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THE SUPREME COURT AND OUR CULTURE OF IRRESPONSIBILITY

Mary J. Davis*

In this article, Professor Davis chronicles the Supreme Court's expansion of the "culture of irresponsibility," where institutional defendants are freed from tort liability with no check on the abuse of such immunity. Professor Davis describes the Court's progression toward immunity in products liability decisions of the past decade including East River Steamship, Boyle, Cipollone, and Lohr. Noting the effect of the Court's decisions in promoting institutional irresponsibility, Professor Davis encourages the Court to use its "cultural influence" and reconsider its broad extension of immunity which has spread to situations and institutional defendants the Court never imagined.

“Our privileges can be no greater than our obligations. The protection of our rights can be no larger than the performance of our responsibilities.”

John F. Kennedy

INTRODUCTION

We are a society of avoiders of responsibility. One does not have to look far to see evidence supporting this conclusion in everyday life; it is inevitable if one pays any attention at all to current events. And it is perhaps most clearly seen in the evolution of legal principles defining responsible conduct. Tort reformers are constantly bemoaning the litigation explosion, fueled, so they claim, by plaintiffs who want something for nothing and who have only themselves to blame for their harm. Many legal observers opine that tort law has increasingly created rules imposing liability—i.e., providing rights to victims—without adequately emphasizing the responsibilities which accompany those

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1. President's Remarks in Nashville at the 90th Anniversary Convocation of Vanderbilt Univ., PUB. PAPERS 406, 407 (May 18, 1963) [hereinafter Kennedy Speech].

rights. Consistent with this observation, old common law rules providing immunity from liability had been, until recently, on the decline.

The debate over tort rights and responsibilities seems to center primarily around how to deal with those who abuse the rights afforded them and less often on the idea that certain rights should not be recognized at all. In response to the increasing concern that rights have been recognized without the incumbent responsibility, many have observed that the "owners" of rights should bear some concomitant recognition that they have, at the least, a responsibility not to abuse the right. Similarly, when a responsibility that would otherwise be recognized under existing law is immunized from liability, such freedom from responsibility is also a right in itself and should be accompanied by an obligation not to abuse it. This article explores the increasing avoidance of responsibility by those who have been bestowed with the "right" to be free from liability through immunities, and one institution that has encouraged abuse of that right, the Supreme Court of the United States.

In particular, this article chronicles the way in which the Supreme Court of the United States has encouraged the culture of irresponsibility by creating new common law immunities, creatively extending old ones, and interpreting Congress's intent to federalize these immunities. Through four significant products liability decisions in the last decade, the Court has contributed to the culture that "privileges [are] greater than our obligations." Part II of the article briefly summarizes the Court's approach to responsibility through the following cases in which it has interpreted products liability immunity rules over the last

3. E.g., HUBER, supra note 2; Mary Ann Glendon, Does the United States Need "Good Samaritan" Laws?, RESPONSIVE COMMUNITY, Winter 1990-91, at 9 (discussing the lack of civic responsibility associated with the no-duty-to-rescue rule).


An immunity . . . avoids liability in tort under all circumstances, within the limits of the immunity itself. It is conferred, not because of the particular facts, but because of the status or position or relation of the favored defendant. It does not deny the tort, but the resulting liability. The immunity does not mean that conduct that would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of the particular defendant, or of interests that the defendant represents, absolution from liability is granted . . . .

Immunities are today very much upon the wane, as the result of years of attack from numerous legal writers, and expressed doubts on the part of many courts.


decade: *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 7 *Boyle v. United Technologies Corp.*, 8 *Cipollone v. Liggett Group, Inc.*, 9 and *Medtronic, Inc. v. Lohr*. 10 This article addresses the Court's tendency to expand, rather than contract, those immunities. Part III expands in detail on those decisions and explores their impact on perpetuating the culture of irresponsibility among institutional actors. 11 This article concludes that the Court should, but has failed to, consciously consider the culture it has helped create and the abuse of the "right" of immunity by institutional actors it has encouraged. The Court approaches its task in the products liability and, even more broadly, tort responsibility fields with little appreciation for the irresponsibility that it has fostered in institutional defendants.

I. THE CULTURE OF IRRESPONSIBILITY EXPLAINED

The Supreme Court has enormous influence in many areas which it is not empowered to affect directly simply by virtue of its position as the highest judicial body in this society. 12 When the Supreme Court speaks, all people listen, not just lawyers, lawmakers, and law professors. 13 People certainly are listening to the high profile cases which in-

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11. For a discussion of the term "culture of irresponsibility," see infra note 19.
12. It is axiomatic to state that the Supreme Court is a court of limited jurisdiction, competent to address only those legal issues which the grant of its authority allows. U.S. CONST. art. III, §§ 1, 2. See John E. Nowak et al., CONSTITUTIONAL LAW 23-34 (1978) (outlining original and appellate jurisdiction of the Supreme Court).
To support the idea that the Supreme Court has influence beyond the purely legal effect of its decisions, I assume the existence of what Lawrence Friedman has called the "mechanism or channel" of how social and legal forces affect one another. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1581 (1989). Friedman explains the idea that legal and popular culture are images of each other, "help[ing] explicate and illuminate their respective contents." Id. at 1579. More importantly, Friedman explores a methodology for a social theory of law which "insists . . . that an analysis of social forces best explains why the legal system is as it is, what shapes and molds it, what makes it ebb and flow, contract and expand; what determines its general structure, and the products that it grinds out day by day." Id. at 1581. In this article, I build on Friedman's observation of the truism that "[l]aw and legal institutions are absolutely ubiquitous in modern society." Id. at 1587. Thus, legal decisions, particularly by the Supreme Court, become part of popular legal culture which "acts as a medium or channel for transmitting values and attitudes" to the general public. Id. at 1592-93.
13. An example of the media attention to the Supreme Court's decisions is the at-
form much of today's social and political discourse. The Court's power to change directly society's legal landscape is self-evident; its power indirectly to affect our cultural landscape similarly cannot be overestimated.

In recent years, the scope of, and general decline in respect for, civil responsibilities has received significant attention as a changing aspect of our societal landscape. The Communitarian movement, among others, has chronicled an "impoverishment of our political discourse" resulting from an excessive focus on rights that has prevented a discussion of the responsibilities that attend those rights. While the Court does not have the authority to address directly civil responsibility in the sense of generally defining the conduct to which civil liability attaches, it does so in certain limited areas governed by federal law. When it addresses civil responsibilities in these limited


14. Friedman, supra note 12, at 1598. Changes in the law itself have been vitally important in pushing legal institutions into center stage. . . . Unquestionably, the great cases of the Warren court attracted fresh attention to the judicial branch, or at least to the apex of that branch. The Burger court made itself highly visible—and controversial—when it decided Roe v. Wade.

Id.

15. Put another way: "It matters how judges decide cases." RONALD DWORKIN, LAW'S EMPIRE 1 (1986). It matters for a number of reasons, not only to litigants, but because, as Dworkin states:

There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him.

Id. Dworkin also emphasizes one of the premises of this article, that the Supreme Court has enormous influence on what the law is because the law is often not self-evident, nor analytically derived, but, rather, what judges say it is. Id. at 2-6.


17. GLENDON, supra note 16, at xi.

circumstances, the Court is providing much more than the legal resolution to the issues before it. The Court's influence in creating a perception of what constitutes responsible behavior goes far beyond the parameters of the issue before it, affecting how the general public views the scope of responsibility of different members of society.

Through this secondary influence, the Court has perpetuated a culture in which avoiding responsibility is acceptable, at least if engaged in by the large segment of society made up of institutional actors. The cases from which I derive this thesis involve products liability, the variation of tort and warranty law in which responsible conduct has for centuries been defined by judges. Tort liability may be considered a “state-enforced attribution of responsibility.” How the Supreme Court defines the “attributes of responsibility” in its unique role as our leading judicial body deserves special attention as the dialogue over the balance between rights and responsibilities continues unabated.

Since 1986, with its first meaningful foray into products liability, the Court has directly addressed the content of tort and products liability rules on only a few occasions. The Court on these occasions has
been influenced by the instrumentalist theory that rules of civil liability have as their primary function the promotion of efficient conduct and the maximization of society's welfare, usually defined in the economic sense. The Court has chosen consistently to adopt rules that immunize conduct to which liability would otherwise attach under the existing applicable rules. This course protects institutional decision-makers over individual victims and, consequently, discourages rather than encourages responsible institutional behavior.

There are a number of explanations for these results: the Court's increasingly conservative to centrist membership; reluctance to legislate progressive and innovative federal standards of liability; dedication to precedent which required these results; and a desire to engage in some reverse social engineering to correct the expansion of liability thought to have occurred since the sixties. The Court has issued opinions which, taken as a whole, create a perception that irresponsibility, at least by some, is tolerable if economic efficiency and institutional autonomy goals are at stake. The Court's consistent choice of instrumental values as the fundamental basis of decisionmaking has produced a domino effect among other decisionmakers and within society generally. Lower courts, revering the Court's analysis and paying deference to it, give the Court's decisions much credence and follow them almost blindly, even when that result is not mandated, and fail to evaluate the effect on the overall balance of rights and responsibilities. The end result is not one decision recognizing an immunity in a limited area of law, but a series of such decisions, creating an avalanche

rules. For a discussion of the Court's definition of statutory preemption in Cipollone, see supra note 13 and accompanying text. For a discussion of the Court's further refinement of this analysis in Lohr, see infra notes 286-306 and accompanying text.


24. The Court has often cited its deference to Congress's role as the legislative body as a reason for its decisions. See Bush v. Lucas, 462 U.S. 367, 389-90 (1983) (concluding a ruling was inappropriate on a federal employment contract due to an express congressional remedy); United States v. Gilman, 347 U.S. 507 (1954); Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (relying on Congress for aid in interpreting maritime law).

of immunized conduct, ever-expanding on its inevitable way to the bottom where immunity is the rule rather than the exception.

II. THE PRODUCTS LIABILITY DECISIONS

The Court does not have much opportunity to address issues of tort liability. When it does, therefore, its opinions and observations are given increased attention. In the last decade, the Court has had more than its usual opportunity to address issues of civil responsibility. Therefore, how it has chosen to do so and with what results are especially significant in its cultural impact.

A. East River Steamship Corp. v. Transamerica Delaval, Inc. and Economic Loss in Tort

Although the debate over how to resolve product-related injuries heated up in the early 1960s and has continued over the ensuing three decades to this day, the Court did not decide a products liability case until 1986. In East River Steamship Corp. v. Transamerica Delaval, Inc., the Court was called on to decide (1) whether a strict products liability action is cognizable in admiralty and (2) if so, whether purely commercial economic loss is recoverable under strict products liability principles. The Court quickly, and with little discussion, decided that strict products liability principles operated in admiralty. The Court, speaking unanimously through Justice Blackmun, supported the rationale behind strict liability: to impose liability on the party best able to protect persons from hazardous equipment.

26. 476 U.S. 858 (1986). This case involved a dispute between the charterers of a supertanker and the manufacturer of the tanker's turbine engines. The charterers alleged the million dollar engines malfunctioned during operation as a result of design and manufacturing defects. Id. at 860-61.

27. Id. at 859. The district court granted summary judgment on the basis that purely economic loss is not recoverable in strict products liability, and the Third Circuit Court of Appeals affirmed. Id. at 862. The Third Circuit applied a test for determining when purely economic damages are recoverable in strict products liability that would have allowed recovery for damage solely to a defective product itself if the defect creates an unreasonable risk of harm to persons or property other than the product itself. Id.

28. Id. at 865. The Court noted that general admiralty law is federal and developed by the judiciary, absent statute, from state and federal sources: "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." Id. at 864-65. Consequently, the Court's discussion of applicable principles is not limited entirely to admiralty law but rather is relevant to general attitudes regarding tort responsibilities. The Court's precedents relating to injuries of maritime workers had long pointed in the direction of strict liability in the areas of unseaworthiness and breach of implied warranty of workman-like service. Id. at 865.

29. Id. at 866. The Court noted that its precedents relating to injuries of maritime workers logically led to the conclusion that strict products liability applied. Id. The Court did refer, however, to Justice Traynor's famous concurring opinion which explained the many reasons supporting the adoption of strict products liability. Id. at 866-67 (citing Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).
According to the Court, the more immediate problem was whether there was any room left for contract principles to operate in claims arising from defective products.\textsuperscript{30} The Court phrased the inquiry in a telling way:

Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty. It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort. We must determine whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligations.\textsuperscript{31}

This description of the "public policy judgment" which formed the basis for products liability is a classic understatement.\textsuperscript{32} The Court does go on to identify what is often considered the primary goal of products liability—to fix responsibility where it will most effectively reduce the hazards inherent in defective products\textsuperscript{33}—but in doing so, the Court clarifies that its primary purpose in identifying that goal is not to further it, but to distinguish it from the circumstances of the present case and limit its operation.\textsuperscript{34}

One would have thought that the Court would take more time to explore fully the policies behind an area of law that had caused turmoil in state courts for the previous twenty years. Perhaps the timing of the Court's decision, twenty years after adoption of strict liability in the \textit{Restatement (Second) of Torts},\textsuperscript{35} prevented the Court from believing it was necessary to explore fully the additional policy bases supporting products liability: encouraging the manufacture of safer products, com-

\textsuperscript{30} Id. at 866.

\textsuperscript{31} Id.

\textsuperscript{32} There have been numerous explanations of the policy bases of products liability, and much debate about the priority that the competing bases have in defining substantive products liability rules. See, e.g., Fleming James, Jr., \textit{Products Liability}, 34 Tex. L. Rev. 192 (1955) (analyzing theories of strict liability and negligence); W. Page Keeton, \textit{Products Liability—Some Observations About Allocation of Risks}, 64 Mich. L. Rev. 1329 (1966) (discussing manufacturers as risk distributors for all losses except those attributable to certain known causes); William L. Prosser, \textit{The Assault upon the Citadel (Strict Liability to the Consumer)}, 69 Yale L.J. 1099 (1960) (discussing abrogation of the “citadel” of privity and the expansion of strict liability); William L. Prosser, \textit{The Fall of the Citadel (Strict Liability to the Consumer)}, 50 Minn. L. Rev. 791 (1966) (discussing the recent explosion in products liability). For further discussion of the goals of tort liability for defective products, see Mary J. Davis, \textit{Design Defect Liability: In Search of a Standard of Responsibility} 39 Wayne L. Rev. 1217, 1226-30 (1993) (advocating a higher standard of responsibility for manufacturers in product design).

\textsuperscript{33} \textit{East River S.S.}, 476 U.S. at 866-67 (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring)).

\textsuperscript{34} The Court states: “Obviously, damage to a product itself has certain attributes of a products-liability claim. But the injury suffered—the failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.” \textit{Id.} at 867-68.

\textsuperscript{35} \textit{Restatement (Second) of Torts} § 402A (1965). This section contains the primary version of strict products liability used in this country.
compensating innocent victims in non-contractual relationships with producers, making impossible negligence cases easier to prove and thus allocating responsibility more evenly and fairly, and acknowledging the supremacy of consumers' expectations of product quality justified by producers' representations of quality. It does appear shortsighted to fail to discuss these fundamental principles in any depth and choose to focus instead on protecting contract law from drowning in a sea of tort.\(^{36}\) To the Court, twenty years of products liability decisions discussing the goals of products liability and attempting to balance those goals boiled down to the preservation of contract law, hardly the main concern of most products liability jurisprudence.

The Court ultimately concluded that loss to a product itself is not the kind of harm strict products liability principles were designed to address.\(^{37}\) In doing so, the Court discussed the approaches taken by other jurisdictions in answering the question.\(^{38}\) According to the Court, the majority approach preserved a role for the law of warranty and prevented recovery in tort for harm solely to the product itself.\(^{39}\) Labeling this a "majority" approach overstates the state of the law at the time; actually, very few jurisdictions had addressed the question directly. The approach designated by the Court as a "minority" had, in fact, been adopted by a majority of the courts of appeals at that time. That approach promoted "the safety and insurance rationales behind strict liability"\(^{40}\) by allowing recovery in strict products liability for purely economic loss, including harm to the product itself. An intermediate approach would have recognized recovery for injury to the product itself if the defect which caused the loss endangered consumers as well, but through fortuity in the specific case, did not.\(^{41}\)

The Court adopted what it termed the "majority approach" which denied recovery.\(^{42}\) The Court relied on two themes that would recur in its products liability opinions: that chosen responsibility standards must enable manufacturers easily to structure their business behavior and that limitations on damages must be maintained.\(^{43}\) The Court's

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37. *Id.* at 871.
38. *Id.* at 868-70.
39. *Id.* at 868 (relying on *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) (holding that preserving a proper role for warranty law precludes tort liability for pure economic harm)).
40. *Id.* at 869. These courts "reject the Seely approach because they find it arbitrary that economic losses are recoverable if a plaintiff suffers bodily injury or property damage, but not if a product injures itself." *Id.* Unlimited liability was not a concern under this approach, according to many of the courts of appeals, because "a manufacturer can predict and insure against product failure." *Id.*
41. *Id.* at 869-70. This position was advocated by the court of appeals below. *East River S.S. Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903, 908-10 (3d Cir. 1985).
43. *Id.* at 870-71. The Court noted that the intermediate position, which essentially turns, as do all cases involving negligent behavior, on the degree of risk, was too indeterminate to allow workable standards. *Id.* at 870. The Court never explains why a stan-
choice to promote efficiency in business operations stands out starkly against the general strict liability backdrop of manufacturer responsibility for hazardous products without regard to fault. The Court discusses only briefly the nature of the manufacturer's responsibility and defines that responsibility very narrowly. Importantly, the Court concludes, not that damages should be limited for breach of a duty to make a reasonably safe product, but that product manufacturers have no duty to make products safe when the only injury that results is economic loss. The Court attempts to define product-related duties differently based on the injury which ultimately occurs; the responsibility of a manufacturer in making and distributing its products differs depending on the harm which results.

