A National Product Liability Statute of Repose - Let's Not

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STEPHEN J. WERBER*

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I. INTRODUCTION

Despite the failure of the 104th Congress to override President Clinton’s veto and enact the Common Sense Product Liability Legal Reform Act,¹ there is little doubt that such an Act will be passed by the 105th Congress.² Uniform national laws concerning product liability are necessary, can be

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2. A Bill containing essentially the same provisions as H.R. 956 has been introduced into the Senate this term. See S. 5, 105th Cong. (1997).
enacted consistent with Congressional authority, and should be enacted at the earliest possible time.

A balanced Act, recognizing the need to protect injured consumers while providing necessary protection to product manufacturers and distributors, can be drafted. Such an Act could include provisions that abolish the consumer expectancy test for design defect litigation, reject the product line exception to successor corporate liability, limit industry-wide liability concepts, impose a substance abuse defense, abolish joint and several liability in a comparative responsibility allocation system, and others which would restore balance to the field. A national product liability act should not contain a statute of repose.

This article will address various aspects of a potential statute of repose on the assumptions that (1) its enactment is likely, (2) it will be substantially similar to the provisions of House Bill 956 as approved by the Congress in March 1996, and (3) it will have preemptive effect. For purposes of this article the language of House Bill 956, Section 106, as enrolled, will be utilized.3

There is no compelling need for a national statute of repose.4 The number of potential claims affected is too small to justify the draconian effect of a repose statute.5 This is all the more true in light of the Act’s exclusion of a substantial body of potential claims, including: all toxic tort claims which would be governed by the two year statute of limitations and

3. H.R. 956, 104th Cong. § 106(b) (1996) provides:
   (b) Statute of Repose.—
   (1) In general.—Subject to paragraphs (2) and (3), no product liability action that is subject to this Act concerning a product, that is a durable good, alleged to have caused harm (other than toxic harm) may be filed after the 15-year period beginning at the time of delivery of the product to the first purchaser or lessee.
   (2) State law.—Notwithstanding paragraph (1), if pursuant to an applicable State law, an action described in such paragraph is required to be filed during a period that is shorter than the 15-year period specified in such paragraph, the State law shall apply with respect to such period.
   (3) Exceptions.—
   (A) A motor vehicle, vessel, aircraft, or train, that is used primarily to transport passengers for hire, shall not be subject to this subsection.
   (B) Paragraph (1) does not bar a product liability action against a defendant who made an express warranty in writing as to the safety or life expectancy of the specific product involved which was longer than 15 years, but it will apply at the expiration of that warranty.
   (C) Paragraph (1) does not affect the limitations period established by the General Aviation Revitalization Act of 1994 (49 U.S.C. § 40101 note).


5. Id. at 1032.
discovery rule of Section 106(a); motor vehicles, vessels, aircraft, and trains used primarily to transport passengers for hire; all non-durable goods; and aircraft governed by the General Aviation Revitalization Act. The lack of need bears directly upon the questionable constitutionality of such a statute. Courts continue to grapple with constitutional issues when determining whether to uphold and apply a repose statute so as to preclude a cause of action before injury occurs or where knowledge of the relationship between injury and product did not exist within the statutory period.

II. RECENT DECISIONS

One of the most comprehensive recent decisions is Cummings v. X-Ray Associates of New Mexico. This state court decision applied federal constitutional law to uphold a rigid three-year medical malpractice statute of repose against claims that it violated equal protection and due process mandates. The court’s due process reasoning could apply with equal force to a product liability statute. The distinctions between repose statutes and statutes of limitations was recognized in fairly traditional terms:

A statute of limitations establishes the time, after a cause of action arises, within which a claim must be filed. A statute of limitations begins to run when the cause of action accrues, the accrual date usually being the date of discovery. On the other hand, a statute of repose terminates the right to any action after a specific time has elapsed, even though no injury has yet manifested itself.

Plaintiff asserted that her due process rights were violated because the statute denied her fundamental right of access to the courts. By rejecting

6. H.R. 956, 104th Cong. § 106(b)(1). This will most likely include harm caused by various chemical or mineral products, such as asbestos or polyvinyl chloride, and a substantial number of pharmaceuticals which can cause delayed onset toxic harm.
7. Id. § 106(b)(3)(A).
8. Id. § 106(b)(1). The repose provision applies only to durable goods as ambiguously defined in Section 101(7).
11. Id. at 1331.
12. As the nature of the classifications involved in this case are distinct from those made in product liability cases, that portion of the decision, utilizing a rational basis standard, has only limited application to a product liability repose statute.
13. Id. at 1334.
14. Id. at 1331.
the claim that a fundamental right was involved, the court was able to apply a rational basis standard instead of strict scrutiny.\textsuperscript{15} Despite its recognition that statutes of limitations differ from statutes of repose, the court utilized standard limitation period arguments to reject the due process claim. It ruled that regardless of reason, limitation periods always preclude persons from bringing claims and that this does not implicate due process.\textsuperscript{16} Moreover, the statute does not address an accrued or vested right that has been taken away. Rather, the claim is an attempt to gain something not yet possessed—compensation for injury. Posed differently, there is no cause of action because, under such a statute, it never comes into existence. Hence, there can be no due process violation.\textsuperscript{17}

The court’s reasoning in \textit{Cummings} ignores the meaningful differences it recognized between a limitation period and a repose period. In a limitations situation the injured party knows, or has the capacity to know, that a claim exists. This is not true of a repose statute. The rationale of no cause of action accruing is usually applicable to the commencement period for statutory wrongful death actions rather than common law personal injury actions. That form of reasoning is better left to statutory claims.

