases, so the agency ends up working with manufacturers to

Generally speaking, recalls are only about ten to twenty percent effective, meaning that millions of dangerous products remain in use.

negotiate recalls. Because dangerous products remain on the market while these discussions carry on, each day of the negotiation puts CPSC in a weaker bargaining position.

Moreover, while the recall numbers we see reported in the media are staggering (think of the several million toys recalled by Mattel in 2007), those statistics do not reflect accurately the number of products that are actually returned, replaced, or repaired. Generally speaking, recalls are only about ten to twenty percent effective,[38] meaning that millions of dangerous products remain in use. In fact, CPSC has yet to cancel some recalls from the 1970s because insufficient quantities of the target products were returned.[39]

Information Disclosure

Even the regulatory tool that seems most innocuous, CPSC's power to release information it has obtained regarding dangerous products, is burdened with procedural requirements that limit the agency's power to protect consumers. CPSC collects information about potential product hazards from a variety of sources: hospitals, insurance companies, fire and police investigators, consumers, and manufacturers. When CPSC staff analyze the data and discover evidence of a potential product hazard, they have an obligation to inform the public. Recent legislation requires CPSC to develop a product safety database. However, information disclosure through this database must be accomplished within an existing legal framework that will likely limit the database's utility. For instance, any time CPSC releases hazard-related information, the agency must notify the manufacturer at least 15 days prior to releasing the information and give the manufacturer an opportunity to comment on the accuracy and fairness of the information release.[40] The threat of litigation looms, too: if CPSC does not alter its information release in response to a manufacturer's complaints about its accuracy or fairness, the manufacturer can seek an injunction from a federal district court that will prohibit CPSC from releasing the information.[41]

Product Bans

CPSC has the power to ban products that pose "an unreasonable risk of injury." Originally designed as a tool of last resort, a ban is only available upon a formal finding that the product in question "presents an unreasonable risk of injury" and that there is no "feasible" safety standard that "would adequately protect the public."[42] Early on, CPSC used product bans creatively to protect public health (e.g., to "ban" the sale of bicycles that do not meet certain safety standards).[43] But today, additional procedural requirements limit the agency's use of this regulatory tool. The Reagan-inspired 1981 amendments to the CPSA ensured that CPSC could only pass a product ban by engaging in the same industry-friendly rulemaking process required for mandatory safety standards.

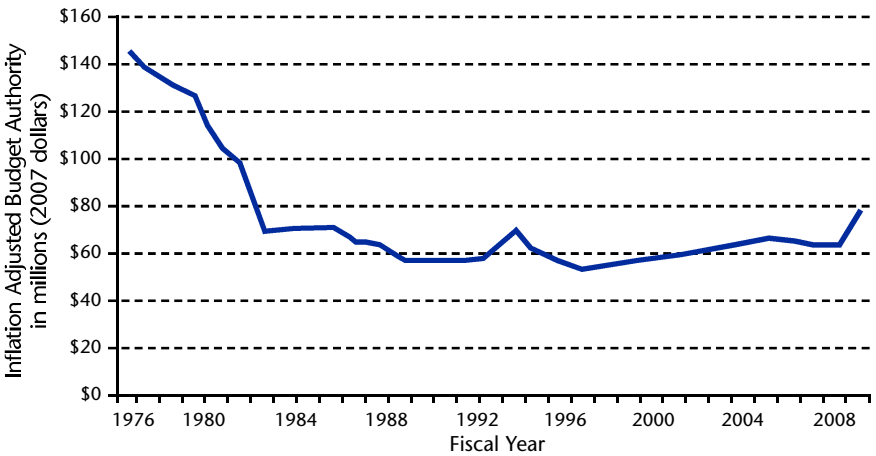
Excessive procedural requirements prevent CPSC from developing mandatory safety standards, banning hazardous products, publishing important safety information, and recalling dangerous products. When the regulatory system fails, the tort system creates incentives for manufacturers to act quickly when a product presents a hazard.