This begs the question of how producers are supposed to be able to decide when their products are going to injure only themselves so they can accommodate the different duties. The difference, of course, is not in the duty, but rather what damages the manufacturer's tortious conduct must pay for, whether strict liability or negligence-based. The Court, contrary to what it says, makes this distinction based upon the nature of the victim and his supposed ability to acquire insurance for such commercial losses rather than any difference in the manufacturer's duty. This, it seems to me, is putting the cart before the horse. The nature of the responsibility to manufacture a non-defective product would seem the same whether the product ultimately merely self-destructs, as did the turbine engines in East River Steamship, or in-

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44. The Court interchangeably refers to the relevant loss as loss to the product itself and purely economic harm. Id. at 866-67. These are two different things; one can have loss to the product itself leading to significant other economic loss besides mere loss of the product. Ultimately, the Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." Id. at 871. The Court's broad language referring to economic harm generally reads more into this simple holding.

45. Id. at 871. The Court quotes Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965):

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.

East River S.S., 476 U.S. at 870.

46. East River S.S., 476 U.S. at 871. The Court's distinction rests on the commercial user's ability to acquire insurance for commercial losses; the Court does not note the manufacturer's equal, and perhaps superior, ability to acquire insurance because of its ability to identify design and manufacturing defects and thus anticipate them. Id.
juries someone or something else in the process. The tort duty arises at
the time of manufacture, not at the time of injury. To say the responsi-
bility differs with the result is a disingenuous way of creating an im-
munity from liability for conduct that would otherwise be irresponsible
to favor the economic position of the manufacturer over that of the vic-
tim, even a commercially viable one. To say that “[t]he tort concern
with safety is reduced when an injury is only to the product itself” is
absurd; the concern with safety is no different. The Court begins to
create the perception that irresponsible product manufacture is accept-
able when the victim is in a position to insure against it.

There may be very good reasons to limit tort recovery of plaintiffs
like those in East River Steamship. The plaintiffs were large commer-
cial companies playing for high stakes and could look out for them-
selves. They had the opportunity to pay for increased warranty pro-
tection. Their contract damages would provide the benefit of their
bargain, arguably all that the plaintiffs were entitled to, by compen-
sating for repair costs, lost profits, and other reasonably foreseeable
consequential damages. When the loss is contemplated at the time of
the contract and can be the subject of bargaining, contracting parties
should reasonably expect that the contract will govern the loss; thus it
is fair to limit them to contract remedies.

Even given these reasons which support a limited recovery in tort
for purely economic loss, the Court writes with an unnecessarily broad
brush when it discusses the primacy of contract over tort responsibil-
ity, particularly when the loss sustained is from an unreasonably dan-
gerous and defective product and not simply from some product char-
acteristic which failed to please the purchaser with its quality or
quantity. Tort law provides recovery only for unreasonably dangerous
products, and thus the Court’s refusal to recognize that tort law may
have some room to operate in this situation is unfortunate. Limiting
the manufacturer’s duty in such broad terms downplays the effort of
the previous twenty years to put products liability into the tort arena.

47. Id.
48. The Court was convinced that contract and warranty law are better suited to
the type of controversy involved: commercial situations involving parties of equal bar-
gaining power who choose to allocate risk of loss in a particular way. Id. at 872-73.
49. Id.
50. The Court relies on the “more appropriate” contract law recovery to support its
decision that tort recovery is not available. Id. at 873 nn.8-9. Tort damages might tend
to overcompensate an injured commercial purchaser by providing the value of the dam-
aged product, a value which might be more than the purchaser paid, given a reduction
in price for reduced warranty coverage. Id. at 872-73.
51. Id.
52. See, e.g., Salt River Project Agric. Improvement & Power Dist. v. Westinghouse
Elec. Corp., 694 P.2d 198, 206 (Ariz. 1984) (noting that a tort plaintiff must prove that
the product was unreasonably dangerous, while a contract plaintiff need only show that
the product was defective); see also RESTATEMENT (SECOND) OF TORTS § 402A (1965) (stating
manufacturers and sellers are liable for products in a “defective condition unreasona-
bly dangerous” to consumers or property).
Further, the Court confuses the tort concept of foreseeability in its form as proximate cause with foreseeability as a limit on the duty owed. Foreseeability of the risk has always acted as an impediment to defining the scope of the liability. This is foreseeability in its proximate cause sense. The Court considers foreseeability within proximate cause as an inadequate limitation on the manufacturer's liability and, thus, narrowly defines the responsibility of manufacturers in the commercial loss context to exclude losses that clearly are foreseeable even to the most jaundiced eye. The Court's concern for unlimited manufacturer liability and purportedly efficient allocation of risk causes it to seek not a middle ground, as did the Third Circuit in adopting an intermediate approach, but rather a more limited way to define the obligations in issue. The Court admits that tort law provides limitations that would address some of its concerns. However, the Court has staked out its position that limitation of liability is paramount to the products liability goals of encouraging safe products and fairly allocating loss.

1. Effect of East River Steamship

Since the Supreme Court decided *East River Steamship*, most states addressing the question have followed it, mostly without analy-

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54. *East River S.S.*, 476 U.S. at 874. The Court notes that it would be difficult for a manufacturer to take into account all foreseeable plaintiffs who may encounter the product. Id. This, however, is a proximate cause argument, as the Court admits by citing to *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821 (2d Cir. 1968). *East River S.S.*, 476 U.S. at 874. When the argument is one of proximate cause, the duty question has already been answered in the affirmative and the question remains: "Are there other public policy reasons to limit liability?" See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to take a series of events beyond a certain point."). The Court could have taken this approach, much as did the court of appeals in the case below. Instead, the Court states there is no tort duty, not that the breach of that duty has not been the proximate cause of the harm. *East River S.S.*, 476 U.S. at 871. This classic debate, which *Kinsman* only touches upon, is best expressed in *Palsgraf* in the opinions of Justices Cardozo in the majority, arguing for a duty approach, *Palsgraf*, 162 N.E. at 99-101, and Andrews in dissent, arguing for a proximate cause approach, id. at 102-05 (Andrews, J., dissenting).
55. *East River S.S.*, 476 U.S. at 874 (warning that foreseeability alone would extend a manufacturer's liability too far down the distributional chain).
sis and in total deference to the Court. Prior to *East River Steamship* only ten states denied recovery for loss if a product damaged only itself.59 After the Court decided *East River Steamship*, eighteen more states decided to follow it.50 Several states have not yet considered the

59. Morrow v. New Moon Homes, Inc. 548 P.2d 279, 283-86 (Alaska 1976) (holding buyers of a defective manufactured home could not recover in tort when the only damage was to the product itself) (subsequently limited by Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981) (holding strict liability in tort may apply when only the product itself is damaged if the defect also threatens other property or persons), and Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1180 (Alaska 1993) (stating *East River Steamship* unjustifiably disregards safety concerns resulting from defective products)); Seely v. White Motor Co., 403 P.2d 145, 149-51 (Cal. 1965) (holding that strict liability in tort applies to injury to person or property other than the defective product, but not to economic injury alone); Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co., 544 P.2d 306, 309-11 (Idaho 1976) (denying recovery to buyer of airplane for damages sustained to aircraft due to mechanical failure due to lack of privity and noting distinction between personal injury, property damage, and economic loss); Sanco, Inc. v. Ford Motor Co., 771 F.2d 1081, 1086 (7th Cir. 1985) (holding Indiana state court would deny tort recovery for purely economic losses); Diatom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1581 (10th Cir. 1984) (holding that Kansas law denied tort recovery to commercial purchaser of rotary vacuum dryers for purely economic loss); Eaton Corp. v. Magnavox Co., 581 F. Supp. 1514, 1539 (E.D. Mich. 1984) (holding manufacturer of antilock brake systems could not recover from component manufacturer in tort for purely economic losses); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981) (holding commercial purchaser of hot plate press could not recover in tort when cylinder failed and only damage was to press itself); Schiavone Constr. Co. v. Elgood Mayo Corp., 496 N.E.2d 1322, 1325 (N.Y. 1982) (denying recovery in strict products liability to remote purchaser of defective truck hoist when purchaser suffered only economic loss and the product was not unduly dangerous); Maru Shipping Co. v. Burmeister & Wain Am. Corp., 528 F. Supp. 210, 214-15 (S.D.N.Y. 1981) (holding shipowner who did not allege personal injury or damage to other property as a result of defective parts in auxiliary vessel engines could not recover in tort); Hart Eng'g Co. v. FMC Corp., 593 F. Supp. 1471, 1481-83 (D.R.I. 1984) (holding that purchaser of admittedly defective clarifiers could not recover in tort when defect did not create an unreasonable risk of danger and only injury was failure to meet consumer expectations); Mid Continent Aircraft Corp. v. Currie County Spraying Serv., Inc., 572 S.W.2d 308, 312-13 (Tex. 1978) (denying tort recovery for damages to product itself to purchaser of rebuilt airplane that crashed due to the seller's failure to attach a crankshaft gear bolt lock plate when the engine was overhauled). Each of these jurisdictions followed the California *Seely* decision, as did the Court in *East River Steamship*. Some jurisdictions looked at

the nature of the defect and the manner in which the damage occurred before allowing a plaintiff to recover for damage to the product . . . . The underlying rationale for this inquiry is that when a product creates a risk of personal injury, liability should not depend on whether or not the victim is actually injured.


Interestingly, a recent Ninth Circuit Court of Appeals decision discussing the California rule from *Seely* notes that the United States Supreme Court "gave *Seely* a broader reading than its holding." Aris Helicopters, Ltd. v. Allison Gas Turbine, 932 F.2d 825, 827 (9th Cir. 1991) (Thompson, J., concurring). The concurring opinion further states: "[I]t is well to bear in mind the old adage that the Court is not last because it is infallible; rather, it is infallible because it is last." *Id.*

recoverable even when damage was sudden and calamitous and when plaintiff had no

In American Xyrofin, Inc. v. Allis-Chalmers Corp., 595 N.E.2d 650 (Ill. Ct. App. 1992), the Illinois court seemed to agree with the foundation of East River Steamship, but ultimately concluded the instant case was outside its scope because damage occurred to property other than the product itself. Id. at 656; see also Trans States Airlines v. Pratt & Whitney Can., Inc., 875 F. Supp. 522, 525 (N.D. Ill. 1995) (holding plaintiff could seek recovery for economic loss along with property and personal injury damage if product damage was the result of sudden and calamitous breakdown). In Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 374 S.E.2d 897, 901-06 (S.C. App. 1988), the South Carolina court discussed the "economic loss rule" in the context of an allegedly defective dwelling and appeared to favor the concept, relying partially on Seely, but did not discuss East River Steamship. Shortly thereafter, the South Carolina Supreme Court rejected Carolina Winds to the extent that it advocated a complete denial of tort recovery for new home buyers who suffered pure economic loss. Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730, 736-37 (S.C. 1989). In Kennedy, the court held that, in the new home context, the "economic loss rule" would apply if a builder breached a purely contractual duty. Id. at 737. However, if the builder breached a legal duty, such as constructing a house that posed a serious risk of physical harm, the injured home buyer
issue, but few states that have addressed the issue since *East River Steamship* have declined to follow the Court's lead.\(^6\) Many of these opinions are federal court cases based on diversity of citizenship jurisdiction; the Supreme Court's influence is formidable in this circumstance.\(^6\) One can only surmise that had the Supreme Court taken a more moderate approach, recognizing that its rule may only be appropriate in commercial, non-consumer goods transactions, jurisdictions which had yet to rule on the matter would also have taken a more moderate approach.

could sue in tort even if only the house was damaged. *Id.*

61. The District of Columbia, Georgia, Illinois, Iowa, Missouri, Montana, Nebraska, New Mexico, North Carolina, South Dakota, Tennessee, and Virginia have not addressed the issue, in part because some do not recognize strict products liability. Some states continue to adhere to the minority position which allows recovery for purely economic loss when the product injures only itself. Blagg v. Fred Hunt Co., 612 S.W.2d 321, 323 (Ark. 1981) (allowing buyers of house with defective carpet to sue builder in strict liability); Sherman v. Johnson & Towers Baltimore, Inc., 760 F. Supp. 499 (D. Md. 1990) (limiting *East River Steamship* to commercial settings). No state has addressed the issue by statute.

Alaska, which followed *Seely* at one time, has since narrowed its approach and expressly declined to follow the *East River Steamship* approach in Pratt & Whitney Can., Inc. v. Sheehan, 852 P.2d 1173, 1180 (Alaska 1993) (holding that damage to defective product itself may be recovered in strict liability if persons or other property are also endangered). The court rejected *East River Steamship*, stating: "We think, however, that any gain in certainty from a per se rule against economic loss is bought at too high a price: decreased safety and consumer protection." *Id.* at 1180. The court further noted that *East River Steamship* fails to protect consumers who lack equal bargaining power and are thus inadequately protected by contract law. *Id.* The court describes the diversity of opinion in the area, noting that an intermediate approach, which *East River Steamship* rejected, "[reflects] not only the developing direction of case law but socially appropriate engineered philosophy directed toward better product and a safer environment . . . . Confining recovery to contractual remedies makes no real sense." *Id.* at 1180-81 (citing Continental Ins. v. Page Eng’g Co., 783 P.2d 641, 684-85 (Wyo. 1989) (Uribigtik, J., dissenting)).


62. For example, in New York, which followed *Seely*, federal district courts have held that the New York Court of Appeals would follow *East River Steamship* if given the chance. See, e.g., Bocre Leasing Corp. v. General Motors Corp., 840 F. Supp. 231 (E.D.N.Y. 1994) (expressing belief that New York Court of Appeals would apply *East River Steamship*); Karshan v. Mattituck Inlet Marina & Shipyard, Inc., 785 F. Supp 363, 385-86 (E.D.N.Y. 1992) (applying the *East River Steamship* principle to consumer rather than commercial setting). In Bellevue South Assocs. v. HRH Constr. Corp., 579 N.E.2d 195 (N.Y. 1991), the New York Court of Appeals reviewed the state of the law in the area and confirmed its adherence to what it described as the intermediate approach of *Seely*, concluding that there was no need to adopt the more restrictive *East River Steamship* approach in that case. *Id.* at 198-200; see also Bocre Leasing Corp. v. General Motors Corp., 645 N.E.2d 1195, 1196-98 (N.Y. 1995) (adopting *East River Steamship* for contractually-based economic losses, including injury to the product itself, in arms-length "as is" transaction involving purchase from subsequent owner of the product).
New Jersey stands alone in following the minority position allowing recovery for economic loss in strict liability.\textsuperscript{63} It was this position that the Supreme Court rejected in favor of its more restrictive liability rule.\textsuperscript{64} Even after the Supreme Court issued \textit{East River Steamship}, New Jersey has refused to adopt it.\textsuperscript{65} Although federal courts have found \textit{East River Steamship} persuasive and applied it to cases based on New Jersey law,\textsuperscript{66} New Jersey courts still refuse to adopt the \textit{East River Steamship} approach.

2. The culture of irresponsibility illustrated

A particularly enlightening opinion on the effect \textit{East River Steamship} has had on perpetuating a culture of irresponsibility is \textit{Richard O'Brien Cos. v. Challenge-Cook Bros.},\textsuperscript{67} from the United States District Court in Colorado. Plaintiffs were the purchasers and lessees of allegedly defective concrete pumps made by the defendant.\textsuperscript{68} In granting summary judgment for the defendant, the district court decided to disregard a prior Colorado Supreme Court case that had held purely economic loss recoverable in tort.\textsuperscript{69} The district court said that since the Supreme Court of the United States had decided \textit{East River Steamship}, an admiralty case based on federal law, the Colorado Supreme

\begin{itemize}
\item \textsuperscript{63} Santor \textit{v. A & M Karagheusian, Inc.}, 207 A.2d 305, 312-13 (N.J. 1965) (holding manufacturer's duty to make non-defective products allows recovery for injury to product itself). This holding was later narrowed, pre-\textit{East River Steamship}, in \textit{Spring Motors Distribs., Inc. v. Ford Motor Co.}, 489 A.2d 660, 672 (N.J. 1985), to exclude commercial transactions, a fair compromise position which recognizes the importance of the inequality of bargaining power between consumers and product manufacturers. For a discussion of courts following an intermediate approach to allow recovery for some economic losses depending on the risk of harm involved in the product's defect, see supra note 61 and accompanying text.
\item \textsuperscript{64} \textit{East River S.S.}, 476 U.S. at 870.
\item \textsuperscript{66} McConnell \textit{v. Caterpillar Tractor Co.}, 646 F. Supp. 1520, 1525-26 (D.N.J. 1986) (holding “a manufacturer in a commercial relationship has no duty under negligence or strict liability to prevent a product from injuring itself,” relying on \textit{East River Steamship}).
\item \textsuperscript{67} 672 F. Supp. 466, 472 (D. Colo. 1987) (disallowing damages for pure economic loss under \textit{East River Steamship}).
\item \textsuperscript{68} Id. at 467.
\item \textsuperscript{69} \textit{Id.} at 471-72. In \textit{Hiigel v. General Motors Corp.}, 544 P.2d 983 (Colo. 1976), the Colorado Supreme Court decided that the purchaser of a motor home which was damaged allegedly by defects in the product itself could recover in strict liability for the damage to the product sold. \textit{Id.} at 989. The \textit{Hiigel} court had followed the New Jersey case, \textit{Santor v. A & M Karagheusian, Inc.}, 207 A.2d 305 (N.J. 1965), one of the first cases holding economic loss was recoverable in strict products liability. \textit{Hiigel}, 544 P.2d at 989.
\end{itemize}
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Court's decision necessarily must be questioned since it was decided prior to East River Steamship. East River Steamship did not control the case before the court because the Colorado case was based on diversity of citizenship, governed by state law under the Erie doctrine. The effect of East River Steamship, according to the district court, compelled the conclusion that a Colorado Supreme Court opinion on point could be disregarded. The court noted that it was not usurping the Colorado Supreme Court's opinion; it just "cuts the edge of the decision very finely." The district court was clearly consumed with following the Supreme Court's opinion, finding that East River Steamship "makes perfect sense conceptually" as well as practically, even though it was facially inapplicable.