The Sixth Circuit recently faced statute of repose issues pursuant to Tennessee law and to Ohio law. In both cases the court adhered to the decisions of the state court without engaging in its own analysis. As the federal court is not bound by the state interpretation of federal constitutional law, this deference was unnecessary. One result of this overly restrictive approach is the continuation of a conflict between the states.

In \textit{Hayes v. General Motors Corp.},\textsuperscript{18} the court ruled that no violation of the Tennessee Constitution existed in the application of that state’s product liability repose statute and further found no reason to revisit any federal questions.\textsuperscript{19} An opposite result was reached in \textit{Schaffer v. A.O. Smith Harvesterstore Products, Inc.}\textsuperscript{20} In \textit{Schaffer}, the decedents drowned in

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\item \textsuperscript{15} \textit{Id.} The court distinguished between the right of access in civil and criminal settings. \textit{Id.} at 1331-32.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.} at 1331.
\item \textsuperscript{18} No. 95-5713, 1996 WL 452916 (6th Cir. Aug. 8, 1996).
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} 74 F.3d 722 (6th Cir. 1996). The Eleventh Circuit has also been faced with application of a state product liability repose statute previously deemed unconstitutional by a state supreme court and confusion engendered by that state’s law. The Eleventh Circuit certified questions to the Florida Supreme Court. Mosher v. Speedstar Div. of AMCA Int’l, Inc., 52 F.3d 913 (11th Cir. 1995). The answers came in \textit{Mosher v. Speedstar Division of AMCA International, Inc.}, 675 So. 2d 918 (Fla. 1996), in which the state supreme court clarified its rule as to a “reliance exception” to protect those who relied on \textit{Battilla v. Allis Chalmers Manufacturing Co.}, 392 So. 2d 874 (Fla. 1980) (holding the Florida product liability repose statute invalid as a violation of the state’s right of access provision), and did not file their claims until after the repose statute had run. \textit{Mosher}, 675 So. 2d at 920-21.
\end{itemize}
a manure pit which was part of an integrated manure handling system.\textsuperscript{21} After determining that the pit was within the definition of an improvement to real property, the court had to determine whether the applicable statute of repose was constitutional.\textsuperscript{22} The court avoided an analysis of the federal constitutional question. The district court finding was reversed only because the Ohio Supreme Court found the repose statute to be in violation of the Ohio Constitution’s right to remedy provision.\textsuperscript{23}

III. GENERAL CONSTITUTIONAL CONCERNS

Whether a preemptive national repose statute can withstand constitutional scrutiny remains an open question. To answer the question requires consideration of three distinct lines of argument: equal protection, due process,\textsuperscript{24} and right to remedy or access to the courts (otherwise known as an “open courts” right). The open courts right, if it exists under federal constitutional law, exists as an independent right.\textsuperscript{25}

There is no doubt as to the weight to be given a federal statute. Pursuant to the Supremacy Clause,\textsuperscript{26} a national Product Liability Act enacted within the scope of the Commerce Clause\textsuperscript{27} will govern all actions

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\item The issue required clarification as the court receded from Battilla and upheld the statute in question. \textit{Id.} at 920. The Florida Legislature repealed the statute in 1986. \textit{Id.}
\item \textit{Schaffer}, 74 F.3d at 725.
\item \textit{Id.} at 728.
\item Despite the significant use of due process reasoning in medical malpractice repose cases, see, e.g., Garcia v. La Farge, 893 P.2d 428, 435-38 (N.M. 1995); Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709, 715-17 (Ohio 1987), nothing has changed the fact that the Supreme Court has not used due process to invalidate social or economic regulatory laws since 1937. D. Don Welch, \textit{Legitimate Government Purposes and State Enforcement of Morality}, 1993 U. ILL. L. REV. 67, 72 (1993). The primary vehicle for constitutional analysis of product liability statutes of repose has been equal protection. In light of this fact and because the likelihood of a successful equal protection claim outweighs that of a due process argument, extensive discussion of due process will not be provided.
\item Cummings correctly states that access to the courts “is not a due-process question applicable to one who, as with all others similarly situated, has no recognized cause of action by reason of a valid statute of repose.” Cummings, 918 P.2d at 1331. Though the reasoning may be doubtful, the conclusion is proper—due process and open courts are distinct concepts.
\item U.S. CONST. art. VI, cl. 2. For a discussion of specific preemption concerns, see \textit{infra} notes 79-110 and accompanying text.
\item U.S. CONST. art. I, § 8, cl. 3. The obvious connection between products and interstate commerce, supported in both testimony before the Congress and in H.R. 956’s statement of purpose and findings, see Werber, \textit{supra} note 4, at 1001-02, negates any concern that Congress has overstepped the bounds of the Commerce Clause as found in \textit{United States v. Lopez}, 115 S. Ct. 1624 (1995).
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within its purview. Its validity will be governed by federal constitutional law in lieu of any state constitutional provisions. Ultimately, federal rather than state courts will determine the proper bounds of constitutional analysis.

The initial question regarding federal constitutional review will be the applicable standard. A repose statute will most likely be reviewed under the liberal and usually ineffectual rational basis test. The requisite suspect class or fundamental right necessary to activate strict scrutiny is not present. The absence of both gender and illegitimacy concerns makes it unlikely that an intermediate standard of review will be applied. With rare exception, federal and state courts have applied rational basis to ascertain the validity of statutes of repose.