A Resource-Starved Agency

At the same time Congress amended the CPSA to increase the procedural hurdles that CPSC must cross before taking any protective action, the agency was in the midst of absorbing a plummeting budget. The agency's budget peaked just three years after it began operations, enjoying almost $145 million in funding for Fiscal Year (FY) 1976 (in 2007 dollars). But over the course of the next six years, CPSC's budget was slashed to a fraction of that amount, leaving the agency with just under $70 million to work with in FY 1982. (See Figure 1.) CPSC's budget has yet to fully recover: even with an inflation-adjusted increase of almost 23 percent for the 2008 budget, CPSC's overall budget is just over half of its historic high set in 1976. The Consumer Product Safety Improvement Act of 2008 could help to restore the agency's budget. The new law includes increased authorizations for appropriations beginning in FY 2010 that rise to over $134 million in FY 2014. Whether these authorized funds will actually be appropriated by future Congresses remains to be seen.

Decreases in CPSC's budget are reflected in the number and geographical distribution of agency staff. In FY 2007, CPSC had just 393 full-time equivalent (FTE) staff.[44] A budget increase for FY 2008 will boost that number to an estimated 420 FTE,[45] but this is still only about half of what the agency had in its prime.[46] In addition, CPSC staff are concentrated primarily in the D.C.-metro area. Roughly three-quarters of CPSC staff work at CPSC headquarters in Bethesda, Maryland or the CPSC laboratories in Gaithersburg, Maryland. Only about 100 investigators, compliance officers, and consumer information specialists work in the rest of the country. At one time, the agency had 14 regional offices spread throughout the country.[47] Today, there are just three regional offices and a number of individual postings in other cities.

FIGURE 1.
CPSC Budget Authority (1976 to 2008)[48]



Funding constraints, limited staff, and a highly concentrated geographical distribution all have negative effects on CPSC's attempts to fulfill its mission. Even Acting Chairwoman Nancy Nord, who balked at Congress's initial offers to increase her budget beyond what President Bush had requested, admits that CPSC's testing facilities are outdated and desperately in need of renovation. With limited staff, CPSC lacks the ability to undertake significant hazard identification work. In FY 2007, CPSC used 311 FTE and spent $48.1M on developing and enforcing standards and on public information campaigns, leaving only about 20 percent of the agency's budget and 82 FTEs to work on identifying hazards.[49] The fact that most of CPSC's staff is concentrated in the D.C.-metro

area means that the agency is "just another D.C. bureaucracy" to most Americans, limiting its effectiveness in obtaining information about product hazards from local communities.

So long as it is not preempted by federal regulation, the tort system can provide resources desperately needed to protect consumers from dangerous products. The near-ubiquity of personal-injury lawyers ensures that injured consumers have a local and responsive resource for investigating potential defects or design flaws. The legal system also creates a market for private product safety specialists, who can test the safety of consumer goods that CPSC fails to address.

Agency Capture

Since CPSC is so small, so dependent on the regulated industry when taking action, and so concentrated "inside the beltway," it is highly susceptible to agency capture. CPSC's career employees complain that their superiors, the politically appointed leadership whose votes are the *sine qua non* of protective action, have been drawn from the ranks of industry law firms and other groups hostile to the agency's consumer-protection mission.[50] Indeed, prior to her appointment as a CPSC commissioner, Acting Chairwoman Nancy Nord held positions including Director of Federal Government Relations for Eastman Kodak Company and Director of Consumer Affairs for the U.S. Chamber of Commerce. Nord's predecessor, Hal Stratton, in 2002 left the Rio Grande Foundation (a non-profit dedicated to promoting "individual freedom, limited government, and economic opportunity") to take his position as CPSC Chairman, but then resigned in 2006 to join the Detroit law firm Dykema Gossett, "where his work will include advising companies about the product safety issues on which he had been chief regulator."[51] President Bush's nominee to replace Stratton, Michael Baroody, failed to obtain Senate confirmation, largely due to his current positions as a senior lobbyist for the National Association of Manufacturers (NAM) and representative for NAM on the Executive Committee of the Business-Industry Political Action Committee.

It bears repeating that the administrative procedures which precede implementation of any protective action by CPSC are strongly tilted in favor of the regulated industry. The bulk of CPSC's work focuses on disclosing information about and recalling dangerous products, activities in which the regulated industry alone has the right to negotiate with CPSC. During the negotiations CPSC staff must bear the torch for consumer advocates while at the same time trying to maintain a working relationship both with the manufacturers upon whom they rely for product safety information and with the CPSC political appointees who head the agency.