As mentioned earlier, good reasons exist to limit recovery for purely economic loss to contractual allocation. Those reasons, however, do not apply when the highest court of the state whose law governs the action says otherwise. East River Steamship defined only a rule operating in admiralty law, but has affected other products liability areas in which it does not directly operate. The philosophical basis for the decision has carried great weight. Courts deciding the issue rely almost exclusively on East River Steamship with no analysis of feasible alternatives. Further, the circumstances presented in many of the cases relying on East River Steamship do not involve equal bargainers in non-admiralty or commercial transactions and often involve consumer transactions where the unreasonably dangerous nature of the product could well have caused serious harm to persons and property.

B. Boyle v. United Technologies Corp. and the Government Contractor Defense

Building on the theme of immunizing irresponsible conduct is the Court's 1986 decision in Boyle v. United Technologies Corp., in which

72. Richard O'Brien Cos., 672 F. Supp. at 472. In addition, the New Jersey Supreme Court had narrowed the effect of Santor in a subsequent case, and the district court was persuaded by this development as well. Id. (citing Spring Motors v. Ford Motor Co., 489 A.2d 660 (N.J. 1985)).
73. Id.
74. Id. at 471. The court goes on to say that imposing a tort remedy in a situation which involved "the principal concern and function of the law of contract—the protection of the legitimately bargained expectations of the parties"—would produce not only uncertainty but represents "a radical undercurrent which threatens to subvert the very concept of predetermined risk allocation." Id.
75. Id.
76. For a discussion of reasons to limit tort recovery for pure economic loss to contractual allocation, see supra notes 48-58 and accompanying text.
77. For a discussion of cases denying tort recovery for pure economic loss where parties have unequal bargaining power, see supra notes 59-66 and accompanying text.
the Court had its first opportunity to address products liability in a non-admiralty context. *Boyle* required the Court to address an actual standard-setting issue, an arguably more difficult issue than that in *East River Steamship*, which called for the type of line-drawing regarding liability more typical of common law judges making policy choices. *Boyle* asked the Court to decide a purely responsibility-defining issue: whether a product manufacturer should be responsible for a defective product design when it complied with government contract design specifications. Defining design defect standards has caused significant difficulty for the judiciary over the last twenty years. Consequently, the Court's first opinion on the issue predictably met with great interest and had a predictably significant impact on the culture of irresponsibility.

*Boyle* sought clarification of the availability and scope of the government contractor defense in a products liability action involving military equipment. The plaintiff was a Marine flyer who died when the escape hatch in the Sikorsky helicopter he was piloting failed to open after the helicopter crashed. Unlike *East River Steamship* which was governed by federal admiralty law, *Boyle* was governed by state tort law since it involved private civil litigation with no federal question. The Supreme Court was asked to determine if federal law preempted state law in defining the applicable liability standards for the manufacturer's design flaws. The defendant contractor argued that under federal law it could not be held liable for the defective escape hatch because the contract under which the helicopter was supplied to the military specified the design and, therefore, the contractor was just following government orders.

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79. *Id.* at 502-04.


82. *Boyle*, 487 U.S. at 502-03. Plaintiff was not killed in the crash, but he drowned because he could not get out of the crashed helicopter; the escape hatch opened out and would not function because of the water pressure after it was submerged. *Id.* at 503. Plaintiff recovered on a jury verdict against the helicopter's manufacturer, but the Fourth Circuit reversed and remanded with directions that judgment be entered for Sikorsky because, in part, the government contractor defense prevented imposition of liability based on federal law. *Id.*

83. *Id.* at 504-05.

84. *Id.* at 503-04, 506. This defense has been variously described as the "government contractor" defense, *id.* at 510, the "military contractor" defense, *id.* at 500, the "contract specifications" defense, *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 739 (11th Cir. 1985), cert. denied, 487 U.S. 1233 (1988), “the government made me do it” de-
The Court first addressed whether there was any basis for federal law to preempt state law in the area of design standards. There was no federal statute which expressly preempted state law in the area, nor was there a direct conflict between applicable federal and state law. The Court thus had to turn to the third circumstance in which it had found preemption of state law: whether the issue involved "uniquely federal interests" so that, even absent a congressional directive or a direct conflict between federal and state law, federal law must displace state law.

The Court identified two unique federal interests at play: the obligations and rights of the United States under its contracts and the civil liability of federal officials for actions taken in the course of their duties. Both of these interests were only indirectly present in this products liability case which involved breach of a tort duty by the private manufacturer defendant and a private plaintiff. The Court took great pains to point out that the federal government's interest was implicated in this suit even though the dispute was between private parties. The interest implicated is the one alluded to in East River Steamship: preventing an increased cost of doing business through unlimited liability. The Court, consistent with its East River Steamship focus on preserving the role of contract, elevated the importance of the government procurement contract and the relationship between government and contractor over the manufacturer's responsibility to the victim.

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fense, In re Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 632 (2d Cir. 1990), and the "I was only following orders" defense, R. Joel Ankney, Note, "But I Was Only Following Orders": The Government Contractor Defense in Environmental Tort Litigation, 32 WM. & MARY L. REV. 399 (1991).

85. Boyle, 487 U.S. at 504, 512.
86. Id. at 504.
87. Id.
88. Id. at 504-05. Cf. id. at 521-22 (Brennan, J., dissenting) (stating the government interests identified are collateral at best to the action and thus the federal interest in the "discretionary function exception" to governmental immunity does not extend to that relationship).
89. Id. at 502-03.
90. Id. at 506-07. The Court attempted to distinguish previous cases that had refused to find a unique federal interest when the case involved private parties even though a federal government contract served as the basis for the dispute. Id. (discussing Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956) and Miree v. DeKalb County, 433 U.S. 25 (1977)). Justice Brennan pointed out to the Court that the interests in these two cases were at least comparable to that in Boyle, and thus indistinguishable, supporting not finding a unique federal interest to preempt state law. Id. at 519-22 (Brennan, J., dissenting).
92. Boyle, 487 U.S. at 507.
Once the Court found a unique federal interest which might justify preemption, the Court had to determine if there was indeed a "significant conflict" between that interest and state law that would require displacement of state law. The area of "significant conflict" which most courts of appeals had evaluated when determining the scope of state law displacement, and thus the content of applicable federal law, was the Feres doctrine "under which the Federal Torts Claims Act (FTCA) does not cover injuries to Armed Services personnel in the course of military service." The Court, recognizing that the Feres doctrine would limit liability only in the military injury context, declined to adopt the Feres doctrine as the basis for defining the area of state law displacement.

The Court recognized the basis of the conflict instead to be the "discretionary function exception" to the FTCA's grant of sovereign immunity to government officials and agencies. The Court said that allowing suits against third-party government contractors would produce the same effect on the federal government sought to be avoided by the FTCA exemption—judicial second-guessing of federal official judgments through state tort suits. As foreshadowed by East River Steamship,

93. Id. The Court states that the presence of a uniquely federal interest "merely establishes a necessary, not a sufficient, condition for the displacement of state law." Id. at 510 (citing Feres v. United States, 340 U.S. 135 (1950)).
94. Id. at 510 (citing Feres v. United States, 340 U.S. 135 (1950)).
95. The Court stated:
We do not adopt this analysis because it seems to us that the Feres doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever Feres would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock . . . or by any standard equipment purchase by the Government, would be covered . . . . On the other hand, reliance on Feres produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines.
Id. at 510-11.
96. Id. at 511. See Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1994) (excepting from consent to suit "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). For a discussion of the scope of the exception, see Dalehite v. United States, 346 U.S. 15, 35-36 (1953) ("It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."). For a post-Boyle discussion of the exception, see Berkovitz v. United States, 486 U.S. 531 (1988) and United States v. Gaubert, 499 U.S. 315 (1991). See generally Donald N. Zillman, Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act, 47 Me. L. Rev. 365 (1995) (discussing the "discretionary function exception" to the Federal Tort Claims Act).
97. Boyle, 487 U.S. at 511. The Court does not elaborate on the types of functions
the Court relies for its conclusion on the potential that the "financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs."98

The Court defined the elements of the defense which protects defectively designed products:29

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.100

The Court believed that these elements insured that the design being challenged was one considered by the government and therefore involved the exercise of a discretionary function.101

The Court specifically rejected a more pro-recovery test102 which would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the product’s design; or (2) the contractor warned the government of the risks of the design, identified alternative designs reasonably known by it, and the government clearly authorized the dangerous design anyway.103 The Court’s reason for rejecting this less broad immunity, one which would have placed greater responsibility on participating contractors to identify risks and design alternatives, is consistent with its focus in East River Steamship on protecting the manufacturer from tort liability.

that have been found to be discretionary but quickly concludes that the selection of the appropriate design for military equipment is one. Id. Justice Brennan, in his dissent, notes that the "discretionary function exception" has never been so broadly construed as to include independent contractors like the defendant:

The immunity we have recognized has extended no further than a subset of "officials of the Federal Government" and has covered only "discretionary" functions within the scope of their legal authority. Never before have we so much as intimated that the immunity (or the "uniquely federal interest" that justifies it) might extend beyond that narrow class to cover also nongovernment employees.

Id. at 522-23 (Brennan, J., dissenting) (citations omitted).

98. Id. at 511-12.

99. Id. at 512. The Court agreed with the scope of displacement adopted by the Fourth and Ninth Circuit Courts even though those cases relied on the Feres doctrine as the area of significant conflict which required displacement. Id. (citing Boyle v. United Techs. Corp., 792 F.2d 413 (4th Cir. 1986) and McKay v. Rockwell Int’l Corp., 704 F.2d 444 (9th Cir. 1983)).

100. Id.

101. Id.

102. Id. at 513 (referring to Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985)).

103. Id.
While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the "discretionary function exception." The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.\footnote{Id.}

The Court's rationale in \textit{Boyle} is a poignant example of its perpetuation of a culture of irresponsibility. The government contractor defense is a tort rule—it is a rule of immunity developed to prevent the unfair imposition of liability on actors whose conduct is controlled contractually by another with superior knowledge and expertise.\footnote{This reason is reflected in the earlier cases which involved public works contracts and an agency relationship between contractor and contractee in order for the defense to arise. \textit{See} \textit{Yearsley v. W.A. Ross Constr. Co.}, 309 U.S. 18 (1940); \textit{see also} \textit{Restatement (Second) of Torts} § 404 cmt. a (1965) (noting that a contractor will generally not be liable for faulty specifications or materials provided by his employer); \textit{Ausness, supra} note 81, at 993 (noting applicability of the contract specification defense in private employment cases and observing: "The assumption behind this rule is that an ordinary contractor does not have sufficient skill to evaluate design specifications provided by an employer and must rely on the employer's superior knowledge and expertise.").} No one would say with a straight face that military contractors like McDonnell Douglas, Boeing, and General Dynamics have knowledge and expertise inferior to that of the government procurement and design officials with whom they contract for such sophisticated weaponry as helicopters and fighter planes. If anything, the military contractors have a cadre of highly trained and paid expert engineers in their employ with far superior knowledge and expertise than their military counterparts, many of whom are probably career military or government bureaucrats. Further, to say that government contractors will be deterred from engaging in the government contract business and from participating in the design process fails to recognize the cash cow that is the United States Department of Defense.\footnote{This is, after all, one of the few federal government agencies whose budget the new 104th Congress, with its Republican majority, planned to increase under its \textit{Contract with America}. H.R. 10, 103d Cong., 1st Sess. (1995). Further, the extraordinary increase in federal spending for the Department of Defense in the 1980s is well-documented. To suggest that military contractors will be deterred from contracting with the Department of Defense because of a little tort liability is, at best, misinformed.} And the idea of placing a military contractor "at risk" for a design defect implies that such institutions are in need of protection from increased risk and are incapable of allocating it or anticipating it, in a way that Lieutenant Boyle and his family somehow were capable. The Court's choice to protect United Technologies over Lieutenant Boyle is proof positive that the Court is more concerned with the economic welfare of the institutional defendant over the innocent victim.
The Court had previously restricted the circumstances in which sovereign immunity operated to those in which “the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens” because immunity “contravenes the basic tenet that individuals be held accountable for their wrongful conduct.” The Court had struck a balance between the extension of immunity and the protection needed to encourage effective administration of government by narrowly defining the reach of the discretionary function exception. In Boyle, the Court bucks its previous approach almost entirely because of the mere possibility that government contractors will pass liability costs onto the government. It is by no means clear that costs will be avoided under the Court's ruling; in fact, greater costs in human life and limb will most certainly be sustained from the unreasonably dangerous and unsafe products that will result. Further, it is not at all clear that tort liability will interfere with government policymaking.

The Court's decision to extend an otherwise narrowly construed immunity to government contractors because of the possible indirect burden on governmental functions indicates the Court's conscious choice to benefit institutional actors—corporate defendants and the government included—with protection from otherwise tortious conduct, a choice similarly promoted in East River Steamship. A concern over unlimited liability is not undeserving of attention. Rather, it is one concern of many that the Court must consider in evaluating the competing interests at issue. Once the Court decided that there was a uniquely federal interest at stake, its refusal to consider the countervailing interests supporting tort liability (compensation, fair allocation of loss and deterrence, among others) perpetuates the “culture” that institutional defendants have a “right” to be irresponsible when it comes to manufacturing products.

108. Id. (Brennan, J., dissenting) (quoting Westfall v. Ervin, 484 U.S. 292, 295 (1988)).
109. Id. at 522-23 (Brennan, J., dissenting).
110. This conclusion is not self-evident and certainly is the subject of debate. Id. at 519-30 (Brennan, J., dissenting).
111. The tort system is premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention. If the system is working as it should, Government contractors will design equipment to avoid certain injuries (like the deaths of soldiers or Government employees), which would be certain to burden the Government. The Court therefore has no basis for its assumption that tort liability will result in a net burden on the Government (let alone a clearly excessive net burden) rather than a net gain.

Id. at 530 (Brennan, J., dissenting).

Justice Brennan further disagrees with the Court's decision to address the issue at all, believing that it is an issue for Congress, not the Court. "Perhaps tort liability is an inefficient means of ensuring the quality of design efforts, but [w]hatever the merits of
The Court further encouraged "abuse of the right" to immunity by refusing to choose an intermediate position in defining the government contractor defense, one which would have accommodated the concern for protecting military decisionmaking while providing some protection to the victims of defective products. There is an area in which a federal government contractor defense reasonably should operate to prevent a contractor who works with the government from bearing all the loss attendant to performing a contract the way the government required it to be performed. The Court's definition of the defense, however, provides too much protection for a class of institutions not needing it.\footnote{112}

The Court's defense overprotects the federal interest in official immunity for discretionary functions and that breadth compounds the perception of tolerable irresponsibility the Court has created.\footnote{113} The official immunity potentially applies not only to specially ordered military equipment like the helicopter in this case, but to "any made-to-order gadget" that the federal government might purchase after some cursory review of plans—"from the Challenger to the Postal Service's old mail cars."\footnote{114} Several post-Boyle cases have involved this question and most have extended Boyle's government contractor defense to run-of-the-mill civilian products the government purchases, even if unrelated to the discretionary choice of military might over safety.\footnote{115} Boyle could apply to civilians injured by a government contractor's product designed for the military, as the Court clearly intends.\footnote{116} Further, it could apply even if the government has not intentionally sacrificed

the policy the Court wishes to implement, 'its conversion into law is a proper subject for congressional action, not for any creative power of ours.'" \textit{Id.} (quoting United States v. Standard Oil Co., 332 U.S. 301, 314-15 (1947)). Congress had declined on several occasions to provide a government contractor defense in spite of pressure by military contractors to do so. \textit{Id.} at 515 n.1 (Brennan, J., dissenting).

\footnote{112} Justice Brennan's dissent provides an eloquent explanation of why the Court has gone too far in the definition of the defense. \textit{Id.} at 515 (Brennan, J., dissenting). Justice Brennan calls the Court's conclusion "an injustice" and "breathtakingly sweeping." \textit{Id.} at 516 (Brennan, J., dissenting). Apropos of the unjustified breadth of the defense is Congress's refusal to legislate such a defense in the face of "a sustained campaign by government contractors to create some defense." \textit{Id.} at 515 & n.1 (Brennan, J., dissenting).

\footnote{113} Justice Brennan observes that the grant of immunity would not enhance the "fearless, vigorous, and effective administration of policies of government" because (a) the threat of suit is not likely to influence the conduct of an industrial giant, (b) the government contractor role is devoted largely to assessing how to satisfy government's needs and not to setting policy, and (c) government contractor suits would rarely "consume time and energy" that would otherwise be devoted to governmental service. \textit{Id.} at 523-24 (Brennan, J., dissenting).

\footnote{114} \textit{Id.} at 516 (Brennan, J. dissenting).

\footnote{115} For a discussion of this extension of the government contractor defense, see \textit{infra} notes 152-80 and accompanying text.

safety for other interests like speed or efficiency, and even if the equipment is not of a type typically considered dangerous.\textsuperscript{117}

1. \textit{Expansion of Boyle under the culture of irresponsibility}

There are a number of examples of both the way in which \textit{Boyle} has been expanded and the impact felt on the culture of acceptable irresponsibility the Court has created. These areas of expansion fall into three categories: (1) extension of the government contractor defense to warning and manufacturing defects even though \textit{Boyle} is, on its face, limited to design defects; (2) extension of the defense to non-military government contractors for everyday civilian products in non-military settings; and (3) expansive readings of the "reasonably precise specifications"\textsuperscript{118} and warning requirements of \textit{Boyle} to include circumstances not within the reach of \textit{Boyle}'s discretionary function rationale.