This test calls only for a determination that the legislation have a rational relationship to a legitimate governmental purpose. Rational basis analysis, an approach and principle designed to provide substantial deference to the legislative body, provides a standard which generally yields a conclusion validating the legislation under consideration. This is equally true of equal protection and due process clause applications. For example, when the Colorado repose statute was upheld in Eaton v. Jarvis Products Corp., the court found no invidious discrimination and based its decision on the absence of a fundamental right. Such a statute must be upheld if any set of facts can reasonably justify it regardless of the existence of some statutory discrimination. The classification protected some manufacturers against open-ended liability for equipment that would typically reveal defects before the statutory period ran. The court refused to recognize the elimination of a tort action prior to its accrual as anything


like a fundamental right and provided no real basis to support its contention that most defects would be revealed prior to the end of the statutory period. Under rational basis there was no mandate for the court to truly explore the factual predicates. As this standard of review also precludes the court from second guessing the wisdom or logic of a given legislative action, the actual scrutiny is so limited as to be almost farcical.

Despite occasional forays into a true determination of whether a statute advances a legitimate government interest, the courts generally fail to provide a true “in fact” approach to rational basis decision-making. To be a meaningful test, rational basis must demand that there be a true relationship between the classification and the governmental interest which promotes that interest. This approach is consistent with the principles of law enunciated by the United States Supreme Court.

Though not utilizing “in fact” language, the plurality opinion in Adarand Constructors v. Pena recognized that evaluation of rational basis assertions was a judicial function. A more explicit fact-based analysis was utilized to find an absence of an interstate commerce connection in United States v. Lopez. Based upon its independent evaluation of the facts, the

34. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (a combination of six Justices, two in concurring opinions, applied rational basis to invalidate a state employment practice that denied a party the right to a hearing); United States Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1933) (rejecting a classification made by the Food Stamp Act as unrelated to the purposes of the Act).
35. See generally, Logan, 455 U.S. at 439 (stating that “the classificatory scheme must ‘rationally advance[] a reasonable and identifiable governmental objective’” (citations omitted)). Recognition that rational basis analysis is not toothless was also recognized in decisions such as Matthews v. Lucas, 427 U.S. 495, 510 (1975) (upholding a Social Security Act provision regarding surviving child benefits), but recognizing Jimenez v. Weinberger, 417 U.S. 628 (1974) (which did not use the term “toothless,” but which voided a provision of the Social Security Act regulating disability insurance for illegitimate children). In Jimenez, the need for a true relationship between the law and its basis was emphasized in the Court’s reasoning that:

We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimates in appellant’s subclass, as defined under the federal statute, has not been legally established. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellant’s subclass of illegitimates is reasonably related to the prevention of spurious claims.

Id. at 636.
37. Id. at 2112-13.
Court concluded that the firearms provision under consideration had no rational basis and connection to interstate commerce regardless of what Congress asserted. Justice Kennedy, in an important concurring opinion, provides a realistic analysis of the duties imposed upon the political branches of government:

"[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . Some Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure."

When Congress fails to heed this obligation, the Court must step in to assure that Congress has acted in a constitutional manner. Any less assertive approach would allow Congress to become not only the enactor of statutes, but also the arbiter of their validity. This abdication of judicial prerogative must not be tolerated. Absent true judicial review, rational basis analysis "virtually immunizes social and economic legislative classifications from judicial review." Appropriately rational basis analysis, however unlikely, should void a product liability repose statute.

The majority of reasons proffered by Congress for enactment of product liability reform apply with equal force to other elements of the civil justice system. Product liability concerns are no different from other tort concerns in regard to abuse of the civil justice system, a litigious nation, arbitrary damage awards and liability allocations, inconsistent laws among the several states, state inability to solve these problems, the need to remove barriers to interstate commerce, and the need to restore fairness to the system. The remaining reasons arguably justify the unique treatment given to product liability litigation. These reasons are: (1) withdrawal of products from the marketplace; (2) an adverse impact upon industry and small business; (3)

39. Id. at 1629 n.2.
40. Id. at 1639 (Kennedy, J., concurring)
42. These are seven of the eleven reasons specified in H.R. 956, 104th Cong. § 2(a)-(b) (1996) (Findings and Purposes section).
43. It does not appear that a significant number of products have been withdrawn. The American consumer has not suffered a significant loss of products although there has been a reduction of manufacturers in areas such as pharmaceuticals and sports equipment. In 1983 the Physicians Desk Reference, at 204 and 211, listed eight manufacturers of injectable anesthetics and four manufacturers of Biological Live Vaccines. These numbers were reduced to six and three respectively in the 1996 Physicians Desk Reference at 204 and 208. The reduction of companies engaged in the manufacture of sports helmets is more...
loss of a competitive position in the international market; and (4) increased insurance costs. The justification is valid only if there is a factual connection between the assertions and reality. Moreover, the relationship of a statute of repose to any of these reasons is distinctly remote in comparison to other provisions of national legislation.

A common law right to recover for harm caused by defective products did not evolve as the brainchild of Justice Traynor in 1944 or the American Law Institute in the early 1960s; rather, its roots are more than a century old.\textsuperscript{44} The right to bring such an action is more than a newly developed economic right or privilege. To foreclose those injured by products from their common law right to compensation, while leaving all other tort plaintiffs free to bring suits within the time frame of a traditional statute of limitations, is unjustifiable and violates the equal protection clause.

The statute of repose provision in the Product Liability Reform Act distinguishes persons injured by defective products from persons injured by any other forms of tort-based conduct.\textsuperscript{45} Recognition of the unique aspects of product liability litigation predicated on this distinction, such as a non-conduct based liability theory,\textsuperscript{46} may be justifiable. The statute of repose provision also distinguishes persons injured by a product within a fifteen year period from those injured by the identical product in the identical way at a later time.\textsuperscript{47}

Nothing suggests that fifteen years of use indicates that a product is not defective or even reasonably safe. The opposite is at least equally true. For example, product based punch press litigation is common. Such machines are durable goods within the purview of the repose statute.\textsuperscript{48} Punch press injuries can arise from machines that are one day old, as well as from

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\item[44.] See Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (including Justice Traynor’s concurring opinion at 440-43, and cases cited therein).
\item[46.] Such a standard is unrealistic. Strict liability theory, even with a consumer expectation definition of defect, cannot avoid conduct concerns. The proposed RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft, April 1, 1997) defines design defect only in terms of risk/benefit analysis which is markedly conduct conscious.
\item[47.] H.R. 956, 104th Cong. § 106 (1996).
\item[48.] Id. § 101(7).
\end{itemize}
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machines that are fifty years old. If a machine causes harm every year of the first fifteen years of its use life, suit for each injury is possible. However, if that same machine continues to cause the same kind of harm over the next fifteen years, the statute of repose permits no relief. Product safety is obviously not a factor in the congressional analysis. If a repose statute is to be upheld, it must be for other reasons.

