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Product Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz.

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PRODUCTS LIABILITY IN THE UNITED STATES SUPREME COURT: A VENTURE IN MEMORY OF GARY SCHWARTZ

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I. INTRODUCTION	

In the same year that Gary Schwartz commented *en passant* on the Supreme Court as a products liability court,¹ Mary Davis published *The Supreme Court and*

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1. See Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 944-45 (1996).

Our Culture of Irresponsibility, the definitive article on this topic.² Professor Davis attacked the Court for encouraging “irresponsibility by creating new common-law immunities, creatively extending old ones, and interpreting Congress’s intent to federalize these immunities.”³ The Supreme Court, according to her critique, has been blunting and thwarting strict liability.⁴ Business interests demand that they are entitled, in the name of efficiency, to know that the legal system will cut off their liability for the harms they cause. Docile in the face of this demand, the Court has federalized products liability law.

Customarily, a law review article that begins by referring to another law review article has a critical agenda. On this occasion of tribute to a departed colleague, I intend something friendlier. My revisit to *Irresponsibility*, with Gary Schwartz in mind, will take a constructive tack: Yes, Professor Davis is right, but what else should be said about the Supreme Court as a products liability court? Sheltering business defendants from common-law liability has been only a fraction of a bigger story.

Associating this agenda with our honoree requires a bit of disclosure at the outset. Although I will guardedly pay tribute to the Supreme Court as a products liability court, Gary wrote that he didn’t think much of it.⁵ Nor was he inclined to mix products liability and “culture,” as Davis does in her title, manifesting a taste that I share.⁶

Nevertheless this venture does proceed very much in memory of Gary Schwartz. I write remembering—and trying to evoke—a colleague who eschewed overt politics, published no trenchant criticism of any institution like the Davis indictment of the Supreme Court, and tended to believe that the truth is what falls between two extreme stances. As a scholar, this colleague had a taste for primary materials: case law when talking about what courts do, statutes when evaluating legislative schemes, and hard facts when describing how accidents and risks materialize.⁷ The occasion of tribute impels me to look at a topic that Gary would think about from time to time, in a centrist perspective. Perhaps needless to add, this Essay does not undertake to do any of the work of Gary Schwartz. No self-

2. See Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075 (1996). The other significant publication about the Supreme Court as a products liability court is RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4-5 (1988) (commending the Supreme Court as a force in the development of products liability and arguing that unless the Court assumes leadership in this area, products liability will be riven by factionalism among the states).

3. Davis, *supra* note 2, at 1076.

4. *Id.* at 1077-81, 1135-38.

5. Schwartz, *supra* note 1, at 945-46.

6. See, e.g., Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2156-57 (1997) (exploring thalidomide as a “signifier”); Anita Bernstein & Paul Fanning, *Heirs of Leonardo: Cultural Obstacles to Strict Products Liability in Italy*, 27 VAND. J. TRANSNAT’L L. 1, 2-5 (1994) (proposing that Italian national culture is averse to strict products liability).

7. See generally RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) (mentioning, in the Reporters’ Notes, extensive reliance on primary materials).

designated successor can imitate, synthesize, or add to this unique corpus of scholarship by derivative means. All that this Essay can express is its appreciation. Our severe collegial loss will only be mourned and commemorated, never repaired.

II. PLACING THE SUPREME COURT AMONG THE PRODUCTS LIABILITY COURTS OF THE UNITED STATES

A. *Products Liability Leadership from a Small Number of American Courts*

It's easy to name the leading products liability court in the United States. Even its relatively minor precedents—*Mix v. Ingersoll Candy Co.*,⁸ *Ray v. Alad Corp.*,⁹ and *Daly v. General Motors Corp.*,¹⁰ for instance—made important new law. As Gary Schwartz noted, the California Supreme Court established itself as preeminent on the subject of design defect by virtue of its decisions published “in 1970, 1972, 1978, 1982, and 1994.”¹¹ Before these five decisions were published—indeed, before design defect emerged as a distinct concept—the California Supreme Court stood astride all of products liability when it announced strict liability in tort for a product-caused injury in *Greenman v. Yuba Power Products, Inc.*,¹² a concurrence by Roger Traynor, published in 1944, had presaged the acceptance of strict products liability throughout most of the nation.¹³ From his vantage point at Berkeley and later at Hastings, inside the state and working alongside Traynor, William Prosser observed and helped to solidify the development of strict products liability.¹⁴

Prosser's “Citadel” articles are closely associated with the decision, and then the reception, of *Henningsen v. Bloomfield Motors, Inc.*,¹⁵ and New Jersey remains

8. 59 P.2d 144, 148 (Cal. 1936) (establishing “the foreign-natural test” for claims against food suppliers), *overruled by* *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992).

9. 560 P.2d 3, 11 (Cal. 1977) (imposing strict liability on a successor corporation that continues to manufacture the same product line of which the injurious product was a part, even if the successor corporation did not purchase all or most of the assets of the predecessor).

10. 575 P.2d 1162, 1172 (Cal. 1978) (adopting comparative negligence as a defense against strict products liability claims).

11. See Schwartz, *supra* note 1, at 946.

12. 377 P.2d 897, 900 (Cal. 1963)

13. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

14. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966).

15. 161 A.2d 69 (N.J. 1960). See generally George L. Priest, *Commentary in Fred R. Shapiro, The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1471 (1991) (“Prosser had been predicting the imminent demise of warranty law and the adoption of strict products liability as part of his propaganda . . . for almost two decades. And in *Assault Upon the Citadel* he finally got lucky,” when courts began to agree with him.).

a competitor with California for recognition as a leading products liability court.¹⁶ Following its strong role in the formation of modern products liability in 1960, "[t]he New Jersey Supreme Court has led the nation in pushing back the frontiers" in this field.¹⁷ For example, *Beshada v. Johns-Manville Products Corp.* held that manufacturers could be liable for failure to warn of risks that the plaintiff could not prove they knew or should have known at the time of marketing;¹⁸ *O'Brien v. Muskin Corp.* permitted plaintiffs to declare an entire product category defective;¹⁹ and *Perez v. Wyeth Laboratories, Inc.* announced that pharmaceutical sellers may have a duty to warn patients directly, contrary to the no-duty learned intermediary rule.²⁰ In 1965 alone, the New Jersey Supreme Court proclaimed three expansions of strict products liability. *Santor v. A & M Karagheusian, Inc.* gave plaintiffs generous remedies for economic loss.²¹ *Schipper v. Levitt & Sons, Inc.* applied strict products liability to defects in real estate.²² *Cintrone v. Hertz Truck Leasing & Rental Service* extended strict liability beyond sellers to lessors of commercial property.²³

New York warrants mention here too, not only for its extraordinary *MacPherson v. Buick Motor Co.*²⁴ but also for its decisional law in the latter decades of the twentieth century. By way of contrast to California and New Jersey, pro-plaintiff innovators in products liability,²⁵ historian William Nelson has described New York as a conservative, even stodgy, products liability venue for several decades after *MacPherson*, coming into its own only in hesitant steps beginning in the late 1950s.²⁶ *Codling v. Paglia*,²⁷ decided in 1973, according to Nelson, was a landmark—the first products liability case where the Court of

16. See George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 YALE L.J. 1087, 1091-92 (2000) (praising the New Jersey and California Supreme Courts for their "judicial innovation" toward strengthening "tort law as a tool for consumer protection").

17. Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J. L. REFORM 575, 586 (1985).

18. 447 A.2d 539, 547 (N.J. 1982).

19. 463 A.2d 298, 306 (N.J. 1983), *superseded in part* by N.J. STAT. ANN. § 2A:58C-3 (West 2000), *as recognized in* *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990).

20. 734 A.2d 1245, 1253 (N.J. 1999).

21. 207 A.2d 305, 313-14 (N.J. 1965).

22. 207 A.2d 314, 325 (N.J. 1965).

23. 212 A.2d 769, 781 (N.J. 1965).

24. 111 N.E. 1050, 1053 (N.Y. 1916) (holding that lack of privity was no longer a barrier between a plaintiff seeking to recover in negligence from a product manufacturer).

25. See Frances E. Zollers et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Products Liability Reform*, 50 SYRACUSE L. REV. 1019, 1042 (2000) (noting that the high courts of California and New Jersey, famed for pro-plaintiff decisional law, have more recently attracted attention for pro-defendant decisions).

26. William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFF. L. REV. 117, 181-94 (1999).

27. 298 N.E. 2d 622 (N.Y. 1973).

Appeals announced both its intention to engage in overt policymaking and its commitment to efficiency as a policy.²⁸

Recent decades put the New York courts back on the products liability map. The New York Court of Appeals has published especially influential DES decisions.²⁹ Federal courts in New York, often applying judge-made New York law, have left a strong mark on products liability. Guido Calabresi, famed as a scholar of accident law before joining the U.S. Court of Appeals for the Second Circuit, has published extensive decisional law on products liability.³⁰ Judge Jack Weinstein of the Eastern District of New York has issued innovative decisions in cases involving many of the most notorious products marketed in the United States—Agent Orange, DES, and handguns—and has weighed in on other products-related controversies such as repetitive-motion injury and liability where the plaintiff cannot identify the manufacturer of an injurious product.³¹ Contemporary scholars continue to regard New York as a source of provocative decisional law in products liability.³²

B. Enter the United States Supreme Court

Along with the highest courts of California, New Jersey, and New York and perhaps a couple of the federal courts of appeals,³³ the United States Supreme Court

28. Nelson, *supra* note 26, at 190.

29. See *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 199 (N.Y. 1991) (rejecting claim by a DES granddaughter); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) (accepting market share liability).

30. See *Castro v. QVC Network, Inc.*, 139 F.3d 114 *passim* (2d Cir. 1998); *Liriano v. Hobart Corp.*, 132 F.3d 124 *passim* (2d Cir. 1998); *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-75 (2d Cir. 1997) (Calabresi, J., dissenting).

31. For a partial sampling, see *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640, 641 (E.D.N.Y. 1997) (repetitive-motion injury); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1308 (E.D.N.Y. 1996) (handguns); *Braune v. Abbott Labs.*, 895 F. Supp. 530, 531 (E.D.N.Y. 1995) (DES); *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 378-80 (E.D.N.Y. 1972) (burden-shifting on causation). The various Agent Orange opinions are too numerous to cite. See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 111-42 (1986) (describing Judge Weinstein's pivotal role in the litigation).