Even the CPSC activities for which statutes mandate public participation evidence a bias in favor of the interest groups with the most money (i.e., product manufacturers and their lobbying machinery). A review of public comments on recent CPSC regulatory proposals reveals an imbalance in the number and sophistication of comments submitted: not only are there more comments from regulated industry, few of the consumer advocates have the technical expertise to make detailed recommendations for ways to improve the safety of products

through regulation. Before the voluntary standards even reach the stage where CPSC publishes them for comment, they are vetted by standards development organizations (SDOs) like the American National Standards Institute (ANSI), Underwriters Laboratories (UL), and ASTM International. CPSC staff work with the SDOs and provide analysis and commentary on new standards, but have no voting power in the process.[52] Consumer advocates struggle to harness the resources needed to monitor and participate in these standard-development activities. Thus the regulated industry has essentially captured complete control over the standard-setting process.

The tort system can help mitigate some ill effects of agency capture at CPSC. The tort system gives the general public a greater voice in the evolution of safety standards by allowing judges and juries to determine whether compliance with voluntary safety standards (developed through manufacturer-biased processes) meets a duty of due care. Importantly, the decisionmakers in the tort system are less susceptible to capture than those at CPSC. The sheer size and distribution of the judiciary prevent manufacturers from gaining undue influence, even given the fact that many judges are elected and need campaign donations. Furthermore, the participants in the tort system may only present their evidence according to rules designed to put both parties on equal footing, regardless of their available resources. Finally, the tort system makes up for the limited viewpoints that go into CPSC regulatory analysis because the jury selection process screens out the very people most likely to involve themselves in CPSC's work. Paid consumer advocates and individuals whose lives have been seriously affected by a particular product will never make it onto a jury, thus ensuring that a broader societal view of manufacturers' duties informs the outcome of product safety litigation.

Corrective Justice

Absolving product manufacturers of tort liability simply because they comply with CPSC safety standards frustrates one of the hallmark functions of our legal system: its power to provide corrective justice. The concept of corrective justice embodies the fundamental principle that, as a society, we should be able to rely on the legal system to correct situations where one person's actions unjustly diminish another person's health, wealth, or happiness.[53] It is a matter of basic justice, which Congress expressly preserved for those injured by dangerous products through inclusion of a savings clause in the CPSA.

As noted earlier, the CPSA preemption and savings clauses were designed to mimic those found in the National Traffic and Motor Vehicle Safety Act. Congress drafted language suggested by the National Commission on Product Safety, which interpreted the Motor Vehicle Safety Act to preserve tort law and its corrective justice capabilities. Keeping with the protective ideals of that era's legislation, Congress designed CPSC not as a replacement for tort law, but as a complement to tort law. CPSC would use safety standards to prevent dangerous products from entering the market, use recalls to get dangerous products off the market, and use public information campaigns to help consumers protect themselves from potential

CPSC's career employees complain that their superiors, the politically appointed leadership, have been drawn from the ranks of industry law firms and other groups hostile to the agency's consumer-protection mission.

hazards; but the agency would not displace the time-honored power of the court system to protect the public's right to seek compensation for injuries suffered because of others' negligence.

Preservation of the corrective justice function of tort law makes even more sense today than it did in the 1970s, given changes to the CPSA and the power of product manufacturers to limit the agency's protective work. In addition to lacking regulatory teeth and being captured by the regulated industry, CPSC now has to contend with a global product design and manufacturing chain that dwarfs the system that CPSC had to deal with when it was originally formed. At that time, most products sold in the U.S. were manufactured domestically, where CPSC had greater power to inspect manufacturing processes in hopes of preventing product safety problems. "Today, over 85 percent of toys, 95 percent of fireworks, and 59 percent of electrical products are manufactured in other countries,"[54] which limits CPSC's power to assess and respond to problems early in the supply chain. Foreign-made products are shipped into the U.S. through ports that see millions of truck-sized containers enter annually. The Los Angeles area ports alone see 15 million containers a year and are overseen by a single agency inspector, working two or three days per week.[55] Judging by its most recent annual report, CPSC's inspection capabilities seem to have wavered in recent years, notwithstanding the steady increase in product imports. (See Table 1.)

TABLE 1.