Evidence to support the claim that a repose statute will somehow reduce insurance rates and make insurance more available to small businesses is lacking. Similarly, there is a paucity of evidence to support the claim that product liability litigation, no less the small fraction of it concerning products over fifteen years of age, is somehow the cause of a litigation explosion. Finally, foreign manufacturers are as amenable to state product liability laws as are American manufacturers. Any past factual support for these claims no longer exists.\(^4^9\)

A recently published study provides data which illustrates flaws in the purported reasoning of these "factual" justifications.\(^5^0\) Of the almost 250,000 civil cases commenced in the United States District Courts during the 12-month period ending September 30, 1995, only 11% (22,288) were product liability personal injury actions.\(^5^1\) Based on analysis of 75 large counties, it appears that only 3% of state court civil actions filed in 1992 were product liability cases, and only 3% of those cases were tried by juries.\(^5^2\) The report also notes that studies "suggest that the direct costs of product liability represent a small share of the value added for most manufacturing firms (less than 1%) even in reputed high exposure sectors."\(^5^3\) The data regarding the extent of product liability litigation


Although all such data is subject to a degree of manipulation and is no better than the base from which it is drawn, the totality of the evidence is overwhelming: There is no product liability based litigation explosion and there is insufficient data to support a claim that a product liability repose statute will reduce insurance rates.

\(^5^0\) AMERICAN BAR ASSOCIATION, AN AGENDA FOR JUSTICE: ABA PERSPECTIVES ON CRIMINAL AND CIVIL JUSTICE ISSUES (1996).

\(^5^1\) *Id.* at 99 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS (1995)).

\(^5^2\) *Id.* (citing BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ-154346, CIVIL JUSTICE SURVEY OF STATE COURTS (1992)).

\(^5^3\) *Id.* (citing GEORGE EADS & P. REUTER, RAND INSTITUTE FOR CIVIL JUSTICE, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND
make clear that any "litigation explosion" cannot be attributed to product liability actions. It is also difficult to support the claim that a small percentage increase in manufacturing costs can have a significant effect on product development or international trade. Indeed, this small manufacturing cost increase may be less than the costs prevented through injury reduction.

Application of realistic rational basis analysis to the repose statute leaves no doubt as to the proper constitutional outcome. This classification, which addresses a small fraction of the potential product liability claims, has no

REGULATION (1983); P. REUTER, RAND INSTITUTE FOR CIVIL JUSTICE, ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY: AN EXPLORATORY STUDY (1988)). This author's experience with several major manufacturers suggests that the 1% figure is overly conservative.

54. The role of tort litigation as a factor in court congestion is limited. See id. at 92-94.


Other more limited exemptions further reduce the effect of the repose provision. Moreover, the vast majority of product-related injuries, related to products within the statute, occur well before the expiration of fifteen years. An Insurance Services Office Survey indicated that over 97% of product-related accidents occur within six years of product purchase. See Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1002 (Ala. 1982).
realistic relationship to any of the Congressional purposes. The repose provision does not and cannot have any significant effect upon case filings, insurance rates, international competitiveness, business development, or any other legitimate objective of national product liability reform. Nevertheless, it is safer to predict that the Supreme Court will uphold a repose statute on these grounds than to predict that it will find a violation of equal protection or due process.

IV. OPEN COURTS

It is equally unlikely that the Court would utilize an open courts approach to void the repose statute. The United States Constitution lacks a clause of this type and there is no indication that the current Court membership would take the “activist” role needed to create such a right. It is fairly clear that no such right presently exists. On the other hand, a legitimate argument can be made that precedent allows the Court to recognize an open courts right and to utilize that right to void a repose statute. To do so would require the Court to pull together strands from three distinct areas: 1) existing decisional law with open courts language; 2) the penumbra of the Bill of Rights; and 3) policy concerns, stated and unstated, which led to the steady expansion of in personam jurisdiction since the demise of Pennoyer v. Neff. Collectively, these disparate factors provide sufficient grounds for courts to recognize an open courts right within the United States Constitution, thereby ensuring that injured parties have their day in court.

A. Precedential Language

The potential for a federally recognized open courts right begins with the language, though not the holding, of Marbury v. Madison. In Marbury, Chief Justice Marshall recognized that every individual possesses the right to claim protection of the law when injured. This statement was, however, made in a context quite distinct from modern concepts of...

56. See Werber, supra note 4, at 1005-15.
58. 95 U.S. 714 (1877).
59. 5 U.S. (1 Cranch) 137 (1803).
60. Id. at 162-63.
product liability and repose statutes. It remains a statement of policy or theory waiting, perhaps, for a modern application. Equally strong language was used by the Supreme Court in a case far closer to the current question than was considered in *Marbury*. In *Wilson v. Iseminger*, the Court reviewed a state statute that imposed a twenty-one year statute of repose upon claims applicable to various charges against realty. The statute contained a savings clause stating that it was not to take effect until three years after its date of passage. The Court, which recognized and upheld the repose aspect of the statute, reasoned:

Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.