32. See, e.g., Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 399 (2000) (describing products liability as a "particularly fruitful area" in New York certification); Jerry J. Phillips, *The Unreasonably Unsafe Product and Strict Liability*, 72 *CHI.-KENT L. REV.* 129, 158-59 (1996) (discussing *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995)).

33. Gary Schwartz remarked on the contributions of federal appellate judges to products liability doctrine. See Schwartz, *supra* note 1, at 936. The old, pre-split Fifth Circuit would be a contender among the circuit courts of appeals, for bestowing on us *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), "providing the framework of asbestos litigation," and *Reyes v. Wyeth Labs., Inc.*, 498 F.2d 1264 (5th Cir. 1974), "broadening the liability of the producers of vaccines." *Id.* at 935-36. The vast Ninth Circuit is a presence as well. See generally Michael C. Polentz, Comment, *Post-Daubert Confusion with Expert Testimony*, 36 *SANTA CLARA L. REV.* 1187, 1211 (1996) (discussing the tension between two important Ninth Circuit decisions, *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994), and *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995) (*Daubert II*)). Each summer the Quinpiac Law Review publishes a survey of the year's products liability decisions by the Second Circuit. See Eric D. Daniels, *Review of 2000 Second Circuit Products Liability Cases*, 21 *QUINPIAC L. REV.* 51 (2001).

is a products liability court. Readers of its jurisprudence might debate when exactly the Court earned this designation. In *Irresponsibility*, Davis wrote that the Court did not publish a products liability decision until 1986,³⁴ when it addressed economic loss in *East River Steamship Corp. v. Transamerica Delaval, Inc.*³⁵ Until some duly empowered authority determines which characteristics make a case a products liability case, naming those decisions that comprise the Supreme Court's products liability contribution will remain a matter of opinion, as it were.³⁶ We have no official compilation. To derive my own list for this Essay, I started by casting a wide net into Supreme Court decisional law.

Several questionable cases swam in. For instance, what to do with the 1890 decision of *Detroit v. Osborne*,³⁷ whose first sentence speaks a products liability buzzword? "On November 19, 1883," Justice Brewer begins, "the defendant in error, while walking on Church Street, in the city of Detroit, was thrown to the ground and received severe personal injuries in consequence of a *defect* in the sidewalk."³⁸ I do not think a sidewalk is a product, especially for purposes of determining the liability of a municipality (that is, rather than a commercial seller),³⁹ and so I tossed *Detroit v. Osborne* from the roster. Others have disagreed about sidewalks, however.⁴⁰ Ultimately it seemed to me that the entire nineteenth century yields only anachronistic references to this famed innovation of the middle twentieth. Continuing into post-industrial case law, I decided to insist on decisions in which (1) the plaintiff attributed personal injury or property damage to an item marketed in commerce and (2) the opinion for the Court paid at least a little attention to the injury and its connection to a product, so that the presence of "products liability" was not entirely incidental to the decision. This second criterion eliminated several cases, starting with some that reached the Court through the

34. 476 U.S. 858 (1986) [hereinafter *East River*].

35. See Davis, *supra* note 2, at 1079 & n.21 (calling *East River* the Court's "first meaningful foray into products liability"). See also Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense*, 63 S. CAL. L. REV. 637, 639 & n.1 (1990) (calling products liability in the Supreme Court "virtually nonexistent" until *East River*).

36. See Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 3-4 (1995) (noting the fundamental question of definition).

37. 135 U.S. 492 (1890).

38. *Id.* at 495 (emphasis added).

39. See Bernstein, *supra* note 36, at 61-64 (proposing that in order for "products liability" to be present, a user must have exercised a choice).

40. In *Truglio v. Hayes Constr. Co.*, 785 A.2d 1153, 1156 (Conn. App. Ct. 2001), the parties litigated the question of sidewalk-as-product by disputing the centrality of construction techniques, a "service," in the fashioning of the sidewalk. The court concluded that the sidewalk was not a product. *Id.* at 1160. See also *Engelhardt v. Rogers Group, Inc.*, 132 F. Supp. 2d 757, 759-60 (E.D. Ark. 2001) (holding that a public highway is not a product); *Leong v. Sears Roebuck & Co.*, 970 P.2d 972, 979 (Haw. 1998) (permitting strict products liability claim for injuries suffered on an escalator used by the public in a retail store); *Harrington v. LaBelle's of Colorado, Inc.*, 765 P.2d 732, 735 (Mont. 1988) (holding that a speed bump is not a product), *rev'd on other grounds* *Pierce v. ALSC Architects*, 890 P.2d 1254 (Mont. 1995).

maritime route,⁴¹ and later excluding products liability litigation that focused exclusively on issues unrelated to products liability.⁴²

By these criteria, *East River* enters not first, but merely early in an ongoing show. The Supreme Court's first products liability case is probably *Dalehite v. United States*, a 1953 decision about the application of the Federal Tort Claims Act for injuries arising out of a fertilizer explosion.⁴³ In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, decided in 1964, the Court for the first time cited a products liability treatise; the decision itself, permitting indemnity for a personal injury action based on the defendant's shipment of defective rope, meets my criteria to join the products liability list.⁴⁴ *World-Wide Volkswagen Corp. v. Woodson* is the first Supreme Court case that the Court expressly labeled "a products-liability action;" it was decided in 1980.⁴⁵ By my reckoning the Supreme Court also decided two other products liability cases before *East River*: *Piper Aircraft Co. v. Reyno*,⁴⁶ on *forum non conveniens*, and *McDonough Power Equipment, Inc., v. Greenwood*,⁴⁷ on jury selection criteria. My list goes on to include a total of twenty-five decisions, running from *Dalehite* a half-century ago to *Buckman Co. v. Plaintiffs' Legal Committee*,⁴⁸ decided in 2001.

Many of the Court's twenty-five cases relate only peripherally to the issues that Mary Davis and I and other specialists care about, especially the central problem of how to identify "defect" in a product that has caused injury. The Supreme Court could never produce a corpus of products liability jurisprudence like that of California or New Jersey. Even assuming that the Court has the capacity to build the law of accident liability, a point on which Gary Schwartz expressed skepticism,⁴⁹ its mandate to address procedural fairness and to find limits in government powers necessarily turns away from the content of common-law rules.⁵⁰ The hardcore products liability enthusiasts might start to fidget, but even they would identify the Supreme Court as a products liability court. As a review of the Appendix will show, more than half of the twenty-five products liability decisions

41. See *Kermarec v. Compagnie Gen. Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406 (1953); *Levinson v. Deupree*, 345 U.S. 648 (1953).

42. See, e.g., *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 369-70 (1981) (holding that an order denying a motion to disqualify the opposing party's counsel is not appealable under 28 U.S.C. § 1291 after allegations of a defect in multipiece truck tire rims); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 741 (1980) (addressing the relation between state statute of limitations and Federal Rule of Civil Procedure 3; the complaint alleged that a defect in a nail caused the nail to shatter and hit plaintiff in the eye).

43. 346 U.S. 15, 17 (1953).

44. 376 U.S. 315, 324 (1964). See, e.g., *id.* at 319 n.4 (citing 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* § 10.01 (1960)).

45. 444 U.S. 286, 287 (1980).

46. 454 U.S. 235, 238 (1981).

47. 464 U.S. 548, 556 (1984).

48. 531 U.S. 341 (2001).

49. Schwartz, *supra* note 1, at 946.

50. Cf. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (objecting to the Court's meddling in state tort litigation).

appear of interest to readers who specialize in products liability. This showing is substantial. Few courts in the United States have had this much to say about products liability.

III. *THE SUPREME COURT AND OUR CULTURE OF IRRESPONSIBILITY'S* THESIS RECONSIDERED: A SECOND LOOK AT FOUR CASES

The thesis of *The Supreme Court and Our Culture of Irresponsibility* rests on Davis's extrapolations from three Supreme Court decisions in addition to *East River*⁵¹: *Boyle v. United Technologies Corp.*,⁵² *Cipollone v. Liggett Group, Inc.*,⁵³ and *Medtronic, Inc. v. Lohr*.⁵⁴ This Part returns to Davis's four cases, exploring how they have fared and what they have wrought in the years following the 1996 publication of *Irresponsibility*. Although much of the Davis critique remains compelling, I see a landscape less bleak and monolithic than what *Irresponsibility* reported.

A. *East River Steamship Corp. v. Transamerica Delaval, Inc.*

The Supreme Court's leading economic-loss decision arose from the malfunctioning of turbine engines that Delaval, Inc. supplied to a series of corporate entities in the shipping industry.⁵⁵ Four subsidiaries of Seatrain Lines, Inc., each possessing a ship under "a bareboat charter, by which it took full control of the ship for 20 or 22 years as though it owned it," eventually became the *East River* petitioners.⁵⁶ These chartering companies suffered economic loss when the engines malfunctioned: they were obliged to pay for the repair of the engines, and when the ships were out of service, the charterers lost revenue.⁵⁷ The plaintiffs alleged the engines were defectively designed, and sought to recover in tort for the value of the engines and for their economic loss generally.⁵⁸

This tort claim encountered rejection from all of the numerous federal judges who heard it. The District Court for the District of New Jersey entered summary judgment in favor of Delaval.⁵⁹ Sitting *en banc*, the Court of Appeals for the Third Circuit affirmed.⁶⁰ Writing for a unanimous Court, Justice Blackmun declared that the charterers could not recover in tort.⁶¹ Destruction of these engines, the Court

51. Davis, *supra* note 2.

52. 487 U.S. 500 (1988).

53. 505 U.S. 504 (1992).

54. 518 U.S. 470 (1996).

55. 476 U.S. 858, 859 (1986).

56. *Id.* at 860.

57. *Id.* at 861.

58. *Id.* at 861-62.

59. *Id.* at 862.