\textit{a. Extension to non-design defects.} \textit{Boyle} involved an alleged design defect.\textsuperscript{119} Product design decisions involve making choices between a great many alternatives based on costs, material availability, commercial practicability, consumer acceptance, and product use, among others.\textsuperscript{120} The "discretionary function exception" to the FTCA relied on in \textit{Boyle} is implicated, if at all, in the discretion exercised in making those product design choices, particularly in military products.\textsuperscript{121} Logically, therefore, the rationale behind \textit{Boyle} should limit its operation to design defects where official government discretion may be exercised in creating the reasonably precise design specifications which the government contractor is bound to follow.\textsuperscript{122} Unfortunately, this logical result has not obtained and many courts have extended \textit{Boyle} to both manufacturing and warning defects.\textsuperscript{123}

The Eleventh Circuit Court of Appeals analyzed whether \textit{Boyle} should be extended to manufacturing defects in \textit{Harduvel v. General Dynamics Corp.}\textsuperscript{124} The plaintiff was killed when the F16 aircraft he

\begin{itemize}
  \item 117. \textit{Boyle}, 487 U.S. at 516 (Brennan, J., dissenting).
  \item 118. Id. at 512.
  \item 119. Id. at 501.
  \item 120. For a discussion of the factors and influences involved in making product design decisions, see Davis, \textit{supra} note 32, at 1235-48 (explaining the changes in products liability law over the past four decades that have greatly increased an injured plaintiff's chances for recovery). \textit{See also} Theodore S. Jankowski, \textit{Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions}, 36 S. Tex. L. Rev. 283, 311-26 (1995) (discussing various factors that influence product manufacturing and design decisions).
  \item 121. For a discussion of the government contractor defense and discretionary decision-making in the non-military product context, see \textit{infra} notes 151-80 and accompanying text.
  \item 123. For a discussion of cases extending \textit{Boyle} to manufacturing and warning defects, see \textit{infra} notes 124-150 and accompanying text.
  \item 124. 878 F.2d 1311 (11th Cir. 1989), \textit{cert. denied}, 494 U.S. 1030 (1990). Retired As-
was piloting crashed. The crash destroyed the aircraft, and the cause of the crash was indeterminate. The jury found a manufacturing defect based on an inference of defect allowable under Florida law when it is not possible for the product involved to be inspected because it was destroyed in the accident. Soon after the jury returned its verdict for the plaintiff, the Supreme Court issued Boyle. Retired Associate Justice Powell analyzed Boyle to determine its applicability to manufacturing defects.

First, the Harduvel court concluded that whether a defect was one of design or manufacture was no longer a question of state law but rather federal common law because Boyle governed the type of defect involved. The court observed that Boyle recognized a “broad formulation” of the defense. In light of that, the court concluded that the inference of a manufacturing defect raised by Florida law was inoperable and that federal law required an investigation of the type of defect present based on the protection of discretionary functions for which the defense was intended. The court, consistent with its broad reading of Boyle, expanded the category of defects which were included in the defense and excluded only those product defects reflecting “shoddy workmanship.” The court noted that if the “defect is one inherent in the product or system that the government has approved, it will be covered by the defense.”

Consequently, manufacturing flaws which arise in the production of all products, because there is no such thing as 100 percent quality in the manufacture of anything (including F16 aircraft), are now protected from liability. These flaws are “inherent in the product,” in the Harduvel sense, because they are the natural byproduct of the production process. These flaws are the raison d’être of strict products liability, and certainly not the type of product design feature that government officials consciously choose in the way that the design feature in Boyle was chosen. No balancing of safety versus combat effectiveness is involved in such product features. On the contrary, these features are not chosen at all, but rather happen by default because of the nature of all production systems. To include such flaws in the scope of Boyle’s defense reverts the state of products liability to its pre-1960

sociate Justice Lewis Powell, sitting by designation, wrote the opinion. Id.

125. Id. at 1313.
126. Id.
127. Id. at 1315.
128. Id.
129. Id. at 1317.
130. Id. at 1315.
131. Id. at 1317. Of course, the plaintiff did not know what type of defect caused the crash, though the F16 had had several design problems, and the inference of defect was the only means of proof available to her. Id.
132. Id.
133. Id.
134. Id.
state where plaintiffs had no hope of proving negligent manufacture, where privity was a bar, and where defendants had no incentive to make safer products because they could not get caught.  

An additional important case on this point is Bailey v. McDonnell Douglas Corp., in which the Court of Appeals for the Fifth Circuit disregarded four of its prior decisions, all of which had concluded that manufacturing defects were not included within the Boyle government contractor defense, to determine that manufacturing defects could be included within Boyle if the defect was one which arose out of the government's specifications. When might a manufacturing defect not arise out of the government's specifications? In military equipment especially, the specifications constitute volumes of documents dealing with every conceivable feature. Given the court's willingness to include manufacturing defects if the feature which is defective is the subject of a specification, nothing would be excluded. In Bailey, for example, the manufacturing defect was a metallurgic defect in a component part. If the government requires a product feature be made of a particular metal, the product manufacturer who uses that metal, even if purchased from an unreliable source or from stock known to have had metallurgic defects, would not be liable because the metal was specified by the government. Does such a result implicate the discretionary decisionmaking of the government?

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136. 989 F.2d 794 (5th Cir. 1993).

137. Id. at 800-01. The prior cases are: Skyline Air Serv., Inc. v. G.L. Capps Co., 916 F.2d 977, 980 (5th Cir. 1990) (noting manufacturing defects “arguably” not covered by Boyle); Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 245 (5th Cir. 1990) (“Boyle reinforced the established reasoning that the government contractor defense only applies in cases of defective design, not in cases of defective manufacture.”); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1481 n.6 (5th Cir. 1989) (holding manufacturer liable for manufacturing defects “no matter who designed or approved the specifications”); McGonigal v. Gearhart Indus., Inc., 851 F.2d 774, 777 (5th Cir. 1988) (holding “military contractor immunity does not apply in cases of defective manufacture”).

138. 989 F.2d at 801.

139. Id. at 796. The court stated that “it is possible to have an allegedly defective feature about which the government specifications are silent.” Id. at 799. The court also explained that if the metal that the product in this case was made of had not been specified, such a manufacturing defect would not be included. Id. This category of defects to which the government contractor defense does not apply is small consolation given that the defense itself is being read so broadly to include manufacturing defects in the first place. It is unlikely that courts will be quick to exclude many manufacturing defects if only a hint of a specification relates to the part in question.

140. While the answer begs the question, one case dealing with a manufacturing defect in sensitive and sophisticated combat weaponry concluded that the government contractor defense should be extended to such manufacturing defects under a “high-tech preemption” because of the purely combat use in wartime activities of such products. Bentzin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1489 (C.D. Cal. 1993). In Bentzin, the court granted summary judgment to the manufacturer of the Maverick missile which mistakenly killed Marines during the Persian Gulf War. Id. at 1494. Plaintiffs claimed
was exercised with regard to the dangerous characteristic of the product. Such a result, rather, encourages irresponsibility by the manufacturer who has no incentive to avoid the unreasonably dangerous aspect of the product because of the safety net the defense provides. Such an extension of the defense-conferred “right” can be legitimately considered an “abusive” one.

Because Boyle on its face only applies to design defects, courts have also had to determine whether the government contractor defense applies to products whose defect lies not in its design or manufacture, but rather in the manufacturer’s failure to communicate the product’s unreasonable dangers so that users may take precautions against those dangers when using the product. These failure to warn claims revolve around the manufacturer’s conduct more than they do the actual condition of the product. Consequently, Boyle’s foundation—protection of government discretion in choosing a product design or feature—would not seem implicated in failure to warn claims because consumers, not even the government, do not usually purchase products because of the content of the accompanying warning or instructional literature. If, however, the government dictates the type of warning or instructional literature to accompany products it purchases, reflecting the exercise of discretion, the Boyle government contractor defense logically may be applicable. The problem, after Boyle, is defining the

the missile had a manufacturing defect which “caused the missile to deviate from its intended target.” Id. at 1487. The court, after noting the disagreement in post-Boyle courts of its application to manufacturing defects, concluded that the defense “necessarily extends to preclude manufacturing defect claims . . . against the manufacturers of sophisticated high-technology military equipment (‘high-tech preemption’).” Id. at 1489. The court, relying on the discretionary function rationale of Boyle, explained that the design of such single-use wartime products necessarily involves government decisions needing protection from disclosure to ensure national security. Id. at 1490-92. The court’s exemption for manufacturing defects was thus specifically limited to non-civilian combat products. Id. at 1491. The injury, occurring during wartime, also gave rise to federal interests in controlling military policy during war. Id. at 1492. See also Koohi v. United States, 976 F.2d 1328, 1333 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993) (finding manufacturer of Aegis Air Defense System not liable for injuries suffered when U.S.S. Vincennes shot down an Iranian passenger aircraft by mistake during Persian Gulf “tanker war” with Iran based on “combatant activities” exception to FTCA).

Interestingly, the court goes on to propose that if the government were to assert an interest in a case involving a manufacturing defect in a non-combat military product, that assertion alone would be enough to require the case between the plaintiff and the government contractor to be dismissed. Bentzin, 833 F. Supp. at 1491 n.8. In Bentzin, the United States government intervened and raised state secrets and nonjusticiable political question arguments seeking dismissal of plaintiffs’ case. Id. at 1487. The court opened up the possibility that all government contractors have to do to have products liability cases dismissed is to encourage the government to intervene and state an interest. Id. at 1489 n.4, 1491 n.8.


142. In In re Joint Eastern & Southern District New York Asbestos Litigation, 897 F.2d 626 (2d Cir. 1990), the Second Circuit explains that the proper scope of the “mili-
line between applicability and unnecessary expansion.

As with the expansion of *Boyle* to manufacturing defects, some courts include failure to warn claims within the scope of *Boyle* primarily because of *Boyle*'s aim to reduce the potentially unlimited liability of military contractors, regardless of whether the claims implicate the interest of protecting discretionary government decisionmaking. This result stems in part from the Supreme Court's focus in *Boyle* on concern for unlimited manufacturer liability. The Court's sweeping language allows lower courts the latitude to apply *Boyle*, without analysis, to products liability cases simply because it would limit manufacturer liability.

A more thoughtful approach would be to determine if a significant conflict existed between the state law duty to warn and the federal contract warning obligations to determine if the interest in protecting discretionary decisionmaking is present. An excellent example of this analysis is found in *In re Joint Eastern & Southern District New York Asbestos Litigation*. In that case, the defendant who supplied the Navy with asbestos-insulating products provided no warning regarding the dangers of asbestos exposure, and the contract with the Navy required none. The court recognized that "the existence of conflicting federal and state warning requirements can undermine the Government's ability to control military procurement" and thus, that *Boyle* might apply to failure to warn claims. In spite of this broad reading...
of the policy basis of Boyle, the court limited the area of displacement of state law, tailoring the elements of Boyle to the warning situation. If the state law duty conflicts with an actual governmental choice of the appropriate warning language required, indicating a conscious balancing of the interests involved in the use of the product, then Boyle might logically apply and require a determination of the nature of the specifications, the defendant's compliance with them, and whether the defendant fully apprised the government of the dangerous characteristic needing a warning of which the government was not aware. If not, the interest in discretionary decisionmaking, with which Boyle says it is most concerned, is not at risk. If courts apply Boyle to situations where that interest is not at risk, they expand federal law into an area where it has no business. When that occurs, the perception of acceptable irresponsibility the Court has created reaches far beyond the legal holding and affects areas of social policy balancing at the core of tort law.

b. Extension to non-military contractors. While Boyle involved a purely military product in a purely military setting, the Court's opinion seemed purposely to leave open the extent to which the defense is applicable to non-military products in either military or non-military settings. It seems clear that one of the driving forces behind Boyle was the Court's concern that the judiciary not second-guess military deci-

148. Id. at 630. The court concluded that the contractor must show "that whatever warnings accompanied a product resulted from a determination of a government official, and thus that the Government itself 'dictated' the content of the warnings meant to accompany the product." Id. (citation omitted). The court's choice of this requirement appropriately heightens the defendant's burden in proving entitlement to the defense in the warning context to reflect the proper scope of Boyle. Id. at 631; see also Nicholson v. United Techs. Corp., 697 F. Supp. 598, 604 (D. Conn. 1988) (applying government contractor defense in an inadequate instruction case where defendant established government's extensive control over both original compilation of repair manual and revisions).

149. For a discussion of elements of the government contractor defense from Boyle, see supra notes 99-101 and accompanying text.

150. The court defined the proper scope of the defense:
Stripped to its essentials, the military contractor's defense under Boyle is to claim, "The Government made me do it." Boyle displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion.

N.Y. Asbestos Litig., 897 F.2d at 632; see also In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 839-40 (2d Cir. 1992) (holding failure to warn claim not subject to defense in asbestos cases); In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 812-13 (9th Cir. 1992) (finding no conflict between failure to warn claim and military requirement); Jackson v. Deft., Inc., 273 Cal. Rptr. 214, 221 (Cal. Ct. App. 1990) (holding failure to warn claim available if no conflict between state tort duty and contract); Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc., 884 F.2d 920, 927 (Wash. 1994) (holding manufacturer's compliance with design defects not absolute defense to post-manufacture failure to warn claims).
sions which place combat and tactical effectiveness over the safety of personnel. While the Court chose to rely on the “discretionary function exception” to the FTCA as the basis for its decision (and not the Feres doctrine which would have limited the scope of the defense to military personnel), it appears the reason for doing so was not so much that the Court wanted the defense to apply in non-military contexts but that it wanted the defense to apply to discretionary military decisionmaking in whatever context. The Boyle opinion left many doors open for the expansion of the government contractor defense to the non-military contractor—doors that many defendants have tried, some successfully, to pass through.

An example of the expansion of Boyle to a non-military product in a military context is Stone v. FWD Corp. In Stone, a civilian fireman employee of the United States Navy brought suit against a fire truck manufacturer for injuries sustained when he slipped on steps of a Navy fire truck. The defendant successfully argued that the government contractor defense prevented the plaintiff’s suit from proceeding even though the plaintiff was injured by non-military equipment. The plaintiff alleged that even though the fire truck was manufactured pursuant to a contract with the Navy and according to Navy specifications, a fire truck is not the type of product which Boyle was designed to address because it does not implicate a discretionary military decision to choose a particular design for combat effectiveness or other military imperative. In fact, the design aspect in issue, a step and safety rail, has no impact whatsoever on any governmental decisionmaking deserving of protection in the sense contemplated by Boyle.

The district court concluded that Boyle was applicable to this product and to the civilian plaintiff. The reasoning of Boyle would seem not to reach non-military products; non-military products do not necessitate conscious design choices to prefer hazardous features which allow for certain military capabilities over particular safety features that would not need to be sacrificed if the product were being purchased for a routine purpose. The court noted that Boyle was unclear on this point, though Boyle did refer to “government” and not just “military” contractors. Further, Boyle’s reliance on the “discretionary function exception” of the FTCA indicated the Court’s desire that the defense be

151. Boyle, 487 U.S. at 511-12.
153. Id. at 1212.
154. Id. at 1212-13.
155. Id. at 1211-12. The defendant did actively participate in the design of the fire truck, however. Id. The Navy did not simply provide the defendant with specifications that the defendant mindlessly followed. Id.
156. Id.
157. Id. For a similar conclusion involving paint manufactured for the Navy which injured a civilian plaintiff, see Garner v. Santoro, 865 F.2d 629, 635 (5th Cir. 1989).
158. Stone, 822 F. Supp. at 1212 n.4.
159. Id.
broadly applied. Hence, Boyle was read to apply to the very type of design flaw, lack of an appropriate safety feature, that strict products liability was intended to prevent.

Even though the product conformed with the Navy's specifications and the defendant offered proof that it was not actually aware of any design defect, this product is not contained within the scope or spirit of Boyle because no discretionary decisionmaking needing protection was present. To include such design "choices" within the defense would allow product manufacturers "protection" from failing to provide reasonable safety devices which would have no impact on the product's function or the government agency's decisionmaking in an area of "unique federal interest" as was present in Boyle. The Court created a perception in Boyle that permitted, even encouraged, the court in Stone to extend immunity from responsibility.

The extension in Stone is defensible, if at all, based on Boyle's reliance on the protection needed for military discretion in decisionmaking. The extension to non-military products made by non-military contractors for non-military government agencies is not a legitimate expansion based on Boyle. Several courts have done so, however. Carley v. Wheeled Coach from the Third Circuit Court of Appeals is the primary example.

In Carley, the plaintiff, an emergency medical technician, was injured while riding in an ambulance made by the defendant for the General Services Administration (GSA). She alleged that the ambulance was defectively designed because it was prone to turn over due to an excessively high center of gravity. The trial court granted the defendant's motion for summary judgment based on Boyle's government contractor defense. The court of appeals affirmed the trial court's decision. Several cases cited in Carley support the idea that Boyle applied to non-military products.

The third prong of Boyle requires that the government contractor had no actual knowledge of a design defect that it did not warn the government about. Boyle, 487 U.S. at 512. This is decidedly more pro-manufacturer, and less rigorous, than the usual "knew or should have known" standard that tort law generally imposes on defendants.

160. Id. The court also relied on a number of other cases which had concluded that Boyle applied to non-military products. See, e.g., Kleemann v. McDonnell Douglas Corp., 890 F.2d 698, 700 (4th Cir. 1989) (holding Boyle particularly applicable in the military equipment context), cert. denied, 495 U.S. 953 (1990); Tillett v. J.I. Case Co., 756 F.2d 591, 598 (7th Cir. 1985) (finding front end loader being used on a military base constituted military equipment); cf. Johnson v. Grumman Corp., 806 F. Supp. 212, 216-17 (W.D. Wis. 1992) (holding defense applicable to the non-military context where the United States Postal Service procured mail delivery vehicles).


162. Id. The third prong of Boyle requires that the government contractor had no actual knowledge of a design defect that it did not warn the government about. Boyle, 487 U.S. at 512. This is decidedly more pro-manufacturer, and less rigorous, than the usual "knew or should have known" standard that tort law generally imposes on defendants.