The repose statute closes the door without regard to whether the injured party has neglected or refused to apply for redress. It mandates that the capacity to seek such redress ends before it begins. The *Wilson* analysis recognizes the traditional statute of limitations rationale for such a rule: the loss of evidence that would allow the defense to refute the claim. This reason has limited, if any, current validity due to advances in technology and recordkeeping methodology available even to small businesses. Product manufacturers can most certainly retain all records pertaining to research and development, design, manufacture, and sale of their products. These records could be used in court with full explanatory testimony consistent with the business records exception to the hearsay rule.

A potential flaw in reasoning that *Wilson* supports an open courts right is that the decision also declared that parties to a contract have "no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; . . . it is well settled that the legislature may change [statutes of limitations] at its discretion, provided adequate means of enforcing the right remain." This generally recognized rule of law, applicable to the shortening of a statutory period, has no relevance to the abolition of a cause of action.

The repose statute does not provide for an adequate means to enforce the right. Even with the limited exceptions specified in Section 106, in most cases the right is gone with the passage of time. Nevertheless, the

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61. 185 U.S. 55 (1902).
62. Id. at 56.
63. Id. at 62.
64. Fed. R. Evid. 803(6).
65. Wilson, 185 U.S. at 63; cf. Brennaman, 639 N.E.2d at 430 (holding that a repose statute violated the Ohio Constitution which, at a minimum, "requires that [an injured party] have a reasonable time to enter the courthouse to seek compensation").
Theoretical claim that there is no vested right in a cause of action may defeat an extension of Wilson into a true open courts right.\textsuperscript{66} The potential for a broader federal open courts right is even more confused by virtue of the Court's recent decision in \textit{M.L.B. v. S.L.J.}\textsuperscript{67} This decision, recognizing both equal protection and due process concerns, ordered that the state pay for a transcript necessary to perfect an appeal from a decree terminating parental rights.\textsuperscript{68} The Court relied upon the well-established line of cases involving access to court decisions in the criminal law context\textsuperscript{69} as well as a narrower line of cases mandating fee waivers to guarantee court access and appellate rights to civil litigants in regard to divorce, paternity, and parental status matters.\textsuperscript{70} The \textit{M.L.B.} opinion makes clear that the constitutional right of access in civil actions is exceptional and that such a right has been denied in a wide range of cases such as \textit{United States v. Kras.}\textsuperscript{71} The Court has distinguished between what it perceives to be matters of fundamental concern to the family, in which the right can be recognized, and matters of economic or social welfare in which the right has been denied. In a very real sense the loss of access to the courts to seek compensation for injury caused by a product defect is closer to "state controls or intrusions on family relationships"\textsuperscript{72} than to an economic or social welfare concern.

\textsuperscript{66} Such a conclusion is consistent with decisions that have either narrowly circumscribed \textit{Marbury} or rejected an opportunity to recognize an open court right. \textit{See, e.g.}, Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (indicating that the remedy language of \textit{Marbury} must be narrowly circumscribed); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735 (1989) (refusing to expand the remedy provision of 42 U.S.C. § 1981); \textit{cf.} Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66, 76 (1992) (finding an implied right to damages for a Title IX violation relying, in part, on the remedy language of \textit{Marbury}).

\textsuperscript{67} 117 S. Ct. 555 (1996).

\textsuperscript{68} \textit{Id.} at 570.

\textsuperscript{69} \textit{Id.} at 565-66; \textit{see, e.g.}, Mayer v. Chicago, 404 U.S. 189 (1971) (free transcripts for indigent appellants charged with petty offenses); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent's right to transcript to perfect an appeal); \textit{see also} Bounds v. Smith, 430 U.S. 817, 821 (1977) (requiring that prisoners have access to law library or adequate legal assistance and noting that "it is now established beyond doubt that prisoners have a constitutional right of access to the courts"). The degree to which \textit{Bounds} will remain fully viable is questionable. \textit{See Lewis v. Casey, 116 S. Ct. 2174 (1996)} (narrowly defining the "right of access" acknowledged in \textit{Bounds}).

\textsuperscript{70} \textit{See} Little v. Streater, 452 U.S. 1 (1981) (allowing a party to be denied redress in a bankruptcy action because of the party's inability to pay filing fees); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (prohibiting a State from denying access to its courts to a party seeking a divorce solely because of the party's inability to pay filing fees).

\textsuperscript{71} 409 U.S. 434 (1973) (filing fee for bankruptcy).

\textsuperscript{72} \textit{M.L.B.}, 117 S. Ct. at 564.
The destruction wrought upon a family when any member of that family is injured can be devastating on many levels. For example, paraplegia, quadriplegia, coma, or other brain damage can be as destructive to a family as divorce or loss of parental rights. Product-related death terminates family relationships more certainly than a judicial decree. A product liability action may compensate for economic loss arising from such harm and, therefore, enable family relationships to continue. This approach recognizes that compensation addresses family concerns rather than the more limited view that its effect is limited to economic matters. A statute of repose arbitrarily denies this compensation to those families whose harm is sustained by a product more than fifteen years old. Whether viewed as a mandate of due process or of equal protection, the result should be the same. Either yields a recognized open courts or right of access component. The statute of repose should fall. It is time to recognize that the Court's rule against an open courts provision is so riddled with exceptions and so devoid of fairness that the "exceptions" should become the rule.

This conclusion is substantiated not only on policy grounds but also because doing so will advance other constitutional mandates or objectives. An open courts right can also be recognized by utilization of the penumbra concept which supported development of the constitutional right of privacy. It can also be drawn from the policies which undergird the expansion of in personam due process concepts.