60. *East River S.S. Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. 1985) *aff'd sub nom.* *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

61. *East River*, 476 U.S. at 875-76.

held, could be the basis of only an economic loss claim—because no person, nor property beyond the engines themselves, was harmed—and the Court saw no reason to approve the awarding of economic loss damages in tort to a party that could have reallocated the relevant risks by contract.⁶² Using a briny metaphor fitted to the admiralty docket, the Court fretted that if modern products liability were encouraged to entertain economic-loss claims without regard for the strictures of warranty, “contract law would drown in a sea of tort.”⁶³

Davis concedes that the holding of *East River* does not trouble her much, but she expresses several objections to passages in the opinion for the Court.⁶⁴ The Court purported to reject a contrary or “minority” view, identified with *Santor v. A & M Karagheusian, Inc.*,⁶⁵ that would have permitted recovery for the lost value of the self-destroyed product; Justice Blackmun declared that this approach “fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages.”⁶⁶ To Davis, this “need” is far from compelling. The whole point of modern products liability since *MacPherson* and *Henningsen*, she notes, has been to move product-caused damage away from the repressive confines of contract law and acknowledge the nexus between products liability and tort principles.⁶⁷ Any need “to maintain a realistic limitation on damages” is simply a boon to defendants, unconnected to the policies of products liability law. Contract-thinking drains out of products liability its primary concern about danger that victims can never perfectly predict: “The Court,” as Davis puts the point, “begins to create the perception that irresponsible product manufacture is acceptable when the victim is in a position to insure against it.”⁶⁸

This reading of *East River* makes much of dicta, to the neglect of the opinion as a whole. *East River* tells a story of disappointment and financial loss that befell investors when they encountered a defective product in a commercial transaction. Delaval, Inc. carried out its unfortunate engine-installation business in a series of dealings with a subsidiary, a parent corporation, a trustee, a charterer, and then the petitioners, another set of subsidiaries. These amply capitalized parties had no particular claim to the solicitude of Traynorian policy engineering. Davis is right to declare that because questions of duty should be kept distinct from questions of damages, the Court should have cast its holding as disallowing economic-loss damages rather than imply, as it did, that this supplier breached no duty when it rendered a defective product in commerce.⁶⁹ But the point is quibble-sized. The central fact of *East River* is its economic-loss claim, which was brought by one set of business litigants against a corporate adversary of equal sophistication and

62. *Id.* at 872-73.

63. *Id.* at 866.

64. Davis, *supra* note 2, at 1085-86.

65. 207 A.2d 305 (N.J. 1965).

66. *East River*, 476 U.S. at 870-71.

67. Davis, *supra* note 2, at 1082-83.

68. *Id.* at 1085.

69. *Id.* at 1083-84.

bargaining power.⁷⁰ Davis's concerns about permitting Contract to regain its nineteenth-century domination over the kinder and better qualified Tort notwithstanding, the Blackmun opinion repeatedly emphasizes that it wishes to say nothing about safety, consumers, or personal injury. With great approval Justice Blackmun cites the Traynor concurrence in *Escola* (twice) and refers to *MacPherson* as having described "[t]he paradigmatic products-liability action," a claim involving a commercial good "reasonably certain to place life and limb in peril."⁷¹ *East River* shows no desire to roll back the central gains that modern products liability offers plaintiffs.⁷² Its interest in contract law is to delineate one sphere away from the center of products liability, not to supersede tort's preoccupations with safety.

Moving to the effects of *East River* on subsequent case law, Davis mentions two developments. First, although the states are free to ignore a Supreme Court precedent that came from the admiralty route, many state supreme courts after 1986 did not ignore *East River*, holding that pure economic loss or damage to a product itself was not recoverable in tort-based products liability actions pleaded as torts.⁷³ This development in state law is troublesome only to the extent that the *East River* holding is troublesome, and it gets feebler when one decides not to worry much about economic loss in general, or about the business losses of corporate plaintiffs in particular.⁷⁴

Davis's second concern, classified under a heading called "The culture of irresponsibility illustrated,"⁷⁵ is that the U.S. District Court for the District of Colorado chose to follow *East River* in *Richard O'Brien Cos. v. Challenge-Cook Bros., Inc.*,⁷⁶ a 1987 diversity case, even though the Colorado Supreme Court had held in a 1975 decision, *Hiigel v. General Motors Corp.*,⁷⁷ that pure economic loss was recoverable in tort.⁷⁸ Like Davis, I understand the *Erie* doctrine to require the Colorado federal district court to follow Colorado state precedent rather than a contrary holding from a Supreme Court admiralty opinion. Colorado businesses should not have the rules switched on them without warning unless there is a good

70. *Id.* at 1085.

71. *East River*, 476 U.S. at 866-67.

72. Indeed, not every potential plaintiff is rendered worse off by the characterization of economic-loss claims as breaches of contract or warranty, rather than as torts. In some circumstances, the warranty statute of limitation gives the plaintiff time to sue when tort claims would be time-barred. See, e.g., *Bancorp Leasing & Fin. Corp. v. Agusta Aviation Corp.*, 813 F.2d 272, 276-77 (9th Cir. 1987) (presenting an economic-loss claim that the plaintiff preferred to characterize as a breach of warranty, for this reason).

73. Davis, *supra* note 2, at 1086-90.

74. Cf. *Bocre Leasing Corp. v. Gen. Motors Corp.*, 645 N.E.2d 1195, 1199 (N.Y. 1995) ("Tort law should not be bent so far out of its traditional progressive path and discipline by allowing tort lawsuits where the claims at issue are, fundamentally and in all relevant respects, essentially contractual, product-failure controversies.").

75. Davis, *supra* note 2, at 1090.

76. 672 F. Supp. 466 (D. Colo. 1987).

77. 544 P.2d 983 (Colo. 1975).

78. Davis, *supra* note 2, at 1090-91.

reason to switch; the plaintiff, reasonably believing itself swaddled in plaintiff-favoring state precedent, was entitled to relax a little in its contract negotiation with the defendant. But it is hard to see *Richard O'Brien Cos.* as a dire portent of the culture of irresponsibility, especially since the decision makes a point of emphasizing that Mr. Hiigel had been "an individual, noncommercial plaintiff,"⁷⁹ presumably someone Davis would deem more entitled than Richard O'Brien Cos. to judicial protection. Perhaps Judge Kane chose the path of "irresponsibility" in following *East River* rather than *Hiigel*—or, as he preferred to put it, "restrict[ing] the decision in *Hiigel* to its particular facts."⁸⁰ But he is hardly the first judicial author of a products liability decision to approach precedent with less than obedient awe.⁸¹ He was not even the first federal judge to resolve a conflict between *East River* and state precedent by favoring *East River*.⁸² As with Davis's first concern, this development is deplorable only to the extent that the *East River* holding is deplorable.

Cases decided after the publication of *Irresponsibility* reveal developments likely to hearten Professor Davis. First, and most significant, of these decisions is *Saratoga Fishing Co. v. J.M. Martinac & Co.*, where the Supreme Court ruled 6-3 in favor of the plaintiff in a products liability claim for property damage.⁸³ The Court held that damage to a boat was not damage to "the product itself" because equipment added subsequently to the boat by an intervening owner constituted "other property"—what was damaged was not the boat itself, according to the Court.⁸⁴ Perhaps aware of Davis's worry about generous new immunities, Justice Breyer, writing for the majority, remarked that to preclude repurchasers like the plaintiff from recovering for mischief that earlier purchasers had done to the product would be a bad idea because it would foster "tort damage immunity beyond that set by any relevant tort precedent."⁸⁵ This "other property" rationale underlies several post-*East River* cases decided in favor of plaintiffs.⁸⁶ As for the concern

79. 672 F. Supp. at 472.

80. *Id.*

81. The New Jersey Supreme Court, famed for innovation, has veered from stare decisis in its products liability case law. *See supra* notes 15-23 and accompanying text; *see also* Feldman v. Lederle Labs., 479 A.2d 374, 387-88 (N.J. 1984) (overruling *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) with "We do not overrule *Beshada*, but restrict *Beshada* to the circumstances giving rise to its holding"); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 94 (N.J. 1960) (rewriting rules about privity and disclaimers: "The task of the judiciary is to administer the spirit as well as the letter of the law. . . . [P]art of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer.").

82. *See* Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110, 119 (3d Cir. 1987).

83. 520 U.S. 875, 875-76 (1997).

84. *Id.* at 884-85.

85. *Id.* at 880.

86. *See* *Transco Syndicate No. 1, Ltd. v. Bollinger Shipyards, Inc.*, 1 F. Supp. 2d 608, 613 (E.D. La. 1998); *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1223 (Fla. 1999); *Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055, 1095 (Haw. 1997). *But see* *Staton Hills Winery Co. v. Collons*, 980 P.2d 784, 790 n.5 (Wash. Ct. App. 1999) (citing nine cases in a string cite, some decided before *Saratoga Fishing* and some after, where courts ruled against plaintiffs that had attempted to characterize their economic losses as damage to "other property").

hinted at in *Irresponsibility* that *East River* would encourage encroachment by contract into tort more generally, beyond products liability,⁸⁷ courts have specifically kept the economic-loss limitation out of other commercial cases, and preserved tort or tort-like claims in contexts that raise ambiguity on how to classify the actions.⁸⁸

In sum, what Davis makes of *East River* sounds excessive. "Product liability law rests on the moral perception that the economic burdens of death or incapacitation are too much for an individual," write three Florida practitioners in thoughtful resistance to exempting individual plaintiffs from the harshness of the economic loss rule.⁸⁹ But pro-plaintiff variations rewrite the economic loss rule "into a norm for commercial transactions in which no one is injured."⁹⁰ Davis, unclear on exactly what it is she wants to remedy with liberalization, advocates an "intermediate approach," which would have denied the plaintiff's claim in *East River* but offered comfort in the form of encouraging dicta.⁹¹ Intermediate compromises are certainly available. Courts could permit liability for economic loss caused by a sudden accident, for instance, while disallowing claims for gently sputtering failure or deterioration.⁹² They could permit recovery for economic loss caused by an accident that *could* have injured a person, and only fortuitously did not happen to do so.⁹³ But such "intermediate" compromising begs the question of what if anything is wrong with a straightforward no-recovery rule. "Ignoring the need for empirical evidence of social need and effect, courts too often react automatically to slogans of past product liability battles," conclude the Florida lawyers, summing up economic-loss alarms.⁹⁴ "Overused, the Marseillaise has decayed into Muzak."⁹⁵

87. Davis does not make this claim directly about *East River*, but raises it in her discussion of *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), and the same reasoning might be applied to her *East River* discussion. See Davis, *supra* note 2, at 1113-16.

