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TORT REFORM AND IMPLIED CONFLICT PREEMPTION

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I. INTRODUCTION

For many years, the argument that federal legislation or, more commonly, rules promulgated by federal agencies, serve to preclude adjudication under state tort law undoubtedly seemed far-fetched. While courts occasionally found federal preemption, there seemed to be a general consensus that while Congress had the authority under the Supremacy Clause[1] to enact laws that superseded state legislation, state administrative regulation, or local ordinances, absent a "clear and manifest" statement of intent to preempt, the development of common-law doctrine was an area reserved to the states.[2]

Beginning with the Court's decision in *Cipollone v. Liggett Group, Inc.*,[3] the displacement of tort law under the doctrine of federal preemption has, in David Owen's words, "grown from little more than a blip on the radar screen to one of the most powerful defenses in all of products liability law."[4] The key to understanding the importance of *Cipollone* lies in the interpretation of a single clause in the legislation at issue. The Federal Cigarette Labeling and Advertising Act of 1965 (as amended in 1969) provided that "[n]o requirement or prohibition . . . shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this Act."[5] If, as the lower court had concluded, the phrase only precluded action by state legislatures and regulatory bodies, state courts applying state

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1. Article VI provides, in part, "[t]he Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. VI.

2. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

3. Cipollone v. Liggett Grp., Inc., 505 U.S. 504 (1992).

4. DAVID G. OWEN, PRODUCTS LIABILITY LAW, § 14.4 (2005).

5. 15 U.S.C. § 1334(b) (1969) (amending 15 U.S.C. § 1334(b) (1965)).

products liability law could find cigarettes to be defective notwithstanding the fact that cigarette packages were labeled in conformity with federal law. If, on the other hand, the imposition of tort liability constituted a "requirement or prohibition" under state law that was forbidden by the federal statute, tort liability was precluded as well.

It is this idea that common-law tort damages serve as a form of state regulation that may conflict with federal law or policy that lies at the heart of the federal preemption debate. In *Cipollone*, Justice Stevens, responding to the petitioner's argument that the express preemption provision at issue applied only to state legislation and regulation, not to common-law tort actions, asserted: "[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[6]

The decision to include tort law together with state legislation and regulation was, in fact, a departure from the prevailing view.[7] Nevertheless, eight years later in *Geier v. American Honda Motor Co., Inc.*,[8] the Court dramatically expanded the preemption doctrine in holding that courts could find that federal legislation or administrative regulation implicitly preempted state tort law where the imposition of liability was found to conflict with federal law or policy either in the sense that became impossible to comply with both state and federal law or in the sense that the imposition of liability under state law would serve to frustrate federal policy objectives.[9] Unfortunately, neither in *Geier* nor in the decisions

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6. *Cipollone*, 505 U.S. at 521 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

7. *See id.* at 537 n.3 (pointing out that "[t]he Court has explained that *Garmon*, in which a state common-law damages award was found to be pre-empted by the National Labor Relations Act, involved a special 'presumption of federal pre-emption' relating to the primary jurisdiction of the National Labor Relations Board.") (Blackman, J., concurring and dissenting); *see also infra* text accompanying notes 339-47 (arguing that *Garmon* represented a distinctive form conflict preemption based on the allocation of decision-making authority, rather than substantive policy objectives).

The distinction between preemption of state statutory and regulatory actions, as distinct from common-law litigation, according to the dissent, had a long, established history. *See id.* at 538-39 ("In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously 'requirements' or 'prohibitions' imposed under state law. The plain language of the 1969 Act's modified pre-emption provision simply cannot bear the broad interpretation the plurality would impart to it.") (Blackman, J., concurring and dissenting). *See also infra* note 165.

8. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000).

9. *Id.* at 873 (explaining "[t]he Court has not previously driven a legal wedge—only a terminological one—between 'conflicts' that prevent or

that followed has the Court provided any basis for identifying the federal policy at issue, let alone determining when state tort law should be found to frustrate its implementation.[10]

Given the lack of guidance from above, lower federal court and state court judges have filled the vacuum by imposing their own values and political ideologies, often abolishing large areas of state tort law generally, and products liability law specifically, in a wave of what can only be described as tort reform from the bench.

Numerous scholars and commentators have analyzed and reanalyzed the Supreme Court decisions seeking to explain and harmonize the cases,[11] or to suggest new directions.[12] The goal of this Article is somewhat different; it is to show how some state courts and lower federal courts have responded in the face of doctrinal uncertainty and confusion and to put those responses into the broader historical context of the evolution of products liability law as it has moved from strict liability, to negligence, to no liability. To be sure, the final step of across-the-board immunity from tort liability has not yet been completed and the demise of products liability law, in specific, or tort law, in general, certainly is not inevitable. Nevertheless, a few serious scholars have expressed their concerns and warned of the dangers.[13] Those

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frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are 'nullified' by the Supremacy Clause . . . .").

10. *See, e.g.*, Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011) (holding that the regulation did not preempt a products liability action alleging defectiveness based on the fact that the vehicle lacked a rear shoulder belt).

11. *See, e.g.*, Jean Macchiaroli Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725, 726 (2006) (noting that "[s]cholars have long observed that the United States Supreme Court's preemption doctrine has been fraught with uncertainty, leading to unpredictable results in the lower courts.").

12. *See, e.g.*, Anita Bernstein, *The Products Liability Restatement: Was It a Success?: Implied Reverse Preemption*, 74 BROOK. L. REV. 669 (2009) (arguing that interpreting congressional intent should be taken to the next level to determine when congressional action (or inaction) permits an inference of the abandonment of an earlier preemptive intention).

> The exercise of drawing inferences about what a legislature one intended with respect to regulation necessarily entail the possibility of inferring that the legislature has relinquished an older inferred intent on this point. Any doctrine of implied preemption that does not recognize the possibility of abandoning a once-held preemptive scheme cuts courts off from reality. Dropping the regulatory ball is as normal and predictable—just as integral to regulation—as picking it up.

Id. at 682. Moreover, Professor Bernstein specifically argues "that at some point during a period of seventeen years, Congress ceased to intend, if it ever did intend, to assert a federal safety-regulatory stance that precluded tort liability for injuries attributed to consumer products." *Id.* at 675.

13. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of*

warnings need to be taken seriously.

The process by which tort has been undercut is not only a product of tort reform from the bench.[14] During the George W. Bush administration, preempting tort law by administrative agency action was openly pursued as part of a corporate protectionism agenda.[15] However, more important for purposes of this Article is the recognition that many judges who share that viewpoint are actively engaged in accomplishing the same result. To pretend that judges are above partisan politics and not influenced by ideological considerations and predispositions is simply unrealistic and unhelpful.[16]

Although the courts have repeatedly asserted that federal preemption is grounded in congressional intent,[17] these attempts to place the responsibility at Congress's doorstep are unconvincing.[18] Arguments about institutional intent in the face of a changing legal landscape of underlying preemption jurisprudence and in the face of a changing legal landscape in products liability law seem unlikely to be more than marginally

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Modern American Tort Law, 26 GA. L. REV. 601 (1992); Robert L. Rabin, *Poking Holes in the Fabric of Tort*, 56 DEPAUL L. REV. 293 (2007); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

14. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (Farrar, Straus and Giroux 2009) (explaining the effect of public opinion on the Court).

15. *See* Sharkey, *supra* note 13 (discussing and documenting a concerted effort to use federal preemption language inserted into the preamble of agency reports (and thus not subject to the notice and comment requirement) as a means of achieving tort reform during the George W. Bush Administration); *see also* Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TUL. L. REV. 1203, 1219-22 (2010) (critically discussing actions taken by the Obama Administration to limit the use of preemption regulatory preambles); *see also* Roger I. Abrams, *Tort Law and "Family Values,"* 48 RUTGERS L. REV. 619, 622 (1996) (observing that "[i]n order to promote the interests of the class of traditional defendants—product manufacturers and physicians, for example, who have been chilled by the prospect of unlimited, uncertain and uninsurable damage costs—political and judicial actors have revised tort law principles.").

16. In fact, the view that the judicial role encompasses a legislative function (and perhaps ought to) has entered the mainstream. *See generally*, Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267 (2009) (noting views on judicial decision making).

17. *But see* Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 612 (2010) (dealing with agency preemption "in the absence of statutory instruction").

18. Although congressional power to solve the problem is undeniable, it is safe to assume that the power will not be exercised.

productive in all but the most obvious situations.[19] This is particularly true once one accepts that, even if individual congressmen and women may have actually had some relevant intention, unless it is stated clearly, attempts to parse ambiguous language or examine the structure of the law for hints of intention is fundamentally an exercise in futility.[20] Thus, as we move beyond those instances where the topic of preemption has been expressly addressed by Congress,[21] or conclusions arise by obvious implication and find ourselves in the morass of most implied preemption cases,[22] charges of judicial activism take on a level of plausibility that risks undercutting judicial legitimacy.[23]

The proposal made here is necessarily modest. Courts need to recognize that common-law litigation can conflict with federal policy in three different ways, rather than the two acknowledged by the courts. In addition to so-called "impossibility conflict," there are at least two distinct forms of frustration of federal purpose conflict—substantive and procedural.[24] Finding state common-law litigation displaced in the case of the latter, but not the former,

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19. *See, e.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1082 (2011) (noting "[w]hen 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute. . . . We cannot make the same assumption when widespread disagreement exists among the lower courts.").

20. *See* Bernstein, *supra* note 12, at 674 (noting that other scholars have pointed out that "the indicators of a tacit decision by Congress to bar state tort claims are both unclear and controversial."). *See also Bruesewitz*, *supra* note 19, at 1075, 1092 (presenting conflicting analyses of the language of the statute at issue).

21. *See* Rabin, *supra* note 13, at 297 (noting that "Congress has been notoriously vague in indicating its intention to preempt, let alone its intention to delegate this power to an agency pursuant to the creation of regulatory authority.").

22. Criticizing both the Supreme Court and Congress for ambiguity *see* Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2058 (2000) and Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 28 (1997).

23. *See Geier*, 529 U.S. at 894.

> When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States.

Id. at 894 (Stevens, J., dissenting). *See also, e.g.*, *Bruesewitz*, 131 S. Ct. at 1100 (Sotomayor, J., dissenting) (asserting "[t]he majority's decision today disturbs that careful balance based on a bare policy preference that it is better 'to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.'") (internal citation omitted), *and infra* notes 349-57 and accompanying text.

24. *Cipollone*, 505 U.S. at 517.

will provide at least some guidance to the judiciary, permit cases to be decided in a principled manner, acknowledge the evolving role of products liability doctrine, and avoid the ongoing problem of leaving wronged and injured plaintiffs without recourse.

The Article will proceed as follows: in Part II, after reviewing, in somewhat summary fashion, the twists and turns of products liability law since the adoption of 402A[25] in 1965, we turn to the question the current understanding of the function of imposing liability for defectively designed products. Somewhat more specifically, the section traces design-defect theory from instrumentalist strict liability to negligence liability (with a focus on the assignment of personal responsibility to others) to the current trend toward the formulation of instrumentalist no-liability rules. It is within the context of the current trend of "no-liability" that the implied preemption doctrine has been brought to bear to threaten tort law. In Part III, the Article takes up the recurrent problem of the legislative power to abrogate common-law tort liability, federalism concerns, and implied preemption. In that context, it seeks to analyze and explain impossibility conflict preemption, frustration of federal purpose preemption, and to distinguish the latter from field preemption. Part IV, looks to the Consumer Product Safety Commission's regulation of disposable lighters[26] and the cases finding and refusing to find federal preemption, and seeks to illustrate not only the common confusion between implied conflict preemption and the statutory or regulatory compliance defense, but, more importantly, to make clear the unworkability of implied conflict preemption as currently understood. Additionally, the Article seeks to explicate the third type of conflict preemption, a distinction the *Cipollone* plurality and subsequent Court decisions largely ignored. Nevertheless, if conflict preemption is limited so as to exclude substantive frustration conflicts, many concerns can be eliminated.

II. THE COMMON-LAW LIABILITY STANDARD IN CASES OF DESIGN DEFECT

A. A Brief Review of the Evolution of "Strict" Products Liability Doctrine

Many books and articles have described the evolution of the standard of liability for badly designed products from its initial modern formulation in the dicta of *Greenman v. Yuba Power*

25. RESTATEMENT (SECOND) OF TORTS § 402A (1965) ("proposing" strict liability in tort on sellers of defective products).

26. Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,557-01 (July 12, 1993) (codified at 16 C.F.R. § 1210).

Products[27] in 1963 into the mid-1980s. While rehashing the progression in any detail is unnecessary for the purposes of this Article, a few comments may be helpful to put the current state of affairs into perspective.[28]

First, the underpinnings of the strict liability experiment were explicated to an unusually large extent by academicians.[29] Most, or at least much, of the academic literature of the time can be fairly described as "instrumentalist."[30] Tort law generally, and products liability law in particular, was increasingly viewed as a public law system that was to be designed and implemented to accomplish specified social goals other than (or in addition to) the resolution of a specified dispute between litigants. Not surprisingly, the goals to be accomplished varied depending on the viewpoint and values of the academician. The law and economics scholars—initially largely led by Richard Posner—argued that the goal should be efficiency in order to maximize wealth (or utility).[31] Some scholars argued for wealth maximization without regard for distributional justice considerations, while others fine-tuned the approach to take distribution into account. Thus, for example, the concept of Pareto efficiency (or Pareto optimality) sought to add the requirement that allocation or reallocation of resources be done in a way that "will leave no individual worse off and at least one individual better off."[32]

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27. Greenman v. Yuba Power Prod., 377 P.2d 897 (Cal. 1963). The views expressed by Justice Traynor in *Greenman* largely echo similar views expressed in his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

28. For a history of strict products liability leading up to *Greenman, see generally* James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443 (1995).

29. *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 215-43 (Oxford University Press 1980) (noting the origins of tort law).

30. *See, e.g.*, Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 948 n.13 (2006) (explaining that "[t]he instrumental theory of tort law posits that the tort system pursues policy objectives derived from the needs of society external to the legal system, such as wealth maximization, accident prevention, or the distribution of losses.").

31. *See* Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (distinguishing wealth maximization and utilitarianism); RICHARD A. POSNER, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, *in* LAW, ECONOMICS, AND PHILOSOPHY: A CRITICAL INTRODUCTION, WITH APPLICATIONS TO THE LAW OF TORTS (Mark Kuperberg & Charles R. Beitz eds. 1983).

32. Joseph M. Steiner, *Economics, Morality, and the Law of Torts*, 26 TORONTO L.J. 227, 229 (1976). *See also* Robert Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 CHI.-KENT L. REV. 523, 524 (1987) (explaining Pareto efficiency).

Efficiency, even tempered by concerns for distributional consequences, was not the sole value promoted. For example, upon Guido Calabresi's argument that the goal should be a macro reduction of accident costs to be accomplished by imposing liability on the party who is in the best position to engage in a cost-benefit analysis, the famous "cheapest cost avoider,"[33] John Attanasio built his theory of "aggregate autonomy" in which he argued "that the Calabresian liability model promotes the most important autonomy interests of the greatest number of persons, while promoting utility and efficiency in the process."[34]

On the other hand, building on an intellectual tradition dating back to the early days of the twentieth century, numerous academicians and judges came to view tort law as a form of social insurance.[35] Under this view, the compensatory function of tort would serve to prevent the "social dislocation" experienced by accident victims.[36] Rather than pay premiums to private insurers

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33. *See* Guido Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 95-129, 174-97, 266-73 (Yale University Press 1970) (developing the concept of "cheapest cost avoider" as a means to reduce accident costs); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) ("[Manufacturers are in] the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.").

34. David G. Owen, *Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 493 (1993) (discussing John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988)).

35. *See generally* Hackney, Jr., *supra*, note 28, at 491 (noting "in the landmark treatise, *The Law of Torts*, which [Fleming] James authored with Fowler Harper, an entire chapter was devoted to 'social insurance.' At the beginning of the chapter, a direct reference is made connecting the torts project James wished to pursue with 'workmen's compensation in 1910' and '1930's social insurance legislation.' In the treatise, the importance of social insurance is discussed, along with the litany of ills that concerned the social insurance theorists . . . ."); *see also* James Henderson, *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 TOURO L. REV. 107, 120 (1993) (characterizing tort as social insurance as "a miserable flop").

36. Hackney, Jr., *supra*, note 28, at 470. Discussing HENRY SEAGER, SOCIAL INSURANCE: A PROGRAM FOR SOCIAL REFORM (Macmillan 1910), Hackney explains:

> Seager was particularly concerned with the ideology of individualism, and he believed that the ability to adopt social insurance schemes hinged upon changing the "state of the public mind" regarding individualism. Seager argued that this transformation, and the consequent social insurance program, would be vital in guarding against the social dislocation befalling those who were unfortunately beset by social ills. Social dislocation came in the form of economic hardships to families suffering a loss of income and insufficient savings. Workers had very little money to save and the "failure of wage earners to provide . . . against emergencies was . . . proof that collective remedies must be found and applied . . . ."

Id.

and/or fund governmental social welfare programs though individual contributions or general tax revenues, institutional defendants or classes of defendants would, through the imposition of strict liability, compensate accident victims and spread the costs of accidents over a large class of products (or services) to consumers through their pricing mechanism.[37]

The "tort as social insurance" approach reached its pinnacle (or nadir, depending on one's view) in the 1970s and 1980s with decisions in *Beshada v. Johns Manville Products Corp.*,[38] in the New Jersey Supreme Court, *Hall v. E.I. Du Pont de Nemours & Co.*,[39] in the federal district court in New York, and in *Sindell v. Abbott Laboratories*[40] in the California Supreme Court.

1. *The Hindsight Approach to Strict Liability*

Beshada was an asbestos case based, in part, on the defendants' alleged failure to warn of the dangers of inhalation of the asbestos fibers. The defendants responded that they could not, at the time of marketing, warn of the dangers because the dangers were scientifically "unknowable" at the time (the "state of the art" defense).[41] Rejecting this argument, the court reasoned:

> Essentially, state-of-the-art is a negligence defense. It seeks to explain why defendants are not culpable for failing to provide a warning. They assert, in effect, that because they could not have known the product was dangerous, they acted reasonably in marketing it without a warning. But in strict liability cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer. "If the conduct is unreasonably dangerous, then there should be strict liability without reference to what excuse defendant might give for being unaware of the danger."
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> When the defendants argue that it is unreasonable to impose a duty on them to warn of the unknowable, they misconstrue both the purpose and effect of strict liability. By imposing

37. *See Escola*, 150 P.2d at 441 (Traynor, J., concurring) (asserting that "[i]t is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").