B. The Penumbra

The Supreme Court "has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." The majority in the seminal decision of Griswold v. Connecticut recognized that a wide variety of rights were assured by applications and interpretations of the First, Fourth, and Fifth Amendments. The Griswold majority also reiterated the important

73. The better approach may be that of due process. See id. at 570 (Kennedy, J., concurring); see also Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
74. In a recent decision, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that plaintiffs had standing to bring suit as a "person" within the meaning of the Endangered Species Act of 1973. Bennett v. Spear, 65 U.S.L.W. 4201 (U.S. March 19, 1997). The holding allowed the plaintiffs access to the courts for a complaint asserting that the Secretary of the Interior had overenforced a section of that Act.
75. Roe v. Wade, 410 U.S. 113 (1973) (qualified right to abortion within the constitutional right of privacy despite absence of express constitutional provision); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy encompassed in the penumbra of Bill of Rights guarantees).
76. Griswold, 381 U.S. at 486-87 n.1 (Goldberg, J., concurring).
77. 381 U.S. 479 (1965).
78. Id. at 484.
principle of the Ninth Amendment that "[t]he enumeration . . . of certain rights, shall not be construed to deny or disparage others retained by the people." 79 Thus, case law suggests, and so found in *Griswold*, "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 80 Although concerned with the right to privacy, the decisions relied upon to support this right were far more broadly based.

The Bill of Rights, Seventh Amendment, provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. 81

A product liability action is a common law tort action within the purview of the Seventh Amendment. The Seventh Amendment, in turn, makes the establishment of the judiciary and its powers as set forth in Article III more meaningful. The Constitution creates a judiciary with authority to determine "all Cases, in Law and Equity" 82 and provides the judicial branch with the authority to hear the claims of aggrieved parties. 83 The Seventh Amendment adds the right to a trial by jury. 84 These rights, which encompass product liability actions, are rendered nugatory through a statute of repose. Unless one extends the claim that the right does not come into existence and that, therefore, due process and equal protection concerns are irrelevant, it is impossible to rationally deny the right of access to the court. Indeed, the equivalent right to trial by jury found in the Ohio Constitution has been recognized as a fundamental right. 85

To be meaningful—to give "life and substance" to the Seventh Amendment—its emanations and penumbra must be recognized. This will guarantee that injured parties, given the right to trial by jury, retain that right for at least a reasonable time after they have sustained injury. To hold

79. *Id.* In *Roe v. Wade*, the Court reiterated that the right of privacy existed despite the absence of an explicit right in the Constitution and recognized that the right, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state actions, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough [to allow termination of pregnancy.]" *Roe*, 410 U.S. at 153.

80. *Griswold*, 381 U.S. at 484.

81. U.S. CONST. amend VII.

82. U.S. CONST. art. III, § 2, cl. 1.

83. *Id.*

84. *Id.*

otherwise—to subvert logic into a claim that the right does not exist—is inconsistent with the establishment of the right to trial by jury. The very statute which seeks to abolish the right recognizes that it has existed for fifteen years. Thereafter, by slight of hand, the right to trial by jury is transformed into a non-right. Appropriate application of the Seventh Amendment should forbid such a result. Thus, a statute of repose is inconsistent with the right to trial by jury.

C. Expansion of In Personam Jurisdiction

The third thread supporting recognition of an open courts right is the underlying premise which has supported a steady expansion of in personam jurisdiction since the territorial approach to jurisdiction was replaced with the "minimum contacts" and "traditional notions of fair play and substantial justice" of International Shoe Co. v. Washington.86 Due process demands have been diluted to permit forums to assert jurisdiction in a substantial number of cases where contacts with the forum state are highly limited. This process has been made easier by adoption of long-arm statutes which expressly or impliedly permit service of process upon non-residents to the maximum extent allowed by due process.87 The underlying premise, though rarely stated as such, is that a broad based ability to comport with due process allows injured parties to access the courts in a meaningful manner with minimum inconvenience.

This is not to say that due process has been effectively eliminated as a limiting device. The Supreme Court has marked boundaries which prevent forums from asserting jurisdiction when doing so serves needs too limited to justify bringing a given defendant into a given court.88 On the other

86. 326 U.S. 310, 316 (1945).
87. Section 410.10 of California's Code of Civil Procedure provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973); see R.I. GEN. LAWS § 9-5-33 (1985). Ohio sets forth nine distinct events that can serve as a basis for service of process, four of which are based on tortious action or injury. See OHIO REV. CODE ANN. § 2307.382 (Anderson 1995). Recent decisions reflect a willingness to carefully consider due process implications when determining the validity of service under this statute. For instance, limited contacts were deemed sufficient in a number of Ohio cases. See, e.g., Dynes Corp. v. Seikel, Koly & Co., 654 N.E.2d 991 (Ohio Ct. App. 1994) (providing and overseeing a tax accountant); PharmCo v. Biologics, Inc., 646 N.E.2d 1167 (Ohio Ct. App. 1994) (negotiation by mail and facsimile for sale of beds in Ohio). But see Sherry v. Geissler U. Pehr GmBbH, 651 N.E.2d 1383 (Ohio Ct. App. 1995) (single sale of a winding machine not sufficient for imposing personal jurisdiction).
88. See, e.g., Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987) (placing product in stream of commerce, in and of itself, insufficient to allow jurisdiction over a Japanese company with no other contacts, even if this met minimum contacts as it was an unreasonable assertion of jurisdiction); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (permitting jurisdiction over the foreign manufacturer and its national importer
hand, the states are permitted to assert jurisdiction where the factual nexus to the forum is highly limited.

A leading example of such broad based compliance with the need for minimum contacts, substantial justice, and fair play is McGee v. International Life Ins. Co. Here the defendant, a Texas insurance company, was subject to jurisdiction in California despite limited contacts with that State. The Court found that due process demands were met even though only a single act or contract was involved because the “suit was based on a contract which had substantial connection with [the state’s courts].”