163. Boyle, 487 U.S. at 500.


165. Id. at 1117.

166. Id. at 1118.

167. Id. Plaintiff was employed by the Virgin Islands Department of Health at St. Croix Hospital. Id. Plaintiff suffered knee and back injuries in the accident. Id.
court’s application of the government contractor defense under federal common law.\footnote{169}

The court of appeals noted the split in authority on whether the \textit{Boyle} government contractor defense is available to manufacturers of non-military products.\footnote{170} After identifying the twin areas which made the product design in \textit{Boyle} an issue of uniquely federal concern—upholding government contracts and protecting the exercise of government discretion—the court acknowledged that the driving force behind \textit{Boyle} was the financial effect of excess liability on the government through its contractors.\footnote{171} This interest, based on the FTCA and not

\footnote{169. Id. The court of appeals reversed the trial court’s grant of summary judgment, however, because the defendant failed to prove the third prong of the \textit{Boyle} test: that the defendant warned the United States of dangers in the product known to the defendant but not to the government. Id.}


A number of courts have been asked to apply the defense to non-military products but decided the cases before them without reaching the issue of whether \textit{Boyle} applied. \textit{See}, e.g., Dillaplain v. Lite Indus., 788 S.W.2d 530, 534 (Mo. Ct. App. 1990) (relying on government contractor defense where fireman sued for asbestos exposure from protective clothing, but case involved personal jurisdiction); Trapnell v. Sysco Food Servs., Inc., 850 S.W.2d 529, 549 (Tex. App. 1992) (holding where defendant raised defense based on supplying food services to Navy cafeteria and plaintiff died of sulfite poisoning from food, defense unavailable because defendant failed to prove elements of defense), \textit{aff’d}, 890 S.W.2d 796 (Tex. 1994).

\footnote{171. Carley, 991 F.2d at 1120 (“[W]ithout the government contractor defense, it would be more difficult and costly for the government to acquire products. The government would suffer this economic harm regardless of whether it procured a product for}
the Feres doctrine, is present in every procurement contract, not just military contracts.\textsuperscript{172}

The Carley court recognized that the important assumption justifying Boyle, that the selection of military product designs involved "not merely engineering analysis but judgment as to the balancing of many technical, military and even social considerations, including specifically the trade-off between greater safety and combat effectiveness,"\textsuperscript{173} was not present in the selection of non-military designs.\textsuperscript{174} Nonetheless, the court in Carley found that increased contractor liability and the effect on government decisionmaking were sufficient, standing alone, to warrant extending the defense to non-military products.\textsuperscript{175}

It was, then, easy for the court to conclude that the decision to choose a particular design for a non-military product implicated a significant conflict between state and federal law to extend the defense to those product manufacturers.\textsuperscript{176} It is particularly interesting to note that the design feature in issue, the center of gravity of the ambulance, was not specified in the GSA's design specifications. Instead, this detail was left up to the manufacturer, so long as the parameters of the chassis manufacturer, in this case Ford Motor Company, were met.\textsuperscript{177} The defendant exclusively chose the location of the center of gravity and should have been responsible for its unreasonably dangerous choice, not the GSA. How in such a case is the exercise of a governmental discretionary function implicated?\textsuperscript{178}

\textsuperscript{172}Id. at 1121-22.

\textsuperscript{173}Boyle, 487 U.S. at 511-12.

\textsuperscript{174}Carley, 991 F.2d at 1121-22.

\textsuperscript{175}Id. at 1122. The court attempted to distinguish Boyle and its reliance on combat effectiveness decisions in a lengthy footnote. See id. at 1122 n.3. The court seemed uneasy with its decision and dissected Boyle to conclude that the interest in noninterference with military decisions was "on an equal footing with . . . the other policy concerns mentioned, such as engineering analysis, technical, military and social considerations, and passed-on costs of judgments against contractors." Id. (emphasis added).

\textsuperscript{176}Id. at 1122. The court states that its holding is consistent with a Seventh Circuit and an Eleventh Circuit Court of Appeals decision. Id. at 1123. Both those decisions were based on state law prior to Boyle. For a discussion of state law prior to Boyle, see supra note 170 and accompanying text.

\textsuperscript{177}Carley, 991 F.2d at 1125. The court of appeals ultimately reversed the district court's grant of summary judgment because it found the defendant had not proved the third element of the Boyle defense, that it warned the government of known dangers of which the government was unaware. Id. at 1127. The district court took judicial notice of the fact that the government conducts its own crashworthiness tests and of the well-known propensity of vehicles with high centers of gravity to crash. Id. at 1126. The court of appeals did not agree that either of these matters are properly the subject of judicial notice. Id.

\textsuperscript{178}The court disagreed with the contrary decisions reached by two panels of the Ninth Circuit Court of Appeals. Id. at 1124 (referring to In re Hawaii Fed. Asbestos
Once the interest being protected is reduced to its lowest common denominator, every transaction in which the government is even tangentially involved will become one to which the immunity defined in Boyle could attach. As Judge Becker states in his dissent: "[T]he cost theory relied on by the majority proves too much, for every time the government purchases a product made in the private sector, potential liability costs (factored into the price) are passed on to the government." The perception of tolerable irresponsibility, for the sake of supposedly imperiled government fisc, is a bandwagon on which all government contractors, state and federal, will jump. It becomes increasingly clear, after decisions like Carley, that the Court's opinion in Boyle was truly a Pandora's box for victims of defective products and a boon to product manufacturers seeking refuge from their responsibility to make safe products.

c. Extension through application of the Boyle test. Boyle defines three elements which a government contractor must prove to be entitled to its immunity. The first requirement is that the government approved "reasonably precise specifications," indicating the exercise of

Cases, 960 F.2d 806, 810-12 (9th Cir. 1992) and Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1452-55 (9th Cir. 1990)). The court felt that Judge Becker's dissent gave undue importance to Boyle's "premise[ ] on concerns unique to the military." Id. at 1122 n.3; cf. id. at 1129 (Becker, J., concurring in part and dissenting in part) (agreeing with the policy justifications for protecting military contractors from tort liability). Judge Becker, while recognizing a federal interest in limiting liability arising from its procurement contracts, concludes that such an interest is not in "significant conflict" with state law to warrant the extension of federal common law immunity to it. Id. at 1131 (Becker, J., concurring in part and dissenting in part). This is particularly so, according to Judge Becker, because of the historically narrow areas in which federal common law, and particularly an immunity, operates. Id. at 1132-33.


180. In fact, a Pennsylvania federal district court judge recently extended Carley to protect non-military contractors under state law in Davis v. Budd Co., No. CIV.A.94-3023, 1995 WL 766015 (E.D. Pa. Dec. 28, 1995), a case based on diversity of citizenship jurisdiction. Plaintiff sued to recover for injuries sustained from the collapse of a motorman seat on which he was sitting as driver for a Southeastern Pennsylvania Transport Authority (SEPTA) railcar. Id. at *1. Plaintiff claimed the mechanical latching device on the folding seat was defective and sued the manufacturer of the railcar who had purchased the seat from another supplier and installed it on the railcar. Id. Under the plaintiff's strict liability claim, the manufacturer would be liable for the defective product regardless of whether it had manufactured it or not. The prior Pennsylvania cases had not addressed the immunity in strict products liability actions and are, in fact, quite liberal in most of their strict products liability doctrine. See, eg., Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978) (holding supplier is guarantor of products' safety). In spite of significant policy differences in strict products liability cases, the trial court extended the defense, relying on federal court cases interpreting the federal government contractor defense, including Carley, extended the defense. Davis, 1995 WL 766015, at *2 n.3.

the discretionary judgment Boyle sought to protect. Because the Court did not define what “reasonably precise specifications” are, this element has been the subject of much discussion from courts applying Boyle. One would think that the specifications which form the basis of the defense must indicate that the government did exercise its discretion in choosing the design feature in question, not that it was approved through some “pro forma” approval process where the review is superficial or nonexistent. A number of cases have agreed with this conclusion, indicating that a mere “rubber stamp” of the manufacturer’s specifications is not sufficient approval. The difficulty lies in determining what constitutes approval of precise specifications and not mere rubber stamping. It is here that many courts have applied the defense based on little government involvement in the design of the product feature at issue, expanding Boyle to areas where the interest in protecting discretionary functions is not threatened.

For example, in Stout v. Borg-Warner Corp., the plaintiff, an Army air-conditioning repair technician, lost several fingers on his hand while attempting to repair an air-conditioning unit for the Hawk Missile Mobile System Repair Unit. The plaintiff had removed the side panels from the unit while it was in operation and was manually trying to determine the cause of the problem when his hand was caught in the fan blades. The plaintiff alleged that the unit should have had side panels which could not be removed while the unit was operating or some similar protective device to prevent contact with the fan blades. The unit was designed by the defendant based on a product originally designed by the Army. At no time during the design

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182. Id.
183. See Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 70-71 (3d Cir. 1990) (holding “rubber stamp” approval insufficient, but no rubber stamp where proposed design change suggested by defendant was subjected to several levels of approval); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1486 (5th Cir.) (requiring “approval based on substantive review and evaluation,” not mere rubber stamp, where Navy left design of submarine diving chamber in issue entirely to defendant), cert. denied, 493 U.S. 935 (1989).
185. Id. at 332. The unit “serves to maintain controlled atmospheric conditions inside the shelter to the repair unit, preventing damage to the sensitive computers and radar systems essential to the performance to the Hawk Missile System.” Id.
186. Id.
187. Id.
188. Id.

The Army Corps of Engineers had developed the predecessor to the . . . air conditioner, known as the VEA4-3. In the early 1960s, the Army Corps of Engineers . . . wrote and issued initial specifications for a redesigned VEA4-3 air conditioner for specific use with the Hawk Missile System. The Army's initial specifications included engineering design drawings and required shop drawings and pre-production models. The Army's specifications for the unit's condenser fan . . . did not provide for, or prohibit, the installation of a safety device, such as a wire screen to cover the condenser fan.

In 1966, [Fairchild Industries] was awarded the contract to redesign the
review process did it appear that the Army, who critiqued and ultimately approved the designs submitted, prevented the inclusion of the suggested safety features. Rather, it appears that the issue simply did not come up, not that the Army affirmatively chose the design without safety features in some balance of safety and economic or combat effectiveness factors. Plaintiff argued that the Army “only accepted, but did not approve within the meaning of Boyle, the product’s design features.” Consequently, the defendant could have complied with the Army’s specifications and its state tort law duty and, therefore, there was no significant conflict governed by Boyle.

The court of appeals upheld the district court’s grant of summary judgment for the defendant. While there was an Army review of the design generally, and even specifically as to some elements, there was no discussion or evaluation of the proposed safety features during that review process. Boyle requires that, to protect military discretionary decisionmaking, the government must have chosen the particular feature which is challenged, not simply have accepted it by default or without consideration. The court in Stout appears correct in its conclusion that there was more involvement than mere rubber stamping of the defendant’s design. However, to be true to the purpose of Boyle and not overextend its application to situations in which the immunity need not operate, the court should have determined whether the particular feature in question came under such scrutiny that a discretionary decision was made with regard to that feature, not with regard to the product’s general design as a whole. Only then will the purpose of Boyle be promoted and liability be imposed where appropri-

VEA4-3. Fairchild performed a detailed engineering analysis, including engineering calculations to select components for the VEA4-3A that would comply with the Army’s specifications.

Id. at 332-33. This analysis did not include any safety features of the type which would ostensibly have prevented plaintiff’s injuries. Id. at 333.

189. Id.
190. Id.
191. Id. at 334.
192. Id. at 334-35.
193. Id. at 336.
194. For a discussion of Boyle’s affirmative government choice requirement, see supra notes 99-104 and accompanying text.
195. Stout, 933 F.2d at 336.
196. Id. This was the result of Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir.), cert. denied, 493 U.S. 935 (1989), which the Stout court distinguished as involving a true rubber stamp situation. Stout, 933 F.2d at 335. In Trevino, the contractor seemed to have more control over the product’s design, and the government apparently abdicated control over it. Trevino, 865 F.2d at 1486. However, the Trevino court specifically called for an analysis of the government’s actions with regard to the particular design feature in question and actual government discretion over that feature. Id. This analysis was lacking in Stout. Further, Trevino concluded that rubber stamping could occur even if the government retained the right to reject the design at any stage of the process, implying that courts should give detailed scrutiny to the actual process, not just the paper process. Id.
Stout allows for the unnecessary expansion of the perception of irresponsibility created by Boyle because the decision discourages manufacturers from considering user safety along with the government's design requirements. In Stout, there was no need to choose product design over safety; both could be accommodated.

Certainly there are areas where the immunity created by Boyle, though leading to a harsh result for injured armed services personnel, "is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense." Where continuous back and forth discussions between government personnel and contractors evidence a conscious government decision to choose a product feature while aware of the risks involved, the contractor is not in a position to disagree, absent refusing to perform. Allowing immunity when the government contractor has no meaningful alternative in the specific design feature challenged ensures that discretionary choices are protected without unwarranted intrusion into the sphere of responsibility. However, allowing immunity for all design features, regardless of the quality of the discretion exercised in the selection, is an invitation to irresponsibility for product manufacturers.

The second prong of the Boyle test is whether the product conforms to design specifications. This element is a purely factual one, not subject to interpretation. The last element requires that the defendant warn the government of the dangers from equipment use that were actually known to the supplier but not to the government. The Boyle court specifically identified that it was "actual" and not con-


198. See, e.g., Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 71-72 (3d Cir. 1990) (finding Army required defendant to use the ball bearing which plaintiff alleged was defectively designed); Kleeman v. McDonnell Douglas Corp., 890 F.2d 698, 700-01 (4th Cir. 1990) (finding design of F/A-18 aircraft resulted from intensive Navy involvement, including Navy personnel on staff with the defendant during design and engineering), cert. denied, 495 U.S. 924 (1990).

199. See also Lewis v. Babcock Indus., Inc., 985 F.2d 83, 86-87 (2d Cir. 1993) (extending defense to "non-critical" design feature which did not represent conflict between federal contract and state tort law where government did not exercise discretion regarding choice of that feature over safety risk in design of F-111-F aircraft), cert. denied, 509 U.S. 924 (1993); Oliver v. Oshkosh Truck Corp., 911 F. Supp. 1161, 1175 (E.D. Wis.) (applying government contractor defense despite contractual language giving it "total design responsibility" for a military supply truck occupying a "middle ground" for Boyle's first prong), aff'd, 96 F.3d 992 (7th Cir. 1996); Niemann v. McDonnell Douglas Corp., 721 F. Supp. 1019, 1023 (S.D. Ill. 1989) (allowing defense for use of asbestos in design even though asbestos not specified in design drawings).


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structive knowledge that was relevant. By providing immunity for dangers actually known and warned of, Boyle discourages product manufacturers from investigating the dangers of its products.203

What manufacturer will diligently search for and evaluate the dangerousness of its product designs if to do so would only lead to an obligation to warn the government and potential liability? A manufacturer is able, under Boyle, to claim ignorance of what he "should have known" as an expert in the field.204 The history of the reasonable person as the standard for negligent conduct has always required an objective, not a subjective standard of knowledge.205 In strict products liability actions, knowledge of the dangers inherent in a product are imputed to the manufacturer so that the plaintiff need not prove what should have been known, with the attendant expert testimony and delay, as the manufacturer is presumed to know the dangerous characteristics of his products.206 Yet in Boyle the Supreme Court chooses to hold certain product manufacturers responsible only for dangers in their products that are actually known. Such a choice illustrates how the Court encourages irresponsible conduct.

2. Expansion of Boyle to non-tort situations

The breadth of the holding in Boyle affects non-tort cases and situations. The Court's conclusion in Boyle that federal law preempts state law based on a tenuous conflict encourages defendants to seek shelter behind expansive readings of favorable federal law over traditionally applicable state common law. As mentioned above, a number of courts have expanded Boyle to apply to non-military products and accidents.207 In addition, defendants have tried to stretch Boyle's preemp-

203. For an example of the application of this prong, see Mason v. Texaco, Inc., 741 F. Supp 1472, 1492 (D. Kan. 1990) (allowing defense if defendant could prove no actual knowledge of dangers of exposure to benzene), aff'd and remanded, 948 F.2d 1546 (10th Cir. 1991), cert. denied, 504 U.S. 910 (1992).

204. Product manufacturers are generally held to the standard of knowledge of an expert in the field. See generally W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 96 (5th ed. 1984).


He may, furthermore, be engaged in an activity, or stand in a relation to others, which imposes upon him an obligation to investigate and find out, so that the person becomes liable not so much for being ignorant as for remaining ignorant; and this obligation may require a person to know at least enough to conduct an intelligent inquiry as to what he does not know. The . . . manufacturer of goods to be sold to the public, . . . [is] charged with the duty of the affirmative action which would be taken by a reasonable person in their position to discover dangers of which they may not be informed. Keeton et al., supra note 204, § 32 (footnotes omitted).


207. For a discussion of cases extending Boyle to non-military products and accidents, see supra notes 151-76 and accompanying text.
tion analysis to obtain favorable federal law in a number of other circumstances.

For example, defendants often seek to remove cases to federal court for the seeming advantages: different (better?) jury pools, different (better?) judges, quicker dockets, and smoother procedures, among others. Without complete diversity or federal question jurisdiction, which are rarely present in normal tort and products liability cases, removal is not an option. Boyle may give defendants an option. Because Boyle’s ratio decidendi for creating a federal common law defense for government contractors is sovereign immunity based on the “discretionary function exception” to the FTCA, Boyle arguably extends a quasi-immunity to government contractors. This quasi-immunity could support a colorable claim to a federal law defense, thus supporting removal under § 1442(a)(1) of the removal statute. In one of the many Agent Orange cases under his control, Judge Weinstein discussed the effect of Boyle on the removal of those cases. Judge Weinstein noted that Boyle may provide a colorable claim to federal law governance, not because it provides a defense, but because, after Boyle, federal law defines the standard of care, albeit a very low one, to which covered contractors must comply.

The Court in Boyle took great pains to say that it was not extending official immunity to government contractors, but the natural


210. Ryan, 781 F. Supp. at 944-45. Judge Weinstein refused to rule on the motion to amend the defendant’s removal notice to allege this basis of removal and certified the matter of removal immediately to the Second Circuit. Id. at 935. The Court of Appeals for the Second Circuit refused to decide the applicability of § 1442(a)(1) removal to the defendants and concluded that removal was proper under the All Writs Act to issue writs “necessary or appropriate” in aid of its jurisdiction. In re “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425, 1431-32 (2d Cir. 1993). For additional discussion of Boyle as support for removal based on federal question jurisdiction based on federal common law, see Caudill v. Blue Cross & Blue Shield, 999 F.2d 74, 76 (4th Cir. 1993) (holding Boyle governs determination of whether federal common law exists to govern insurance coverage provided under a private health insurance policy for federal employees and supports federal common law when “mere possibility” of conflict exists between federal interest and state law).