38. Beshada v. Johns Manville Prod. Corp., 447 A.2d 539 (N.J. 1982).

39. Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

40. Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).

41. *Id.* at 545-56.

> strict liability, we are not requiring defendants to have done something that is impossible. In this sense, the phrase "duty to warn" is misleading. It implies negligence concepts with their attendant focus on the reasonableness of defendant's behavior. However, a major concern of strict liability—ignored by defendants—is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them.[42]

2. Industry-Wide Liability

Industry-wide liability, sometimes termed "enterprise liability"[43] was an approach developed for one case at the height of judicial acceptance of cost shifting as the basis for strict liability in tort. In *Hall*,[44] thirteen children who had been injured by blasting caps between 1955 and 1959 brought suit against the six American manufacturers of blasting caps and their trade association.[45] It was alleged "that the practice of the explosives industry during the 1950's . . . of not placing any warning upon individual blasting caps and of failing to take other safety measure created an unreasonable risk of harm resulting in plaintiffs' injuries."[46]

The initial hurdle, faced by each of the plaintiffs, was that none could identify which of the named defendants had manufactured the particular blasting cap that caused injury to them.[47] Traditionally, of course, if a plaintiff could not identify the tortfeasor who harmed him or her by a preponderance of the evidence or make out a case that all of the defendants had been in a relationship under which each would be vicariously liable for the tortious misconduct of the others, the plaintiff would lose as a matter of law. Seeking to find a basis upon which liability could be imposed, however, the court developed a new theory called "joint control of the risk." According to the court:

> Joint control may be shown in one of three ways. First, plaintiffs can prove the existence of an explicit agreement and joint action among the defendants with regard to warnings and other safety features—the classic "concert of

42. *Id.* at 546 (quoting W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 408 (1970)).

43. *Hall*, 345 F. Supp. at 368 (noting the "approach has been variously expressed as 'loss distribution,' 'risk allocation,' or 'enterprise liability.'").

44. To be somewhat more precise, two cases were consolidated for decision. As Judge Weinstein explained: "In *Chance*, the name of the manufacturer who actually produced the cap causing a particular injury is apparently unknown. In *Hall* it is, plaintiffs allege, known." *Id.* at 358. The facts recited above were those of the *Chance* case.

45. *Id.* at 359.

46. *Id.* at 358.

47. *Id.*

> action." Second, plaintiffs can submit evidence of tacit agreement or cooperation.
>
> Third, plaintiff can submit evidence that defendants, acting independently, adhered to an industry-wide standard or custom with regard to the safety features of blasting caps. Regardless of whether such evidence is sufficient to support an inference of tacit agreement, it is still relevant to the question of joint control of the risk. The dynamics of market competition frequently results [sic] in explicit or implicit safety standards, codes, and practices which are widely adhered to in an entire industry. [T]he existence of industry-wide standards or practices alone will not support, in all circumstances, an imposition of joint liability. But where . . . individual defendant-manufacturers cannot be identified, the existence of industry-wide standards or practices could support a finding of joint control of risk and a shift of the burden of proving causation to the defendants.[48]

The idea that an entire industry could be held liable for the conduct of one member of that industry was justified not by the fault or personal responsibility of any one member, but the (then) accepted idea that tort law should seek to accomplish certain instrumentalist objectives completely apart from the assignment of personal responsibility. Thus, the court explained, "we are no longer dealing with specific conduct but with the broad scope of a whole enterprise. Further, we are not looking for that which can and should reasonably be avoided, but with the more or less inevitable toll of a lawful enterprise."[49]

3. Market-Share Liability

Sindell v. Abbott Laboratories[50] was a case that arose out of the DES disaster. DES (diethylstilbestrol) was a synthetic estrogen drug that was widely prescribed and sold to pregnant women during the 1940s, '50s, and '60s to prevent miscarriage.[51] As it turned out, not only was the drug allegedly ineffective for its prescribed purpose,[52] but it also caused clear cell carcinoma and pre-cancerous vaginal and cervical growths in the female children of mothers that ingested it during pregnancy.[53]

Because clear cell carcinoma is a so-called "signature disease," the causal link between DES ingestion and the disease was not an issue.[54] The problem was that the disease had a long latency

48. *Id.* at 373-74 (citations omitted).
49. *Id.* at 377.
50. *Sindell*, 607 P.2d at 924.
51. *Id.* at 925.
52. *Id.* at 925-26.
53. *Id.* at 925.
54. *See, e.g.*, Gerald W. Boston, *A Mass Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. OF

period and did not show up until after the women affected passed puberty. Moreover, the drug was sold as a generic and there were literally hundreds of pharmaceutical companies manufacturing it.[55] When pharmacists were presented with a prescription for DES, they simply filled the prescription with whichever brand they had in stock.[56] By the time the disease became manifest, many of the manufacturers had gone out of business, as had the pharmacies that sold it. Thus, it was often impossible to know just whose product any individual plaintiff's mother had consumed.[57] Again, as in *Hall*, of course, traditionally the plaintiff would have the burden of proving the identity of the party that was alleged to have caused her injury and, on the peculiar facts of these cases, this was simply impossible.[58]

Arguably viewing tort as an insurance mechanism, the court adopted an unconventional approach that had been proposed in a student-authored comment published in the Fordham Law Review.[59] Although there had been two hundred or more manufacturers of DES, there were eleven named defendants. Of those, the five respondents before the California Supreme Court—Abbott Laboratories, Eli Lilly and Company, E.R. Squibb and Sons, The Upjohn Company, and Rexall Drug Company[60]—had commanded a market share that amounted to ninety percent.[61]

The court considered and rejected a number of approaches including the enterprise liability theory announced in *Hall*.[62] Instead, the court announced a "market-share liability" approach and held that it was:

> reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES

ENVT'L. L. 181, 203-04 (1993) (explaining that "[s]ome toxic substances produce so-called 'signature diseases' which are rare diseases associated with exposure to a particular substance that rarely occur in the non-exposed population. The incidence of the background risk for signature diseases is virtually zero; for example, asbestosis and mesothelioma are signature diseases of asbestos exposure and clear cell adenocarcinoma of the vagina of DES exposure. They have been discovered by cluster analysis and their presence enables plaintiffs exposed to those substances to establish causation without the usual controversies . . . .").

55. *Sindell*, 607 P.2d at 935.

56. *Id.* at 932.

57. *Id.* at 926.

58. *See, e.g.*, McCreery v. Eli Lilly & Co., 150 Cal. Rptr. 730, 734 (Cal. Ct. App. 1978) (explaining that the "identity of the manufacturer must be ascertained and proved.").

59. Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964-67 (1978).

60. *Sindell*, 607 P.2d at 926 n.4.

61. *Id.* at 937.

62. *Id.* at 935.

> sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose.
>
> Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products.[63]

A number of justifications for the new approach were listed. These included the idea that "[t]he manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects . . . [and] holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety."[64] However, at its heart was the purely instrumentalist view that:

> From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in Escola, "[the] cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[65]

4. The Reaction to Instrumentalist Strict Liability

The idea that personal responsibility was to be excluded from the assignment of tort liability met with a storm of protest.[66] Only two years after deciding *Beshada,* the New Jersey court was forced to retreat and permit a state-of-the-art defense, at least in failure-to-warn cases.[67] In *Ryan v. Eli Lilly & Co.*,[68] the court, expressing

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63. *Id.* at 937.

64. *Id.* at 936.

65. *Id.* (citing and quoting *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

66. *See, e.g.*, Henderson, *supra* note 35, at 121-22 (asserting that, "I do not want strict liability to be used in toxic pharmaceutical cases. It was done in Beshada and the result in that case was not a good one. Beshada stands alone, and it should. I call it 'The Plague Ship Beshada' because I hope it never docks at another shore again."). *See infra* note 67.

67. Feldman v. Lederle Laboratories, 479 A.2d 374, 387-88 (N.J. 1984). In the course of decision, the court noted that "[m]any commentators have criticized this aspect of the Beshada reasoning and the public policies on which it is based" and cited: Joseph A. Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 877-82 (1983); Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901-05 (1983); John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 754-56 (1983); William

a widely-held view, called the enterprise liability theory of *Hall* "repugnant to the most basic tenets of tort law."[69] Few, if any, subsequent cases supported the approach.[70]

Sindell too found little long-standing support. In *Brown v. Superior Court*,[71] the California Supreme Court, now composed very differently than at the time of the *Sindell* decision,[72] limited the earlier holding.[73] By the mid to late 1980s, the tide had turned. In *Mulcahy v. Eli Lilly & Co.*,[74] for example, the Iowa Supreme Court described what had happened in *Sindell* and other cases following it as "courts develop[ing] theories which in one way or another provided plaintiffs recovery of loss by a kind of court-constructed insurance plan [with the result] that manufacturers are required to pay or contribute to payment for injures which their product may not have caused."[75] Attempts to utilize market share or industry-wide liability in asbestos and other mass tort litigation found virtually no success.[76]

R. Murray, Jr., Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983); Robert D. Casale, Comment, Beshada v. Johns Manville Products Corp.: *Adding Uncertainty to Injury*, 35 RUTGERS L. REV. 982, 1008-15 (1983); Robert D. Towey, Note, *Products Liability – Strict-Liability in Tort-State-of-the-Art Defense Inapplicable in Design Defect Cases*, 13 SETON HALL L. REV. 625 (1983) (form of citations altered from original).

68. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981).

69. *Id.* at 1017.

70. *See, e.g.*, Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963, 971 n.6 (Pa. Super. Ct. 1985) (noting that enterprise liability "as embodied in *Hall* has now been rejected by virtually every other jurisdiction confronted with this issue.") (citing cases).

71. Brown v. Super. Ct., 751 P.2d 470 (Cal. 1988).

72. Justice Stanley Mosk authored the opinion of the court in both cases, however, the other six justices sitting when *Brown* was decided had joined the court after the decision in *Sindell*. *Id.* at 473; *Sindell*, 607 P.2d at 925.

73. *Brown*, 751 P.2d at 484-87 (holding market-share theory cannot be used under a fraud or breach of warranty theory and further holding that defendants, under a market-share theory, were not jointly and severally liable, an issue left open in *Sindell*).

74. Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986).

75. *Id.* at 76.

76. *See, e.g.*, M. Stuart Madden & Jamie Holian, *Defendant Indeterminacy: New Wine into Old Skins*, 67 LA. L. REV. 785, 804 (2007) explaining:

> [I]n Sheffield v. Eli Lilly & Co., another vaccine case, the court reemphasized and hammered home that market share liability should not apply to a nongeneric "defective batch" vaccine case, despite any difficulties of identification. The court held that recovery could not be had under market share or any other collective liability theory where the action was based on an allegedly defective batch of the vaccine and not on any joint or collective action of the manufacturers that resulted in a generically defective vaccine.
>
> Probably the most conspicuous category of cases in which market share or related liability theories failed to gain a foothold has been that of

But why? Apparently, the answer lies in a broad-based commitment to principles of traditional non-instrumentalist negligence theory as the underpinning of the tort system. Thus, one can see not only that courts negatively respond to strict liability, but also the emergence of a body of scholarship reacting negatively to it. For example, David Owen, a leading products liability scholar and commentator, argued not only had the pendulum swing from negligence to strict liability begun its inevitable swing back,[77] but fault-based liability had a philosophical and moral basis that strict liability lacked.[78]

At least two descriptive models capture the non-instrumentalist conception of negligence law. First, what is commonly referred to a corrective justice theory—or at least parts of it—seem to fit the bill, though it is easy to be misled given the extensive debate as to what should or should not be included within its rubric.[79] Secondly, as Patrick Kelley described and analyzed it, common-law negligence principles freed from the instrumentalism grafted onto the basic theory by Oliver Wendell Holmes,[80] seems to broadly support or complement corrective

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asbestos litigation. The courts overwhelmingly have found that, as asbestos is not a single mineral but instead a group of several different ones, it is not a single-formula, fungible product that might permit application of market share liability. There are six different asbestos silicates used in industrial applications, and each presents a distinct degree of toxicity in accordance with the shape and aerodynamics of the individual fibers.

Id. (footnotes omitted).

77. David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703-04 (1992).

78. David G. Owen, *The Moral Foundations of Product Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 427-94 (1993).

79. The best-known debate between corrective justice theorists is that between Jules Coleman and Ernest Weinrib. *See, e.g.*, Jules L. Coleman, *On the Moral Argument of the Fault System*, 71 J. PHIL. 473 (1974); Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989); Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989).

80. Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 345-46 (1990) explaining:

> Holmes theorized that the "secret root" of judicial decisions, rarely articulated by judges, is legislative policy: "considerations of what is expedient for the community concerned." . . . Regardless of what judges say are the reasons for their decisions, the only real basis for judicial decision is public policy: consideration of the effect on the community of deciding the case one way or the other. The best decision is the one that influences future human action in ways most conducive to overall community welfare.

See also generally, Patrick J. Kelley, *A Critical Analysis of Holmes's Theory*

justice description of the common understanding of the nature and function of tort law.[81]

The insistence on fault-based liability has, among some segments of the American populace, moved it beyond its traditional status as a question of public policy, quite literally, into an article of religious faith.[82] Thus, a corrective justice underpinning for the obligation to compensate for unintended harm is asserted by the Christian right. Ronald Rychlak, discussing the concept of monetary damages paid by the wrongdoer to the victim to make him or her whole, explains:

> This concept has an extensive history, going back as far as the Old Testament legal codes contained in the book of Exodus. For example, Exodus 21 and 22 contain parameters for the compensation of both individuals who have been injured and the violations of personal property. The *lex talionis,* or law of retribution, is famously contained in the phrases: "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe" (Exodus 21:23-25 NAB). The general principle behind this law is one of reciprocity, which holds that the punishment or restitution for the wrong is to be appropriately linked to the extent of the harm or damage.[83]

Not only is corrective ("commutative") justice critically important,[84] but it is asserted to be more important than

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of Torts, 61 WASH. U. L. Q. 681 (1983).

81. *See infra* text accompanying notes 118-19.

82. *See, e.g.*, Samuel Gregg, *Tort Reform and Thomas More: Lessons from a Christian Lawyer*, ACTION INST. (Sept. 8, 2004), http://www.acton.org/pub/commentary/2004/09/08/tort-reform-and-thomas-more-lessons-christian-lawy; Jordan Ballor, *Touting Tort Reform*, ACTION INST. (Mar. 24, 2004), http://www.acton.org/pub/commentary/2004/03/24/touting-tort-reform; Ronald J. Rychlak, *Tort Reform as a Moral Issue*, ACTION INST. (Apr. 6, 2005), http://www.acton.org/pub/commentary/2005/04/06 /tort-reform-moral-issue.

83. RONALD RYCHLAK, TRIAL BY FURY 8-9 (2004).

84. My equation of corrective justice and commutative justice may be a little imprecise, but sufficient for our purposes here. Aquinas distinguished commutative justice and distributive justice.

> For distributive justice directs distributions, while commutative justice directs commutations that can take place between two persons. Of these some are involuntary, some voluntary. They are involuntary when anyone uses another man's chattel, person, or work against his will, and this may be done secretly by fraud, or openly by violence. On either case the offence may be committed against the other man's chattel or person, or against a person connected with him. If the offence is against his chattel and this be taken secretly, it is called "theft," if openly, it is called "robbery." If it be against another man's person, it may affect either the very substance of his person, or his dignity. If it be against the substance of his person, a man is injured secretly if he is treacherously slain, struck or poisoned, and openly, if he is publicly

distributive justice. Again, as explained by Rychlak:

> The reason why commutative justice is so important in Catholic doctrine is that it most clearly impacts individuals, not just the State. Commutative justice "requires safeguarding property rights, paying debts, and fulfilling obligations freely contracted." Assurance that the State will enforce these rights helps shape the expectations and attitudes of the citizens in a way that lead to the proper functioning of the State. In this way, "Distributive justice is possible only upon the foundation of commutative justice. [C]ommutative justice is not only fundamental, but is also prior to distributive justice."[85]

Thus, to the extent that liability without fault is based on principles of distributive justice, it follows that it must necessarily be subordinate to a system of fault-based liability. Moreover, the Christian right, and of course many others who do not share their theology, are firmly committed to free market enterprise and the advancement of corporate interests.[86] To the extent that religious and economic convictions coincide, one ends up with a broad societal commitment to traditional negligence and/or corrective justice that prohibits (or at least condemns) the imposition of liability on an entire industry for the act of one (unidentified) participant in that industry.[87]

> slain, imprisoned, struck or maimed. If it be against his personal dignity, a man is injured secretly by false witness, detractions and so forth, whereby he is deprived of his good name, and openly, by being accused in a court of law, or by public insult. If it be against a personal connection, a man is injured in the person of his wife, secretly (for the most part) by adultery, in the person of his slave, if the latter be induced to leave his master: which things can also be done openly. The same applies to other personal connections, and whatever injury may be committed against the principal, may be committed against them also.

ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Vol. 3 (Part II, Second Section) 1447-48 (1911).

85. Rychlak, *supra* note 83, at 14 (quoting the Catechism of the Catholic Church 2411 and Stephen J. Grabill, Kevin E. Schmiesing and Gloria L. Zuniga, DOING JUSTICE TO JUSTICE: COMPETING FRAMEWORKS OF INTERPRETATION IN CHRISTIAN SOCIAL ETHICS, VOL. 4, CHRISTIAN SOCIAL THOUGHT SERIES 40-41 (2002)).

86. *See, e.g.*, David C. Barker & Christopher Jan Carman, *The Spirit of Capitalism? Religious Doctrine, Values, and Economic Attitude Constructs*, 22 POLITICAL BEHAVIOR 1, 21 (2000) (finding that "those who adhere to conservative Protestant doctrine—namely fundamentalist, evangelical, and oftentimes charismatic Protestantism . . . inspires economic individualism as manifested through opposition to taxes, spending, and governmental activism in economic affairs."); *see also* John C. Green and James L. Guth, *The Christian Right in the Republican Party: The Case of Pat Robertson's Supporters*, 50 J. OF POLITICS 150, 159 (1988) (finding that "approval of party economic stands links the Christian Right and GOP regulars . . . .").