88. See, e.g., *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F. 3d 79, 104 (3d Cir. 2001) (expressing a preference for the more permissive "gist of the action test" rather than the more stringent "economic loss test" in the context of breach of fiduciary duty); *Norwalk Cove Marina, Inc. v. S/V Odysseus*, 90 F. Supp. 2d 190, 192 (D. Conn. 2000) (refusing to apply the *East River* economic-loss limitation in the context of fraud).

89. Edward T. O'Donnell et al., *On the Differences Between Blood and Red Ink: A Second Look at the Policy Arguments for the Abrogation of the Economic Loss Rule in Consumer Litigation*, 19 NOVA L. REV. 923, 964 (1995).

90. *Id.*

91. Davis, *supra* note 2, at 1086.

92. See *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 875 F. Supp. 522, 525 (N.D. Ill. 1995) (identifying "sudden and calamitous" event as the touchstone of recovery for economic loss).

93. See *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1173 (3d Cir. 1981) (relied on by the Third Circuit in *East River*, 476 U.S. at 862); *Russell v. Ford Motor Co.*, 575 P.2d 1383, 1387 (Or. 1978) (distinguishing between "endangered" and merely "disappointed" users because only the former can recover for economic loss).

94. O'Donnell et al., *supra* note 89, at 964.

95. *Id.*

B. *Boyle v. United Technologies Corp.*

The *Irresponsibility* thesis finds much stronger support in *Boyle v. United Technologies Corp.*, where the Supreme Court, in a 5-4 decision revealing some rancor among the Justices, held that “[l]iability for design defects in military equipment cannot be imposed, pursuant to state law” in products liability actions where three criteria are met: the federal government approved reasonably precise specifications; the equipment that the defendant supplied conformed to the specifications; and “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.”⁹⁶ On its surface, this holding might look like a simple extension of military immunity, but Davis argues that it is much more sinister. Like *East River*, writes Davis, *Boyle* menacingly returns to archaic immunities derived from contract, deeming the procurement agreement and other relations between the government and the contractor more important than a manufacturer’s responsibility to a victim.⁹⁷

Carrying out its immunity agenda, Davis contends, the Court has gone out of its way to favor the “discretionary function exception,” which attributes responsibility for design decisions to the immune sovereign rather than a contractor.⁹⁸ A reader accepting the contract paradigm might agree that suppliers hemmed in by procurement strictures should perhaps not face personal-injury liability for defective design after they have duly complied with government orders. However, enterprises “like McDonnell Douglas, Boeing, and General Dynamics”⁹⁹ do not warrant this solicitude. They know at least as much about product design as the Pentagon officials who award them their lucrative procurement contracts, and their eagerness to feed at the Department of Defense trough—Davis uses another term, “the cash cow”¹⁰⁰—suggests that they do not need tort immunity in order to keep the nation prepared and defended.¹⁰¹ As Justice Brennan remarked in his *Boyle* dissent, military contractors had lobbied Congress hard to get this favor via legislation; having failed in Congress, these enterprises relocated their campaign to what proved to be a more hospitable forum for their rent-seeking, the United States Supreme Court.¹⁰² There is no reason for the Court to give this constituency that

96. 487 U.S. 500, 512 (1986).

97. Davis, *supra* note 2, at 1096-99. Furthermore, in *Boyle* the Court rejected a better path: it could have stayed within the confines of *Feres v. United States*, 340 U.S. 135 (1950), as had many courts of appeals in deciding government-contractor cases. *Id.* at 1094. Under the *Feres* doctrine, service personnel may not use the Federal Tort Claims Act to recover from the United States for injuries that arise during military service. *Id.* at 1094. *See also id.* at 1095-96 (suggesting other “pro-recovery” routes that the Court could have taken).

98. *Id.* at 1094 & n.96.

99. *Id.* at 1096.

100. *Id.*

101. Justice Scalia nevertheless expressed concern on this point. *See Boyle*, 487 U.S. at 507 (“The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.”).

102. 487 U.S. at 515-16 & n.1 (Brennan, J., dissenting).

much protection from liability, Davis maintains.¹⁰³ Apart from the substance of this holding, *Boyle* is also troublesome as a matter of procedure; it adds to the girth of federal common law, a corpus that ought to be expanded sparingly.¹⁰⁴

Davis next argues that the seeds of irresponsibility that *Boyle* sowed have yielded a grim harvest in the lower courts. She mentions several developments. First, although the *Boyle* holding was limited to design defects, courts have come close to saying that some manufacturing defects are covered by the government contractor defense.¹⁰⁵ Second, courts have applied the defense to non-military suppliers of civilian goods, even though the Scalia opinion emphasized its focus on military contexts.¹⁰⁶ Third, ambiguity in *Boyle*'s "reasonably precise specifications" provision has been resolved in favor of defendants.¹⁰⁷ Fourth, in a kind of transition to her preemption cases, *Cipollone* and *Medtronic*, Davis expresses concern about the application of *Boyle*-style immunity to non-tort claims.¹⁰⁸ Because *Boyle* identified a federal interest that outweighed or preempted state common law, defendants have now enjoyed what Davis calls "a taste of immunity,"¹⁰⁹ and so they are keen to apply *Boyle* beyond the fairly narrow confines of government-contractor tort law, thereby gaining access to "favorable federal law."¹¹⁰

Irresponsibility supports each of these assertions with case citations, but also acknowledges contrary authority. A similar pattern of checkered development continues in case law following the 1996 publication date. In these more recent decisions judges have stated, for instance, that *Boyle*-style immunity can cover manufacturing defects as well as design defects, but they usually consider manufacturing-defect claims as part of a larger question of whether the defendant supplied the product pursuant to "reasonably precise specifications" from the government. This heuristic yields results in favor of both plaintiffs and defendants.¹¹¹ The spreading of *Boyle*-style immunity beyond military contractors

103. Davis, *supra* note 2, at 1096. For arguments in support of the idea that Congress rather than the courts should craft the government contractor defense, see Green & Matasar, *supra* note 36, at 642; Sean Watts, Note, *Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 WM. & MARY L. REV. 687, 714-16 (1999).

104. See *Boyle*, 487 U.S. at 517-18 (Brennan, J., dissenting). The stance hostile to federal common law derives from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

105. Davis, *supra* note 2, at 1099.

106. *Id.* at 1104-09.

107. *Id.* at 1109-13.

108. *Id.* at 1113-16.

109. *Id.* at 1114-15.

110. *Id.* at 1113-14.

111. See *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997) (holding that although manufacturing defects as well as design defects are covered under the *Boyle* immunity rule, the defendant would be denied the defense because the alleged defect did not fall within reasonably precise specifications). Compare *Roll v. Tracor, Inc.*, 102 F. Supp. 2d 1200, 1202 (D. Nev. 2000) (defendant not entitled to summary judgment because the defect might have been a simple manufacturing defect, outside government specifications) and *Anzalone v. WesTech Gear Corp.*, 661 A.2d 796, 802 (N.J. 1995) (not cited in *Irresponsibility*) (defendant not entitled to summary judgment

has indeed gained ground,¹¹² but one might question whether this constitutes real spreading: Once the Supreme Court refused to rely on the *Feres* doctrine in *Boyle* and instead used the discretionary function exception to the Federal Tort Claims Act—a waiver of sovereign immunity that *Boyle* extended to benefit nongovernment defendants—it becomes difficult to confine *Boyle* to its military-based facts.¹¹³ The Davis prediction that defendants will attempt to federalize personal injury claims and use *Boyle* to remove cases to federal court has encountered a mixed fate; such preemption/removal attempts frequently fail.¹¹⁴ As for the concern that *Boyle* would be overextended outside of tort law to spread immunity among a wide class of business defendants, several post-1996 decisions have rejected this defense-initiated effort.¹¹⁵

There remains the general discursive point that although progeny cases both favor and disfavor defendants who are greedy for immunity, *Boyle* sends a troubling message about exemptions from tort liability that benefit powerful corporate parties and leave personal injuries unremedied where they fall. By way of response, a passage from a case called *Connor v. Quality Coach, Inc.*¹¹⁶ may be pertinent. Driving a van that the defendant had furnished to the state pursuant to a vocational-rehabilitation contract, Bruce Connor, a paraplegic man, suffered personal injuries when his left hand was trapped in the brake-throttle control.¹¹⁷ The Pennsylvania Supreme Court refused to immunize the defendant for having supplied the van under government contract and condemned *Boyle* as wrongheaded, too generous to contractors:

We acknowledge the public policy relied upon by the United States Supreme Court in *Boyle* . . . namely, protection of the public's interest in receiving competitive bids from contractors, consequently lowering the government's procurement costs. [However, this court finds] such a general policy statement,

because it did not establish compliance with reasonably precise specifications) with *Quiles v. Sikorsky Aircraft*, 84 F. Supp. 2d 154, 165-71 (D. Mass. 1999) (entering summary judgment in favor of the defendant on all elements of the *Boyle*-formulated government contractor defense) and *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1290 (D. N.J. 1996) (defendant entitled to summary judgment because it established compliance with reasonably precise specifications).

112. See *Andrew v. Unisys Corp.*, 936 F. Supp. 821, 829-30 (W.D. Okla. 1996).

113. See *Green & Matasar*, *supra* note 35, at 684-85 (drawing this conclusion about *Boyle* before post-*Boyle* case law developed).

114. Examples of remands that followed unsuccessful removal attempts include *Faulk v. Owens-Corning Fiberglass Corp.*, 48 F. Supp. 2d 653, 670 (E.D. Tex. 1999) and *McCormick v. C.E. Thurston & Sons, Inc.*, 977 F. Supp. 400-01 (E.D. Va. 1997). But see *Blackman v. Asbestos Defendants*, No. C-97-3066, 1997 U.S. Dist. LEXIS 17821, at *8-9 (N.D. Cal. 1997) (permitting removal).