211. Boyle v. United Techs. Corp., 487 U.S. 500, 505 n.1 (1988) (declining to address whether Court was extending sovereign immunity to non-government employees as Justice Brennan suggests in dissent).
effect of its holding was to provide at least a taste of such immunity. When defendants get a taste of immunity, there is no natural stopping point where defendants will say, "I'm not entitled to immunity for that." The parameters of the immunity will be stretched to cover as much territory as possible. That is one of the real effects of Boyle and why the resulting irresponsibility is so significant. The abuse of the "right" of immunity is evidenced by the lengths to which the beneficiaries of the Court's largesse will go to take advantage of it. For example, manufacturers of Agent Orange who have benefited from the immunity afforded them by the government contractor defense recently tried to obtain indemnity from the government for amounts they contributed to settlement, their attorneys' fees, and litigation costs associated with litigating Agent Orange claims. The Court of Appeals for the Federal Circuit concluded that because the defendants had access to the government contractor defense, no liability would attach and therefore no indemnity was available. The government could not prevent the filing of claims against the defendants and the immunity extended to the defendants through Boyle did not include costs incurred to defend claims or settlement costs. On appeal, the Supreme Court virtually ignored Boyle in deciding the case and rejected the manufacturers' claims, relying on the contractual relationship between the government and the manufacturers and finding no express or implied promise to indemnify.

In addition, the extension of federal preemption to areas where the federal interest is remote and speculative at best signals a major expansion of the traditionally limited areas where federal common law governs. Justice Brennan's dissent heralds such an expansion and warns of the danger of expanding historically narrow federal interests and displacing state law. For example, in Lamb v. Martin Marietta Energy Systems, Inc., the court read Boyle broadly to provide immunity to an operator of a gaseous diffusion plant to prevent recovery for contamination of the environment. This was so even though the fed-

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212. For a discussion of the applicability of the government contractor defense to Agent Orange Manufacturers, see supra notes 209-10 and accompanying text.

213. Hercules Inc. v. United States, 25 Cl. Ct. 616 (1992), aff'd, 24 F.3d 188 (Fed. Cir. 1994), aff'd, 116 S. Ct. 981 (1996). The contractors proceeded on several contract and warranty-based claims which assumed that the federal government somehow made it more difficult for the contractor to perform the contract, therefore causing it to incur unexpected costs. Hercules, 24 F.3d at 192.

214. Id. at 194.


216. Boyle, 487 U.S. at 518-19 (Brennan, J., dissenting) ("And the Court's ability to list 2, or 10, inapplicable areas of 'uniquely federal interest' does not support its conclusion that the liability of Government contractors is so 'clear and substantial' an interest that this Court must step in lest state law does 'major damage.'").

217. For an example of such extension in the face of an express preemption provision, see Caudill v. Blue Cross & Blue Shield, 999 F.2d 74, 79 (4th Cir. 1993).


219. Id. at 966.
eral statute which conferred a cause of action for the plaintiff specifically stated that the rule for decision would be the law of the state where the incident occurred.\textsuperscript{220} Needless to say, if Congress has seen fit to provide a cause of action based on state law, then there should be no federal common law preempting that liability. Even \textit{Boyle} recognized a federal common law defense only because of significant conflict with federal policies reflected by rules operating in other areas. There was no statutory scheme which operated in \textit{Boyle}.\textsuperscript{221} While the court in \textit{Lamb} concluded that the defendant had failed to satisfy \textit{Boyle}'s elements,\textsuperscript{222} its potential extension of \textit{Boyle} to the negligent performance of a service contract illustrates the encouragement the Court has given to defendants to claim the “right” of immunity. An institutional defendant will naturally seek to come within the protection of sanctioned excuses for its behavior, not acknowledge its irresponsible behavior.

\textbf{C. \textit{Cipollone v. Liggett Group, Inc.} and Express Federal Preemption of State Standards of Responsibility}

The Court again had an opportunity to elaborate on the way in which federal legislation and policies preempt common law standards of responsibility in \textit{Cipollone v. Liggett Group, Inc.}\textsuperscript{223} \textit{Cipollone} raised issues of responsibility by requiring the Court to define the effect on state common law actions of the provisions of the Federal Cigarette Labeling and Advertising Act of 1965 (the 1965 Act)\textsuperscript{224} and Public Health Cigarette Smoking Act of 1969 (the 1969 Act)\textsuperscript{225} which mandate the cigarette warning label. The Court took this opportunity to resolve tensions between state and federal court decisions regarding the application of federal preemption doctrine under these statutes.\textsuperscript{226} At the same time, however, the \textit{Cipollone} decision reflects the Court’s continuing effort to curtail broad rules of institutional responsibility in favor of limited ones. This is particularly evident in \textit{Cipollone} which involved the peculiarly state law dominated field of products liability in contrast to the traditionally federally governed areas of admiralty and national defense involved in \textit{East River Steamship} and \textit{Boyle}. The

\begin{itemize}
\item \textsuperscript{220} \textit{Id.} at 962 (referring to Price-Anderson Amendments Act of 1988, 42 U.S.C. §§ 2014(hh), 2210(n)(2) (1994)).
\item \textsuperscript{221} For a discussion of \textit{Boyle}'s lack of a statutory scheme, see \textit{supra} notes 86-87 and accompanying text. This is one of the reasons that Justice Brennan in dissent strongly disagreed that federal common law should operate—because Congress had specifically chosen not to recognize a defense by statute. \textit{Boyle}, 487 U.S. at 518 (Brennan, J., dissenting).
\item \textsuperscript{222} \textit{Lamb}, 835 F. Supp. at 966-68.
\item \textsuperscript{223} 505 U.S. 504 (1992).
\item \textsuperscript{224} 15 U.S.C. §§ 1311-1340 (1994).
\item \textsuperscript{225} \textit{Id.} §§ 1331-1340.
\item \textsuperscript{226} \textit{Cipollone}, 505 U.S. at 508. The Court of Appeals for the Third Circuit, for example, concluded that the plaintiff’s claims were preempted by the 1989 Act based on an implied preemption analysis. \textit{Cipollone v. Liggett Group, Inc.}, 893 F.2d 641 (3d Cir. 1990); \textit{Cipollone v. Liggett Group, Inc.}, 789 F.2d 181 (3d Cir. 1986).
\end{itemize}
Cipollone case was of such a high profile, being the first tobacco litigation to reach a trial and verdict for the plaintiff, that the Court's opinion was expected by all observers to have significance beyond the specific preemption analysis the Court announced.\textsuperscript{227}

Many scholars have analyzed the Court's preemption decision and explored its effect on the scope of federal government involvement in tort actions.\textsuperscript{228} It is axiomatic that when Congress speaks, its voice is supreme.\textsuperscript{229} Similarly, when the Court speaks about an issue that federal law governs under the Supremacy Clause, courts take notice, even though the particulars of the decision itself may not specifically require such deference. The Court's voice under the Supremacy Clause is especially forceful because it prevents the states from exercising their historic "police powers," such as defining the nature of common law tort responsibilities.\textsuperscript{230}

In Cipollone, the Court gave controlling authority to an express federal preemption provision "when that provision provides a 'reliable indicium of congressional intent'."\textsuperscript{231} The Court appeared to be trying to preserve the traditional state police power role in such areas as defining civil duties and liabilities by protecting that role absent Congress's clear intent to usurp it. The Court consequently reiterated its dedication to the presumption against preemption and concluded that

\begin{itemize}
\item 229. U.S. Const. art. VI, cl. 2. The Cipollone Court explained: "[S]ince our decision in McCulloch v. Maryland, it has been settled that state law that conflicts with federal law is 'without effect.'" Cipollone, 505 U.S. at 516 (citations omitted).
\item 230. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.'" Cipollone, 505 U.S. at 516 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Accordingly, '[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." Id. (citations omitted).
\item 231. Id. at 517 (quoting Malone v. White Motor Corp., 453 U.S. 497, 505 (1978)). In addition, the Court has recognized areas in which a federal statutory scheme may implicitly preempt state regulation of the area even when no express preemption provision exists. See Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (holding state law preempted if it actually conflicts with federal law); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding federal law may thoroughly occupy a legislative field leaving "no room for the States to supplement it"). Interestingly, there is no discussion of Boyle regarding preemption. Boyle was one of the Court's most recent preemption decisions and appears to have involved the "actual conflict with federal law" category of implied preemption.
\end{itemize}
the clear and manifest intent of Congress must be shown to preempt traditional state police power regulations.\textsuperscript{232}

On its face, then, it would appear that the Court's preemption analysis would restrict the availability of preemption as a defense because the Court requires an express provision, if one exists, in any preemption determination, forbidding the lower courts to use implied preemption as a basis for the defense in such cases.\textsuperscript{233} More often than not, regulatory statutes do not expressly preempt common law damage awards.\textsuperscript{234} Since \textit{Cipollone} requires an interpretation of the clear mean-

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\begin{itemize}
\item \textsuperscript{232} \textit{Cipollone}, 505 U.S. at 517.
\item \textsuperscript{233} Lower courts have consistently and legitimately read \textit{Cipollone} this way. In \textit{Freightliner Corp. v. Myrick}, 115 S. Ct. 1483 (1994), the Court may have reopened the door to implied preemption even if an express provision exists. \textit{Myrick} involved the \textit{National Traffic and Motor Vehicle Safety Act of 1966}, which has an express preemption provision operating only if there is a specific motor vehicle safety regulation in place by the \textit{National Highway Transportation and Safety Administration}. \textit{Id.} at 1486. In \textit{Myrick}, the plaintiff was injured in an accident involving a tractor trailer without anti-lock brakes (ABS) and sued based on the lack of ABS as a design defect. \textit{Id.} at 1485. The Court affirmed a finding by the Eleventh Circuit of no express preemption. \textit{Id.} The Court also somewhat gratuitously said:

\begin{quote}
The fact that an express definition of the preemptive reach of a statute "implies"—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption. . . . At best, \textit{Cipollone} supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.
\end{quote}

\textit{Id.} at 1488.

This observation will inevitably lead to increased argument for implied preemption even when express preemption has failed. In \textit{Medtronic, Inc. v. Lohr}, 116 S. Ct. 2240 (1996), discussed \textit{infra} at notes 286-306 and accompanying text, the Court, in deciding a preemption case involving the \textit{Medical Device Amendments to the Federal Food, Drug and Cosmetic Act (MDA)}, relied on an express preemption provision and stated:

\begin{quote}
As in \textit{[Cipollone]}, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the preemptive language of § 360k(a) means that we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law . . . we must nonetheless "identify the domain expressly pre-empted" by that language.
\end{quote}

\textit{Id.} at 2250. The plurality opinion, authored by Justice Stevens who wrote the \textit{Cipollone} plurality, concluded by suggesting that implied conflict preemption analysis might resolve certain additional claims not resolved by the express preemption provision. \textit{Id.} at 2259. The Court did not have to address this issue, however, because it concluded none of the plaintiffs' claims were expressly preempted. For a discussion of the preemptive reach of the MDA and the \textit{Lohr} decision, see \textit{infra} notes 286-309 and accompanying text.

\item \textsuperscript{234} For example, federal courts have routinely found that federal law that establishes safety options for automobiles impliedly preempts common law claims based on defective design for failing to have an airbag. The \textit{National Traffic and Motor Vehicle Safety Act of 1966}, 15 U.S.C. §§ 1381-1420 (1988) (repealed 1994), and \textit{Federal Motor Vehicle Safety Standard (FMVSS)}, while containing an express preemption provision that prohibits nonidentical state regulation when a federal safety standard deals with an aspect of the vehicle's performance, \textit{id.} § 1392(d), also has a savings clause that allows common law damages actions against the manufacturers. \textit{Id.} § 1392(k). Most courts have found these provisions do not expressly preempt common law damages claims, but have found an implied preemption in spite of the savings clause. \textit{See Taylor v. General Motors}}}
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ing of the express preemption provision as the only likely means of finding preemption, defendants relying on federal regulatory schemes to set standards of responsibility may have been surprised and concerned by the Court's decision, especially after the broad protections from responsibility afforded by *East River Steamship* and *Boyle*. A close reading of the Court's preemption analysis in *Cipollone* clarifies that such a fear is unfounded. The Court's "clear meaning" interpretation of an express preemption provision is anything but clear and broadens rather than limits the availability of express preemption as an immunity from responsibility.

In applying its analysis to the language of the 1965 Act, the Court concluded that the presumption against preemption required a narrow reading of the Act's preemption provision which prevented states from requiring additional or different "statements" on cigarette packages or in advertising. In discussing the relationship between congressional requirements involving safety and health, like cigarette labeling, and state law interests in allowing damages actions for its injured citizens, the Court noted that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions" which provide recovery for those injured by the inadequacy of the warning. The Court shows initial respect for state standards of responsibility by refusing to recognize an ouster of those standards absent Congress's clear desire to do so.

Discussing the 1969 Act, however, the Court changes its approach significantly and appears to move away from an analysis of Congress's clear and manifest intent to a much more lax analysis in its evaluation of that intent, relying instead on the inconsistent language of the statute to discover a preemption scope very likely unintended by the Con-

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235. For a discussion of the possible effect of *Myrick*, see *supra* note 233 and accompanying text.

236. *Cipollone*, 505 U.S. at 518. A majority of the Court joined in section III of the opinion in which Justice Stevens outlined the operative legal principles regarding express preemption. *Id.* at 508. In addition, a majority of the justices joined in section IV of the opinion applying those principles to the 1965 Act, concluding the Act did not preempt state common law damages actions. *Id.* at 508.

237. *Id.* at 518. The Court supported this conclusion with a reference to the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 (1986), which specifically preempted additional state warning requirements and at the same time explicitly saved common law damages actions. *Cipollone*, 505 U.S. at 518. The Court further looked to the purpose of the Act, which expressed a desire to avoid non-uniform regulations, and the regulatory history of the Act, which was prompted by the impending regulation of cigarette package labeling by the Federal Trade Commission. *Id.* at 519.
The Court reviewed the semantic changes in the statutory preemption language from the 1965 Act to the 1969 Act and concluded that these seemingly minor changes sweep broadly, in spite of the fact that neither of the parties suggested that the changes were significant to the analysis. Further, even though the Court said preemption of police powers would be found only where Congress's intent to do so was clear and manifest, the Court totally ignored the Committee Report on the 1969 amendment to the preemption provision which stated that the language change simply “clarified” the 1965 Act provision on the preemption of advertising provisions. Further, the “purposes” section of the 1969 Act was not changed from the 1965 Act, but remained primarily concerned with “regulations.”

238. *Cipollone*, 505 U.S. at 520. Only three justices—the Chief Justice and Justices White and O'Connor—joined in section V of the Court's opinion discussing the 1969 Act. Id. at 505. Justices Kennedy and Souter joined in Justice Blackmun's opinion concurring in part and dissenting in part, from section V, and concurring in the judgment. Id. at 506. Justice Scalia dissented, joined by Justice Thomas, finding both Acts preempted the damages actions in issue. Id. at 508-07. Therefore, it is difficult to determine whether the 1969 Act, as interpreted by Justice Stevens, preempts common law damages actions or not.

239. The 1965 Act's preemption provision, § 5(b), stated that “[n]o statement” shall be imposed under state law that is inconsistent with the warning label required by the 1965 Act. See *Cipollone*, 505 U.S. at 518. The 1969 Act's preemption provision was slightly different in that it prohibits any requirements or prohibition based on smoking and health imposed under state law with respect to advertising or promotion. Id. at 520. The legislative history suggests that these changes were intended only to clarify, not broaden, the scope of the preemption. Id. at 540 (Blackmun, J., concurring in part and dissenting in part).

240. *Cipollone*, 505 U.S. at 520-21 n.18. It is highly likely that attorneys for the tobacco companies would have argued for the broadest preemption possible from the statutory changes had they even an inkling of support for it in precedent, interpretation analysis, or legislative history.

241. Id. at 520.

242. Id. Even though there were other indications in the legislative history to support the finding that Congress was primarily concerned with regulations and positive enactments and not common law damages actions, the Court still considered the preemption provision changes “substantial” to include those actions in its scope. Id. at 520-21. On the interpretation of the changes to the 1969 Act, Justice Blackmun in dissent said:

> Viewing the revisions to § 5(b) as generally nonsubstantive in nature makes sense. By replacing the word “statement” with the slightly broader term, “requirement,” and adding the word “prohibition” to ensure that a State could not do through negative mandate (e.g., banning all cigarette advertising) that which it already was forbidden to do through positive mandate (e.g., mandating particular cautionary statements), Congress sought to “clarify” the existing precautions against confusing and nonuniform state laws and regulations.

> Just as it acknowledges the evidence that Congress' changes in the preemption provision were nonsubstantive, the plurality admits that “portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities.” . . . Indeed, the relevant Senate report explains that the revised pre-emption provision is “intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivisions.
Therefore, it was a small step for the Court to conclude that “common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose ‘requirements or prohibitions.’” 243 The Court found the phrase “State law” to include common law damages actions even though Congress had both included “common law” in preemption provisions before and had used savings clauses before to preserve damages actions when it thought that its preemption provisions might be construed too broadly. 244 In this case, it did not, and the Court found this consistent with its conclusion that only some common law damages actions are preempted while others are not. 245 In comparing the Court’s analysis of the 1965 and 1969 Acts, it is clear the Court changed its approach and analysis of preemption in a significant way based on insignificant changes.

In his concurring and dissenting opinion, Justice Blackmun artfully points out the inconsistencies in the plurality’s analysis of the 1969 Act’s provisions. 246 Justice Blackmun noted that while common law damages actions exert a regulatory effect on manufacturers, as the Court assumed, the issue of the extent of that effect and whether Congress intended to halt that effect by the chosen preemption language is much more complicated and is unanswered by the statute’s ambiguous preemption section. 247 Further, Justice Blackmun points out that there

of any State,” a list remarkable for the absence of any reference to common-law damages actions.