87. This raises the question of whether that same commitment to principle should also preclude the regulation of an entire industry from immunizing one

B. The Transition from Strict Liability to Negligence

In many ways, the Products Liability Restatement,[88] begun in 1992[89] and published in 1998, is a transitional document. In its most important aspects, it rejects strict liability, though often retaining strict liability language. For example, Section 1 subjects those in "the business of selling or otherwise distributing products" to liability if the product is defective.[90] Section 2 then defines defectiveness in design and failure-to-warn cases in terms of negligence. Thus, Section 2 provides, in relevant part, as follows:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe . . . ;[91]

Although different tests are specified for use in cases involving of some special products such as food, medical devices, and pharmaceuticals,[92] Section 2 is intended to apply generally to most manufactured goods. The test for design defect contemplated by the Reporters and adopted by the ALI involves the application of a risk-utility balancing approach. Comment *d* explains:

> Subsection (b) adopts a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product

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tortfeasor participant in that industry from tort liability to a specific victim of its (alleged) misconduct.

88. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (1998).

89. *Restatement (Third) of Torts: Institute Announces Advisory Committee for Restatement Product Liability Revision*, BNA PROD. LIAB. DAILY, June 11, 1992.

90. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998) (non-manufacturing defendants are thus held liable as sellers even if they had no responsibility for the existence of a defect).

91. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998).

92. Restatement (Third) of Torts: Products Liability (1998) Section 7 provides for a consumer expectation test in the case of food and Section 6 provides for a special test in cases involving drugs and medical devices. The test for drugs and medical devices remains quite controversial and some commentators have urged the application of Section 2's general standard in those cases as well. *See e.g.*, George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability*, 109 YALE L.J. 1087 (2000).

> and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe. (This is the primary, but not the exclusive, test for defective design.) Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution.
>
> Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence.[93]

To assist in the performance of the risk-utility analysis, comment *f* sets out and discusses the factors to be taken into consideration. It states:

> The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. A plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case. Moreover, the factors interact with one another. For example, evidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and the utility of the product. On the other hand, evidence that a proposed alternative design would increase production costs may be offset by evidence that product portrayal and marketing created substantial expectations of performance or safety, thus increasing the probability of foreseeable harm. Depending on the mix of these factors, a number of variations in the design of a given product may meet the test in Subsection (b).[94]

Although there are significant variations in the design-defect

93. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. d (1998) (internal cross-references omitted).

94. *Id.* cmt. f.

approaches adopted in the various states, the overwhelming majority utilize the Restatement's risk-utility approach for most cases, or something similar to it.[95] However, simply characterizing the liability standard in design cases as requiring the utilization of a "cost-benefit" or "risk-utility" approach is misleading.

In an important article on the topic, David Owen distinguished what he described as "macro" and "micro" cost-benefit analyses. Regarding the use of a "macro-balancing" test, he explained:

> A survey of balancing test definitions for design defectiveness presently used by appellate courts across the nation shows a diversity of approaches, but it also reveals a disturbing trend. A definition now recurring with enough frequency to be characterized as dominant may be summarized as follows: A design is defective if the product's risks exceed its utility. Despite its increasing popularity, however, this formulation of the test is flawed as an adjudicatory standard for determining design defectiveness. Defining liability in this manner may retain linguistic fidelity to the name by which the test increasingly is known—"risk-utility"— but it is highly problematic as a liability standard in that it appears to call for a balancing of all the risks of "the product" against all the product's "utility" or "benefits." This meaning, clearly implied by many court definitions, sometimes is made explicit, as in one court's recent formulation in terms of "balancing the overall risk and utility of a product."[96]

Rather than utilize this macro approach, trial lawyers typically can and should utilize a "micro-balancing" approach under which the plaintiff is required to propose an alternative design which, he or she will argue, the defendant should have adopted.[97] Thus, the micro-balancing test, as Professor Owen explains it, could be formulated in a few different ways including as one of the following:

A product is defective in design if the safety benefits from

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95. RESTATEMENT (THIRD) TORTS: PROD. LIAB. § 2, Reporters' Note to cmt. d (1998) (although specifically insisting that the extensive citation of authority "is not intended to provide a state-by-state compendium[,] it comes pretty close.").

96. David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1672-73 (1997) (footnotes omitted).

97. So-called "product category liability," i.e., the imposition of liability on a type of product notwithstanding the absence of an alternative design was rejected by the Restatement in all but the most extreme cases. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e, Ill. 5 (conceding that in the case of a prank exploding cigar that causes injury, "[t]he utility . . . is so low and the risk of injury is so high as to warrant a conclusion that the cigar is defective and should not have been marketed at all.").

> altering the design as proposed by the plaintiff were foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety.[98]
>
> [or]
>
> A product is defective in design if it was not designed with reasonable safety, such that the safety benefits from altering the design, as proposed by the plaintiff, were foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety.[99]

In explaining his preference for this second formulation, Professor Owen notes that the "definition is plainly softer, for the 'reasonable safety' bough adds wiggle room for cases where even the [first] . . . micro-balance definition . . . appears too narrow to include certain issues in the case."[100]

To illustrate what I take to be his basic point, consider the case of *Fallon v. Clifford B. Hannay & Sons, Inc.*[101] In that case, the plaintiff, a propane gas delivery man, was running with a hose in the course of delivering gas.[102] While running, the hose snagged and stopped his forward progress suddenly, resulting in back injuries.[103] The defendant was the manufacturer of the reel around which the propane hose was wound. The plaintiff's argument was that the reel should have been equipped with a "'guide master,' a piece of optional equipment manufactured and offered for sale by defendant with the power reel."[104] Moreover, it was claimed that if the guide had been provided, the hose would not have tangled and the injury would not have occurred.[105]

Although the actual price of the hose guide is not provided and it is impossible on the facts recited by the court to know either the severity of the plaintiff's injuries or the frequency with which such injuries occur,[106] assume for the sake of argument that under a purely mathematical cost-benefit analysis, it was foreseeable that the cost of accident avoidance (adding the guide) was less than the discounted magnitude of the harm. Would the court necessarily have to find for the plaintiff?

Under Owen's first formulation of the micro-balance, it would. As long as the injury cost that would be avoided exceeds the cost of

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98. Owen, *supra* note 96, at 1690.
99. *Id.* at 1691.
100. *Id.*
101. Fallon v. Clifford B. Hannay & Sons, Inc., 153 A.D.2d 95 (N.Y. App. Div. 1989).
102. *Id.* at 97.
103. *Id.* at 98.
104. *Id.*
105. *Id.* at 99.
106. *Id.* at 101 (accepting the defendant's proof that "the danger of injury was insubstantial.").

design alternatives, the defectiveness element is established. Under the "softer" second version, however, a court could (as this particular court did) conclude that even without the addition of what was clearly a feasible alternative design, the product was reasonably safe—i.e., safe enough.[107] In an appropriate case, such as *Fallon*, non-defectiveness might be found as a matter of law.[108] In other words, when the "micro-balancing" test is utilized by the courts in these cases, it is, as Owen rightfully argues it should be, a very traditional negligence test under which monetized costs and benefits have a role to play, but the essential question remains whether the defendant behaved reasonably under all of the circumstances that are deemed relevant to the decision of tort cases.[109]

C. More on the Underpinnings of Negligence Law

1. Corrective Justice

Negligence, however, is only coherent and acceptable as the basis for requiring compensation if certain elements are found to exist. First, of course, there can be no obligation to compensate in the absence of wrongdoing or fault. Second, the party to be compensated must have been harmed by the act or omission of the defendant, i.e., causation must be established. Strict liability, which eliminates wrongdoing, and theories such as enterprise liability, which eliminate the need to show a particular defendant's conduct was wrongful and/or eliminate the need to show the causal connection between a particular defendant's act or omission and the harm to the plaintiff, were unacceptable to many precisely because those theories sought to discard essential elements.[110] Moreover, under principles of corrective justice, there is a third requirement; the payment of compensation by the harm-doer is necessary to restore a preexisting equality between that wrongdoer and the victim of the wrongdoing.[111] As Ernest Weinrib

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107. *Id.* at 100 (finding "the facts and reasonable inferences to be drawn from the evidence submitted in support of defendant's motion negated plaintiff's claim that the Hannay Reel without a guide master was not reasonably safe.").

108. *Id.* at 102 (finding "[i]n the absence of such a prima facie showing that defendant's reel was not reasonably safe, plaintiff failed to create an issue of fact precluding summary judgment.").

109. *See infra* notes 242-54 and accompanying text.

110. *See supra* notes 77-86 and accompanying text.

111. Since the payment of compensation for harm only serves to restore the status quo ante, some have argued that preexisting inequalities are perpetuated. From this claim arises the additional claim that corrective justice then becomes a form of distributional justice, rather than a wholly independent basis for normative assertions. *See* Peter Benson, *The Basis of Corrective Justice and Its Relationship to Distributive Justice*, 77 IOWA L. REV.

posited, the relationship between the wrongdoer and victim is, therefore, essential. He explained:

> Aristotle was the first to notice that private law exhibited a rationality internal to the relationship of doer and sufferer, and he demonstrated that this rationality, which he termed corrective justice, was distinct from that governing considerations of distribution and assessments of virtue. At the heart of corrective justice was a special kind of equality that abstracted from the particular characteristics of the interacting parties. Aristotle conceived of the private law wrong as violating this equality, and of the award of damages as restoring it. His was thus the first analysis in our philosophical tradition both of the distinctiveness of the plaintiff-defendant relationship and of the role of adjudication in vindicating the relationship's moral dimension.[112]

Weinrib argued that negligence law, properly understood, applied this corrective justice principle and was dependent on the understanding of the relationship between a wrongdoer and the victim of that wrongdoers misconduct. He wrote:

> Tort litigation, accordingly, effects a transfer of wealth from the defendant to the plaintiff that retraces the moral relationship created by the wrongful injury. The plaintiff cannot recover from just anyone who was negligent, but must sue the particular party who wrongfully inflicted this particular injury. The relational aspect of wrongdoing fuses the defendant's doing and the plaintiff's suffering of wrongful injury into a normatively significant unit. Because this relational aspect is confined to the litigants, the transfer of wealth through the litigational mode of annulment is insulated from the distributional considerations that implicate the relative holdings of a wider range of persons.[113]

Applying the relational aspect of negligence law to perhaps the most famous tort case in American jurisprudence—*Palsgraf v. Long Island Railroad Co.*—Weinrib explained:

> Since the negligence could be defined only in terms of the package's owner, the plaintiff was suing for harm done to her as a result of a wrong to someone else.
>
> Cardozo's majority opinion emphasizes the relational quality of negligence. In construing negligence as the commission of a wrong that signifies the violation of another's right Cardozo makes the wrongfulness of negligence embrace both the actor

515, 529 (1992). A full discussion of the underlying philosophical debate, however, is beyond the scope of this paper.

112. Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 449-50 (1987) (footnote omitted).

113. *Id.* at 434.

> and the sufferer. The wrongfulness of unreasonably imposing on another the possibility of injury is correlative to the right of the other to be free from this imposition, and so the compensation that plaintiff seeks from the defendant is a vindication of her right. The plaintiff's entitlement to compensation from the defendant mirrors her status as the victim of the wrong he has done her. Without such status the plaintiff cannot win.[114]

Importantly, in the foregoing, Weinrib apparently assumes, but does not expand upon, the plaintiff's entitlement to compensation. In other words, if the necessary relationship of wrongdoer and victim exists, can the victim rightfully be denied compensation?[115] Most, though not all, philosophers writing on the subject argue that there is such an entitlement,[116] though no federal court and only a few state courts have so held.[117]

2. *Negligence as Violation of Community Standards*

Negligence, viewed in non-instrumental terms, has long been considered to be a means of redressing private wrongs between individuals. As Patrick Kelley explained:

> The argument that "duty" is a judicial fiat concealing

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114. *Id.* at 441.

115. As Richard Wright has pointed out, one of the hotly debated issues, moreover, is whether corrective justice theory requires that "a corrective justice duty be discharged only by the party who is subject to that duty" (as opposed to some third party or entity). Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 703 (1992). He concludes:

> Such a requirement would seem to apply only when the appropriate mode of rectification is punishment. When the appropriate mode of rectification is compensation for the unjust loss, rather than or in addition to punishment, corrective justice merely establishes the duty of the party who caused the unjust loss to see to it that the required compensation occurs. There is nothing in corrective justice which prevents that duty from being discharged voluntarily, on behalf of the party with the duty, by someone else—e.g. that party's insurer of rich aunt.

Id. (footnotes omitted). Although I argued years ago that the dominant public understanding of tort was, in fact, punitive, that claim is beyond the scope of this paper. *But see* Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231 (1990).

116. *See, e.g.*, Heidi M. Hurd, *Corrective Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 56 (1991) (stating "[f]or more traditional corrective justice theorists [than Coleman], such as Aristotle, Holmes, George Fletcher, Richard Epstein, and Ernest Weinrib, have thought of the principle of corrective justice as demanding not just that innocent victims of culpably-caused losses be compensated, but that such victims be compensated by those who have culpably harmed them.") (footnotes omitted).

See also Wright, *supra* note 115 (noting duties of corrective justice).

117. *See infra* text accompanying notes 144-56.

> underlying policy judgments comes naturally to modern tort theorists, for it embodies the prevailing view that duties are positive legal duties imposed by legislators or judges based on their views of desirable social policy. This modern view, however, ignores an earlier understanding of the appropriate bases for judicial decision—the understanding prevalent at the time the general duty of care pleading first appeared. Under that view, judges were to look to the preexisting customs and mores of the community to resolve disputes. The custom of the realm, they thought, was the common law. From this, one may conclude that the early duty of care pleading was understood as a method of referring in a general way to the specific preexisting customs, conventions, and coordinating practices of the community. Understood in that way, the duty terminology is not an empty formula. If tort liability is imposed to redress a private wrong, defined by reference to the practical coordination norms of the community, it seems only natural to characterize that wrong as [sic] breach of duty owed by defendant to plaintiff. You wrong someone when you fail to give him what is "due him," that is, when you fail to fulfill your duty to him. There is no circularity . . . here, because the courts reason from pre-judicial community-defined obligations, based on the accepted coordination norms of the community, to a conclusion about legally redressing a wrong understood as a breach of that community-defined obligation.[118]

Kelley goes on to explain that community norms or customs may or may not "impose a duty to all the world," since it is entirely possible that the custom as it has developed may only require one to protect another within the context of a specified relationship.[119]

3. Per Se Liability

Of course, while application of community standards of reasonableness by a jury performing its normative law-making function is the paradigmatic illustration of negligence, it has long been accepted that there may be other sources of behavioral standards.[120] Thus, behavioral standards contained in statutes, ordinances and administrative regulations may, in appropriate cases, be utilized in lieu of the ordinary reasonable prudent person standard.[121]

Inasmuch as legislative bodies can, and often do, explicitly create new torts and provide damages remedies if they choose to

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118. Kelley, *supra* note 80, at 355-56.

119. *Id.* at 357.

120. RESTATEMENT (SECOND) OF TORTS § 285 (1965) (naming "legislative enactment or administrative regulation . . . [or] judicial decision" in addition to trial judge or jury).

121. RESTATEMENT (SECOND) OF TORTS § 286 (1965); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 14 (2005).

do so, the relevance of the fact that a defendant has violated a statute, ordinance or regulation which does not, by its terms, provide a damage remedy for someone harmed by the violation has always been less than clear.[122] Obviously, in a negligence case the defendant's compliance or noncompliance with community or industry custom may have a bearing on the reasonableness of the conduct.[123] Although the theoretical relevance of custom in strict liability cases was less clear, courts utilizing various explanations rapidly came to accept its probative value in those cases as well.[124] If there is a statute or regulation, its existence may help to establish the content of the custom, at least arguably on the theory that most members of the relevant community customarily follow the law.[125] Furthermore, in some states compliance or noncompliance with the statutory or regulatory standard of behavior is deemed relevant to the reasonableness of the defendant's conduct,[126] separate and apart from the question of

122. Although, it should be noted that Kelley argues that the statutory liability rules cases (i.e., negligence per se cases) "provide[] a key to understanding the relationship between community standards of conduct and the individual, private wrongs redressible by tort liability." The negligence per se requirement that that statute be enacted to protect a class of persons of which the plaintiff is a member from a specific hazard the statute is enacted to avoid, can also be used "to determine when breach of any conventional rule or practice is a private wrong to [the] plaintiff." Kelley, *supra* note 80, at 363.

123. *See* The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) (famously noting "[t]here are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

124. *See* Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976) (finding custom evidence relevant to consumer expectation under Maryland law); Carter v. Massey-Ferguson, Inc., 716 F.2d 344, 350 (5th Cir. 1983) (Garwood, J., concurring) ("industry custom will usually tend to show the collective judgment of the industry on the subject, and in this respect it has the same character of relevance as a professional society *standard,* though the relevance is more attenuated since factors other than product safety are more likely to influence the custom than the standard.") (predicting Tex. Law); Alevromagiros v. Hechinger Co., 993 F.2d 417, 422 (4th Cir. 1993) (holding that the plaintiff "must establish the violation of industry or government standards, or prove that consumer expectations have risen above such standards.") (Va. Law).

125. *See, e.g.*, Trimarco v. Klein, 436 N.E.2d 502, 506-07 (N.Y. 1982) (although using the statute which did not, by its terms, apply was property excluded as it was apt to be prejudicial and confuse the jury).

126. *See* ARK. CODE ANN. § 16-116-105(a) (West 2009) ("Compliance by a manufacturer or supplier with any federal or state statute or administrative regulation existing at the time a product was manufactured . . . shall be

whether the statute permits an inference as to the content of a custom, and, in those states, violation of a statute or administrative regulation is simply evidence of negligence.[127]

A majority of states, however, follow the view expressed by Roger Traynor that, under at least some circumstances, it is appropriate for the court to adopt the statutory or regulatory standard of behavior and use it in lieu of the reasonableness standard.[128] Justice Traynor explained:

> A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort, in this case the failure to exercise the care of a reasonable man at a boulevard stop. The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them.[129]

If the standard is adopted and proof of violation is offered, courts typically either declare that an *unexcused* violation is

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considered as evidence."); WASH. REV. CODE ANN. § 7.72.050(1) (West 2010) (Evidence of custom in the product seller's industry . . . or that the product was or was not in compliance with new government standards or with new legislative standards or administrative regulations . . . may be considered by the trier of fact.").

127. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 14, Reporters' Note to cmt. c (2009).