In reaching this decision the Court recognized two essential realities. First, “a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.” Second, “California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.” That trend, despite occasional setbacks, continues unabated to the present day. Moreover, another version of the redress statement is equally valid: Any state has a manifest interest in providing effective means of redress for its injured residents when those injuries are caused by product defects.

In product liability and tort litigation, the court-house door is often wide open. More than thirty years ago, a state supreme court applied a “stream of commerce” approach to permit suit against an Ohio valve manufacturer. A valve was installed into a water heater in Pennsylvania and the plaintiff purchased the unit in Illinois. The manufacturer benefitted from transactions that took place in Illinois, and, therefore, “[a]s a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.” The Supreme Court, in both World-Wide Volkswagen Corp. v. Woodson and Asahi Metal Industry Co. v. Superior Court, endorsed a “stream of commerce” theory as a means to satisfy minimum contacts, even though, in both cases, other factors necessitated a finding that due process precluded jurisdiction as to some defendants.

while holding that due process was violated by the assertion of jurisdiction over a retailer and regional distributor).

89. 355 U.S. 220 (1957).
90. Id. at 220-21.
91. Id. at 223.
92. Id. at 222.
93. Id. at 223.
95. Id. at 764.
96. Id. at 766. A stream of commerce approach is consistent with policies that support strict liability in tort.
97. See supra note 87. In Asahi, the Court found that jurisdiction could not be
The continuing trend of expansive tort jurisdiction is reflected in recent decisions of the First and Ninth Circuits. The First Circuit upheld jurisdiction upon a foreign corporation that had no office or residence in the state when a Massachusetts resident drowned in the corporation's Hong Kong hotel swimming pool. Applying a tripartite analysis based on the relationship to forum-based activity, availment of the benefits and protections of the forum state, and foreseeability, the court held that there was compliance with the due process clause. The defendant had negotiated a contract with decedent's employers to provide a discount for its employees and had other contacts with Massachusetts. Nevertheless, the totality of links to the state was minimal. The court's reasoning recognized the importance of providing state residents with access to the courts: "Massachusetts has a strong interest in protecting its citizens from out-of-state solicitations for goods or services that prove to be unsafe, and it also has an interest in providing its citizens with a convenient forum in which to assert their claims."

As in McGee, this decision recognizes the importance of providing a forum, of providing access to the court to seek a remedy. The jurisdictional prerequisites necessary to comport with due process are minimal because the courts must be open.

The Supreme Court has recognized an open courts component of due process and equal protection in both criminal and civil contexts. Effectuation of the penumbra of the Seventh Amendment commands a similar result. Such a result is also consistent with the broadening base of due process to support the exercise of personal jurisdiction. It is time to recognize the existence of a federal open courts right sufficient to address and negate a statute of repose so as to destroy the unfair policy encapsulated in it.

asserted in an indemnity action by a Taiwanese tire manufacturer against a Japanese component part supplier. Asahi, 480 U.S. at 116.

99. Id. at 720-21.
100. Id. at 711.
101. Id. at 713-16 (summarizing the court's analysis and description of defendants' contacts with the forum state).
102. Id. at 718 (emphasis added) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463 (1985)); see also Gordy v. Daily News, L.P., 95 F.3d 829 (9th Cir. 1996) (upholding jurisdiction in California for the libel of a California resident by a New York newspaper that did not solicit in the state and where its total California circulation was 13 daily and 18 Sunday newspapers while 99% of its total circulation took place within 300 miles of the New York metropolitan area).
103. These threads can be further strengthened by consideration of the rights maintained through the Ninth Amendment, the First Amendment guarantee of the right to petition for grievances, and the Privileges and Immunity Clause of the Constitution. U.S. CONST. art. IV, § 2. For example, in Canadian Northern Railway Co. v. Eggan, 252 U.S. 553 (1920), the Court recognized that the Privileges and Immunity Clause protected the right of court access to non-residents. Id. at 560. The Court, however, permitted the forum state
V. Preemption—Specific Concerns

House Bill 956, Section 106 contains two provisions which are likely to produce substantial difficulty. First, the repose provision of Section 106(b)(1) exempts toxic harm from its mandate. Second, Section 106(b)(2) provides that if an applicable state law requires filing during a period that is shorter than the fifteen-year period of Section 106, that state's law shall apply. These provisions mean that (1) toxic tort litigation is governed only by the statute of limitations provision set forth in Section 106(a), including its discovery rule; and (2) the broad preemption standard of Section 102(a) and (b) is significantly modified. Although, the toxic tort exception should be upheld, the preemption modification is problematic.

A. The Toxic Tort Exclusion

Operation of the toxic harm provision can have at least two manifestations. Where there is immediate harm arising from a toxic exposure, such as respiratory or cardiac difficulty arising from exposure to acid fumes, an action will have to be brought within two years of that occurrence. This is consistent with standard statute of limitations principles and with the law that will apply to all products within the purview of the Act. Where the harm does not manifest immediately because a latency period exists prior to symptom emergence, the discovery rule allows suit until, in the exercise of reasonable care, a claimant should have discovered the harm and its application.

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104. See H.R. 956, 104th Cong. (1996). That the repose provision applies only to durable goods should present no difficulty in terms of policy or constitutional law. The definition and application of the term may cause some difficulty due to its incorporation of the Internal Revenue Code. Id. § 101(7).

105. Id. § 106(b)(1).

106. Id. § 106(b)(2). The converse situation, extending the longer period specified in the General Aviation Revitalization Act of 1994, supra note 9, presents no difficulty.