Id. at 540 (Blackmun, J., concurring in part and dissenting in part). 243 Justice Blackmun further notes the inconsistency in the Court’s reliance on § 2, regarding purposes, in defining the scope of the 1965 Act but its refusal to acknowledge the importance of that same unamended section in the 1969 Act. Id. at 540-41 (Blackmun, J., concurring in part and dissenting in part).

244. Id.

245. Id. The Court then discusses which actions are preempted—those relying for recovery on the warning or advertising language such as the failure to warn claims and the misrepresentation claims—but not those that do not, like the fraud, express warranty and conspiracy claims. Id. at 523-31. The inquiry being: whether the legal duty predicating the common law damages action constitutes a “requirement or prohibition based on smoking and health . . . imposed under State law with respect to advertising or promotion,” giving that clause a fair but narrow reading. Id.

246. Id. at 534-40 (Blackmun, J., concurring in part and dissenting in part).

247. Id. at 535 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun continued:

The effect of tort law on a manufacturer’s behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer’s continued unlawful conduct, no particular course of action (e.g., the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. Or by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant
is no suggestion in the legislative history that Congress intended to leave injured plaintiffs without alternative remedies for conduct otherwise unlawful under state law traditionally governing such responsibilities.\(^{248}\)

Most important, Justice Blackmun notes the Court's reversal from its previous hesitancy to find federal preemption where Congress provided no comparable remedy.\(^{249}\) Once the Court found express preemption of the warning claims from the ambiguous connection of the preemption language, "no requirement or prohibition" based on "advertising or promotion," it opened the door for all express preemption provisions to be read as broadly. The Court reached its conclusion with no indication that Congress would have approved such a result and, indeed, in the face of evidence to the contrary. As Justice Blackmun concluded:

> By finding federal preemption of certain state common law damages claims, the Court today eliminates a critical component of the State's traditional ability to protect the health and safety of their citizens. Yet such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result.\(^{250}\)

1. **Effect of Cipollone on the culture of irresponsibility**

Even more than did Boyle or East River Steamship, Cipollone affects the way institutional actors perceive the legal responsibilities imposed on them to prevent the creation of unreasonable risks of harm.\(^{251}\) Because it provides a mechanism for those actors to lay the responsibility for their conduct at the feet of Congress, there is no in-

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\(^{264}\) Effect of Cipollone on the culture of irresponsibility

\(^{265}\) Even more than did Boyle or East River Steamship, Cipollone affects the way institutional actors perceive the legal responsibilities imposed on them to prevent the creation of unreasonable risks of harm. Because it provides a mechanism for those actors to lay the responsibility for their conduct at the feet of Congress, there is no in-
centive to act more responsibly than the minimum Congress, in all of its dubious wisdom, requires. While it is true that there is a healthy amount of federal regulation regarding safety issues in the workplace, in the regulation of our food and health care, and in our transportation, it is also true that much of that regulation is a result of years of abuse by the industries regulated in policing themselves. Consequently, unless Congress unambiguously indicates a willingness to immunize the institutional defendant from the traditional state law damages remedies (that have always served as the first line of defense against unreasonable practices), it seems manifestly inappropriate to do so in Congress's place with a tortured statutory interpretation. By doing so, the Court supports an even stronger claim by institutional defendants in the existence of an entitlement to the right of immunity.

2. Cipollone's effect on other regulatory schemes

Of the many federal regulatory schemes, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act (MDA) provide the best comparisons to the regulatory scheme for cigarette labeling found in Cipollone. Both FIFRA and MDA have express preemption provisions and both statutes have fairly specific requirements regarding the products they regulate, like the statutes in Cipollone. The post-Cipollone treatment of the scope of the preemption provisions in these two regulatory schemes will provide insights into the effect of another Supreme Court opinion on the culture of irresponsibility.

a. Preemption under FIFRA. FIFRA authorizes the Environmental Protection Agency (EPA) to regulate comprehensively the production, distribution, and use of pesticides. The EPA, with Congress's approval, exclusively and extensively regulates pesticide labeling requirements. The express preemption provision, like the preemption provision at issue in Cipollone, provides that a state "shall not impose or continue in effect any requirements for labeling or packaging in ad-
dition to or different from those required" under FIFRA. Prior to Cipollone, most courts rejected an express preemption argument under the statute, primarily because Congress had not mentioned common law damages awards in the statute. Pre-Cipollone courts analyzed the statute under implied preemption and disagreed on whether common law damages actions were available. A conclusion of no express preemption is consistent with the EPA's regulatory scheme which allows the manufacturer to design and formulate the content of a warning label based on EPA requirements.

Since Cipollone, most courts addressing the scope of the FIFRA preemption provision have concluded that it expressly preempts common law damages actions for failure to warn. Of the post-Cipollone federal court cases interpreting the FIFRA preemption provision, only two have found no express preemption and one of those was reversed on appeal. The courts finding express preemption base their deci-

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257. 7 U.S.C. § 136v(b) (emphasis added).
260. See 7 US.C. § 136a(c)(1)(B)-(E) (requiring manufacturer to file a statement with EPA which includes name of pesticide, complete copy of labeling, statement of claims made for its use, directions for use, and a full description of tests made and results); 40 C.F.R. § 156.10 (listing EPA requirements governing scope, content, wording, and format of herbicide labeling).
sions on how closely the language of the preemption decision tracks the language in the 1969 Act involved in Cipollone.\textsuperscript{263} This is so even though the Court concluded that the 1965 Act language in Cipollone did not expressly preempt common law damages actions.\textsuperscript{264} One would think that courts interpreting the plurality opinion in Cipollone, badly fractured on the scope of express preemption, would not blindly adhere to the most restrictive view of that opinion but would more thoroughly analyze both the language of challenged regulatory schemes and the traditional role of common law damages actions as encouraging safety and civic responsibility that both the Court and Congress have recognized.\textsuperscript{265}

At the heart of the FIFRA preemption debate, as in Cipollone, is the role of common law damages actions as regulatory vehicles. If it is at all possible that damages actions deter inappropriate conduct,\textsuperscript{266} surely such actions have a conduct-regulating effect, thus making them regulatory. If the goal of preemption analysis in this context is maintaining a balance between encouraging responsible conduct, the traditional domain of state tort law, and respecting Congress's role in legislating federal affairs, then the initial conclusion that damages actions are regulatory should not be the beginning and end of the inquiry.\textsuperscript{267} Once the Court focused the analysis purely on the regulatory effect of common law damages actions, any debate on the nature of re-

\textsuperscript{263} See, e.g., King, 996 F.2d at 1349.

\textsuperscript{264} Courts taking a more open view of the Court's Cipollone analysis have reflected on the 1965 Act's language as compared to the FIFRA provision and found the two to be more similar than the 1969 Act and FIFRA. See Couture, 804 F. Supp. at 1302 (describing FIFRA's preemptive reach); Burke, 797 F. Supp. at 1136-37 (explaining FIFRA's preemptive effect).

\textsuperscript{265} King is an example of this narrow view of the Cipollone decision. The King court, in an opinion written by now Supreme Court Justice Breyer, evaluated the FIFRA preemption provision as compared to the 1969 cigarette warning label requirement and totally ignored any comparison to the 1965 Act requirement. King, 996 F.2d at 1349. The King court also reviewed the legislative history of FIFRA and found that references to preemption of "any State or local government labeling or packaging requirements" was sufficiently broad to encompass state common law damages actions even though the language is narrower and more specific than that used in the Cipollone statutes. Id. at 1350; see also Ausness, Federal Preemption of State Products Liability Doctrines, supra note 228, at 269-70 (concluding common law tort doctrines do not fit the definition of "requirements" well and textual and legislative history arguments for FIFRA preemption are weak).


\textsuperscript{267} For a discussion of the need to evaluate contemporary values and policies in making the preemption determination, see Ausness, Federal Preemption of State Products Liability Doctrines, supra note 228, at 251-52.
sponsible conduct defined by the common law and what it includes was foreclosed. This is even more strikingly seen by the almost unanimous conclusion by state courts that FIFRA broadly preempts state common law damages actions. Deference is one thing, but given the nature of the Court's plurality opinion, in which no more than four justices could agree on the scope of the 1969 Act's provision, it is striking that state courts would so willingly succumb to the Court's admittedly vague conclusion about the effect of a federal statute on the proper reach of state responsibility rules.

b. Preemption under the MDA. The MDA enabled the FDA for the first time to review medical devices for safety and effectiveness and to expand protection against any such dangerous devices. In so doing, Congress also enacted a preemption provision prohibiting states from "establish[ing] or continu[ing] in effect . . . any requirement . . .

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which is different from, or in addition to, any requirement applicable under this [Act] . . . which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device."\textsuperscript{270}

Based on how courts have interpreted the FIFRA preemption provision after \textit{Cipollone}, it will not come as a surprise that courts evaluating the MDA provision almost unanimously find the use of the word "requirement" in that provision sufficient as a basis for express preemption of most, and in some cases all, state common law claims. The opinions frequently lack any meaningful analysis of the major differences in the MDA, FIFRA, and cigarette labeling provisions that have been the subject of preemption analysis.\textsuperscript{271} The broad protection \textit{Cipollone}'s analysis afforded for otherwise irresponsible conduct has continued. Medical device manufacturers successfully relied on \textit{Cipollone} for immunity from liability even though the avowed purpose of the MDA was to provide for increased safety. The presumption against preemption appeared to have been swallowed up in the interpretive tools of "clear meaning" and "congressional intent."

The Supreme Court recently revisited preemption analysis in the medical devices context in \textit{Medtronic, Inc. v. Lohr}.\textsuperscript{272} This decision was supposed to clear up preemption analysis significantly, particularly in the medical devices setting where courts of appeals had widely varying interpretations of the preemptive scope of the MDA since \textit{Cipollone}. Before turning to \textit{Lohr}, it will be helpful to have a brief explanation of the framework of the MDA and canvas the pre-\textit{Lohr} decisions to get a feel for what \textit{Cipollone} had wrought in this particular preemption arena.\textsuperscript{273} As will be discussed, the regulatory scheme in the MDA is significantly more complex and leaves much more room for states to regulate explicitly.

The FDA has authority to interpret the MDA's express preemption provision\textsuperscript{274} and has interpreted it to preempt state or local require-

\textsuperscript{270} 21 U.S.C. § 360k(a).
\textsuperscript{272} 116 S. Ct. 2240 (1996).
\textsuperscript{274} For a discussion of the preemption provision, 21 U.S.C. § 360k, see supra note 270 and accompanying text. Section 360k(b) gives the FDA the power to exempt requirements from the scope of subsection (a) if the requirement is "more stringent than a requirement under this chapter" or the requirement is "required by compelling local conditions" and would not violate any other applicable requirement under the MDA. \textit{Id.}
ments "only when the [FDA] has established specific counterpart regulations or there are other specific requirements applicable to a particular device" and not when there are only state "requirements of general applicability."275 The MDA is a complex system with a variety of approval processes, each of which leaves some flexibility in the manufacturer's hands, very unlike the labeling requirement in Cipollone.276 For example, before a medical device can be marketed, the manufacturer must obtain approval depending on whether the device is a Class I, II, or III device.277 Class III devices are those which are implanted in the body or pose an unreasonable risk of injury.278 Because of their dangerousness, Class III devices are required to obtain premarket approval.

§ 360k(b). To carry out its authority, the FDA has issued regulations which construe the preemption provision generally and which describe the circumstances in which the FDA will grant an exemption. 21 C.F.R. § 808.1 (1995).

275. 21 C.F.R. § 808.1(d) provides:

State or local requirements are preempted only when the [FDA] has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the act, thereby making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific [FDA] requirements . . . .

(1) Section [360k(a)] does not preempt State or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices . . . or to unfair trade practices in which the requirements are not limited to devices.

276. For a description of the MDA regulatory scheme, see Adler & Mann, supra note 273, at 923-42; Lars Noah, Amplification of Federal Preemption in Medical Device Cases, 49 FOOD & DRUG L.J. 183 (1994). For an analysis of the MDA scheme by the first court of appeals to buck the preemption trend, see Kennedy v. Collagen Corp., 67 F.3d 1453, 1457-59 (9th Cir. 1995), cert. denied, 116 S. Ct. 2579 (1996). In Kennedy, the court explained the complexity of the MDA regulatory scheme and noted that preemption occurs only if there exists a "specific requirement applicable to a particular device." Id. at 1459. Finding that the premarket approval process is no such "specific requirement" when most other courts of appeals had, the Ninth Circuit stated:

As the Supreme Court held in Silkwood, it is incredible to believe that Congress would, without comment, void all means of relief for those injured by illegal conduct. State common law damages actions guarantee people who are injured by a manufacturer the opportunity to be compensated for their harm. State regulation of manufacturers directly governs their actions in releasing their goods into the market. Thus, state common law serves a different purpose than state regulation and is unlikely to have been the target of congressional attempts to promote the introduction of safe medical devices onto the market or even to curb dual regulation of the medical devices industry.

Id. After deciding Lohr, the Court denied the petition for review in Kennedy, letting the opinion stand. Kennedy v. Collagen Corp., 116 S. Ct. 2579 (1996).

277. Class I devices are those which pose little or no threat to the public health. 21 U.S.C. § 360c(a)(1)(A) (1994); 21 C.F.R. § 860.3(c)(1) (1995). Class II devices include items such as tampons, 21 C.F.R. § 884.5460(b) (1995), and oxygen masks, id. § 868.5555(b). Because they involve some risk of injury, the FDA has performance standards, postmarket surveillance programs, and guidelines for their use. 21 U.S.C. § 360c(a)(1)(A); 21 C.F.R. § 860.3(c)(2).

278. 21 U.S.C. § 360c(a)(1)(C); 21 C.F.R. § 860.3(c)(3). Class III devices include pacemakers, 21 C.F.R. § 870.3610(b) (1995), heart catheters, id. § 870.1350(b), penile
before manufacture and marketing. Class III device cases constitute the vast majority of the cases in which the preemption defense has been interposed. It is interesting that the most hazardous products are the ones for which manufacturers most want to shield themselves from liability. A culture of irresponsibility? It would appear so.

A canvassing of the pre- and post-Cipollone preemption cases under the MDA supports the conclusion that the MDA is being widely interpreted as over-preemptive, given the lack of device-specific regulations and the generic approval process basis of preemption. Prior to Cipollone, courts' conclusions were mixed on the scope of the MDA preemption provision, some finding preemption and others not. After Cipollone, however, courts have been virtually unanimous in finding preemption of most, and sometimes all, common law tort claims under the MDA. The preemption provision requires a "specific requirement

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prostheses, id. § 876.3350(b), breast implants, id. § 878.3530(b), and other inherently dangerous items.

279. 21 U.S.C. § 360e(c)(1)(A)-(G) (1994); 21 C.F.R. § 814.20 (b)(2)-(12) (1995). The application for premarket approval must contain all of the information on any investigations concerning the device's safety and effectiveness, a statement of the intended use of the product, a description of the expected manufacturing process and any other requested information. 21 C.F.R. § 814.20(3) (1995). There is no opportunity for public challenge to the information presented to the FDA. Id. For descriptions of the premarket approval process, see Kennedy, 67 F.3d at 1453 and Michael v. Shiley, Inc., 46 F.3d 1316, 1329 (3d Cir.) (finding preemption where heart valve one of first to obtain premarket approval under MDA), cert. denied, 116 S. Ct. 67 (1995). For some products as to which a substantial equivalent was already marketed prior to the MDA being enacted, a less rigorous approval process is required under § 510(k): the premarket notification process. Applicants must submit device descriptions and other information sufficient for the FDA to determine equivalence to a pre-MDA approved device. 21 C.F.R. § 807.87 (1995). See Feldt v. Mentor Corp., 61 F.3d 431, 435 (5th Cir. 1995) (holding preemption "does not depend on the route the product takes to the market" where penile prosthesis obtained premarket approval); Lohr v. Medtronic, Inc., 56 F.3d 1335, 1352 (11th Cir. 1995) (same), aff'd in part, rev'd in part, 116 S. Ct. 2240 (1996); accord Mendes v. Medtronic, Inc., 18 F.3d 13, 19 (1st Cir. 1994) (preempting products liability suit regarding pacemaker under MDA).

280. See Adler & Mann, supra note 273, at 917 nn.106-07; Ausness, Federal Preemption of State Products Liability Doctrine, supra note 228, at 226-27. But see Noah, supra note 273, at 926-27 ("Almost without exception, the lower courts have held that this provision preempts tort claims to the extent that the FDA regulates a particular medical device.").

for a particular device"; courts finding preemption have concluded that the generic premarket approval processes are such specific requirements. Their analysis is often expressly based only on the existence of the word "requirement" in the language of the preemption provision in the MDA and in Cipollone, despite the significant differences in the two regulatory schemes and the very different types of "requirements" present. The statutory scheme involved in Cipollone included an explicit congressional, not administrative, mandate from which the manufacturers could not deviate. Preemption of state law claims under the MDA has been argued to be an unwarranted extension of the analysis and rationale of Cipollone. The sweeping post-Cipollone preemption decisions can be considered a knee-jerk reaction to the ambiguity of Cipollone's analysis and result, an easy way of dealing with a difficult topic.

Further, the history and scope of the FDA would seem especially suited to a detailed evaluation of congressional intent before concluding that the presumption against preemption of state police powers specifically recognized in Cipollone should be overcome. The presumption of preemption of breach of express and implied warranty and fraud claims despite that even Cipollone would not have preempted such claims under the cigarette labeling acts involved there. See, e.g., Shiley, 46 F.3d 1316; King, 983 F.2d 1130; Kemp v. Pfizer, Inc., 851 F. Supp. 269 (E.D. Mich. 1994), vacated, 91 F.3d 143 (6th Cir. 1996). For a particularly broad preemption decision, see Talbott v. C.R. Bard, Inc., 63 F.3d 25 (1st Cir. 1995) (preempting plaintiff's fraud claim where conspiracy to defraud FDA provided in criminal proceedings against defendant), cert. dismissed, 116 S. Ct. 1892 (1996).


282. For a discussion of 21 C.F.R. § 808.1(d) (1995), and specific requirements, see infra note 299 and accompanying text.