128. *See, e.g.*, Bier v. Leanna Lakeside Prop. Ass'n, 711 N.E.2d 773, 783 (Ill. App. 1999) ("The violation does not constitute negligence *per se*, however; therefore the defendant may prevail by showing that he acted reasonably under the circumstances."); Mayor of Balt. v. Hart, 910 A.2d 463, 474 (Md. 2006) ("[T]he Baltimore City Police Department's regulations and guidelines, as well as State statutes, are relevant to the issue of reasonableness."); WASH. REV. CODE ANN. § 5.40.050 (West 2009) (limiting negligence per se to small class of cases).

129. Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943).

negligence[130] or apply a *Thayer* or *Morgan* presumption shifting the burden of excusing the violation to the defendant (or the plaintiff in cases of contributory or comparative negligence per se).[131]

In products cases, the violation of an adopted standard goes to defectiveness rather than reasonableness. Nevertheless, since a majority of courts and Section 2 of the Products Liability Restatement define "defectiveness" in design cases in terms of reasonableness, it comes out in the same place.[132] The Products Liability Restatement section 4(a) asserts that:

> In connection with liability for defective design or inadequate instructions or warnings:
>
> (a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation . . . ;[133]

It is important to note, however, that whether the court is utilizing a common-law reasonableness standard to assess a defendant's behavior or is adopting a statutory standard of behavior (but allowing the violator to offer excuses that make the violation reasonable under the circumstances), the essential nature of the theory of liability is unchanged. Wrongdoing,

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130. Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) (asserting that "[w]e think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself.").

131. Although, in a fairly small class of cases, under general tort principles the judicial adoption of some statutory standards has been found to preclude the possibility of excuse for noncompliance. Thus, for example, the Second Restatement notes:

> There are statutes which prohibit an act or omission under particular circumstances, irrespective of whether the actor knows or could in any possible way learn of the circumstances, or could in any way avoid the act or omission, or may have any other excuse whatever. Thus statutes prohibiting the employment of children below a certain age at or about dangerous machinery usually have been construed to make their employment a crime, and to result in tort liability, even though the employer does not know and could not possibly learn that the child is below the statutory age. The Federal Safety Appliance Act has been construed to require railroads engaged in interstate commerce to provide safety devices, such as automatic couplers, in good working order, for the protection of their employees, and to permit no excuse because of the failure of the device to operate, or all possible diligence and care to provide it. Such statutes in reality result in strict liability, although the courts have continued to speak of liability for negligence. When they are adopted by the court as defining a standard of conduct for a tort action, the standard adopted is one of strict liability, and the statute is still construed to permit no excuse.

RESTATEMENT (SECOND) OF TORTS § 288A, cmt. c (1965).

132. *See supra* text accompanying notes 91-93.

133. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 4(a) (1998).

causation, and relationship between the parties are required as conditions for the imposition of liability under both approaches. In fact, under the most commonly accepted theories of negligence per se, assuming the legislation or regulation is appropriate for judicial adoption, the case is still controlled by community standards of behavior, however, it is the legislature "as the authoritative representative of the community" that initially defines the standard.[134] Moreover, the ultimate normative judgment as to the social acceptability of the conduct (perhaps in light of a proffered excuse) remains vested in the jury.

D. Consideration of the Rights of and Wrongs to Non-Parties: The Return of Instrumentalism

To the extent that courts lose sight of the importance of insisting on the existence of a specific relationship between plaintiff and defendant, the moral justification for shifting the loss from the victim to a wrongdoer is lost and tort law becomes purely instrumental—the view which, as previously noted, had been widely and repeatedly rejected since the mid-1980s. Nevertheless, one can observe courts reaching this result in recent cases under at least two circumstances. First, it can occur if the duty issue in negligence law is viewed purely or primarily as a question of public policy, rather than as a moral prerequisite.[135] For example, elsewhere, I criticized the Texas approach to the problem, which apparently adopts that view.[136] In *Humble Sand & Gravel, Inc. v. Gomez*,[137] the court considered whether a flint supplier owed a duty of due care, specifically a duty to warn users of the dangers of non-use of a respirator.[138] Although the court frankly acknowledged that "[t]here is no question . . . that Gomez would have escaped injury had Humble's bags borne an adequate warning label; he so testified, and the jury believed him."[139] The court insisted, however, there was a more important question:

> [A]s we have already explained, the inquiry for purposes of determining duty must be an objective one with a view of the industry as a whole. A supplier with a duty to warn is liable for each injury caused by its failure to do so. Whether such a duty exists, however, depends in part on whether injury in general is likely to result from the absence of warning.

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134. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c (2010).

135. *Id.* § 7(b) (accepting the idea that duty may be decided as a matter of policy).

136. Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779, 834-36 (2007).

137. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170 (Tex. 2004).

138. *Id.* at 172.

139. *Id.* at 192.

> On the record before us, nothing more can be said than that one supplier's failure to warn one worker increased the likelihood of his injury. A legal duty resulting in enormous liability cannot be imposed on an entire industry on the basis of a fluke.[140]

In other words, rather than attempting to determine the parties' rights as to one another, as demanded by principles of corrective justice and the original non-instrumentalist conception of negligence, the court has reinstituted an instrumentalist approach to tort much like that which was rejected in the 1980s,[141] only now the courts act so as to favor those alleged to be wrongdoers, rather than victims. The instrumentalist approach is, accordingly, brought to bear to achieve a no liability regime based on judicial conceptions of social or economic policy, whereas in earlier days it was used to achieve a strict liability regime. One would think that to those morally or philosophically committed to fault-based liability, the same reasons which served to delegitimate strict liability rules, would now serve to delegitimate no liability rules.[142]

In addition to the "no-duty" cases, the adoption of no-liability rules can be seen in cases where courts elect to defer to administrative regulation and, more importantly for our purposes here, in some of the implied preemption cases.[143]

III. THE UNENFORCEABLE "RIGHT" TO SUE

A. Legislative Power to Abolish Tort

While the pendulum of products liability law was swinging from negligence, to instrumentalist strict liability, to negligence, a number of other legal developments occurred that ultimately led to the situation in which we currently find ourselves. The first dealt with the status of the right to bring suit in tort and legislatures' power to abrogate such a right. In fact, the problem can actually be traced to developments that predated the development of strict liability doctrine, though its modern incarnation seems inevitably linked to the instrumentalism of the 1960s, '70s, and '80s, and the legislative push for tort reform that followed in response.

The basic question was whether the right to compensation in

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140. *Id.* at 192-93 (emphasis in original) (apparently conflating the question of duty and liability).

141. *See supra* text accompanying notes 66-87.

142. The term "legitimacy" as used here simply refers to public normative acceptance of judicial action. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990) (defining legitimacy as "the property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively.").

143. *See infra* text accompanying notes 302-16.

tort for harm caused by another should be recognized as a fundamental right, constitutionally beyond the power of legislatures to abolish. The question initially became one of considerable importance in response to the enactment of workers' compensation legislation during the early decades of the twentieth century. Although some of the early cases found the institution of workers' compensation to be constitutionally impermissible,[144] later decisions permitted it, while continuing to question whether states had the constitutional authority to abrogate the right to sue without providing some alternative. Thus, for example in *New York Central Railroad Co. v. White*,[145] after noting that:

> The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.[146]

The court continued:

> Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place.[147]

The issue seemingly disappeared for a while as a fundamental rights issue as substantive due process, more or less, fell out of favor.[148] It reappeared again in the early 1970s when various states enacted no-fault insurance systems to replace tort litigation.

144. *E.g.*, Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1912).
145. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1917).
146. *Id.* at 197-98.
147. *Id.* at 201.
148. Unless you characterize *Griswold* and its progeny as substantive due process cases.

Relying on the earlier workers' compensation decisions, a number of state courts upheld the legislation, again seeming to insist that there be some quid pro quo for the loss of the right to sue.[149]

The legislatures' power to deprive litigants of a right to sue was then repeatedly tested during the ensuing years as successive waves of medical malpractice and other tort reform swept the nation, but, by that time, things had changed. As instrumentalist views of tort began to dominate, the right to sue was relegated to the status of economic right and, as such, the overwhelming view was that it could be abrogated by the legislature as long as there was a rational relationship between the asserted legislative goal and the means chosen to accomplish it.

As to the need for some quid pro quo, most, though not all, states adopted the view that it either was not required at all or, if it was, broad social benefit would suffice to meet the requirement. Thus, for example, in upholding medical malpractice reform legislation, the California court stated:

> [i]t is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages. Since the demise of the substantive due process analysis of Lochner v. New York it has been clear that the constitutionality of measures affecting such economic rights under the due process clause does not depend on a judicial assessment of the justifications for the legislation or of the wisdom or fairness of the enactment [i.e., the 'adequacy' of the quid pro quo]. So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature.[150]

The court dismissed the quid pro quo requirement simply asserting:

> [E]ven if due process principles required some "quid pro quo" to support the statute, it would be difficult to say that the preservation of a viable medical malpractice insurance

149. *See, e.g.*, Gentile v. Altermatt, 363 A.2d 1, 15 (Conn. 1975) ("Standing alone, the nonexempted plaintiff's alternate remedies may not equate with the foregoing tort remedies. It must be recognized, however, that the law requires a reasonable alternative and not an exact equation of remedies. Thus for each remedy or item of damage existing under the prior fault system, it is not required that that item be duplicated under the act but that the bulk of remedies under the act be of such significance that a court is justified in viewing this legislation on the whole as a substitute, the benefits from which are sufficient to tolerate the removal of the prior cause of action."); *see also* cases cited *infra* note 151.

150. Fein v. Permanente Med. Grp., 695 P.2d 665, 679 (Cal. 1985) (emphasis in the original) (quoting Am. Bank & Trust Co. v. Cmty. Hosp., 683 P.2d 670, 676 (Cal. 1984) (other citations omitted)).

> industry in the state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs.[151]

Although the issue has never been definitively resolved under the federal Constitution, at least it has been noted. In *Fein v. Permanente Medical Group*,[152] in dissenting from the Court's dismissal for lack of a substantial federal question, Justice White explained:

> One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* In that case, the Court upheld the provisions of the Price-Anderson Act, which place a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. One of the objections raised against the liability limitation provisions was that they violated due process by failing to provide those injured by a nuclear accident with an adequate quid pro quo for the common-law right of recovery which the Act displaced. The Court noted: It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here."[153]

While the question of remedy stripping by state legislative action has been hotly debated in state courts interpreting state constitutional provisions, in the lower federal courts, it seems to be widely, if not universally, assumed that the right to sue in tort is not protected by the Due Process Clause,[154] or, for that matter, any

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151. *Id.* at 681 n.18. *See also* Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., 663 N.W.2d 43, 74 (2000) ("[I]f a common-law right is taken away, nothing need be given in return."); *but see* Kluger v. White, 281 So.2d 1 (Fla. 1993) ("Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury."); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) ("As did the Supreme Court of Illinois, we reject any argument that the statute may be supported by alleged benefits to society generally: Defendants argue that there is a societal *quid pro quo* in that loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care const for all recipients of medical care.' This *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision with the rationale of the cases upholding the constitutionality of the Workman's Compensation Act." (quoting Wright v Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976))).

152. Fein v. Permanente Med. Grp., 474 U.S. 892 (1985).

153. *Id.* at 894 (White, J., dissenting) (citations omitted). *See also Bruesewitz*, 131 S. Ct. at 1073 (noting the quid pro quo provided to vaccine manufacturers by the establishment of the National Childhood Vaccine Injury Act).

154. *See, e.g.*, Lucas v. United States, 807 F.2d 414 (5th Cir. 1986).

other federal Constitutional provision.[155]

In any event, a formal constitutional principle that might have been available to tort claimants to protect the right to sue against asserted federal preemption is simply not recognized, although, there remains some vestige of the idea which is apparent in the Court's reluctance to rule in a manner that leaves a injured plaintiff with no remedy at all.[156]

B. Federalism Concerns

Along the same lines, the federalism claims that plaintiffs' might have been able to assert to preserve the right to sue under state common-law principles has also been lost under the characterization of tort as economic regulation. As Betsy Grey observed:

> If tort law is predominantly based on economics, then regulating tort law at the federal level aligns closely with the federal interest in regulating economic activity. The stronger the economic element in tort law, the stronger the argument for a substantial, even dominant role for Congress in the tort system, given its power to regulate national economic interests.
>
> However, the recognition of an irreducible moral or ethical imperative in tort law reaches the heart of the exercise of state sovereign power, giving the states an irreducible role to play as co-equal norm setters in our federal system. Insofar as state tort law serves this normative function, it is closer to the other areas granted special protection, particularly to criminal law. In that case, Congress's power to federalize tort law is subject to greater scrutiny under the recent federalism

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> Any due process challenge must rely on a perceived abrogation of a common law right to recover for tort damages worked by the statute. Regarding a due process challenge to a limit on liability in another context, the United States Supreme Court stated that [o]ur cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, *or the abolition of old ones recognized by the common law*, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Id. at 421-22 (quoting Duke Power Co. v. Carolina Study Grp., Inc., 438 U.S. 59, 88 n.32 (1977)).

155. Although, of course, the cases routinely note federalism concerns. *See e.g.*, *Bruesewitz*, 131 S. Ct. at 1096 n.15 (noting that "[t]his Court . . . has long operated on 'the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citation omitted).

156. *See infra* note 344 and accompanying text.

decisions.[157]

Interestingly, prior to the adoption of an instrumentalist view of tort in the 1960s and 1970s, it was widely held that tort was the province of state law and preemption was correspondingly rare, a trend that continued until *Cipollone* was decided in 1992.[158] While one would think that the rejection of strict liability would be followed by a return to the earlier view, it certainly has not happened yet and there are few indications it will in the foreseeable future.[159] The argument here, that tort is generally understood to be more about personal morality than economic regulation, leads one away from modern preemption jurisprudence, yet the fact that preemption functions so effectively as tort reform makes it attractive to many of the same people who might otherwise object to federal law displacing that of the states.[160]

C. Preemption

1. In General

The final nails in the coffin, so to speak, came in the form of preemption jurisprudence itself. The first step was the characterization of tort damages as a form of state regulation. As noted,[161] in *Cipollone v. Liggett Group, Inc.*,[162] Justice Stevens asserted the regulatory equivalence of tort damages and state legislation and regulation, noting that: "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[163]

In fact, had the court simply said that when legislation

157. Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 534-35 (2002).

158. *See* OWEN, *supra* note 4, § 14.4 (explaining that "most courts through the 1980s and early 1990s followed the *Ferebee* approach in holding neither FIFRA nor other federal safety statutes preempted products liability claims. However, once the Supreme Court in 1992 energized the federal preemption defense in products liability litigation, the lower courts began to rethink the role of preemption under federal statutes such as FIFRA.").

159. The Supreme Court's recent punitive damage decision in Philip Morris USA v. Williams, 549 U.S. 346, 353-54 (2007), held it was a violation of defendant's 14th Amendment due process rights to threaten "punishment for injuring a nonparty victim" contains echoes of corrective justice theory.

160. *See* Abrams, *supra*, note 15 (discussing the societal impacts of tort reform); *see also supra* note 86 and accompanying text (noting that partisan opinions play a role in tort reform).

161. *See supra* text accompanying note 6.

162. *Cipollone*, 505 U.S. 504.

163. *Id.* at 521 (quoting *Garmon*, 359 U.S. at 247). *See also infra* text accompanying notes 339-44 (arguing that *Garmon* represented a distinctive form conflict preemption based on the allocation of decision-making authority, rather than substantive policy objectives).

contains both a preemption provision and a savings clause, the preemption language applies only to state legislation and state regulatory action, while the savings clause leaves state tort actions untouched,[164] that interpretation would not only have harmonized the common statutory language, but very well may have been what Congress intended, if they can be said to have intended anything. Furthermore, it would not have been inconsistent with the federal courts' prior preemption jurisprudence.[165]

In any event, courts have recognized three theoretically distinct forms of federal preemption of state law: (1) express preemption; (2) implied conflict preemption; and (3) implied field preemption. In 1992, the Court declared that if there was an express preemption provision, the determination of congressional intent was governed by the interpretation of that provision.[166] Yet, by 2000, in *Geier v. American Honda Motor Co.*,[167] the Court backed off its earlier pronouncement and indicated that, at least under some circumstances, it would find implied conflict preemption notwithstanding the existence of an express preemption clause.[168] Additionally, as noted, the Supreme Court has unequivocally declared that, as a form of state regulation, state products liability law must fall in the face of congressional intent—express or implied—to preempt.[169]

Finally, there is the possibility of a court finding that the federal legislation was intended to be so comprehensive that it demonstrated an implied intent by Congress to occupy the field, leaving no room for state regulation of any kind—including state

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164. *See supra* note 7.

165. *See Geier*, 529 U.S. at 896 (Stevens, J., dissenting):

> It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. Gustafson v. Alloyd Co., 513 U.S. 561, 570, 115 S. Ct. 1061, 131 L.Ed.2d 1 (1995). The two references to a federal safety standard are necessarily describing an objective administrative rule. 15 U.S.C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability-unlike most legislative or administrative rulemaking-necessarily performs an important remedial role in compensating accident victims.

166. *Cipollone*, 505 U.S. at 517.

167. *Geier*, 529 U.S. 861.

168. *Id.* at 869.

169. *Cipollone*, 505 U.S. at 521.

tort law.[170]

2. Implied Conflict Preemption

Courts have recognized two different types of implied conflict preemption, although in *Geier* the majority asserted the distinction between them was one of terminology rather than substance.[171] The first, "impossibility conflict," is said to exist when a party is subjected to two or more sets of regulation and cannot comply with both. The second is said to exist when the application of conflicting state law would "prevent or frustrate the accomplishment of a federal objective."[172]

a. Impossibility Conflict

To say that it is impossible for a defendant to comply with two sets of regulation has taken on a special meaning in preemption analysis—one that is of fairly recent origin. As long as a strict liability instrumentalist view of tort law predominated, the fact that liability might be imposed for conduct that complied with a regulatory command was not viewed as rendering compliance "impossible." Thus, in *Ferebee v. Chevron Chemical Co.*,[173] the court dismissed the argument noting that "Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs."[174] Only after the fall of instrumentalist strict liability and its replacement with a negligence standard, was a conflict seen, although, as I argued elsewhere, this conclusion should have been based on a perception of unfairness to the defendant, rather than as a matter of congressional intent.[175]

Thus, for example, in *Cipollone,* decided as an express preemption case, Congress had mandated that cigarette packaging and advertising were to bear a specified warning. To have permitted defendants to be held liable based on the inadequacy of this warning, notwithstanding their complete lack of choice regarding the warning's content, would be regarded as simply unfair, falling within the current understanding of

170. *See infra* notes 184-93 and accompanying text (using case law to illustrate the federal government's dominant presence in tort law).