Number of Samples of Imported Products Taken for Testing by CPSC[56] and U.S. Consumer Product Imports (in billions of dollars U.S., c.i.f. basis)[57]

Fiscal Year	2004	2005	2006	2007	2008	2009
No. of samples of imported products	838	682	613	725	750*	1000*
Billions of $ of consumer goods imported from all countries	510.0	564.3	603.9	638.9	n/a	n/a
Billions of $ of consumer goods imported from China and Hong Kong	177.1	214.4	243.6	269.2	n/a	n/a

** Agency goal*

Changes in the global distribution of product designers, manufacturers, and consumers have opened gaps in the government safety net that Congress designed to protect consumers. Without tort law to assign responsibility for product-caused injuries, the product safety system would fail to ensure accountability among designers, manufacturers, and consumers. Companies should compensate those who are injured as a result of their failure to act responsibly, even if the companies are not subject to fines for violating any particular regulatory requirements. Tort law recognizes that manufacturers have a responsibility to employ reasonably available measures to prevent injury as they become available, not just when they are told to do so by the federal government.

Importantly, the corrective justice function of tort law is closely tied to the availability of civil jury trials. As an institution, juries play the essential role in our modern legal system of the democratic counterpart to technocratic decisionmakers. CPSC standards are based on detailed analyses of injury statistics, engineering data, and economic factors; but what they fail to take adequately into account are the views of a broad cross-section of society regarding the proper standard of care owed to consumers. Tort law, through its corrective justice function, fills that void.

Information Production

Tort law also plays an important role in uncovering and disseminating information about product safety, a function of the law that is a necessary complement to CPSC's work. The informational interactions of tort law and agency decisionmaking can be conceptualized as "feedback loops … in which each institution draws on information, experience and different incentives of the other." [58] Litigants employ expert witnesses who provide technical data, analyses of the state of the science from the relevant literature, and other information that can inform subsequent regulatory decisions. Though these data are available during the discovery process of a tort action, litigants are not required to disclose the data to CPSC. Meanwhile, courts can look to the agencies for analysis of the risks and benefits of regulated products, as well as regulatory standards that can factor into decisions about whether regulated parties have met their duty of care. Feedback loops "have unquestionably improved the quality of decisionmaking in both institutions."[59]

Preemption of state common law through CPSC regulation destroys the feedback loop, unwisely limiting the useful information that CPSC can get from the tort system. Simply by virtue of a claim having been filed, the tort system provides signals that defects may exist or existing safety standards may be inadequate. "The availability of damages in state tort lawsuits can give injured citizens the incentive to come forward and share potentially valuable information."[60] In the words of CPSC Commissioner Thomas Moore, "If we have gotten this standard right, then [lawsuits] against manufacturers should be a rarity and prevailing ones even less common. But if we have gotten it wrong, the fastest way we will find out is through people bringing lawsuits that challenge our conclusion."[61]

At each successive step in the litigation process, tort suits provide additional opportunities for the development of information that could be useful to CPSC in regulating product safety. Pre-trial discovery can turn up technical data about product safety; information about costs, manufacturing practices, and the number of reported problems with a product; and other facts relevant to the regulatory process. The discovery process can also uncover useful information about manufacturers' decisionmaking processes, adding a level of public accountability to corporate decisions about what level of risk should be foisted on consumers given the costs of added safety features or, more disturbingly, the costs saved by removing safety features.[62]

Expert testimony given in discovery or at trial could also be useful to CPSC staff insofar as the testimony is bolstered by the experts' analysis of the state of the science. In addition, expert analysis of the specific facts that give rise to tort claims sheds light on how injuries actually happen in the real world.[63] Laboratory testing procedures provide some level of information about product hazards, but this is (necessarily) a controlled environment that does not account adequately for environmental or anthropogenic factors that can affect consumer safety. Tort law provides information about how products are used in the real world, which is useful information for regulators charged with preventing injury. Finally, jury decisions, whether in favor of injured plaintiffs or manufacturer defendants, provide insight about evolving social norms.

Conclusion

Having virtually eviscerated CPSC's standard-setting powers, slashed the agency's resources, and captured the highest levels of the CPSC decisionmaking process, the product manufacturing industry needs only one more thing to make the agency an irrelevant artifact of a bygone consumer-protective era: regulatory preemption of state common law. At that point, industry will have the best of both worlds – minimal regulation at the front end of the production process, and no liability for injuries at the back end. All three branches of government must take positive steps to ensure that product manufacturers are accountable for injuries caused by their goods.