283. See King, 983 F.2d 1130; Martello, 42 F.3d 1167. These cases, and others, hold all state law claims are preempted, even those for breach of express and implied warranties, misrepresentation, and fraud.

284. The court of appeals decision in Lohr v. Medtronic, Inc., 56 F.3d 1335 (11th Cir. 1995), broadly interpreted the term "requirements" and found that common law actions are within the meaning of § 360k(a) for purposes of a preemption claim involving a pacemaker marketed through premarket notification under § 510(k). Lohr, 56 F.3d at 1342-43. The court in Lohr found the design defect claims were not preempted, id. at 1347-49, but the failure to warn and manufacturing defect claims were preempted. Id. at 1350-51.

285. See Kennedy, 67 F.3d at 1459; Adler & Mann, supra note 273, at 916-23.
tion against preemption is particularly relevant regarding a scheme like the FDA, which has always been considered to operate in addition to and not instead of the state law tort system. The fact that the MDA scheme is so much more detailed than the cigarette labeling act in Cipollone should constitute a clear reason for lower courts to do a thorough preemption analysis and not just rely on the presence of the term "requirement." Cipollone's analysis of the 1969 Act's language and the hopelessly fractured Court opinions on the regulatory effect of common law damages actions has enabled lower courts to rest on the simple analytical tool of "plain meaning" when the meaning of the MDA's preemption provision is anything but plain.

Enter Medtronic, Inc. v. Lohr. The Court was asked to clarify the MDA's preemption provision in the case of an allegedly defective pacemaker lead which had been marketed under the MDA's premarket notification, or section 510(k), procedure. The court of appeals' decision reflected one of the many positions taken on the MDA's preemptive scope, not the most restrictive nor the most permissive. The court of appeals found common law damages actions to be "requirements within the meaning of § 360k(a)." The court of appeals then concluded that the section 510(k) procedure, which allows marketing with much less scrutiny because the device is found substantially equivalent to a device already on the market, was not a sufficient requirement under the Act to preempt design claims, but that the good manufacturing practices and labeling requirements were "requirements" so that claims based on manufacturing and warning were preempted.

As in Cipollone, the Lohr Court was in disagreement over the scope of the term "requirement" for preemption purposes. In a plurality opinion written by Justice Stevens, the Court confirmed the preemption interpretation principles discussed in Cipollone and then

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286. 116 S. Ct. 2240 (1996). After refusing to grant certiorari in several previous MDA preemption cases, the Court finally did so. Id.
287. Id. at 2250. The court of appeals found the design claims were not preempted but the manufacturing and warning claims were. Id. at 2249.
288. Lohr, 55 F.3d at 1342. In Lohr, a pacemaker manufactured by the defendant failed while implanted in the plaintiff. Id. at 1338.
289. Id. at 1346, 1347-49.
291. Lohr, 116 S. Ct. at 2250. This portion of the opinion, section III, was a majority opinion joined by Justice Breyer. The Court described the guiding principles as "two presumptions about the nature of pre-emption." Id. Those principles are "First . . . Congress does not cavalierly pre-empt state-law causes of action . . . . [W]e used a 'presumption against the pre-emption of state police power regulations' to support a narrow interpretation of such an express command in Cipollone." Id. (quoting Cipollone, 505 U.S. at 508). In addition, the Court described its guiding interpretive principles in the form of a second presumption that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" Id. (quoting Cipollone, 505 U.S. at 529 n.27). That understanding is gleaned first, from the language of
discussed in some detail whether the use of the term "requirement" preempted all common law damage claims as Medtronic argued. Given Cipollone's broad reading of the same term, it is not at all surprising that Medtronic made this argument; that type of rather unprincipled extension by a defendant manufacturer of an otherwise narrow "immunity" is just the type of response Cipollone should have been expected to elicit. The plurality, fortunately, concluded that the argument is "not only unpersuasive, it is implausible." What is rather unfortunate is that only four justices agreed with that assessment; the other five found it not only plausible but likely that Congress's use of "requirement" meant that common law damages claims were preempted, at least in some respects.

Justice Stevens, in his opinion, analyzes the intent of Congress, as interpretive principles require, and concludes that "Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order 'to provide for the safety and effectiveness of medical devices intended for human use.'" In a fascinating twist, Justice Stevens relies on the pre-Cipollone preemption case, Silkwood v. Kerr-McGee Corp., to observe that it would be "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." Justice Stevens states that the language used in the MDA is not plain enough to show such a congressional intent. Justice Stevens concludes that the MDA does not sweep as broadly as the statutory language in Cipollone and that none of the plaintiff's claims are preempted because there is no specific federal "requirement" applicable to the device on which to base preemption of state law. Justice Stevens declines to respond to the plaintiff's argu-

the statute and second, the structure and purpose of the statute aided by a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." Id. at 2251.

292. Id. at 2251.
293. The plurality reversed the court of appeals in part, on the finding of preemption, and affirmed in part, on the finding of no preemption. Id. at 2243 (Breyer, J., concurring); id. at 2250-61 (O'Connor, J., concurring in part and dissenting in part) (finding partial preemption of manufacturing and warning claims).
294. Id. at 2251 (plurality opinion, Stevens, J.).
296. Lohr, 116 S. Ct. at 2251 (citing Silkwood, 464 U.S. at 251).
297. Id.
298. Id. Justice Stevens identifies the many differences between the two statutory schemes and examines the purposes behind the legislation and their respective histories. Id. at 2251-53. He concludes that the MDA's use of "requirements" was intended to reach only positive law enactments by legislative or administrative bodies, not the application of general common law rules. Id. at 2252. Justice Stevens also concludes that "[i]f Congress intended such a result, its failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing product liability litigation." Id. at 2253.
299. Id. at 2252. Justice Stevens uses the FDA regulations to aid in the interpreta-
ment that the MDA's use of "requirements" never includes common law duties, given the finding of no preemption, and "given the critical importance of device-specificity . . . it is apparent that few, if any, common-law duties have been pre-empted by this statute." He concludes that "[i]t will be rare indeed for a court hearing a common-law cause of action to issue a decree" that is sufficiently precise to constitute a preempted substantive device requirement.

The remainder of the Justices, given an opportunity to clarify the meaning of "requirement" for preemption purposes, was again unwilling to embrace Justice Blackmun's well-supported position in Cipollone: that Congress cannot be said to have intended common law damages actions to be preempted and thus destroy a traditional area of state law protection. Justice Breyer, in concurrence, and Justice O'Connor, in dissent, agreed in principle that common law causes of action under the MDA constitute "requirements" for purposes of their preemption. Justice Breyer concludes that the MDA "will sometimes pre-empt a state-law tort suit," where a state statute or regulation would be preempted, "a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action" would also be preempted. Justice O'Connor, relying heavily on Cipollone and its analysis of the term "requirement," concludes that the statute clearly preempts some state common-law claims without
reference to the FDA preemption regulations on the point and in spite of the lack of device-specific regulations pertinent to the device involved.306

What to make of the Lohr opinion regarding the culture of irresponsibility defined and explored in this article? The Court appears to be softening its preemption analysis somewhat in light of Justice Stevens' embrace of the idea that Congress's use of a single term need not sweep as broadly as Cipollone suggested in the area of protecting manufacturers from responsibility. It is disheartening that in an area so clearly related to public health and safety the remaining five justices disagreed that unless Congress unequivocally states its intent to disrupt state tort law remedies, it should not be deemed to have intended to do so by judicial interpretation. The presumption against preemption receives lip service again by a majority of the Court. The usual attempt to squeeze additional immunities in the form of federally preempted state actions can be expected to follow in the other statutory schemes not yet addressed by the Court. FIFRA, the Federal Hazardous Substances Act,307 the Consumer Product Safety Act,308 and others are likely to provide fertile preemption arguments, and countless judicial opinions, in spite of Lohr.

That courts would find preemption of the wide array of common law tort claims in the medical device area indicates the strong effect the Cipollone decision has had on encouraging institutional defendants to ignore their responsibility and seek to be immunized when they are arguably not so entitled. The Court's own confusion in Lohr, though somewhat clarifying and narrowing the scope of preemption under the MDA, will continue to encourage defendants to seek the outer limits of their immunities. Of course, parties will try to extend the law in a way that makes it applicable to protect them or allow them recovery. This is what lawyers are supposed to do. The concern expressed in Cipollone, and in the concurring and dissenting opinions in Lohr, over the extensive regulatory effect of common law tort actions has been over-embraced by lower courts, however, and has become an apparent license to curtail long-recognized civil responsibilities imposed by state tort laws. Those responsibilities encourage product safety in ways that

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306. Id. at 2264 (O'Connor, J., concurring in part and dissenting in part).
308. One court of appeals has recently found preemption based on the 25-year-old Consumer Product Safety Act and a safety standard for lawn mowers. See Moe v. MTD Prods., Inc., 73 F.3d 179 (8th Cir. 1995). This decision is being cited as the first significant court of appeals decision on the Act's preemptive scope. See also Cortez v. MTD Prods., Inc., 927 F. Supp. 386, 390 (N.D. Cal. 1996) (extending the preemptive scope of Consumer Product Safety Act).
regulatory schemes do not. The Court's influence in this area has been profound, and has perpetuated an extensive culture of irresponsibility whose growth shows no sign of slowing.

III. CHALLENGING THE CULTURE OF IRRESPONSIBILITY

The avoidance of responsibility catalogued in the above opinions and their progeny is rarely criticized by the purveyors of "tort reform" as an unnecessary extension of "rights" over "responsibilities." Rather, the expansion of these immunities from responsibility is usually sanctioned by those very commentators, scholars, and judges who see a failure of the similar responsibility by victims of tortious conduct. The Court's decisions, based as they are on individualism and economic freedom, promote abuse of the "rights" recognized, not because immunities are always inappropriate but because the Court strains to immunize conduct to protect the interests of the institution over the individual. "Rights" achieved in this way are not hard won but come too easily to be given respect; they are too easy to take for granted because they are unearned and, therefore, easy to abuse.

The Court may not realize that it is encouraging a culture of irresponsibility, but perceptions usually operate absent the intent or knowledge of the creator. Even though the Court has limited the direct effect of immunity on products liability and tort jurisprudence, the expansion of the immunities it has created through East River Steamship, Boyle, and Cipollone point out that the Court should be more cognizant of its influence, come to terms with its influential role and choose a leadership role in the responsibility debate. If the Court continues on its current path, its decisions will continue to combine with other perceptions of irresponsibility to influence negatively society's dedication to responsible conduct.

"No single principle is capable of explaining the full extent of tort law." The Supreme Court has perpetuated through its opinions a perception that certain irresponsible conduct should be given a stamp of approval and emphasizes the institutional defendant's efficiency and protection from unlimited liability concerns over other moral principles that equally serve to explain the basis of tort responsibilities. The cases chronicled in this article, decided by the Supreme Court over the last ten years, reflect the variety of principles which form the basis of tort law: corrective justice notions, efficiency norms, and general prin-

309. See Adler & Mann, supra note 273, at 916-23 nn. 125-27.
310. See, e.g., Huber, supra note 2.
311. For a discussion of perceptions of irresponsibility, see supra notes 2-25 and accompanying text.
principles of autonomy and equality. The Court has chosen to focus on the utilitarian, wealth-maximizing norms over other principles and, to that extent, has forsaken those other principles which inform our notion of "responsible" conduct.

Each of the cases analyzed above rested primarily on the principle that conduct which creates an unreasonable risk of harm, defined by some objective, risk-utility balance, should be subject to liability because, at a minimum, unreasonable risks of harm are irresponsibly created. In *East River Steamship*, the court of appeals opinion had balanced the need to minimize unlimited liability with the need to impose liability for otherwise tortious conduct by defining recovery using an intermediate approach. The Supreme Court instead chose to define immunity from otherwise tortious conduct by totally denying recovery for economic loss in strict products liability. Courts which had not considered the issue quickly and virtually unanimously agreed. Perhaps the force of the Court's analysis was such that other courts deciding the issue simply could not disagree in logic or legal principle. It is unlikely, however, that state courts deciding a purely state law issue would feel so compelled to agree with the Supreme Court were it not also for the Court's cultural influence.

In *Boyle*, the court of appeals had defined a limited "military" contractor defense based on established federal precedents. The Supreme Court affirmed the decision, but on a much broader basis than was necessary to decide the limited issue before it, and created federal common law with which to support its new preemption defense. Post-*Boyle* cases indicate the widespread expansion of *Boyle* to areas where, by its own terms, it does not apply. Lower courts read *Boyle* in its broadest application, not necessarily because that is the correct legal analysis, but because that is its logical extension based on how the Court extended the immunity concerned to areas where no court previously would have thought it would extend. The Court's government contractor defense was broader in *Boyle* than anyone had previously sought to extend it. Recognition of such an immunity, and the legal analysis that led to its creation, can only serve to encourage lower courts to similarly extend the immunity to areas not contemplated even by the institutional defendants it protects. That recognition of im-

314. For a discussion of the court of appeals’ balancing in *East River Steamship*, see *supra* notes 43-45 and accompanying text. In *East River Steamship*, the basis of liability was strict liability, a non-fault based measure of responsibility that takes into consideration loss allocation and the most efficient cost avoider as the primary bases of imposing responsibility. *East River S.S. Corp. v. Delaval Turbine, Inc.*, 476 U.S. 858, 870 (1986).

315. For a discussion of *East River Steamship*, see *supra* notes 26-58 and accompanying text.


317. For a discussion of *Boyle*, see *supra* notes 78-117 and accompanying text.

318. For a discussion of *Boyle*'s progeny, see *supra* notes 118-222 and accompanying text.
munities in such situations encourages those benefited by the immunity to continue to seek its expansion is not a surprise; it is a natural effort to “abuse” the right created.

In *Cipollone*, the Court similarly broke with its own precedents to provide in essence a two-pronged federal preemption defense to the operation of traditional state tort law: preemption must be based on an express preemption provision if one exists, but express preemption provisions are not to be read narrowly in scope, as the Court *said* they should, but rather broadly as the Court *did* in its analysis. And subsequent courts have read such provisions exceptionally broadly. The treatment of the MDA preemption provision is particularly apposite in this regard. Courts after *Cipollone* read the term “requirement” and find preemption. There is no additional analysis and the Court’s *Cipollone* opinion does not encourage any. While Congress has the power to preempt state law, the presumption against preemption the Court purportedly recognizes is in truth given no more than lip service in the process.

In *Lohr*, the Court appears willing to continue to recognize the implied preemption doctrines even though in *Cipollone* it clearly said it would stand on an express preemption provision where one existed. Further, in *Lohr*, Justice Stevens appeared to be trying to right a “wrong” from *Cipollone*: the overbreadth of interpretation of the scope of preemption provisions. While his effort may make the MDA preemption analysis somewhat clearer, his brethren remain remarkably committed to an idea of preemption analysis that is of very recent vintage, essentially being born in *Cipollone*: that Congress, without expressly stating, intends to destroy the operation of traditional state law tort remedies in areas traditionally left to state regulation even when the statute does not create a remedy in its place.

The Supreme Court has chosen in each of these cases to lower the floor of acceptable behavior by its provision of broad immunity rules in the areas of recovery for economic loss, availability of federal immunities, and preemption doctrines. In all these cases, the otherwise applicable rule of liability is a state tort rule that would impose reasonable product manufacturer conduct based on a balancing of the risks and benefits of the product. The Court’s opinions, therefore, provide immunity for conduct which is, by all measures, not judged by particularly rigorous state law standards.

To be sure, very good reasons support immunity rules, but the Court makes the efficiency norms it relies upon prove too much. The need to limit potentially unlimited liability and the need for certainty and predictability in the definition of liability rules will always be reasons to lower the standard of responsibility. There must nonetheless be a meaningful standard upon which to base liability which encourages

319. For a discussion of *Cipollone*, see supra notes 223-50 and accompanying text.
320. For a discussion of *Myrick*, see supra notes 233-35 and accompanying text.
responsible conduct. The Court's relentless focus on preserving the economic health of the institutional actor fails completely to balance the need for such preservation with the need to encourage responsibility. The following excerpt from Mary Ann Glendon's *Rights Talk* aptly describes the danger of focusing on the "rights" side of the equation without balanced attention to the "responsibilities" side—imagine that the reference to "it" is a reference to the Court:

> In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue. In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertion over reason-giving.321

The Court had a number of methods from which to choose to resolve the legal issues raised in the cases discussed in this article. The method chosen in each of these diverse contexts has significant impact beyond the operation of the rule of law selected to govern the specific circumstances, as has been demonstrated. The Court has created a zone of conduct by institutional actors which can only be described as irresponsible but for which no liability will attach. More important, it has sent the message that immune irresponsible conduct is not really so irresponsible at all. The perception of responsibility where none exists contributes to a fundamental confusion in society about when actors should take responsibility for their actions. The Court has retreated from its responsibility and, in the process, made matters worse.

**CONCLUSION**

The Supreme Court has a profound influence in our lives in more than the legal principles it expounds. It both encourages and discourages us; it is like a parent in the way it disciplines us when we misbehave and congratulates us when we do not. And like a parent, it must sometimes do what is unpleasant to ensure that we do not venture into situations which will cause us unnecessary harm. And the Court must do so consistently so that we understand that it really means what it says.

Unfortunately, the Court has been consistent in one of its actions: its recognition of "rights" to immunity that have perpetuated the culture of irresponsibility in many of society's most powerful actors. The analogy to the bully is apposite; institutional actors whose conduct

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would otherwise be deterred by liability are otherwise being given the freedom to engage in that conduct with impunity. Like the bully, failing to take action to stop the offending behavior only encourages further misbehaving, usually of a more serious nature. Similarly, the Court's immunity rules in the last decade in civil tort responsibility are encouraging institutional defendants to stretch the “right” to be irresponsible as far as they will go. This is lazy “parenting” by the Court and has already led to an expansion of the immunities to areas that the Court likely never expected or intended. The Court has the opportunity, and obligation, to reconsider the extension of the “rights” it has created in the light of their treatment by the lower courts and the institutional actors whom they benefit.