171. *Geier*, 529 U.S. at 873.

172. *Id.*

173. Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984).

174. *Id.* at 1541. *See also* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459-71 (2008) (noting that the Court continues to struggle with the question of whether tort should be viewed as compensatory or regulatory and pointing out inconsistencies in recent preemption decisions).

175. Martin A. Kotler, *Shared Sovereign Immunity as a Alternative to Federal Preemption: An Essay on the Attribution of Responsibility for Harm to Others*, 37 HOFSTRA L. REV. 157, 181 (2008).

"impossibility."[176]

b. Frustration of Federal Objective

On the other hand, the "frustration" of federal policy cases, epitomized by *Geier*, are trickier.[177] In that case, the Department of Transportation (DOT) regulation scheme gave automobile manufacturers a choice of different passive restraint systems to incorporate into the design of their products. As the majority explained:

> [The safety standard (FMVSS 208)] deliberately sought variety—a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems.[178]

When Honda was sued, the plaintiff's theory was that the defendant declined to elect airbags from among the choices and that decision made the vehicle defective by reason of its design.[179] Impossibility conflict did not exist given that the regulation did not prohibit the use of airbags. On the other hand, frustration of federal purpose was plausible, depending on how one defined the underlying federal policy objective. If, as the majority stated, the policy was the granting of design choice to automobile

176. *See also* Wyeth v. Levine, 555 U.S. 555, 567-70 (2009) (declining to find conflict preemption under the FDA largely on the basis that FDA approval of warnings did not strip the defendant of the option of strengthening the warning).

177. Just how tricky the issue has become is exemplified by the Court's recent decision in Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) (finding no preemption on facts virtually identical to those in *Geier*). *See also id.* at 1143 (Thomas, J., concurring) (asserting "[t]he dispositive difference between this case and *Geier*—indeed the only difference—is the majority's 'psychoanalysis' of the regulators.").

178. *Geier*, 529 U.S. at 878-79 (internal citations omitted).

179. *Id.* at 865.

manufacturers,[180] there appears to be a conflict. If, on the other hand, the somewhat larger federal policy objective was to promote safety, there was no conflict between that objective and having state products liability law serve to impose liability if automobile manufacturers unreasonably chose the more dangerous design. As the dissent argued, it is entirely possible that the imposition of tort liability would further the safety purpose of the regulation.[181]

Either expressly relying on the *Geier* majority's analysis or, at least utilizing the same approach, a series of decisions have emerged from both state and federal courts finding implied preemption by rules promulgated by the Occupational Safety and Health Administration (OSHA),[182] and the Consumer Products Safety Commission (CPSC),[183] to name just two that the Supreme Court is yet to confront.

c. Field Preemption Distinguished

As noted, field preemption may be implied "if federal law so thoroughly occupies a legislative field 'as to make reasonable the

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180. *Id.* at 875.

181. *Id.* at 903-04 (Stevens, J., dissenting):

> The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10, 25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort liability might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations.

See also Bruesewitz, 131 S. Ct. at 1097 (Sotomayor, J., dissenting) (arguing that tort liability will serve to "ensure that licensed vaccines keep pace with technological and scientific advances.").

182. Gonzalez v. Ideal Tile Importing Co., Inc., 877 A.2d 1247, 1252-53 (N.J. 2005); Arnoldy v. Forklift L.P., 927 A.2d 257, 264-68 (Pa. Super. Ct. 2007), *overruled by* Kiak v. Crown Equip. Corp., 989 A.2d 385, 394-95 (Pa. Super. Ct. 2010).

183. Moe v. MTD, 73 F.3d 179, 183 (8th Cir. 1996); Cortez v. MTD Prod., Inc., 927 F. Supp. 386, 391 (N.D. Cal. 1996); Ball v. Bic Corp., 2000 WL 33312192, at *2 (D. Mo. 2000); Frazier v. Heckingers, 96 F. Supp. 2d 486, 488 (E.D. Pa. 2000); Frith v. Bic Corp., 863 So.2d 960, 967 (Miss. 2004); Bic Pen Corp. v. Carter, 251 S.W.3d 500, 509 (Tex. 2008); *but see* Colon *ex rel.* Molina v. BIC USA, Inc., 136 F. Supp. 2d 196, 209 (S.D.N.Y. 2000) (noting that allowing plaintiff's state claims is consistent with the purposes of the Consumer Product Safety Act); Cummins v. BIC USA, Inc., 628 F. Supp. 2d 737, 743 (W.D. Ky. 2009) (stating that plaintiff's state law claims will not upset federal regulatory scheme); Hittle v. Scripto-Tokai, 166 F. Supp. 2d 142, 149 (M.D. Pa. 2001) (finding that claims was not preempted by the Consumer Product Safety Act).

inference that Congress left no room for the States to supplement it.'"[184] In cases of regulatory agencies, field preemption may be found even if an agency has not actually exercised the regulatory authority granted by Congress as long as Congress has delegated the power to occupy the field.[185]

Field preemption, though relatively rare in theory, was found in *Napier v. Atlantic Coast Line Railroad Co.*,[186] under the federal Locomotive Boiler Inspection Act. Act of Feb. 17, 1911 (as amended). The case considered the validity of locomotive safety statutes enacted by Georgia and Wisconsin. It was acknowledged that the state laws did not conflict with the federal legislation, but required safety appliances in addition to those either required under federal law or which could have been required under federal law had the Interstate Commerce Commission chosen to regulate.[187] Moreover, it was acknowledged that, absent preemption, the state legislation was enacted as a legitimate exercise of state police power.[188] Nevertheless, as Justice Brandeis explained:

> The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose.[189]

Field preemption under the Boiler Inspection Act (and its successor, the Federal Locomotive Inspection Act)[190] has been

184. *Cipollone*, 505 U.S. at 516 (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

185. Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605, 613 (1926).

186. *Id.*

187. *Id.* at 610-11.

188. *Id.* at 610.

189. *Id.* at 612-13.

190. 49 U.S.C.A. §§ 20701-20903 (2010).

extended to preclude personal injury claims and further extended to encompass tort claims against locomotive manufacturers, even though the statute by its terms applies to locomotive operators.[191]

While many of the field preemption decisions have dealt with this same body of railroad safety legislation, they have been employed to a lesser extent in other types of cases. Thus, for example, in *Campbell v. Hussey*,[192] a federal law dealing with the grading of tobacco was found to preempt a Georgia statute regulating the same subject, notwithstanding the absence of any conflict between state and federal law. Little explanation for finding the requisite intent to occupy the field was provided in that case, a fact which drew a sharply critical dissent from the late Justice Black who objected that "the Court proceeds from the bare fact of congressional legislation to the conclusion of federal preemption by application of a mechanistic formula which operates independently of congressional intent."[193]

Importantly, it should also be noted that, depending on how a court articulates federal policy, conflict preemption and field preemption can be effectively conflated. For example, if a court were to find a federal policy of "uniformity," almost by definition the results of state common-law litigation potentially would conflict with federal policy.[194] Thus, one ends up with de facto field preemption. If, on the other hand, a court is more precise in articulating a substantive policy—e.g., manufacturer choice in the selection of passive restraint systems—then implied conflict is readily distinguishable from field preemption.

There is another important distinction that arises because of the Court's insistence that preemption is rooted in congressional intent. Statutes frequently are written so as to contain both express preemption language and a savings clause. For example, the National Traffic and Motor Vehicle Safety Act (NTMVSA), at issue in *Geier*, provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.[195]

The Act also provided that compliance with federal safety

191. Law v. Gen. Motors Corp., 114 F.3d 908, 910 (9th Cir. 1997); Gen. Motors Corp. v. Kilgore, 853 So.2d 171, 175-76 (Ala. 2002).

192. Campbell v. Hussey, 368 U.S. 297 (1961).

193. *Id.* at 311-12.

194. *See infra* text accompanying notes 313-14.

195. 15 U.S.C. § 1392(d) (repealed 1994) (quoting *Geier*, 529 U.S. at 861).

standards "does not exempt any person from any liability under common law."[196]

In the course of finding implied conflict preemption, the Court observed that the savings clause's mere presence squarely contradicted a claim of congressional intent to occupy the field since, in Justice Breyer's words, a "savings clause assumes that there are some significant number of common-law liability cases to save"[197] and further "reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time."[198] In short, the mere existence of the savings clause seems to irrefutably deny the possibility that Congress intended to occupy the field and force courts to narrowly articulate the federal policy at stake to determine whether common-law litigation would actually conflict.

IV. THE CONSUMER PRODUCT SAFETY COMMISSION REGULATION OF DISPOSABLE LIGHTERS

A. Background

The Consumer Product Safety Act (CPSA)[199] was enacted in 1972. It established and delegated the power to make rules and set consumer product standards to the Consumer Products Safety Commission (CPSC).[200] Like many federal laws, the CPSA contains a preemption provision as well as a savings clause. The preemption provision provides:

> Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.[201]

There is also somewhat of an exception to the foregoing. Subsection (c) provides:

196. 15 U.S.C. § 1397(k) (repealed 1994) (quoting *Geier*, 529 U.S. at 861).
197. *Geier*, 529 U.S. at 868.
198. *Id.* at 871.
199. 15 U.S.C. §§ 2051-83 (1972).
200. 15 U.S.C. § 2053(a) (1972).
201. 15 U.S.C. § 2075(a) (1972).

> Upon application of a State or political subdivision of a State, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (a) of this section (under such conditions as it may impose in the rule) any proposed safety standard or regulation which is described in such application and which is designed to protect against a risk of injury associated with a consumer product subject to a consumer product safety standard under this chapter if the State or political subdivision standard or regulation—
>
> (1) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard under this chapter, and
>
> (2) does not unduly burden interstate commerce.[202]

The savings clause provides, "[c]ompliance with the consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person."[203]

In 1993, the CPSC addressed the perceived need for a mandatory standard governing child-resistant features for disposable lighters.[204] It was asserted that the rule ultimately promulgated by the Commission, was "designed to reduce the risk of death and injury from accidental fires started by children playing with lighters."[205] The agency found that:

> From 1988 to 1990, an estimated 160 deaths per year resulted from such fires. About 150 of these deaths, plus nearly 1,100 injuries and nearly $70 million in property damage, resulted from fires started by children under the age of 5. The annual cost of such fires to the public is estimated at about $385 million (in 1990 dollars).[206]

To address the problem, the agency mandated that manufacturers provide the Commission with a description of the child-resistant design features as a condition for the issuance of a certificate of compliance.[207] The rule further specified the testing protocols for the lighters,[208] using children of specified ages[209] and

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202. 15 U.S.C. § 2075(c) (1972).

203. 15 U.S.C. § 2074(a) (1972).

204. Consumer Prod. Safety Comm'n, Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,557-01 (codified at 16 C.F.R. §§ 1210.1-1210.5, 1210.11-1210.18, 1210.20 (1993)).

205. 16 C.F.R. § 1210.5(a) (1993).

206. *Id.*

207. 16 C.F.R. § 1210.15(b)(1)-(3) (1993) (description of design feature); 16 C.F.R. § 1210.12(b)(1) (1993) (certificate of compliance).

208. 16 C.F.R. § 1210.4 (2003).

209. 16 C.F.R. § 1210.4(a)(4) (1993) (ranging from about forty-two months to fifty-one months).

mock ("surrogate") lighters that contained the safety features to be tested, but which emitted an audible or visual signal, rather than a flame.[210] Importantly, the rule specifically required that, following the testing protocols, at least eighty-five percent of the test subjects be unable to successfully operate the surrogate lighter.[211]

Quite obviously, the cost-benefit analysis performed by the CPSC raises a few questions, not the least of which include the means by which the agency monetized the cost of 150 deaths and 1100 burn injuries in coming up with the figure of $385 million per year (in 1990 dollars).[212] However, as important an issue as this may be, it is less troubling than the eighty-five percent standard. One might well ask why the standard was not set at ninety percent or even one hundred percent. After all, if the lighters were designed so that none of the test subjects could operate them, the entire annual cost generated by less-than-five-year-old children playing with lighters (whatever that number might be) could be eliminated.

While many cost-benefit analyses have been criticized by researchers for their outright failure to address key factors, e.g., not providing quantitative information on net benefits,[213] and/or the overall quality of the analysis,[214] the CPSC rule under

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210. 16 C.F.R. § 1210.2(f) (1993) (definition of surrogate lighter); 16 C.F.R. § 1210.4(c) (1993) (protocol for using surrogate lighters).

211. 16 C.F.R. § 1210.3(a) (1993) ("A lighter subject to this part 1210 shall be resistant to successful operation by at least 85 percent of the child-test panel when tested in the manner prescribed by § 1210.4.4.").

212. *See supra* text accompanying note 206. The number seems a little odd. If the 150 lives were valued at $2 million each, and property damages were estimated at $70 million, that means the balance of the estimate of $15 million covers 1100 burn injuries, which seems awfully low given how physically and psychically devastating burn injuries can be (even in 1990 dollars).

> Assuming full compliance with the rule and no substantial change in the relative market shares of the various available types of lighters, between 80 and 105 deaths per year may be averted by the issuance of the rule. The total annual value of reductions in deaths (valued for statistical comparison purposes at $2 million each), injuries, and property damage is approximately $205-270 million . . . .
>
> [T]he rule may cost consumers approximately $90 million per year. Thus, annual net benefits of $115-180 may accrue.

58 Fed. Reg. 37,557-01, 37,564.

213. *See, e.g.*, Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?* 23-25 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper 04-01, 2004), *available at* http://ssrn.com/abstract=495462 (examining the usefulness of government cost benefit analysis).

214. *Id. See also* Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 12 (1998) (warning of the danger that cost-benefit analysis will be "cynically used by powerful interest groups to undermine the regulatory wall

discussion here specifically addressed the choice of the eighty-five percent standard and specifically chose to reject adoption of a more stringent standard[215] of ninety, ninety-five, or even one hundred percent. To understand the stated reasons for rejecting the more stringent standards, some background information on the cigarette lighter industry, and the events leading up to the promulgation of the eighty-five percent rule, may be helpful.

According to the CPSC, in 1991, "[c]onsumers purchased more than 600 million lighters in the United States."[216] Although there were about fifty importers of lighters doing business in the country,[217] in 1989 three companies commanded a ninety-five percent share of the market for disposable lighters.[218] These were: Bic Corp., Wilkinson Sword (Cricket/Feudor), and Scripto/Tokai.[219] By 1991, however, the market share for the big three had declined to seventy percent because of the increasing competition from importers of cheap lighters from Korea, China, Thailand, and the Philippines.[220] According to the CPSC, "[s]ince the late 1980's, there has been a steady market penetration of very low-priced . . . disposable butane roll and press lighters."[221]

Before 1993, when the mandatory rule was promulgated, there was a "draft voluntary safety standard for the child resistance of lighters developed by the ASTM F15.02 Task Group on Safety Standards for Lighters" which the Commission characterized as "similar in most respects to the final CPSC mandatory rule."[222] Although the draft had not been formally adopted, in 1992 both Cricket and Bic were offering conforming products for sale and the Commission "assumed that the Cricket and Bic products w[ould] meet the CPSC [mandatory] rule as well."[223]

In other words, it would appear that the major players in the industry either had already met the eighty-five percent standard or were confident that they could do so within the one-year period of time specified for compliance.[224] Thus, they were apparently

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that Congress has erected to protect human health and the environment.").

215. 16 C.F.R. § 1210.5(g)(4) (1993).

216. 58 Fed. Reg. 37,557-01, 37,563.

217. *Id.* at 37,564.

218. *Id.*

219. *Id.* Bic was apparently the only seller of disposable lighters that had a production facility in the United States. *Id.* Zippo, described as "the only domestic firm that does not import any of its lighters," was a manufacturer of "luxury lighters" and, therefore, "markets no products known to be subject to the rule." *Id.* at 37,568, 37,573.

220. *Id.* at 37,564.

221. *Id.*

222. *Id.* at 37,572.

223. *Id.*

224. *Id. See also id.* at 37,562 (stating that "[t]he rules shall become effective

supporting the establishment of the mandatory standard, if for no other reason than because its adoption would improve their competitive position. In fact, the Commission report specifically notes that:

> The several largest firms marketing disposable lighters may gain some temporary competitive advantage in the U.S. market. Their firms were involved more heavily in the development of the ASTM draft voluntary standard; they were also generally more aware of the details of CPSC's regulatory proceeding, though either ASTM or the Lighter Association. Some of these major firms expended resources to develop and test child-resistant lighter designs; two companies (Bic and Cricket) began marketing disposable lighters with child-resistant features around the time of the Commission's proposal, and others are expected to have done so by the time this final rule is issued.[225]

The CPSC report duly notes that "[t]he Regulatory Flexibility Act (RFA),[226] requires that rules be reviewed for their potential economic impact on small entities, including small businesses."[227] After consideration, the Commission concluded that the rule "may have significant, short-term economic effects on [30-35] small businesses,"[228] since "[t]he foreign suppliers of some small importers may lack the technical capability to develop complying child-resistant lighters. These importers may leave the U.S. market temporarily, or experience disruption in the supply of complying lighters; either outcome could adversely affect the competitive position of small companies [with a corresponding competitive advantage for larger firms]."[229] Nevertheless, these adverse effects would be ameliorated by "establishing a reasonable acceptance criterion [eighty-five percent] attainable by most small firms; and extending the effective date to give affected firms—especially small importers—more time to develop and obtain

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July 12, 1994. Lighters subject to the standard and manufactured in, or imported into, the United States on or after the effective date must comply. The 12-month period was selected in order to get child-resistant lighters into consumers' hands as quickly as reasonably possible, while allowing sufficient time for manufactures and importers of most lighters to design, produce and import safer products. The 12-month period should also minimize any potential disruption that may occur among small importers of lighters subject to the standard.").

225. *Id.* at 37,565.

226. 5 U.S.C. §§ 601-12 (1908).

227. 58 Fed. Reg. 37,557-01, 37,573 (internal footnote omitted).