- The Executive Branch: Given the text of CPSC's organic statute and its legislative history, it is clear that Congress did not intend for CPSC regulation to displace state tort law. CPSC should acknowledge that it lacks the power to preempt tort law and refrain from attempting to do so in future rulemakings.

  Second, although CPSC is not subject to Executive Order 13132 (independent agencies like CPSC are only "encouraged" to comply), there are aspects of the Order that CPSC should adopt as internal policy. For instance, CPSC should consult with state officials prior to making any claims that its regulations preempt state law.

- Congress: The Consumer Product Safety Improvement Act is a first step toward limiting preemption claims made by CPSC, but its exclusive focus on the agency misses a key player in the preemption debate – the courts. Congress should consider additional legislation clearly stating that courts should only give preemptive effect to CPSC regulations if there is a *direct conflict* (i.e., where action to avoid liability under state tort law would subject a manufacturer to liability under the CPSA, FHSA, FFA, or PPPA).

- The Judiciary: The courts should constrain CPSC's attempts to preempt state common law. As evidenced by the savings clause in the CPSA, Congress designed CPSC and delegated powers to the agency in a manner intended to complement the various functions of the existing tort system.

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[4] 15 U.S.C. § 2074(a).

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[6] 529 U.S. 861 (2000).

[7] 15 U.S.C. § 2051(b).

[8] *See, e.g., Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000), *Tober v. Graco Children's Products, Inc.*, 2004 WL 1085178 (S.D. Ind. 2004).

[9] *See, e.g., BIC Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008).

[10] *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000).

[11] Thomas O. McGarity, The Preemption War ch. 7 (2008).

[12] *Quoted in*, Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 233 (2007).

[13] *See*, 15 U.S.C. § 2075 (CPSC), 15 U.S.C. § 1203 (Flammable Fabrics Act), 15 U.S.C. § 1261n (Federal Hazardous Substances Act), *and* 15 U.S.C. § 1476 (Poison Prevention Packaging Act).

[14] 15 U.S.C. § 1203(a).

[15] 15 U.S.C. § 1261, Note (b)(1)(A).

[16] 15 U.S.C. § 1476(a).

[17] Pub. L. No. 94-284 § 17, 90 Stat. 503 (May 11, 1976).

[18] *See, Cipollone v. Liggett Group*, 505 U.S. 504 (1992), *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), *Riegel v. Medtronic*, 128 S.Ct. 999, 552 U.S. ___ (2008).

[19] *See* H.R. Conf. Rep. 94-1022, 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N 1017, 1029-30 (Apr. 8, 1976).

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[21] *See Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552 (1st Cir. 1996), *cert. den'd.* 519 U.S. 1149 (1999), *O'Donnell v. Big Yank, Inc.*, 696 A.2d 846 (Pa. Super. 1997), *and Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980).

[22] *See Miles v. S.C. Johnson & Son, Inc.*, not reported in F.Supp.2d, 2002 WL 31655188 (N.D.Ill. 2002) (holding that the PPPA preempts any common law claims that "seek to impose … packaging requirements that are different from those imposed by [the] statute") *and Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1488 (11th Cir. 1994) (holding that PPPA did not preempt common law claim because the suit was filed against a bulk packager, not a packager of retail products).

[23] Cons. Prod. Safety Comm'n., *Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets*, 71 Fed. Reg. 13472 (Mar. 15, 2006).

[24] Cons. Prod. Safety Comm'n., *Standard for the Flammability of Clothing Textiles*, 73 Fed. Reg. 15636 (Mar. 25, 2008).

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[26] *See Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir. 1973), *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), *Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552 (1st Cir. 1996), *cert. den'd.* 519 U.S. 1149 (1999), *and O'Donnell v. Big Yank, Inc.*, 696 A.2d 846 (Pa. Super. 1997). *See also, Topliff v. Wal-Mart Stores East LP*, 2007 WL 911891, *45 (N.D.N.Y. 2007).

[27] *Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552, 554 (1st Cir. 1996).

[28] *Id.* at 554-56.

[29] *Id.* at 556.

[30] *Id.* at 556, *citing Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 734 (Minn. 1980).

[31] *Id.* at 557.

[32] Pub. L. No. 110-314, 122 Stat. 3016 (Aug. 14, 2008).

[33] *Id.* at § 231(a).

[34] *Id.*

[35] 15 U.S.C. § 2058(b). *See also*, Robert S. Adler, *From "Model Agency" to Basket Case – Can the Consumer Product Safety Commission Be Redeemed?* 41 Admin. L. Rev. 61, 92-106 (1989).