115. See, e.g., *Virginia Panel Corp. v. MAC Panel Co.*, 139 F. Supp. 2d 753, 758 n.6 (W.D. Va. 2001) (refusing to extend immunity in the context of patent litigation); *Commonwealth v. Johnson Insulation*, 682 N.E. 2d 1323, 1329 (Mass. 1997) (refusing, in the context of abatement action by the state against an asbestos supplier, to immunize the supplier against the state's claim that the defendant breached the implied warranty of merchantability).

116. 750 A.2d 823 (Pa. 2000).

117. *Id.* at 824.

lacking in empirical support, ill-suited to serve as a counterweight to the policies favoring just compensation underlying our tort system. Moreover, there are a range of other considerations that would compete with protection of the government's economic interests, not the least of which is that the insulation of the Commonwealth from indirect costs on grounds of public interest has the perverse effect of permitting a government officer to minimize as a consideration in procurement decisions (at least as a matter of financial concern) external societal costs, particularly in terms of potential diminishment to public safety.¹¹⁸

In sum, *Boyle* presents worthy yet not ironclad support for the claim that the Supreme Court has been fostering irresponsibility in its products liability decisional law. Justice Scalia's opinion for the Court indulged a defendant with sweeping immunity, giving contractors even more favorable gains than what they were able to buy from Congress during the Reagan era of military expansion, and helped to immunize other defendants, notably nonmilitary suppliers of civilian goods. I readily join Davis in deploring *Boyle*. Post-*Irresponsibility* case law, however, offers a somewhat brighter picture of the *Boyle* aftermath than what Davis has presented. Through judicious application of the "reasonable precise specifications" criterion, courts appear to be holding military suppliers liable for manufacturing defects, despite Davis's worry that manufacturing defect would be subsumed into the immunity that now blankets design defect.¹¹⁹ Even cases that entered summary judgment for defendants have insisted the *Boyle* criteria add up to a conjunctive test where the defendant has the burden of proof as to each element.¹²⁰ And the federal appellate courts are lately divided, not united, on the application of *Boyle* to nonmilitary suppliers.¹²¹ Responsibility goes head-to-head with irresponsibility, resisting (though admittedly not defeating) the force of an unfortunate Supreme Court precedent.

C. *Cipollone v. Liggett Group, Inc. and Medtronic, Inc. v. Lohr*

Davis combines her discussion of these two preemption cases in the same section,¹²² spending most of her time on *Cipollone*, perhaps because *Medtronic* was brand new when she wrote her article. *Medtronic* may be disposed of right here. To one who accepts the Davis perspective, this decision is a clear victory for the good guys—a victory where a majority of the Justices could not come together to sign a

118. *Id.* at 834 (citations omitted).

119. *See supra* note 107 and accompanying text.

120. *See, e.g.,* *Quiles v. Sikorsky Aircraft*, 84 F. Supp. 2d 154, 165-70 (D. Mass. 1999) (reciting elements).

121. *See generally* *Watts, supra* note 103, at 695-702 (summarizing the split in the circuits).

122. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 470 (1992).

single opinion for the Court, to be sure, but a ticket for the injured Lohr to litigate her claim under the common law of a state with a national reputation for open-handed juries,¹²³ and a promising precedent for many other persons injured by FDA-approved medical devices.¹²⁴ In *Medtronic*, a cardiac patient sued the manufacturer of her pacemaker, alleging both negligence and strict liability under Florida law.¹²⁵ The Court held that her claims were not preempted by the Medical Device Amendments (MDA) of 1976.¹²⁶ In response to Medtronic's attempt to gain the immunity of preemption, Justice Stevens, announcing the judgment for the Court, snorted. "Medtronic's argument is not only unpersuasive," he wrote, "it is implausible."¹²⁷

Why is Davis unhappy with this anti-irresponsibility result? First, she wants a majority, or perhaps the entire Court, to support the injured plaintiff, not just a rickety plurality.¹²⁸ Second, as she writes, "[i]t is disheartening that in an area so clearly related to public health and safety . . . 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."¹²⁹ An embrace of Justice Blackmun's separate opinion in *Cipollone*, which Justices Kennedy and Souter had signed back in 1992,¹³⁰ would have pleased Davis.¹³¹ The wish list seems excessive, not to say "unpersuasive" and "implausible"—or at least unconvincing in support of a thesis that the Supreme Court has been fostering irresponsibility. Activists always want more support than they get. The distinction between acts and omissions seems relevant here: Courts and other political actors that decline to join

123. For commentary describing Florida as a pro-plaintiff jurisdiction with respect to personal-injury claims, see Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 481-82 (1997) (describing Florida personal-injury law as what plaintiffs typically favor in the context of choice-of-law disputes); Harriet Chiang, *West Coast Juries Tough on Tobacco*, S.F. CHRON., Apr. 14, 2000, at A2 (noting that one of the first jury verdicts against a cigarette defendant came from Florida and reporting that a Miami jury awarded three plaintiffs \$12 million as compensatory damages in April 2000).

124. Medtronic suffered another defeat in *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367, 1373-77 (11th Cir. 1999), where the Eleventh Circuit held that Florida-law design defect claims were not preempted by FDA premarket approval of its pacemaker. See also *Oja v. Howmedica, Inc.*, 111 F.3d 782, 789 (10th Cir. 1997) (deeming failure-to-warn claim not preempted by the Medical Device Amendments); *Stiffler v. Drake*, 698 N.E.2d 1068, 1069-70 (Ohio Ct. App. 1997) (dispatching the preemption argument of a medical-device manufacturer with a citation to *Medtronic*); *Sowell v. Bausch & Lomb, Inc.*, 656 N.Y.S.2d 16, 21 (App. Div. 1997) (holding that none of the plaintiff's claims were preempted by the MDA).

125. *Medtronic*, 518 U.S. at 480-81.

126. *Id.* at 502-03.

127. *Id.* at 487. This sentence appeared in a part of the Stevens opinion that drew only four signatures, not the requisite five. However, it has been quoted approvingly in three federal court opinions and three state court opinions. LEXIS search performed on Feb. 23, 2002. I found it helpful as a search term to find pro-plaintiff sequelae of *Medtronic* in case law.

128. Davis, *supra* note 2, at 1132.

129. *Id.* at 1134.

130. *Cipollone*, 505 U.S. at 531 (Blackmun, J., concurring and dissenting).

131. Davis, *supra* note 2, at 1132.

an anti-irresponsibility cause are not by dint of this inaction guilty of encouraging offenders "to be as irresponsible as far as they will go."¹³²

Cipollone cannot be dispatched quite so fast as *Medtronic*. For Davis, this decision, which held that the federal Public Health Cigarette Smoking Act of 1969 precluded the plaintiff from bringing a common law failure-to-warn claim against a cigarette manufacturer,¹³³ marked an ominous departure.¹³⁴ In its 1980s decisions, *East River* and *Boyle*, the Supreme Court had fomented irresponsibility, Davis writes, but at least it did so within traditional federal-law confines: "admiralty and national defense."¹³⁵ In 1992, however, the Court began its march on the common law of torts.

This tocsin about imminent federal invasion into the common law is somewhat overstated. Whereas *Cipollone* rested solidly on what the Court regarded as an express mandate of Congress to eliminate common-law warning liability in cigarette claims when the defendant provided the warnings Congress required, the lower-court progeny of *Cipollone* have found the concept of express preemption shaky and inconclusive, and so post-*Cipollone* decisional law by no means coheres around a banner of irresponsibility. Less committed than *Cipollone* to the prospect of finding expressly preemptive statutory language, post-1992 decisional law does not propose to interpret statutory language as self-defining, and tends not to locate, or perhaps not to look for, an explicit directive to preclude common-law claims.¹³⁶

Let us hew for the moment to the product at issue in *Cipollone*. Post-*Cipollone* cigarette cases illustrate the difficulty of keeping plaintiffs from a jury and, more generally, of nailing a plaintiff down with express-preemption statutory language. Last year the Eighth Circuit held that most of a widower's case against the manufacturer of the cigarettes his wife had smoked was not preempted, including a defective design claim where the plaintiff proffered no reasonable alternative design and a failure-to-warn claim based on pre-1969 marketing.¹³⁷ Another federal court held that a plaintiff alleging injury by secondhand smoke may bring a failure-

132. *Id.* at 1139.

133. *Cipollone*, 505 U.S. at 530-31.

134. Davis, *supra* note 2, at 1116-17.

135. *Id.*

136. It is now almost a truism that statutory interpretation does not consist of looking at words and educing what these words must, self-evidently, always mean. See generally WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 11 (1994) (insisting that text changes its meaning over time, as society changes); see also *id.* at 38 (acknowledging a differing view, associated with the "new textualists," which looks for clear, ordinary meaning of words in a statute). For what it's worth, LEXIS listed in its "Allrev" file 140 articles with "statutory interpretation" in the title published after 1992, and only 57 with "statutory interpretation" in the title before 1992. Although the earliest date of articles in "Allrev" varies depending on what day you search, the oldest "hit" in the latter search has a publication date of 1970, meaning that in more than twice as many years (1970-1991 versus 1993-early 2002) the law reviews available on the Lexis database appear to have published less than half as many articles on this subject. LEXIS search performed on Feb. 23, 2002. Even allowing for the expanding roster of law review articles on every subject, it seems reasonable to infer that the task of finding preemption in a statute has grown more complex and uncertain since *Cipollone*.

137. *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 842, 846 (8th Cir. 2001).

to-warn claim, even though a claim by the smoker himself would have been preempted.¹³⁸ Another court refused to deem preempted a failure-to-warn claim from a plaintiff who bought the defendant's loose tobacco and rolled his own cigarettes,¹³⁹ even though legal and public-health communities site most of the relevant danger in tobacco and its additives, little of it in cigarette paper or filters. Away from the personal injury context, the First Circuit determined that a Massachusetts law requiring cigarette manufacturers to disclose additives and nicotine ratings to the state public health department was not preempted.¹⁴⁰ Alongside these cases, cigarette plaintiffs have sustained losses on the preemption front.¹⁴¹ But the outcome is mixed, a result of considerable judicial latitude and, perhaps, a widespread public antipathy to the cigarette industry that grew stronger in the years following the *Cipollone* decision.¹⁴²

Away from the cigarette context, something resembling a centrist compromise has formed around preemption. Courts following *Cipollone* have purported to balance state and federal interests, although a remark that the Court published in 2000 may have started to discourage them from the practice.¹⁴³ And a "presumption against pre-emption"—which *Cipollone* reaffirmed,¹⁴⁴ and which four dissenting Justices deemed crucial in *Geier v. American Honda Motor Co., Inc.*¹⁴⁵—is still available (though admittedly difficult to measure) for those who want to invoke it.¹⁴⁶

Savings clauses matter. In typical cases, courts will weigh a specific federal mandate—such as the provision in the National Traffic and Motor Vehicle Safety Act of 1966 that “no State shall have authority” to establish a standard not “identical to the Federal standard”¹⁴⁷—against a clause in the statute, often a provision stating that compliance with the federal safety standard does not exempt

138. *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 543-47 (D. Md. 1997).