228. *Id.*

229. *Id.* at 37,573-74. The report specifically notes that, "[l]arger firms with greater resources to invest in the development of child-resistant lighters may gain some competitive advantage once the rule is effective; two firms already market disposable lighters that are believed to comply with the performance requirements of the rule." *Id.* at 37,575.

complying products."[230] Further concessions to the small companies, i.e., other "potentially burden-reducing alternatives" including "lowering the acceptance criterion for acceptable performance, [and/or] further extending the effective date," the Commission concluded, were not worth the safety trade off.[231]

In short, then, the eighty-five percent standard implemented by the rule was not chosen to maximize safety, but rather because the large players in the industry could already meet it, and its adverse economic impact on the small players was not judged to be excessive. Although at least two of those who commented on the proposed rule urged the adoption of a more stringent standard,[232] the Commission specifically rejected such proposals, apparently on the basis of either information provided by the major players or sheer speculation regarding the consequences.[233] The final rule adopted by the Commission explained that:

> A higher (90 percent) acceptance criterion was also considered. This higher performance level is not commercially or technically feasible for many firms, however; the Commission believes that this more stringent alternative would have substantial adverse effects on manufacturing and competition, and would increase costs disproportionate to benefits. The Commission believes that the requirement that complying lighters not be operable by at least 85 percent of children in prescribed tests strikes a reasonable balance between improved safety for a substantial majority of young children and other potential fire victims and the potential for adverse competitive effects and manufacturing disruption.[234]

As to the claim that technological feasibility could not be shown, it is contradicted in the same report. In response to a comment urging the adoption of a "two motion" feature, the report notes that a "lighter design that does not require a two-direction action exceeded the proposed 85 percent acceptance criterion."[235] Thus, the issue appears to have been one of economic feasibility, particularly for small companies, rather than technical engineering problems.

The claim regarding economic feasibility is also questionable. While the report asserts that instituting an eighty-five percent criterion is likely to result in an "increase in total per-unit manufacturing cost . . . estimated at 1-5 cents for disposables . . . ."[236] No estimates of cost or price per lighter under a stricter

230. *Id.* at 37,575.
231. *Id.*
232. *Id.* at 37,578.
233. *Id.*
234. 16 C.F.R. § 1210.5(g)(4) (1993).
235. 58 Fed. Reg. at 37,557, 37,580.
236. *Id.* at 37,565.

standard were provided.

The report goes on to speculate that if the safety standard were increased above the eighty-five percent criterion to ninety or ninety-five percent ("[n]early-child-proof"), "[l]ighters would probably be so difficult to operate that many adults could not operate them." The imposition of such a standard "could virtually ban disposable lighters."[237] However, since no specific design was mandated by the rule, it is impossible to assess whether or to what extent ease of use would be affected.

The report further speculates that "consumers may find the child-resistant features of some complying lighters unacceptably inconvenient and switch to matches instead,"[238] which are less safe than lighters with some child-resistant features. Again, however, it seems impossible to evaluate the likelihood of such behavior.[239] In fact, it seems equally likely, if not more so, that consumers unhappy with child-resistant lighters would switch to inexpensive reusable "luxury" lighters,[240] which the Commission deliberately chose to leave unregulated, primarily, it would seem, to protect Zippo, the only American lighter manufacturer.[241]

B. The Role of Economic Considerations in the Decision of Negligence Cases

1. Exclusion of Broad Economic Policy

It is generally, though certainly not universally,[242] agreed that it is not proper to weigh broad economic policy considerations as part of a balancing test to determine the basis for tort liability. In fact, macro-economic effects are not considered to be appropriately taken into consideration even when they directly concern the defendant. For example, comment *f* to Section 2 of the Products Liability Restatement specifically observes that: "[I]t is not a factor under Subsection (b) that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry."[243]

Of course, all industrial activities from the production of raw materials through the manufacture and sale of component parts and the marketing of the final product are beneficial to society as a

237. *Id.* at 37,570.

238. *Id.* at 37,564.

239. *Id.* (noting that "the extent of the influence of these factors is uncertain.").

240. *See id.* at 37,564 (describing "luxury lighters" as those generally retailing for above ten dollars).

241. *See supra* note 219.

242. *See, e.g., Gomez*, 146 S.W.3d at 182 (asserting that "[t]he considerations [in deciding whether to impose a common-law duty] include social, economic, and political questions and their application to the facts at hand.").

243. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. f (1998).

whole. As I pointed out elsewhere:

> Leaving aside . . . the difficulty, or even the appropriateness, of attempting to determine whether a particular type of product has "utility" to the consumer or whether some products have greater utility than others, and who should make these decisions, the claim that the social benefits of making products at all should be factored into the analysis is worth looking at briefly. Raw materials need to be mined, grown, or otherwise obtained and processed; people have to be hired to test, design, manufacture, assemble and market component parts and ultimately the finished product. All of these, and a host of other related activities, generate jobs and provide general economic benefits to society as a whole. Moreover, given that we live in an increasingly global society, the export (or import) of products affects the balance of trade and has an impact on worldwide economics and, for that matter, politics.[244]

Nevertheless, for purposes of determining liability, that type of benefit does not count. Thus, for example, in *Cipollone v. Liggett Group, Inc.*,[245] the defendant manufacturer attempted to justify the marketing of cigarettes under a risk-utility test by offering evidence of the high social benefit of engaging in the process of manufacturing and marketing cigarettes, the court excluded such evidence observing:

> [A]lthough the risk/utility analysis mandated by the New Jersey Supreme Court may be far-reaching, its focus remains solely on the usefulness of, and dangers inherent in, the product. For while it is true that the "reasonableness" of the manufacturer will in the end be relevant to a determination of whether the product should have been placed on the market, such "reasonableness" is determined by looking only to the social benefits of a product, as opposed to its production. Notwithstanding defendants' attempts to extract such a meaning by means of selective citation, the New Jersey Supreme Court's decisions have never said that a product's utility may be established by looking to whether the defendant "reasonably" believed that its profits would be sufficient to maintain a livelihood, hire employees, or pay taxes by operating the company that placed a product on the market.[246]

While the foregoing excerpt also serves to illustrate some of the early confusion inherent in the attempts to combine a negligence (reasonableness) approach to a strict liability regime,

244. MARTIN A. KOTLER, PRODUCTS LIABILITY AND BASIC TORT LAW 153 (2005).

245. Cipollone v. Liggett Grp., Inc., 644 F. Supp. 283 (D.N.J. 1986).

246. *Id.* at 288.

the basic point goes to the limits necessarily imposed on balancing in a products liability context. Given that in a negligence case the focus must necessarily be on the defendant's status as wrongdoer and the plaintiff-defendant relationship, i.e., whether the defendant is a wrongdoer as to the victim, consideration of the conduct of non-parties, and consideration of broad economic factors are simply outside of the sphere of civil litigation.[247]

2. Cost to the Defendant

This is not to say, however, that the monetary cost to a party of engaging or declining to engage in an activity is not to be considered. Although some of the early law and economics literature undoubtedly overstated the moral implications of monetary cost,[248] long before the Terry-Hand "Calculus of the Risk" explicitly identified the defendant's cost of accident avoidance as a consideration, it was implicit in the understanding of reasonableness.[249]

The consideration of cost to a party as a factor in determining negligence, coupled with the exclusion of evidence of economic benefit to society as a whole, is entirely consistent with the widely held general understanding of personal responsibility and the relational nature of negligence claims. To permit one individual to harm another based on the actor's individual conception of the social good would represent an expression of fundamental inequality between the doer of harm and the sufferer of harm in that one party unilaterally takes it upon him or herself to decide what is in the public interest at another's expense.[250] In that

247. Regarding excuses to otherwise tortious misconduct based on violation of statute or regulation, *see infra* text accompanying notes 130-34.

248. *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUDIES 103, 134 (1979) (discussing the right to sell oneself into slavery and other cases where the wealth maximization principles "are at odds with common moral intuition."); *see also* Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63, 101-07 (1988) (pointing out some limitations of the economists positions in light of the commonly found suspicion of the profit motive).

249. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 123 (2d ed. 1972) (explaining that "[a]lthough the Hand formula is of relatively recent origin, the method that it capsulizes has been the basic one used to determine negligence ever since negligence was first adopted as the standard to govern accident cases."). *See also* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972) (expanding on the thesis).

250. JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971) (asserting that "each person possesses an inviolability that even the welfare of society as a whole cannot override."); *see also* Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 164-65 (2002) (explaining Kant's categorical imperative, Wright states: "It is morally wrong under the categorical imperative to fail to respect the absolute moral worth of anyone,

sense, it is similar to the privilege to enter another's land or injure their chattels based on public necessity. Though, at one time, one who harmed another based on his or her reasonable perception of the public good was not required to compensate for the trespass to land or injury to chattels.[251] Few if any commentators found merit in the rule,[252] however, and a few recent cases have either squarely rejected it,[253] or applied it narrowly.[254]

If, on the other hand, one is not taking it upon him or herself to decide what is in the public interest, but can point to the expression of a legislative or regulatory body that has, at least arguably, sanctioned the harm-causing conduct at issue, should this serve to evidence the existence of a collective goal (as opposed to an individual determination of what conduct serves the general good) and provide a basis for justifying one's harm-causing conduct?

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including yourself, as a self-legislating rational being, regardless of whether you would allow others to treat you without proper respect. All persons should be treated as ends in themselves (i.e., as free and equal persons seeking to fully realize their humanity), rather than as mere means to be used to benefit others or society as a whole.").

251. *See* RESTATEMENT (SECOND) OR TORTS §§ 191, 262 (1965).

252. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 147 (5th ed. 1984) (arguing that "if the property so appropriated was not a part of the menace and was not itself likely to be harmed to destroyed anyway, the owner should be compensated."). *See also* Derek T. Muller, *"As Much Upon Tradition as Upon Principle": A Critique of the Privilege of Necessity Destruction under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 523 (2006) (concluding that "[a]ttempted policy justifications of the privilege overwhelmingly reject concern for the injured property owner. As a matter of policy, this rejection is fundamentally contrary to the values of the early common law philosophers and the nation's Founders.").

253. *See, e.g.*, Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991) (holding municipality obligated to compensate homeowner and subrogated insurer); Wallace v. City of Atlantic City, 608 A.2d 480, 483 (N.J. Super. Ct. 1992) (holding that damage caused for the public benefit requires compensation by the public); Steele v. City of Houston, 603 S.W.2d 786, 789 (Tex. 1980) (holding that the principle of "fairness and justice" requires compensation for destroyed property).

254. *See, e.g.*, Protectus Alpha Nav. v. N. Pac. Grain Growers, 585 F. Supp. 1062, 1067 (1984), *aff'd* 767 F.2d 1379 (9th Cir. 1985) (finding danger not sufficiently imminent to justify destructive conduct). Barton-Barnes, Inc. v. State, 583 N.Y.S.2d 547, 548 (App. Div. 1992) (finding insufficient reasonable effort to eradicate toxins before resorting to complete destruction of the car); Commonwealth v. Berrigan, 501 A.2d 226, 229 (Pa.), *remanded to* 535 A.2d 91 (Pa. Super. Ct. 1987), *app. denied*, 557 A.2d 341 (Pa.), *cert. denied*, 493 U.S. 883 (1989) (public disaster would not result from type of dangerous activity).

C. The Regulatory/Statutory Compliance Defense

1. In General

In recent years, the weight to be given to proof of the defendant's compliance with a relevant statute of administrative regulation has been hotly debated.[255] A number of state legislatures even enacted laws creating a presumption of non-defectiveness in cases where there had been regulatory compliance,[256] although, since the plaintiff normally has the burden of proving that the product is defective, it is not at all clear what such a presumption adds.[257] In any case, the judicial creation of a regulatory compliance defense for product producers has assumed a few distinct forms. The weakest version of the defense, adopted by the Products Liability Restatement, asserts that evidence of compliance with safety regulations is admissible in design and warning cases to show non-defectiveness.[258] A somewhat stronger version of this defense, or at least one which is more precise, was articulated by Hans Linde, who called for judicial deference to administrative decision making in some cases of alleged design defect—depending on the extent to which the administrative agency had considered the same risk-utility factors that a jury is to base its determination of product defectiveness.[259]

An even stronger version of the regulatory compliance defense was announced by the court in *Grundberg v. Upjohn Co.*,[260] a Utah Supreme Court decision extending to defendants "a broad grant of immunity from strict liability claims based on design defects . . .

255. *See generally* Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J. L. REF. 461 (1997); Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210 (1996); Victor E. Schwartz & Cary Silverman, *supra* note 15 (demonstrating different views of compliance regarding administrative regulations).

256. COLO. REV. STAT. § 13-21-403(1) (2009); KAN. STAT. ANN. § 60-3304(a) (2009); KY. REV. STAT. ANN. § 411.310(2) (West 2006); MICH. COMP. LAWS ANN. § 600.2946(4) (West 2010); TENN. CODE ANN. § 29-28-104 (West 2010); TEX. CIV. PRAC. & REM. CODE ANN. § 82.008(a) (Vernon 2009); UTAH CODE ANN. § 78B-6-703(2) (2008).

257. In other words, how does one "shift" the burden of proof to one who already bears that burden?

258. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 4(b) (noting "a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.").

259. Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1334-35 (Or. 1978). *See also infra* note 277 and accompanying text.

260. Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).

[inherent in] FDA-approved prescription drugs in Utah."[261]

There are problems, however, with adoption of even the weakest version of the statutory compliance defense. Under a negligence approach, the application of the same reasonableness standard—viewed as a community judgment of moral fault—could and should potentially result in different outcomes for different defendants even though they produced identical or comparable products. Although under a weak version of a regulatory compliance defense, such as that adopted by the Third Restatement of Torts, evidence that one has complied with an industry standard is admissible on the question of a defendant's wrongdoing, it is not dispositive.[262]

While negligence law normally imposes some minimum standard of behavior to which all actors are held regardless of whether any one individual is capable of meeting it,[263] those with greater talents, abilities, or resources can be found negligent for their failure to exercise that greater potential.[264] This idea is incorporated in the concept of a "feasible alternative design" as that requirement has been developed into a somewhat specialized rule to be applied in product design cases.[265]

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261. *Id.* at 99.

262. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. d (1998):

> The defendant is . . . allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable. Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe. While such evidence is admissible, it is not necessarily dispositive. If the plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for commercial use, at the time of sale.

263. *See* Vaughn v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837) (rejecting an individual best efforts approach and adopted an objective external standard of behavior).

264. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 299, cmt. f (1965):

> If the actor possesses special competence, he must exercise it, not only in his profession, trade, or occupation, but also whenever a reasonable man in his position would realize that its exercise is necessary to the reasonable safety of others. The superior competence, as the result of aptitude developed by special training and experience, may even give to the actor special ability to perceive the existing facts, or special knowledge of other pertinent matters which, separately or together, may enable him to realize the necessity of using his highly competent technique which a person of lesser competence would not realize.

265. The Restatement (Third) of Torts: Products Liability Section 2 (1998) uses the language of "reasonable alternative design." Interestingly, at the 71st ALI Annual Meeting of 1994, Professor Owen objected to that phrase pointing out that the case law being restated universally referred to "feasible alternative" and unsuccessfully moved to amend. 71 ALI Proc. 187-88 (May 18,

Consider, for example, the case of *Appel v. Standex International Corp.*[266] There, the plaintiff was a nurse who was injured while attempting to make up a hospital bed.[267] The bed, manufactured by the defendant, was on wheels.[268] The plaintiff sought to introduce evidence of an alternative wheel brake design that would have prevented the accident.[269] Finding the case analogous to *Wilson v. Piper Aircraft Corp.*,[270] decided five years earlier, the court rejected the argument, observing:

> In *Wilson,* as in this case, the defendant did not manufacture the allegedly defective component part, but rather incorporated it in the assembly of another product. It is implicit in *Wilson* that in this type of case the plaintiff must adduce evidence that the alternative safer design was commercially available at the time the offending product was manufactured. Use of the alternative design cannot be said to be "practicable" if the defendant is not in the business of manufacturing the component part, and if a part incorporating the allegedly safer design is not available for purchase. As the court said in *Wilson,* a "plaintiff's prima facie case of a defect must show more than the technical possibility of a safer design."[271]

In other words, the issue is not that manufacturers who design all component parts are held to a different standard than those who are buying components off the shelf, they are not. Both are held to a negligence standard. However, their economic capacity to adopt a different design must be taken into account when determining whether each behaved reasonably under all of the circumstances that confronted them, and it is entirely possible that a party with greater capacity to act will be negligent for their failure to utilize that capacity, while the conduct of a defendant with a lesser capacity will not be found wanting.

It is for this reason, perhaps, that it is widely agreed that simple compliance with a statutory or regulatory standard is evidentiary, rather than conclusive. The statute or regulation sets the minimum behavioral standard to which all are held regardless of individual capacity.[272] In common parlance, the statutory or

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1994).

266. Appel v. Standex Int'l Corp., 660 P.2d 686 (Or. App. 1983).

267. *Id.* at 687.

268. *Id.*

269. *Id.*

270. *See Wilson,* 577 P.2d 1322 (involving a claim that a fuel-injected engine (rather than a carbureted one) and a different type of restraint harness should have been utilized, notwithstanding that the FAA had approved the use of carburetors).

271. *Appel,* 660 P.2d at 688.

272. One committed to an individualized assessment of negligence might well argue that it is inappropriate to hold a defendant to a standard which it

regulatory behavioral standard sets a floor, rather than a ceiling. While it is true that some commentators, particularly those whose inclination is to distrust jury decision making, have called for greater weight to be given to compliance, their arguments against allowing laypersons serving as jurors to second-guess the asserted expertise of federal regulators are generally based on institutional competence and/or administrative efficiency, rather than fairness or individual culpability.[273] Moreover, as will be discussed shortly,

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cannot meet. In fact, in most negligence per se cases, this has been recognized in the form of permitting a defendant to offer an excuse that it "is unable after reasonable diligence or care to comply." RESTATEMENT (SECOND) OF TORTS § 288A(2)(c) (1965). Interestingly, the Products Liability Restatement refused to permit such an excuse in product design cases. Comment d to Section 4 explains:

> In contrast to Subsection (a), the parallel common-law rule governing noncompliance with safety statutes or regulations in negligence actions not involving products liability claims recognizes that noncompliance with an applicable safety statute or regulation does not constitute failure to use due care when the defendant establishes a justification or excuse for the violation. For example, if noncompliance with an administrative regulation under conditions of emergency or temporary impossibility would not constitute a violation in a direct enforcement proceeding, noncompliance alone does not prove negligence. In connection with the adequacy of product designs and warnings, however, design and marketing decisions are made before distribution to users and consumers. The product seller therefore has the option of deferring sale until statutory or regulatory compliance is achieved. Consequently, justification or excuse of the sort anticipated in connection with negligence claims generally does not apply in connection with failure to comply with statutes or regulations governing product design or warnings.

RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 4 cmt. d (1998). Thus, in effect, the Products Liability Restatement, which generally seeks to utilize a negligence standard, has chosen in this instance, to utilize a strict liability approach.

273. *See, e.g.*, Ausness, *supra* note 255, at 1255-56 (arguing his proposed compliance defense "will uphold the integrity of agency decision-making on product safety issues and protect it against collateral attack in the courts. Second, it will insulate product manufacturers against wasteful and unnecessary litigation. [Additionally, it will] reduce overhead costs [and] secure significant administrative cost savings . . . ."); Victor E. Schwartz & Cary Silverman, *supra* note 15, at 1231 (arguing that a regulatory compliance defense provides "a powerful incentive for companies to adhere to government safety standards, as well as for properly rewarding behavior that is in the public interest.").

The asserted superiority of agency expertise of jury decision making has also been used in conjunction with a claim of congressional intent. *See e.g.*, *Bruesewitz*, 131 U.S. at 1085 (claiming that "[t]o allow a jury in effect to second-guess those determinations is to substitute less expert for more expert judgment, thereby threatening manufacturers with liability (indeed, strict liability) in instances where any conflict between experts and nonexperts is likely to be particularly severe—instances where Congress intended the contrary.").

in cases where a regulation is based on a cost-benefit analysis that takes broad macro-economic factors into consideration, there are few similarities between the underlying considerations for regulators and those which a jury is asked to consider in assessing a defendant's conduct.[274] Thus, to the extent that those who favor a regulatory compliance defense to avoid having a jury second-guess the regulators, their argument is simply misplaced. In fact, in some of the cases the considerations for the regulators are so different from those of a jury, that it is difficult to see why compliance with the statute or regulation should even be considered relevant.[275]

2. Compliance with the Lighter Regulation as a Defense

Should a lighter distributor's compliance with the eighty-five percent standard constitute a defense, given the background of the CPSC's adoption of the standard? In his deservedly famous dissent in *Wilson v. Piper Aircraft Co.*,[276] Hans Linde explained:

> [O]nce the common-law premise of liability is expressed as a balance of social utility so closely the same as the judgment made in administering safety legislation, it become very problematic to assume that one or a sequence of law courts and juries are to repeat that underlying social judgment de novo as each sees fit. Rather, when the design of a product is subject not only to prescribed performance standards but to government supervised testing and specific approval or disapproval on safety grounds, no further balance whether the product design is "unreasonably dangerous" for its intended or foreseeable use under the conditions for which it is approved needs to be struck by a court or jury unless one of two things can be shown: ether that the standards of safety and utility assigned to the regulatory scheme are less inclusive or demanding than the premises of the law of products liability, or that the regulatory agency did not address the allegedly defective element of the design or in some way fell short or its assigned task.[277]

Using this approach, it seems manifestly improper to find that compliance with the CPSC's eighty-five percent standard should provide a defense—particularly in cases where the defendant is Bic, Cricket, or Scripto-Tokai, the big three of the disposable lighter industry.[278] Assuming that plaintiff's counsel could establish that the named defendant had the technological and practical ability to have manufactured a safer usable

274. *See infra* text accompanying notes 274-80.
275. *See infra* text accompanying notes 284-86.
276. *Wilson*, 577 P.2d at 1334-35 (Linde, J., dissenting).
277. *Id.*
278. *See supra* text accompanying note 218.

disposable lighter (that would have avoided the harm that forms the basis of the suit)—i.e., if the plaintiff can show the existence of a feasible (or reasonable) alternative design as he or she would be required to do under most states' products liability law, the regulation provides no basis for immunizing the defendant. The broad economic considerations upon which the eighty-five percent compromise standard was based dealt with economic protection of non-parties.[279] To allow one of the big three to rely on the standard would, in effect, permit them to defend upon the basis of economic considerations that would not be otherwise admissible at trial.[280]

3. Conflict Preemption and Regulatory Compliance Distinguished

It is important to distinguish the issues involved in application of the regulatory compliance defense from those underlying preemption, though the distinction has become increasingly blurred as courts occasionally conflate the two. For example, in *Mwesigwa v. Dap, Inc.*,[281] a case dealing with the alleged excessive flammability of contact cement, the court framed the preemption issue as follows:

> Under Plaintiffs' theory, a jury could override the cost-benefit analysis done by CPSC and determine for itself whether the product was unreasonably dangerous. The Court finds that banning the sale of flammable contact cement under the guise of a common law tort action is impliedly preempted by the CPSA, and Plaintiffs' common law tort claims for defective design, sales, and distribution are barred by conflict preemption.[282]

It is common to question whether jurors have the expertise to reanalyze cost-benefit factors previously considered by the regulatory agency in cases where it is claimed that statutory or regulatory compliance should serve as a defense. There is a strong argument to be made that such "second-guessing" should not be permitted if the determinations by the two bodies are based on the same factors.[283]

In the case of the CPSC regulation of disposable lighters, it is obvious that very different factors were considered by the agency than possibly could have been considered by a jury. The economic impact on the small players in the lighter industry, though necessarily considered by the CPSC because of the terms of the Regulatory Flexibility Act, would clearly be outside of jury

279. *See supra* text accompanying notes 227-29.

280. *See supra* text accompanying notes 243-47.

281. Mwesigwa v. Dap, Inc., No. 4:08CV605 JCH, 2010 WL 979697, at *5 (E.D. Mo. Mar. 12, 2010) *aff'd* Mwesigwa v. Dap, Inc., 637 F.3d 884 (8th Cir. 2011).

282. *Id.*

283. *See supra* text accompanying notes 273-78.

consideration.[284]

If federal preemption is grounded in congressional intent, it is not a matter of second-guessing the agency's determination. Rather, it involves figuring out the underlying policy and whether its implementation would be frustrated by jury decision making. The fact that juries will inevitably be basing their decisions by consideration of wholly different factors than the agency is of no significance if that allocation of decision-making power will thwart the underlying objective. In fact, under those circumstances, any discussion of institutional competence and the merits of jury decision making misses the mark.

In the conflict preemption cases, a judge's role is not evaluative in the sense that he or she does not get to decide whether it is good policy or bad policy—either will have a preemptive effect in the case of conflict. It is only evaluative in the sense that if jury decision making will either advance the underlying policy goal or, at least, not interfere with it, then it should not be preempted.[285] Consider, for example, *Ball v. Bic Corp.*,[286] a case that involved a lighter which lacked child-resistant features. The lighter was manufactured and sold by the defendant in May 1994, during the one-year period following promulgation of the CPSC rule and its effective date.[287] As previously noted, the one-year delay instituted by the CPSC was intended to reduce the burden on small importers.[288] The delay had nothing to do with this particular defendant's capacity to change the design and, in fact, the *Ball* decision specifically notes that Bic was simultaneously marketing lighters that had incorporated child-resistant features.[289]

In such a case, the argument for a regulatory compliance defense would be extremely weak. Under a preemption defense, frustration of purpose is at least somewhat more plausible, although, it may come down to how broadly or narrowly the policy is articulated. Of course, the recent judicial willingness to find federal preemption in many of these cases has largely mooted the debate over statutory compliance.

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284. *See supra* text accompanying notes 226-27.

285. *See, e.g.*, *Bruesewitz*, 131 S. Ct. at 1091 (Sotomayor, J., dissenting) (arguing that "the fact that Congress has never directed the Food and Drug Administration (FDA) or any other federal agency to review vaccines for optimal vaccine design . . . [makes it seem] highly unlikely that Congress intended to eliminate the traditional mechanism for such review (i.e., design defect liability), particularly given its express retention of state tort law in the Vaccine Act.").

286. *Ball*, 2000 WL 33312192.

287. *Id.* at *1-2.

288. *See supra* note 224-25.

289. *Ball*, 2000 WL 33312192, at *1.

D. Conflict Preemption and Federal Policy

There are at least two separate, though related, issues that courts need to confront in the implied conflict cases. First, as the Court has noted,[290] the presence of the savings clause necessarily leads to the conclusion that Congress contemplated some non-uniformity. But how does one know how much? Secondly, how can a court determine whether the imposition of tort liability will promote the underlying federal policy when there may be multiple policies and there is no way to know how to weigh them?

The first issue has been relatively easy to deal with, although whether courts are imposing their own order or following congressional desires is impossible to know. In the lighter cases, courts have permitted injured plaintiffs to assert legal theories that were not squarely addressed by the regulating agency.

1. Allowance of Non-Covered Tort Litigation

It is clear that not all aspects of lighter design were made the subject of the rule. The eighty-five percent standard dealt solely with the ease or difficulty of use of the product as measured by the ability of children under the age of five to produce a flame. Thus, courts have properly recognized that, other than ease of use, products liability cases dealing with failure-to-warn, manufacturing defect, and design defect claims, could not possibly conflict with whatever the federal policy may have been.

In *Colon ex rel. Molina v. BIC USA, Inc.*,[291] one of the plaintiff's design defect theories was that the colors of the plastic lighters made them excessively attractive to children.[292] After noting that the federal regulations do not address warning label requirements and, therefore, do not preempt claims of inadequate warning,[293] the court turned to the design issue, ultimately concluding that:

> The CPSC regulations establish general, rudimentary and minimal requirements—that the child resistant mechanisms on the lighters "reset . . . automatically", "not impair safe operation . . . when used in a normal and convenient manner", "be reasonably effective for the expected life of the lighter", and "not be easily overridden or deactivated." The regulations do not specify design alternatives or production methods from which manufacturers may choose, nor do they address what colors can and cannot be used in connection

290. *See supra* text accompanying notes 197-98.

291. *Colon*, 136 F. Supp. 2d at 209 n.15.

292. *Id.*

293. *Id.* at 207. *See also Ball*, 2000 WL 33312192, at *3 (holding that although the warning claim was not preempted, plaintiff could not show causation).

with the manufacture and distribution of these lighters.[294]

Along the same lines, in *Cumming v. BIC USA*,[295] the plaintiff contended the lighter was defective because the child-resistant feature could be "easily removed within seconds by use of ordinary household utensils like forks, knives, pens or nearly any other sharp, rigid object."[296] Finding that the ease with which a safety feature could be removed was not dealt with in any detail by the CPSA,[297] the court found liability would not conflict.[298] In *Bic Pen Corp. v. Carter*,[299] the case was permitted to go to a jury on a manufacturing defect theory,[300] even though the Texas Supreme Court found implied conflict preemption defeated the claim of design defect.[301]

2. Conflict Preemption on the "Ease of Use" Design Theory

The second issue—the determination of whether tort litigation advances or hinders the underlying federal policy—depends on how one defines the policy itself. It is here that the indeterminacy problems inherent in implied conflict preemption cause the entire area of the law to fall apart. For example, in both *Carter v. Bic Pen Corp.*[302] and *Frith v. Bic Corp.*,[303] Texas and Mississippi courts agreed that the CPSC rule represented a compromise between safety and ease of use, and concluded in each case that the federal policy of making easy-to-use disposable lighters available to adult users would be frustrated by the imposition of state tort liability.[304] In *Carter,* the court held:

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294. *Id.* at 207-08 (footnote and citations omitted).

295. Cumming v. BIC USA, 628 F. Supp. 2d 737 (W.D. Ky. 2009).

296. *Id.* at 742.

297. *Id.* (citing Safety Standard for Multi-Purpose Lighters, 64 Fed. Reg. 71,854 (Dec. 22, 1999) (to be codified 16 C.F.R. pt. 1) "[t]he Commission is expressing no position at this time on any criterion for when a lighter is easily deactivated. If the staff identifies either a cigarette lighter or a multipurpose lighter model with a child resistant mechanism that it believes can be easily deactivated, the Office of Compliance would consider appropriate action.").

298. *Id.*

299. Bic Pen Corp. v. Carter, 171 S.W.3d 657 (Tex. App. 2005), *rev'd* 251 S.W.3d 500 (2008).

300. 2008 WL 5090757, at *3 (Tex. Ct. App. 2008).

301. *Carter*, 251 S.W.3d at 507.

302. *Id.* at 500.

303. *Frith*, 863 So.2d 960 (Miss. 2004).

304. Additionally, in the course of finding federal preemption as to the defective design claims, the courts in *Ball*, 2000 WL 33312192, at *2 and *Carter*, 251 S.W.3d at 508 relied, at least in part, on a provision of the CPSA that allows states the right to seek exceptions from the CPSC standard. *See supra* note 202. That section, which permits states to seek exemptions from the CPSC rule, however, seems only relevant to state product regulation to be achieved by state statute or state regulation—not common-law litigation. Although the Court has held that tort litigation may be a form of state

> Interpreting federal regulation in this area as a liability floor that may be enhanced by state law . . . undercuts the federal regulations and the Commission's conclusion that the eight-five percent test "strikes a reasonable balance between improved safety for a substantial majority of young children and other potential fire victims and the potential for adverse competitive effects and manufacturing disruption." Because the Commission weighed these competing concerns when drafting its standard, we conclude that imposing a common law rule that would impose liability above the federal standard is contrary to the Commission's plan and conflicts with federal law.[305]

In *Frith* too, the court focused on the Commission's attempt to "reach a balance by sanctioning child-resistant lighters not too difficult for adult operation."[306] According to the court:

> If a state law claim succeeded in imposing stricter child-resistant requirements . . . then the lighter would be sufficiently difficult for an adult to operate, thus causing adults to resort to less safer methods of producing fire, such as matches. The end result would be that the more stringent state standard would stand as an obstacle to the accomplishment of the federal objective of producing for the adult consumer a usable lighter which was yet as child-resistant as feasible. If we were to adopt the Friths' standard . . . we would be adopting a state law which would no doubt undermine and frustrate the federal objective and thus conflict with federal law.[307]

In contrast to the decisions in *Carter* and *Frith*, consider the approach adopted in *Colon ex rel. Molina v. BIC USA, Inc.*[308] There, noting that the eighty-five percent standard represented a compromise between safety and economic considerations, the court concluded that "[v]iewed in this light, it is difficult to construe these regulations as anything but a mandatory minimum standard with which all manufacturers or importers must comply."[309]

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regulation, it is obviously not the only form and the language relied upon by the court seems unlikely to be directed at tort litigation. In fact, how such a procedure could even be instituted with the context of a tort case is anybody's guess. Nevertheless, in *Carter*, noting that under the relevant regulation states had the power to apply to the Commission to "exempt a state regulation if it affords a significantly higher degree of protection and does not unduly burden interstate commerce" and since "[p]laintiff has not shown that the State . . . has made an application for exemption[,]" the court found the "design defect claim . . . [to be] preempted by the CPSC." *Carter*, 251 S.W.3d at 508.

305. *Carter*, 251 S.W.3d at 507.

306. *Frith*, 863 So.2d at 967.

307. *Id.*

308. 136 F. Supp. 2d 196 (S.D.N.Y. 2000).

309. *Id.* at 208.

It should be noted that none of these three preemption cases seriously considered the possibility that the potential imposition of tort liability might serve to advance the safety/ease of use policy of the CPSC. Assume, for example, that after promulgation of the regulation it became technologically feasible to produce a safer lighter without adversely affecting its ease of use. If such a design advance became technologically and practically feasible, imposing liability for not adopting that design would be entirely consistent with at least part of the federal policy.[310] On the other hand, if such a change could not be made—i.e., if, at the time of that the product was distributed there was no reasonable or feasible alternative design, there would be no basis under either Texas law,[311] or Mississippi law,[312] to find that the product was defective

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310. *See Bruesewitz*, 131 S. Ct. at 1097 (Sotomayor, J., dissenting) (arguing that "the majority's position elides a significant difference between state tort law and the federal regulatory scheme. Although the Vaccine Act charges the Secretary of Health and Human Services with the obligation to 'promote the development of childhood vaccines' and 'make or assumer improvements in . . . vaccines, and research on vaccines,' neither the Act nor any other provision of federal law places a legal *duty* on vaccine manufacturers to improve the design of their vaccines to account for scientific and technological advances. Indeed, the FDA does not condition approval of a vaccine on it being the most optimally designed among reasonably available alternatives, nor does it (or any other federal entity) ensure that licensed vaccines keep pace with technological and scientific advances.").

311. Texas Civil Practice and Remedies Code Annotated Section 82.005 (1993) provides:

> (a) In a products liability action in which a claimant alleges a design defect, the burden is on the claimant to prove by a preponderance of the evidence that:
>
> (1) there was a safer alternative design; and
>
> (2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery.
>
> (b) In this section, "safer alternative design" means a product design other than the one actually used that in reasonable probability:
>
> (1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and
>
> (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.

312. MISS. CODE ANN. § 11-1-63 (West. 1993) ("[a] product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge

by reason of its design.

Apparently, then, the policy being articulated in those cases finding conflict preemption, or at least the one relied upon, was one of unchanging uniformity of design standard as a substantive goal in and of itself, although why Congress would desire such a goal is unclear. If uniformity is the goal, virtually any common-law litigation has the potential to interfere. In other words, the manner in which the issue is articulated will necessarily dictate the conclusion that state tort litigation would interfere with that uniformity.[313] In that sense, the preemption chosen by the courts seems to resemble field preemption or, at least, partial field preemption, more than conflict preemption.[314]

Of course, by announcing the existence of a federal policy of uniformity, the courts' decisions serve to establish a no-liability rule in many respects parallel to what was achieved by finding no duty in *Gomez*.[315] In *Gomez*, the court considered the effect of the litigation on non-parties, turning the question of duty into a matter of broad economic policy.[316] *Frith*, *Ball*, and *Carter*, considered a regulation enacted in large part, if not primarily, for the protection of companies not involved in the litigation to effectively immunize the defendant.

The same problem is evident in *Bruesewitz*[317] where the Court held that design-defect claims were preempted by the National Childhood Vaccine Injury Act. Although on its face the case was decided on the basis of statutory construction,[318] the dissent, in effect, accused the majority and concurrence of deciding the case based on considerations not before the court. Thus, Justice Sotomayor asserted:

> Respondent notes that there are some 5,000 petitions

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common to the community.").