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[40] 15 U.S.C. § 2055(b), *as amended by* Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 211.

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[44] *Budget of the United States Government, Fiscal Year 2009 – Appendix*, 1138 (2008), *available at* http://www.whitehouse.gov/omb/budget/fy2009/pdf/appendix.pdf (accessed Oct. 14, 2008).

[45] *Id.*

[46] Ann Brown and Pamela Gilbert, *Reviving a Consumer Watchdog*, Wash. Post, B7 (Aug. 26, 2007).

[47] Robert Adler, *From "Model Agency" to Basket Case – Can the Consumer Product Safety Commission Be Redeemed?*, 41 Admin. L. Rev. 61, n.90 (1989).

[48] Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009, Public Budget Database, available at* http://www.whitehouse.gov/omb/budget/fy2009/sheets/budauth.xls (accessed Oct. 14, 2008). Budget authority figures prior to FY 1976 are not available. For a detailed discussion of CPSC's budget over the last 15 years, see OMB Watch, *Regulatory Matters: Product Safety Regulator Hobbled by Decades of Negligence* (Feb. 5, 2008), *at* http://www.ombwatch.org/article/articleview/4154/ (accessed Oct. 14, 2008).

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About the Authors

William Funk is a Professor of Law at Lewis & Clark Law School in Portland, Oregon and a Member Scholar of the Center for Progressive Reform. He has taught and published widely in the fields of administrative law, constitutional law, and environmental law. While in academia, he has remained actively involved in the everyday world of environmental law and regulatory practice consulting for the U.S. Department of Energy, the Administrative Conference of the United States, and the Columbia River Gorge Commission, and chairing an advisory committee for the Oregon Department of Environmental Quality (DEQ). He has been active in the American Bar Association's Section of Administrative Law and Regulatory Practice, where he is a past Chair of the Section, as well as chairing committees and editing its newsletter.

Thomas McGarity holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin. He is a member of the board of directors of the Center for Progressive Reform, and the immediate past president of the organization. Professor McGarity has published widely in the areas of regulatory law and policy. His recent scholarship on issues of regulatory preemption includes numerous law review articles and his new book, *The Preemption War*, published by Yale University Press.

Nina Mendelson is a Professor of Law at the University of Michigan Law School and is a Member Scholar of the Center for Progressive Reform. She teaches environmental and administrative law, as well as legislation and statutory interpretation. Professor Mendelson's scholarship focuses on administrative process, especially in the environmental regulatory setting. Prior to teaching, she served for several years as an attorney in the Department of Justice Environment & Natural Resources Division, litigating and negotiating environmental legislative issues.

Sidney Shapiro holds the University Distinguished Chair in Law at the Wake Forest University School of Law and is the Associate Dean for Research and Development. He is a member of the board of directors of the Center for Progressive Reform. Professor Shapiro has taught and written in the areas of Administrative Law, Regulatory Law and Policy, Environmental Policy, and Occupational Safety and Health Law for 25 years. Professor Shapiro has been an active participant in efforts to improve health, safety, and environmental quality in the United States. He has testified before congressional committees on administrative law and occupational safety and health issues.

David Vladeck is a Professor of Law and Co-Director of the Institute for Public Representation at Georgetown University Law Center and a Member Scholar of the Center for Progressive Reform. He is the former Director of the Public Citizen Litigation Group. Considered one of the nation's foremost public interest litigators, he is an expert in the areas of Administrative Law, Occupational Safety and Health Law, Food and Drug Law, First Amendment Law, and Civil Procedure. Professor Vladeck has published widely in a number of areas, including First Amendment law, regulatory law and policy, and issues of justice.

Matthew Shudtz, J.D., is a Policy Analyst working with CPR's Clean Science and Corporate Accountability issue groups. He joined CPR in 2006. Mr. Shudtz's prior experience in the public interest field also includes work for the Natural Resources Defense Council, where, as a legal intern, he provided research and drafting support in FIFRA and CAA litigation, and CWA regulatory affairs. He also worked as a legal/legislative intern at the Chesapeake Bay Foundation during the 2005 Session of the Maryland General Assembly. Mr. Shudtz received his J.D. with a certificate in environmental law from the University of Maryland and a B.S. from Columbia University.

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