139. *Toole v. Brown & Williamson Tobacco Corp.*, 980 F. Supp. 419, 422-24 (N.D. Ala. 1997).

140. *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 77 (1st Cir. 1997). *But see Jones v. Vilsack*, 272 F.3d 1030, 1039 (8th Cir. 2001) (holding public health initiative by the Iowa state government largely preempted).

141. *See, e.g., Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194, 201-02 (D. Mass. 2000) (reading *Cipollone* to preempt any claim with respect to public communications that the defendant should have made, but deeming several other claims not preempted); *Magnus v. Fortune Brands, Inc.*, 41 F. Supp. 2d 217, 223 (E.D.N.Y. 1999) (deeming post-1969 warning claims preempted).

142. *See Tiffany S. Griggs, Comment, Medicaid Reimbursement from Tobacco Manufacturers: Is the States' Legal Position Equitable?*, 69 U. COLO. L. REV. 799, 799 (1998) (noting that the tobacco industry “incurred the wrath of the public in the 1990s”).

143. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (disparaging the attempt “to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case”).

144. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 470, 518 (1992).

145. *Geier*, 529 U.S. at 886, 907-10 (Stevens, J., dissenting).

146. *But see Mary J. Davis, Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1013-14 (2002).

147. 15 U.S.C. §§ 1381-1431 (1970) (now covered under 49 U.S.C. §§ 30101 *et seq.* (1994)).

any person from liability under the common law.¹⁴⁸ When the mandate meets the savings clause, sometimes the plaintiff finds herself preempted out of court, sometimes not. The opportunity to use a savings clause to counter even an explicitly preemptive mandate received encouragement from the Supreme Court in *Geier*,¹⁴⁹ where Justice Breyer's opinion for the Court stated that a savings clause in a statute must be understood to have *some* meaning; every savings clause must save something.¹⁵⁰ In a kind of inversion of this common paradigm, other statutes contain no expressly preemptive mandate, but also no savings clause. Here again, courts divide. Some accept the implied-preemption label that defendants encourage; others decline to find any preemptive effect in the statute.¹⁵¹

Preemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)¹⁵² provides stronger support for the Davis thesis, but even there courts have found room to maneuver, and the overall outcome does not warrant the word irresponsibility. Enacted in 1947 and later amended in light of environmental concerns, FIFRA established a comprehensive scheme for the registration, labeling, and packaging of pesticides.¹⁵³ The scheme has considerable rigor. Rather than bestow on sellers a warning formulation resembling Congress's plush-quilted gift blanket to those who profit from the sale of cigarettes, FIFRA obliges the manufacturer to register each pesticide with the Environmental Protection Agency, along with its own proposed warning, which the agency reviews for adequacy to protect health and the environment.¹⁵⁴ States are expressly prohibited from imposing other duties with respect to labeling or packaging of registered pesticides, and the savings clause expressly purports to save only other state regulation, not tort liability.¹⁵⁵ FIFRA is a formidable preemptor. Courts typically refuse to hear failure-to-warn tort claims about registered pesticides.¹⁵⁶ But a few plaintiffs do get

148. See, e.g., 15 U.S.C. § 1397(k) (1994) (retaining common-law liability).

149. *Geier*, 529 U.S. at 869.

150. "The savings clause assumes that there are some significant number of common-law liability cases to save." *Id.* at 868.

151. Litigation about the Virus-Serum-Toxin Act, 21 U.S.C. §§ 151-159 (2000), a statute regulating veterinary vaccines, provides an example of mixed results in the context of implied preemption/no savings clause. Compare *Lynnbrook Farms v. SmithKline Beecham Corp.*, 79 F.3d 620, 630 (7th Cir. 1996) (holding the plaintiff's claim preempted) with *Sjovall v. SmithKline Beecham Corp.*, 16 F. Supp. 2d 1112, 1119 (D. S.D. 1997) (holding some claims not preempted) and *Garrelts v. SmithKline Beecham Corp.*, 943 F. Supp. 1023, 1070 (N.D. Iowa 1996) (holding the plaintiff's claim not preempted). SmithKline Beecham has won some preemption immunity in the heartland, lost some. If I were its general counsel, I would not feel "immunized," Davis, *supra* note 2, at 1081, so to speak, with respect to my vaccines.

152. 7 U.S.C. §§ 136-136y (1994).

153. *Id.* § 136a. The major amendments, in 1972 and 1988, recognized pesticides as dangerous beyond the context of direct-contact poisoning. See Brian M. Brown, Note, *Federal Preemption of State Tort Law Failure to Warn Claims by FIFRA: Injury Without Relief?*, 4 S.C. ENVTL. L.J. 147, 148-49 (1995) (providing a concise history of the statute).

154. 7 U.S.C. § 136a(a),(c).

155. *Id.* § 136v(b).

156. See M. Stuart Madden, *Federal Preemption of Inconsistent State Safety Obligations*, 21 PACE L. REV. 103, 120-29 (2000) (summarizing cases).

through the preemption mesh.¹⁵⁷ Pesticide manufacturers, in short, work within a system that has a good reputation for consumer protection,¹⁵⁸ unlike the notorious cigarette-labeling statutes, and do not turn the regulatory scheme into an impermeable shield against failure-to-warn litigation.

To conclude the discussion of *Cipollone* and *Medtronic*, it is worth mentioning—at least Justice Stevens found it worth mentioning in his *Medtronic* opinion—that the Supreme Court did not extinguish all of Antonio and Rose Cipollone's common-law claims.¹⁵⁹ Their families continued the litigation, and ten years later it seems evident that *Cipollone* did not significantly obstruct—it may even have encouraged—the pursuit of redress for cigarette-caused personal injury. Multi-million dollar jury verdicts against cigarette defendants are now everyday headlines; cigarette smokers are rapidly being blown out of public spaces; and secondhand smoke, whether a real menace or not, has acquired a real hold in public discourse. Although the *Cipollone* decision may have seemed broad ten years ago, persons injured and imperiled by cigarette smoke have found many routes around it. However better the law would have been if *Cipollone* had gone the way Justices Blackmun, Kennedy, and Souter preferred, the decision did not directly beget broad new immunity for defendants, neither in its holding nor its progeny.

Notwithstanding these don't-worry, the-glass-is-half-full encouraging counter-developments to the preemption phenomenon, however, I would conclude that the weight of preemption case law comports with the *Irresponsibility* thesis. While defendants claiming preemption do not enjoy an impermeable shield, they have been given dispensations from the common law that probably exceed what Congress intended to give them—putting aside the question of whether it is a good idea for the Court, beginning with *Cipollone*, to have set up Congress in the immunity-granting (or -selling) business.¹⁶⁰ An observer needs faith in the power

157. See, e.g., *Jeffers v. Wal-Mart Stores, Inc.*, 84 F. Supp. 2d 775, 784 (S.D. W. Va. 2000) (deeming packaging claims not preempted, labeling claims preempted); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 11-41 (E.D.N.Y. 1992) (parsing FIFRA finely to conclude that not all warning claims are preempted); *Burt v. Fumigation Serv. & Supply, Inc.*, 926 F. Supp. 624, (W.D. Mich. 1996) (permitting design-defect claim with respect to foreseeable misuse); *Gorton v. Am. Cyanamid Co.*, 533 N.W.2d 746, 755 (Wis. 1995) (allowing claim for misrepresentation); *Malone v. Am. Cyanamid Co.*, 649 N.E.2d 493, 498-99 (Ill. App. Ct. 1995) (allowing claim for breach of implied warranty in advertising). But see *Kuiper v. Am. Cyanamid Co.*, 913 F. Supp. 1236, 1245 (E.D. Wis. 1996) (deeming misrepresentation claim preempted, on facts virtually identical to *Gorton*).

158. See, e.g., *School Pesticide Provision: Hearing on H.R.1 Before the House Subcomm. on Dep't Operations, Oversight, Nutrition, & Firestry, Comm. on Agric.*, 107th Cong. 14-30, 68-79 (2001) (statement of Jay Feldman, Executive Director, Beyond Pesticides/National Coalition Against the Misuse of Pesticides) (available on LEXIS) (praising FIFRA while advocating additional regulation of pesticides for the protection of school-age children); Jeffrey Winograd, *EPA Authority Under Clean Air Act Argued Before Supreme Court*, PESTICIDE & TOXIC CHEM. NEWS, Nov. 9, 2000 (available on LEXIS) (reporting environmentalists' concern about the EPA's future power to enforce FIFRA, implying some satisfaction with current enforcement practice).

159. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996).

160. On whether the Court did anything so bold, see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 534-39 (1992) (Blackmun, J., concurring and dissenting) (noting the lack of precedent behind the majority's decision that "common-law damages actions exert a regulatory effect on manufacturers

of regulation to believe that safety is improved, or at least not jeopardized, by legislation that imposes safety-related duties on manufacturers while also being understood to preempt common law tort claims.¹⁶¹ In his celebrated article on deterrence, Gary Schwartz established that such simple faith is unnecessary for a belief in the power of litigation: his review of the literature found that products liability is indeed a source of deterrence and therefore safety, albeit not too much of it.¹⁶² No study such as his permits the citizenry to rest easy because of public-health statutes or regulations that have been deemed to preempt the common law of torts. Davis is right to worry about the preemption law that *Cipollone* has begotten. More scholars should share her concerns.