313. *Carter*, 251 S.W.3d at 508. The *Carter* court did point out that the Commission "specifically noted that '[a] higher ([ninety] percent) acceptance criterion was also considered,' but rejected because the 'higher performance level [was] not commercially or technically feasible for many firms' and 'would have substantial adverse effects on manufacturing and competition, and would increase costs disproportionate to benefits.'" The court did not mention, however, that these factors, even if substantiated, did not pertain to the defendant. *See also Frith*, 862 So.2d at 963 n.1 (citing 58 Fed. Reg. at 37,578 ("if adults are unable to use child-resistant lighters, they may switch to available non-child resistant lighters.").

314. *See supra* text accompanying note 194.

315. *Gomez*, 146 S.W.3d at 170. *See also supra* notes 137-43 and accompanying text.

316. *See id.* at 197 (responding to the dissenting opinion, Justice Hecht remarked that "[w]here 'no court has gone before' would be to hold a flint supplier liable for failing to give abrasive blasting workers the warnings their own employers should have given.").

317. *Bruesewitz*, 131 S. Ct. at 1068.

318. *Id.* at 1075-78.

> alleging a causal link between certain vaccines and autism spectrum disorders that are currently pending in an omnibus proceeding in the Court of Federal Claims. According to respondent, a ruling that § 22(b)(1) does not pre-empt design defect claims could unleash a "crushing wave" of tort litigation that would bankrupt vaccine manufacturers and deplete vaccine supply. This concern underlies many of the policy arguments in respondent's brief and appears to underlie the majority and concurring opinions in this case.[319]

If Justice Sotomayor is correct, then preemption is little more than tort reform from the bench and congressional intent is a fiction through which the Court imposes its judgment on the resolution of wholly unrelated questions of public policy.

3. Another Approach to Preemption

To this point, there have been two assumptions underlying the discussion. Both have been necessitated by the courts' decisions, but neither is necessarily correct. First, since the Supreme Court's preemption decisions have asserted reliance on congressional intent, it has been assumed that there is no other plausible approach, even though it is obvious to all that congressional intent is a transparent fiction in this context. Second, it has been assumed that legislative bodies, including Congress, have the unrestrained prerogative to alter or abolish tort rights and remedies, subject only to the very weak restraints imposed by substantive due process limitations, i.e., the rational basis test.[320]

However, both of these assumptions have been challenged recently. Accepting the challenges would necessitate reevaluating both federal preemption from an institutional competence approach, and the importance of tort litigation in the face of claims that it can be displaced.

a. Institutional Competence

In a recent article, Mark Seidenfeld proposed approaching federal preemption in a novel way. Rather than clinging to the pretense that preemption is a matter of congressional intent, he argued that an agency's ability to declare its regulations preemptive of state products liability law be inferred from the general fact of congressional delegation of rule-making authority to the agency.[321] If one grants his central premise that a legitimate power to preempt may be exercised on this basis, the question becomes whether the agency should exercise that power. The

319. *Id.* at 1100 n.25 (Sotomayor, J., dissenting).
320. *See supra* text accompanying notes 144-55.
321. Seidenfeld, *supra* note 17, at 612.

answer to this, he argues, is found in the analysis of the relative institutional decision-making competence of regulatory agencies as compared to that of Congress and, more importantly for our purposes, common-law tort "regulation."[322]

Supporting his conclusion that agencies are in the best position to make the preemption decision,[323] Seidenfeld claims that agencies are better than juries at setting efficient care levels; reducing uncertainty (which might discourage the production of useful products, achieving national uniformity of product design, and thus reducing overall cost of production); preventing individual states from imposing unduly strict design standards on other states; increasing transparency and political accountability; and increasing accuracy in assessing costs and benefits based on administrators' better training and jurors' tendency to overstate the costs associated with compensation and understate the cost of accident avoidance.[324]

However, these claims include some that are not provable and others that are simply wrong. For example, the familiar argument that juries overstate compensatory damages is simply not supported by empirical evidence.[325] Moreover, since various types of damages are typically not allowable in tort actions—pure economic loss and pure emotional distress damages, to take two obvious examples—there is a good chance that jury verdicts systemically understate the cost of accidents.

The claim that product producers need certainty and predictability that is unavailable though a case-by-case adjudication process is also questionable. After all, as I have pointed out elsewhere,[326] strict liability is just as certain and predictable as no liability. When confronted with the strict liability experiment of the 1960s, '70s, and '80s, defendants complained about the unfairness of a system that did not allow them to exculpate themselves on an individualized basis.[327] In other words,

322. *Id.* at 615-17.

323. *Id.* at 659.

324. *Id.* at 617-31.

325. *See, e.g.*, VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 23, 175-77 (2000) (arguing that the widespread belief that jurors are sympathetic to plaintiffs in corporate cases is wrong, and that jurors' attitude toward businesses are generally positive). The evidence regarding the award of punitive damages is more controversial. *See* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1198-1200 (2003) (discussing the arbitrary nature of how juries decide damage awards, leading scholars to argue that such awards should be subject to more bureaucratic control).

326. Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 40 U. KAN. L. REV. 65, 106 (2000).

327. *See supra* text accompanying notes 77-87.

the only certainty and predictability desired by many defendants is the certainty and predictability of immunity from liability.

Seidenfeld also argues that agencies can take the benefits of products into account in a way that juries cannot by factoring in harm avoided (to non-parties) due to the lives saved as a result of the availability of certain products. This, he claims, is not a factor taken into account in tort awards.[328] Although this is not strictly true, even more important is the fact that product manufacturers are compensated for the benefits they provide in the form of profits realized on the sale of beneficial products. It is only when the products are excessively dangerous to a class of product users or consumers and harm results that the tort system steps in to reduce the profitability by requiring compensation to those who are unjustifiably harmed.

In any event, my purpose here is not to offer a point-by-point rebuttal of the arguments, or even to review Seidenfeld's own acknowledgment of the weaknesses of a system that vests sole decision-making power in administrative agencies.[329] Rather, I wish to look at the broader question of the value of the tort system when it is permitted to operate. Seidenfeld acknowledges that "tort claims have the advantage of providing compensation for victims of injuries." Although other compensation systems might serve that function, such alternatives to tort law (e.g., the New Zealand system of accident compensation) "do not placate the apparent desire of the public for a requirement that the state make a finding whether the causation of harm by a producer was wrong and, if so, to impose the costs created by that wrong on the producer."[330]

In other words, though courts do not often adequately acknowledge it, tort judgments have a societal importance that goes beyond compensation. And, for that matter, tort is important for reasons that go well beyond whatever economic regulatory function such judgments may perform.

b. Civil Recourse Theory

Traditionally, tort scholars have claimed that the purpose of tort law is to provide compensation to those injured while simultaneously deterring future misconduct.[331] As previously discussed, strict liability theorists added various instrumentalist goals; economists added efficiency; corrective justice theorists

328. Seidenfeld, *supra* note 17, at 620-21.

329. *See id.* at 642-49.

330. *Id.* at 632-33.

331. *See, e.g.*, Keeton, *supra*, note 252, § 4, at 25 (noting that "[t]he prophylactic factor of preventing future harm has been quite important in the field of torts.").

added the restoration of preexisting equality; and so on.[332] More recently, however, in a series of articles, John C. P. Goldberg and Benjamin C. Zipursky have developed a variation of corrective justice theory, which they call "civil recourse" theory.[333] Their view rejects both the traditional "tort law as deterrence" and "tort law as a means of accomplishing various instrumental goals" approaches. Instead, they posit that tort exists to provide those victims (who choose to avail themselves) with "an avenue of civil recourse against those who have wrongfully injured them."[334] In effect, they argue that the state has prohibited victims of tortious misbehavior from taking matters into their own hands and retaliating against the wrongdoer, and thus owes victims an obligation to provide a state-sanctioned mechanism for revenge and/or retaliation. As Jason Solomon explained:

> Goldberg and Zipursky do, in various places, point to reasons for having a system of law that provides civil recourse in place of private vengeance, realizing that even the interpretive task is not complete or persuasive without an animating aim that is not only intelligible, but also normatively justified. Their primary reasons are essentially twofold: (1) that tort law is a necessary component of an overall legal system that seeks to peaceably resolve disputes in order to prevent escalating cycles of vengeance; and (2) that as a matter of political theory, the state cannot take away individuals' rights to avenge wrongs done to them without providing a substitute.[335]

While the idea that tort law is widely perceived to be a system for achieving retribution or even revenge for harm inflicted by wrongdoing is not new,[336] the elevation of the status of the imposition of liability in order to get even and the correlative insistence that the state provide such an avenue of redress brings a new dimension to the problem.

First, as noted earlier, most state courts and all federal courts

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332. *See supra* text accompanying notes 31-37.

333. *See, e.g.*, Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998); John C. P. Goldberg & Benjamin C. Zipursky, Article: *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); Benjamin C. Zipursky, Article: *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003); John C. P. Goldberg, Article: *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) [hereinafter, Goldberg, *Right to Redress*].

334. John C. P. Goldberg, Monsanto Lecture: *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1252 (2008).

335. Jason M. Solomon, Article: *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1781 (2009).

336. *See* Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1233 (1990) (arguing that "punishment of wrongdoers is the dominant social perception of our tort system.").

have denied the existence of a right to sue, claiming that, because tort law provides only an economic right, legislatures, under a substantive due process analysis, can limit or even abolish tort law as long as such legislation can be defended under a rational basis test.[337] Under civil recourse theory, however, the state owes an obligation to the citizenry to provide some mechanism "in the administration of justice, for the redress of private wrongs."[338]

Of course, the redress provided need not have all the trappings of the trial of civil cases before a jury. Nevertheless, a public forum where issues of right and wrong can be determined is essential.

4. Limiting Judicial Choice

Although not acknowledged by the Court's plurality in *Cipollone* when it asserted that common-law tort liability is a form of regulation indistinguishable from state legislation and administrative regulation, the dissent noted that there are actually two different forms of frustration preemption.[339] Some of the cases involve the situation where there is asserted to be a specific substantive federal policy objective. The allowance of manufacturer choice in the selection of passive restraint systems is an example. Other cases, however, do not deal with such substantive policy, but instead deal with a procedural policy objective. In these cases, the Court's focus has been on allocating the decision-making power between Congress and/or agencies, on the one hand, and either state regulatory bodies and/or local communities (speaking through juries or state legislators), on the other hand.[340]

Thus, for example, in *San Diego Building Trades Council v. Garmon*,[341] the conflict preemption case relied upon in finding that state tort law was a form of regulation in *Cipollone*,[342] the conflict articulated by the Court was decision making by the National Labor Relations Board and state common-law adjudication in cases where the commission of an unfair labor practice had been alleged.[343] There is an important distinction to be made between

337. *See supra* note 154 (discussing due process challenges).

338. Goldberg, *Right to Redress*, *supra* note 333, at 622 (quoting Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885)).

339. *See supra* note 7 (noting the history of the distinction).

340. Here too, the decision is, in theory, a matter of congressional intent, although it was recently proposed that agencies should be able to claim such authority to preempt under a broad grant of rule-making authority from Congress. *See* Seidenfeld, *supra* note 17, at 611-12.

341. *Garmon*, 359 U.S. at 236.

342. *Cipollone*, 505 U.S. at 521.

343. *Garmon*, 359 U.S. at 246. The Court specifically noted, "[s]ince the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since

the types of conflicts presented in the two cases. In decision-allocation cases, such as *Garmon*, even though a state common-law damage remedy is denied to the plaintiff, he, she, or it, still has a recourse to some remedy, albeit not necessarily the one desired. In the substantive policy conflict cases, the finding of preemption may well leave the plaintiff with no remedy at all. Although, as Catherine Sharkey has noted, an analysis of the federal conflict preemption cases seems to indicate significant reluctance by the Court to find preemption when the result is to deprive the injured plaintiff of any remedy whatsoever,[344] the issue is obscured by the Court's insistence that it is a matter of congressional intent. Thus, for example, in *Bruesewitz v. Wyeth LLC*[345] the Court stated that: "[W]e previously have expressed doubt that Congress would quietly preempt product-liability claims without providing a federal substitute . . . [though] we have never suggested we would be skeptical of preemption unless the congressional substitute operated like the tort system."[346]

If courts were to limit the operation of conflict preemption to those cases where there is either "impossibility," as it has been

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such activity is arguably within the compass of § 7 or § 8 of the [National Labor Relations] Act, the State's jurisdiction is displaced." Moreover, the *Garmon* Court continued by stating:

> Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

Id. (citing Garner v. Teamsters, 346 U.S. 485, 492-97 (1953)).

344. *See* Sharkey, *supra* note 174, at 480 n.146 ("The Court has repeatedly noted that only in the clearest of cases should a court find that Congress intended wholly to remove any and all remedies for injured citizens, let alone accept an agency's view that such was the intent of Congress. *See e.g.*, Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.") (other cross references omitted). *See also id.* at 480 (terming the elimination of common-law tort actions as the creation of "a remedial or enforcement 'void.'").

345. *Bruesewitz*, 131 S. Ct at 1080.

346. *Id.* at 1080. *But see* text accompanying notes 149-55 (regarding legislative power to abolish the right to sue in tort without providing an alternative remedy).

defined by the Court,[347] or frustration of federal policy in a decision-making allocation sense so that there remains some recourse for the injured victim, it would ensure some level of fairness to the tort reform being mandated by the judiciary. In cases where an alternative to common-law litigation is not available, care must be taken to ensure that common-law tort is left in place. It may be true, of course, that common-law lawsuits may frustrate policy from time to time,[348] yet, if it were to become pervasive, there may be room for congressional correction. Arguably, that is what the Supreme Court is doing anyway, just not being above-board about it.

V. CONCLUSION: JUDICIAL POLICYMAKING IN THE FACE OF INDETERMINACY

If I am correct and, in the final analysis, the indeterminacy problems are so overwhelming as to make it impossible to determine which of the cases are right and which are wrong so that one cannot identify and articulate substantive public policy when Congress fails or refuses to say what it means, where does that leave us?

Even though the traditional distinction between judge and policymaker has become seriously blurred,[349] and the current political climate seems to favor tort reform, even from the bench, there remain limits on the role of the judiciary.[350] To cross the line—even for elected judges—is to risk a loss of institutional legitimacy.

The concept of "legitimacy," of course, though frequently

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347. *See supra* notes 173-76 and accompanying text.

348. The Court has always acknowledged that Congress may freely opt for inconsistent policies. *See e.g.*, *Wyeth*, 555 U.S. at 564 ("As Justice O'Connor explained in her opinion for a unanimous Court: 'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67 (1989))).

349. Republican Party of Minn. v. White, 536 U.S. 765 (2002) (upholding the right of judges to state political positions during judicial elections). *See also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(b) (2010) ("In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.").

350. At the very least, judges are critical of other judges when they make policy-based arguments with which they disagree. *See e.g.*, *Bruesewitz*, 131 U.S. at 1101 n.24 (Sotomayor, J., dissenting) ("Justice Breyer's separate concurrence is even more explicitly policy driven, reflecting his own preference for the 'more expert judgment' of federal agencies over the 'less expert' judgment of juries.").

raised in the context of unelected public officials accused of thwarting the will of the majority, is not limited to the process by which the official comes to power and the public willingness to accept and be bound by such decisions because of its acceptance of the selection process.[351] Legitimacy also deals with the public willingness to accept as authoritative judicial pronouncements because the pronouncements themselves are not so far out of the cultural mainstream that they command the respect of those who disagree with them.[352]

To the extent that judicial decisions appear arbitrary or, as is more often the case, overtly partisan, ideologically driven or, at least subject to that interpretation, they risk undermining the popular respect necessary to legitimate them.[353] This form of illegitimacy in judicial policymaking is commonly condemned as being one variant of "judicial activism." Of course, the condemnation of "judicial activism" has become a common feature in our current political discourse and many commentators have asserted that it is an essentially meaningless term which is indiscriminately applied to any judicial decision with which the user disagrees. Nevertheless, a number of commentators have argued that there are, in fact, limitations on judicial decision making which, if ignored or exceeded, fairly open a court to the "activist" charge. There are really two forms of activism: (1) "Institutional Activism," the failure to give suitable respect and deference to other institutions of government;[354] and (2) what can be termed "Partisan" or "Ideological Activism," deciding cases in accordance with political party lines or based on the judge's personal ideological preference.[355]

The first form of activism is present in the preemption cases if

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351. Regarding electoral sanction as the basis of legitimacy, *see* Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 75-79 (2000).

352. *Id.* at 88-89.

353. *See Williamson*, 131 S. Ct. 1131 ("Purposes-and-objectives pre-emption—which by design roams beyond statutory or regulatory text—is thus wholly illegitimate. It instructs courts to pre-empt state laws based on judges' 'conceptions of a policy which Congress has not expressed and which is not plainly to be inferred by the legislation which it has enacted.'"); *Id.* at 1142 (Thomas, J., concurring) (citations omitted).

354. *See* William P. Marshall, *Conservative and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1220 (2002) (referring to "Counter-Majoritarian Activism" defined as "the reluctance of the courts to defer to the decisions of the democratically elected branches."). *See also* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144 (2002) (identifying a similar category).

355. Marshall, *supra* note 354, at 1246 (distinguishing "partisan" and "ideological" activism), *and* Young, *supra* note 354, at 1144 (identifying the use "partisan" preferences as "activism").

one views those decisions that refuse to find preemption a failure to respect the authority of the agency, assuming the agency has been appropriately vested with authority. If, on the other hand, one feels that preemption should not be found, then it is the agencies which are refusing to respect the authority of the state judiciary, or more accurately, the jury as representative of the community.[356] Certainly, however, in the absence of a more convincing account of how courts are to make the necessary determinations regarding the identification of federal policy in a principled fashion, the charge or partisanship or political ideology is salient. Partisan or ideological activism is inappropriate because of its utter incompatibility with the ideal of judicial impartiality. Institutional activism, on the other hand, reflects an inflated view of the importance of either the institution of the judiciary and a corresponding deprecation of either the role or views of other institutions,[357] most notably that of the jury and its active normative role in the assignment of responsibility for harm.

356. *See* Seidenfeld, *supra* note 17, at 649 (discussing agencies' "willingness to shortchange state interests").

357. *See* Young, *supra* note 354, at 1145 (asserting that activist behavior "involve[s] a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its own independent judgment about the correct legal outcome. Each sort of behavior, then tends to increase the significance of the court's own institutional role vis-à-vis the political branches, the Framers and Ratifiers of the Constitution, or other courts deciding cases in the past or in the future." (footnotes omitted)).