IV. THE SUPREME COURT AND OUR CULTURE OF IRRESPONSIBILITY REVISITED: SOME PRO-RESPONSIBILITY SUPREME COURT HOLDINGS

Not every Supreme Court decision on products liability is a source of irresponsibility. The previous Part has acquitted two out of Davis's four cases of this charge and deemed the more sinister decisions, *Boyle* and *Cipollone*, less menacing than Davis had contended, especially in light of case law that appeared after her article was published. This Part rounds out the discussion of the Supreme Court as a products liability court by describing some of its other holdings, thematically rather than case-by-case. This review suggests that the Court has been building some pro-responsibility decisional law.

A. Concern for Absent Claimants in Products Liability Class Actions

Products liability scholars have long noted that one cannot readily generalize about "products liability" from asbestos claims. This particular injurious product may be unique.¹⁶³ No survey of products liability in the United States Supreme

analogous to that of positive enactments"). See also Davis, *supra* note 146, at 997-1005.

161. Cf. *Sowell v. Bausch & Lomb, Inc.*, 656 N.Y.S.2d 16, 21 (App. Div. 1997) ("[T]he mere fact that a product has received [premarketing approval from the FDA], a procedure that was instituted for the purpose of benefitting and protecting consumers, is not a reason to forever shield its distributors from State tort actions based on harm caused by the product.").

162. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 405-13 (1994).

163. In celebrated writings on "the quiet revolution" in products liability, Theodore Eisenberg and James A. Henderson, Jr. excluded asbestos cases from their empirical assessments. See Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 742 n.40 (1992); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 521-22 (1990) (noting methodological decision to exclude asbestos); see also Bernstein, *supra* note 36, at 3 n.7 (noting anomalous status of abatement litigation within the "products liability" category); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 50-51 (1992) (summarizing data on products liability litigation, excluding asbestos cases).

Court, however, can ignore *Amchem Products, Inc. v. Windsor*¹⁶⁴ and *Ortiz v. Fibreboard Corp.*,¹⁶⁵ two significant decisions from the products docket.

When the Court struck down asbestos class settlements as violative of Rule 23 of the Federal Rules of Civil Procedure, once in 1997 and again in 1999, it grounded its holdings in determinations that the interests of absent class members were not adequately represented in the settlements.¹⁶⁶ In both *Amchem* and *Ortiz*, the Court sided with objectors and against a forceful alliance between high-power class-action litigators and corporations that had manufactured asbestos.¹⁶⁷ Justice Ginsburg, writing for the Court in *Amchem*, faulted the settling parties for reaching a “compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.”¹⁶⁸ Taking an even sharper stance, Justice Souter for the Court in *Ortiz* noted the petitioners’ demand that the entire class action be deemed nonjusticiable: the petitioners, who retained the eminent Laurence Tribe to speak for them in the Supreme Court, described the claim as a “feigned” class action that the defendant Fibreboard initiated “to control its future asbestos tort liability, with the ‘vast majority’ of the ‘exposure-only’ class members being without injury in fact and hence without standing to sue.”¹⁶⁹ Justice Souter’s tone implied that he credited the accusation, a strong choice of words to attack the asbestos defendant as having sought undeserved—indeed, unlawful—shelter from liability.

Inasmuch as pro-plaintiff and pro-defendant scholar-spectators have lined up on both sides of the class action controversy,¹⁷⁰ it would be imprudent to celebrate *Amchem* and *Ortiz* as clear victories for those who, like Davis, decry irresponsibility on the part of business enterprises. Yet the premises that Davis expresses in *Irresponsibility* appear shared to a great measure in both opinions for the Court. Recall that Davis describes the Supreme Court as fostering immunity by overextending and overapplying federal rights as shields against the justice that common-law litigation renders to injured persons.¹⁷¹ This aspect of the *Irresponsibility* thesis—federal products liability law retrogressive, state products liability law progressive—emerges for Davis most strongly in the rise of

164. 521 U.S. 591 (1997).

165. 527 U.S. 815 (1999).

166. *Amchem*, 521 U.S. at 622-28; *Ortiz*, 527 U.S. at 854-56.

167. *Amchem*, 521 U.S. at 591; *Ortiz*, 527 U.S. at 864.

168. *Amchem*, 521 U.S. at 627.

169. *Ortiz*, 527 U.S. at 831.

170. See, e.g., George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 553 (1997) (favoring class actions that exclude potentially meritorious future claims when including them would impose over-deterrence on defendants); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 *passim* (2002) (favoring the class action side of the dispute, rather than the objector side, on the ground that injured persons achieve better results by aggregating their claims rather than pursuing them separately). The question of which side of this dispute makes the more attractive arguments is well explored in Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 784-95 (2002).

171. See *supra* note 2 and accompanying text.

preemption, as set forth in *Cipollone*.¹⁷² In this context, *Amchem* and *Ortiz*, which each struck down "an aspiration to replace the tort system with a private administrative regime,"¹⁷³ take a stand in favor of tort litigation brought by and in behalf of injured individuals.

B. *Pro-Plaintiff Outcomes in the Maritime Cases*

Following the publication of *Irresponsibility*, the Supreme Court decided two products liability actions brought to the Court under admiralty jurisdiction. In both cases, the Court favored the injured party rather than the injurer. *Saratoga Fishing Co. v. J.M. Martinac & Co.*, as mentioned above, distinguished *East River* and permitted the plaintiff to recover for property damage.¹⁷⁴ Along the way in *Saratoga Fishing Co.*, the Court also condemned the Ninth Circuit's contrary holding as bestowing too much "immunity" on a wrongdoer, reiterated that an "important purpose of defective-product tort law is to encourage the manufacture of safer products," expressed a need to maintain this "basic incentive," and asked rhetorically why the Court should permit a series of resales to "progressively immunize a manufacturer to an ever greater extent from the liability for foreseeable physical damage that would otherwise fall upon it[.]"¹⁷⁵

In the other maritime decision, *Yamaha Motor Corp. v. Calhoun*, a twelve-year-old resident of Pennsylvania was killed in an accident while on vacation in Puerto Rico.¹⁷⁶ She had been riding a jet ski manufactured by the defendant.¹⁷⁷ Her parents filed a wrongful death action in Pennsylvania.¹⁷⁸ Yamaha argued that her damages were limited by the federal maritime law of wrongful death.¹⁷⁹ No, held the Supreme Court; those limited remedies "relate to ships and the workers who serve them, and to a distinctly maritime substantive concept—the unseaworthiness doctrine."¹⁸⁰ The decision was unanimous.

C. *Expert Evidence in a Benign Light*

Both case law and commentary could be invoked to support the contention that *Daubert v. Merrell Dow Pharmaceuticals, Inc.* should join the *Irresponsibility* foursome.¹⁸¹ The 1993 decision is curiously omitted from Davis's 1996 article, perhaps because early commentary on *Daubert* had deemed the decision liberal, and

172. See Davis, *supra* note 2, at 1116-35.

173. Nagareda, *supra* note 170, at 783.

174. 520 U.S. 875, 876-77 (1997); see *supra* notes 83-85 and accompanying text.

175. *Saratoga Fishing Co.*, 520 U.S. at 880-81.

176. 516 U.S. 199, 202 (1996).

177. *Id.*

178. *Id.*

179. *Id.* at 203.

180. *Id.* at 213.

181. 509 U.S. 579 (1993).

thus contrary to the *Irresponsibility* thesis.¹⁸² Addressing the plaintiffs' fervid struggle against the prospect of summary judgment for the manufacturing defendant, Justice Blackmun purported to replace a restrictive evidentiary rule about expert testimony, the "general acceptance test," with a multi-factor balance permitting testimony that falls short of a general-acceptance standard.¹⁸³ He probably felt pity for the plaintiffs, children born with birth defects.¹⁸⁴

Around the time that Davis published her article, however, *Daubert* began to take on a pro-defendant air. In 1995, the *Daubert* plaintiffs lost on remand.¹⁸⁵ Judge Kozinski of the Ninth Circuit, affirming summary judgment in favor of the defendant, wrote a much-cited opinion condemning the testimony the plaintiffs had tried to introduce as neither valid nor relevant, contrary to the rigors of Rule 702 of the Federal Rules of Evidence.¹⁸⁶ The next year, Judge Posner wrote two opinions for the Seventh Circuit that James Henderson and Aaron Twerski characterize "as setting a strenuous standard against which to judge scientific expert testimony."¹⁸⁷ The *Daubert* decision did no harm to the then-newish concept of "junk science;" this term grew more prevalent and popular, not less, after 1993.¹⁸⁸ The Supreme Court's revisits to *Daubert* in the late 1990s, *General Electric Co. v. Joiner*¹⁸⁹ and *Kumho Tire Co. v. Carmichael*,¹⁹⁰ both affirmed the decisions of trial judges to exclude expert testimony on behalf of plaintiffs.

And yet *Daubert* remains a liberal decision and a force for responsibility rather than irresponsibility. Even assuming that some types of testimony admissible before *Daubert* became inadmissible in jurisdictions that follow the decision—and many states reject the holding,¹⁹¹ notably California where it was first filed—it is not inherently illiberal or irresponsible to hold expert witnesses to standards. The executive officer of Toxic Products Inc. who at his country club or the Business Roundtable excoriates what he calls junk science is a familiar trope, but one can

182. See, e.g., Effie J. Chan, Note, *The "Brave New World" of Daubert: True Peer Review, Editorial Peer Review, and Scientific Validity*, 70 N.Y.U. L. REV. 100, 110 (1995) (declaring, a bit prematurely, that *Daubert* "settled the long-standing debate over the desirability of a conservative versus liberal admissibility standard").

183. *Daubert*, 509 U.S. at 587-89. See generally Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699 (1998) (casting "general acceptance" as conservative and *Daubert* as liberal).

184. Cf. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) ("Poor Joshua!").

185. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1322 (9th Cir. 1995).

186. *Id.* at 1315-20.

187. JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 156 (4th ed. 2000) (referencing *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996) and *Braun v. Lorillard Inc.*, 84 F.3d 230 (7th Cir. 1996)).

188. Two Australian commentators offer a critical history of the concept of junk science, with detailed reference to *Daubert*. Gary Edmond & David Mercer, *Trashing "Junk Science,"* 1998 STAN. TECH. L. REV. 3, at http://stlr.stanford.edu/STLR/Articles/98_STLR_3/index.htm (last visited Mar. 29, 2002).

189. 522 U.S. 136, 142 (1997).

190. 526 U.S. 137, 150 (1999).

191. See David E. Bernstein, Frye, Frye Again: *The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 485 (2001).

also envision an antitrust defendant trying to introduce a novel theory that would demonstrate its limited market power, and failing because of *Daubert*.¹⁹² Prosecutors enjoy *Daubert* because it supports the introduction of DNA evidence, which bolsters their convictions; rape trauma syndrome, frequently excluded under *Daubert*, would help them get more convictions.¹⁹³

In my view, the Court's trilogy of expert-evidence cases stands for an endorsement of the trial judge as the proper decisionmaker with respect to complex, technical matters. It empowers not appellate judges, who are rendered nearly impotent by *Joiner's* abuse-of-discretion standard;¹⁹⁴ not juries; not expert witnesses, the slick and the inarticulate alike; not lawyers, not parties, and certainly not the Supreme Court. Nor, for that matter, the experts—legislators, regulators, peer reviewers, or elite communities in science. As Justice Blackmun understood, there can be no alternative to *someone's* having power over complex cases. Assigning much of this authority to the trial judge seems at least as sensible and responsible as letting anyone else have it.

V. CONCLUSION

Simultaneously reflecting and fostering an expanded national interest in product-caused injury, the Supreme Court has in recent decades come into its own as a products liability court. In a development parallel to what commentators describe as having taken place in other areas of the law, the Court has been a force for conservatism in products liability.¹⁹⁵ Mary Davis argued masterfully back in 1996 that the Court has crafted a pro-defendant federal law regarding product-caused injury.¹⁹⁶ This new federal law sometimes will immunize business

192. Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 375 (1995).

193. *Id.* I recently had a conversation with an engineer that supported Taslitz's point. This engineer, who testifies frequently as an expert in road accident reconstruction, told me he is pleased that *Daubert* obstructs his erstwhile chief competitors—police officers and state highway patrol troopers. These "expert" witnesses were often utterly ignorant about such basics as how to estimate vehicular speed from the appearance of skid marks. They would generate massive quantities of inaccurate testimony, which juries too readily accepted out of deference to law enforcement officers, in the pre-*Daubert* era. It is now easy to keep these law enforcement not-so-experts out of court, said the happy engineer. Others believe *Daubert* has not solved the problem, however. See Mark Hansen, *Dr. Cop on the Stand*, A.B.A. J., May 2002, at 31,34 (quoting evidence scholar David Faigman: "I think the courts roll over when police officers are proffered as experts.")

194. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997).

195. On conservative tendencies in other fields of the law, away from the more headline-grabbing criminal and constitutional law docket, see Robert F. Blomquist, *Witches' Brew: Some Synoptical Reflections on the Supreme Court's Dangerous Substance Discourse, 1790-1998*, 43 ST. LOUIS U. L.J. 297, 323-26 (1999) (attacking the stance of the Court on questions of environmental regulation); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 39 & n.64 (1998) (borrowing a title from Henderson & Eisenberg, see *supra* note 163, to note a development, similar to the pro-defendant trend in products liability, against plaintiffs in the Supreme Court's decisional law on personal jurisdiction).

196. See *supra* Part III.

enterprises from liability, reduce their damages on those occasions when they do have to pay something, and promote the notion that encouraging returns on capital investment is more important than fostering safety and compensation for victims or potential victims of dangerous products.

Those who judge the Court as a products liability court, however, owe it some procedural fairness. For this reason I have undertaken a kind of pocket-part update to *Irresponsibility*, reviewing decisional law—some from the Supreme Court itself. The review adds twenty-one new Supreme Court decisions to a survey that Davis began with just four. Many of the newer Supreme Court decisions—among them *Saratoga Fishing Co. v. J.M. Martinac & Co.*, *Yamaha Motor Corp. v. Calhoun*, *Daubert v. Merrell Dow Pharmaceuticals Corp.*, *Amchem Products, Inc. v. Windsor*, *Ortiz v. Fibreboard Corp.*—come out pro- rather than anti-responsibility.¹⁹⁷ Space constraints prohibited full discussion in this Essay of more ambiguous cases (such as *BMW of North America, Inc. v. Gore* and *Geier v. American Honda Motor Co.*) that were mentioned in passing;¹⁹⁸ here I can only provide my bottom line, which is that no opinion from the Court since *Cipollone* in 1992 can be read as fostering “our culture of irresponsibility.” Moreover, a review of the progeny of Davis’s cases suggests that although these four decisions provide a vehicle for lower-court judicial irresponsibility, many courts have been vigorously resisting defense attempts to gain immunity through these holdings.¹⁹⁹

The thesis about corporate irresponsibility holds strong when applied to two of Davis’s cases. *Boyle* bestowed gifts on business defendants: a share in the discretionary function exception, which ought to belong entirely to government actors; an extension of military-related immunity to the civilian context, which does not need it; and perhaps some other unwarranted favors as well, such as an extension of design-defect immunity to claims of manufacturing defect, although the evidence there is thin. *Cipollone* invaded the domain of the common law by equating tort damages with state “regulation,” thereby making the shelter of preemption available to those corporate parties that can persuade Congress to write statutes their way. As I sign off on this Essay in the spring of 2002, it appears that Davis’s early warnings about preemption have been borne out by a host of developments, starting with the campaign finance concerns aired in the late 1990s through the American *scandale du jour*, Enron, a parable about what happens when accountants, consulting firms, lawyers, regulators, high-level politicians, and the very content of regulatory standards are all available for sale to the same entrepreneurial buyer. Common law tort courts have long provided a safer haven from the corruption that can accompany the making of statutes and regulations; among institutional actors, judges are relatively likely to treat injured persons fairly.²⁰⁰ Post-*Cipollone* preemption law has made this bulwark much less secure.

197. See *supra* notes 164-93 and accompanying text.

198. See *supra* notes 50, 174-93 and accompanying text.

199. See *supra* notes 114-21, 136-58 and accompanying text.

200. See Richard L. Abel, *Questioning the Counter-majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533-39 (1999).

Let us conclude with a word about "our culture."²⁰¹ Beyond the holdings of cases, the Supreme Court has been a presence in products liability. In the last twenty-five years this field has manifested a growing struggle among various sectors—juries, judges, state legislatures, Congress, scholars, the Restatement—over the power to determine outcomes in products liability actions. Products law has also sought to balance looking forward, toward safety, against looking backward, to determine liability. In its numerous products liability decisions, the Supreme Court has joined and widened the field. Its participation has helped Americans understand this subject as political and fundamental.

Mary Davis reminds us that "[w]hen the Supreme Court speaks, all people listen."²⁰² Indeed. And by taking products liability seriously—and giving space to its politics, policy ambitions, consequences—the Court weighs in on a subject of great interest. For fifty years, the Justices have been underscoring the importance of modern products liability law as a source of social progress.²⁰³ We in the products liability community are indebted to the Court for having dramatized some hard questions of our field in twenty-five high-stakes, tough-call disputes. No one word—and certainly not the word "irresponsibility"—sums up this case law: In the Supreme Court, one party's "immunity" is another party's freedom. What Davis

201. Davis, *supra* note 2.

202. *Id.* at 1077.

203. See, e.g., *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 318 (1964) (noting with approval the "'manufacturer's warranty of the soundness of its manufactured product'"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 313-16 (1980) (Marshall, J., dissenting) (proposing that the law of personal jurisdiction be liberalized regarding suits about "a product whose utility derives from its mobility"); see also *supra* notes 174-75 and accompanying text (noting endorsement of products liability principles in *Saratoga Fishing*).

Of the Justices who participated in *Dalehite v. United States*, 346 U.S. 15 (1953), the three dissenters—Jackson, Black, and Frankfurter—stand higher in posterity than the five-man majority (Reed, Vinson, Burton, Minton, and Warren). In *Dalehite*, the dissent included a paean to strict products liability, reminiscent of Roger Traynor's famous *Escola* concurrence:

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.

Forward-looking courts, slowly but steadily, have been adapting the law of negligence to these conditions.

Dalehite, 346 U.S. at 51-52 (Jackson, J., dissenting).

praises as “responsibilities”²⁰⁴ just might be violations of the United States Constitution.²⁰⁵ The debates continue. Products liability discussions have grown stronger and more interesting, I think, with the help of attention from an important court.²⁰⁶

204. Davis, *supra* note 2, at 1078-79.

205. The personal-jurisdiction products liability cases provide an example of “irresponsibility” as the flip side of due process. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987) (holding that the manufacturer of tire valve assemblies could not be sued for injuries resulting from a motorcycle accident in California, because the actions of the offshore defendant did not establish state court jurisdiction under the Due Process Clause); *World-Wide Volkswagen*, 444 U.S. at 299 (holding Volkswagen immune from suit in Oklahoma because of its lack of contacts to the state). I elaborate on the tradeoffs between what might be called “freedom” and “security” in Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI-KENT L. REV. (forthcoming 2002).

206. The great feature of this attention is that it has not hardened into centralized authority. In his warning about funneling many more products liability problems to the Supreme Court, Gary Schwartz warned that once the Court decided “some particular products liability issue, as a practical matter that decision would probably remain unreviewable for perhaps a generation.” Schwartz, *supra* note 1, at 946. As one products liability court among others, a Court that declines to act Supreme in products liability by, for instance, refusing certiorari for most cases, see *id.* at 944-45—the Court joins a conversation without overpowering it.

APPENDIX A

PRODUCTS LIABILITY DECISIONS BY THE UNITED STATES SUPREME COURT

1. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).
2. Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).
3. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
4. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
5. Baker v. Gen. Motors Corp., 522 U.S. 222 (1998).
6. Gen. Electric Co. v. Joiner, 522 U.S. 136 (1997).
7. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
8. Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875 (1997).
9. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).
10. BMW of North Am., Inc. v. Gore, 517 U.S. 559 (1996).
11. Hercules Inc. v. United States, 516 U.S. 417 (1996).
12. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).
13. Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).
14. Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).
15. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
16. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).
17. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
18. Boyle v. United Techs. Corp., 487 U.S. 500 (1988).
19. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).
20. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

21. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984).
22. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
23. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
24. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).
25. Dalehite v. United States, 346 U.S. 15 (1953).