107. Substantial latency periods are not aberrations in a world reliant on numerous toxic substances in manufacturing, medicine, transportation, and other areas. Exposure to asbestos can lead to mesothelioma twenty years after exposure. Ingestion of diethylstilbestrol (DES) by pregnant women led to vaginal carcinoma in their daughters, but the linkage was not established for a considerable time thereafter. For example, in Borel v. Fibreboard Paper Products, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), the plaintiff's exposure to asbestos began in 1936, but his diagnosis of asbestosis was made in 1969. Id. at 1081-82. Similarly, in Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984), cert. denied, 469 U.S. 826 (1984), the plaintiff was born in 1958 and symptoms related to the effect of her mother's ingestion of DES during pregnancy did not emerge until 1975. Id. at 41.
cause. This right will exist without a repose limitation. Provided that the claimant files an action within the time allowed after discovery, that claim can proceed. This is the only form of harm excluded by definition from the fifteen-year repose provision. With limited exceptions, for product related harm other than toxic harm, the claimant must bring suit within the periods specified in both the statute of limitations provision of Section 106(a) and the repose period of Section 106(b).

The statutory exclusion of toxic harm is predicated on a product/injury differentiation which meets constitutional muster. Toxic tort harm is distinct from other product related harm and is virtually the only type of product harm which can manifest after passage of a substantial period of time. Even if a person is aware of exposure to a toxic substance, it would not be possible to bring suit prior to manifestation of harm. In this respect the governmental interest in permitting a reasonable time period during which a party can seek compensation for harm is advanced. As no other form of harm exhibits such latency period potential, the protection offered by this classification is reasonable.

108. This language is more carefully drawn than a casual reading suggests. A discovery rule predicated on a date which plaintiff learned that injury "may be related to exposure" was held unconstitutional because it allowed the bar to arise despite uncertainty. Proper language demands the certainty of a "knowledge" based provision. Burgess v. Eli Lilly & Co., 609 N.E.2d 140, 142-43 (Ohio 1993).


111. Two other exceptions built into the repose section are reasonable and appropriate. Neither raises questions of constitutional dimension and both serve to protect the interests of injured parties. Section 106(a)(2) provides that persons suffering from a legal disability may bring suit within two years after the person ceases to have that disability. Section 106(3)(B) gives effect to written express warranties as to safety or life expectancy of the product which exceeds fifteen years. Although the "life expectancy" language may cause some difficulty in application this should not be a major problem. The law should permit a product manufacturer, when consistent with the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1975), to warrant a product for such a time as the manufacturer believes appropriate. The Product Liability Act must give effect
B. Selective Preemption

Congress created an exception to its express preemption provision\textsuperscript{112} which gives product liability defendants the greatest possible protection while prejudicing those injured by defective products. This exception mandates that if state law contains a shorter repose period, that period shall govern. Not only does this exception contradict the stated purpose of providing uniform product liability laws,\textsuperscript{113} it creates a potential for multiple statutory periods. At least fourteen states already have product liability repose statutes with time periods ranging from six to fifteen years.\textsuperscript{114}

The diversity of time bars will have at least three significant effects. First, a battle will be waged to determine whether repose statutes are procedural or substantive for choice of law purposes. Second, it must be determined whether such a bifurcation approach is consistent with current law governing preemption. Third, the creation of such classes may raise a

to such warranties or the Act will, itself, create fraud.

\textsuperscript{112} Section 102 provides in applicable part:

(a) Preemption—

(1) In general.—This Act governs any product liability action brought in any State or Federal court on any theory of harm caused by a product.

(b) Relationship to State Law.—This title supersedes State law only to the extent that State law applies to an issue covered by this title. Any issue that is not governed by this title, including any standard of liability applicable to a manufacturer, shall be governed by otherwise applicable State or Federal law.

H.R. 956, 104th Cong. § 102(a), (b) (1996).

\textsuperscript{113} Congressional findings in Section 2(a) reflecting this need include:

(3) the rules of law governing product liability actions, . . . have evolved inconsistently within and among the States, resulting in a complex, contradictory, and uncertain regime that is inequitable . . . unduly burdens interstate commerce;

(8) because of the national scope of the problems created by the defects in the civil justice system, it is not possible for the States to enact laws that fully and effectively respond . . . ;

(9) it is the constitutional role of the national government to remove barriers to interstate commerce and protect due process rights.

\textit{Id.} § 2(a).

These findings are echoed in Section 2(b)(1) indicating that the Act will aid in “establishing certain uniform legal principles of product liability which provide a fair balance among the interests of product users, manufacturers, and product sellers.” \textit{Id.} § 2(b)(1).

serious conflict between equal protection mandates and the rights of the states to establish their own laws.

Generally, a time period within which an action must be filed is deemed procedural unless it is established as part of the right under consideration so as to bar the right, not merely the remedy.\(^\text{115}\) If deemed procedural, forum shopping will begin in earnest. Plaintiffs will avoid states with repose provisions of less than fifteen years so that suit will be brought in other jurisdictions. As many manufacturing defendants transact business across state lines and are well aware that their products can cause harm in many states, jurisdiction over those defendants could be asserted in almost any state. Absent a successful *forum non conveniens* motion, which is no easy task, plaintiffs' choice of forum will stand.\(^\text{116}\)

To counter this result, a reprise of the argument utilized to defeat equal protection concerns will come into play. The repose provision prevents the cause of action from coming into existence and, therefore, it affects the right rather than the remedy. This could make a repose statute substantive for choice of law purposes which permits application of the foreign law limitation. A number of courts have reached this result.\(^\text{117}\) The national repose statute, however, differs from state statutes in that it creates no rights. The national Act seeks only to impose limitations on rights created under state law as made clear by its definition of a product liability claim.\(^\text{118}\) The national repose provision is not part of any state law creating a cause of action. It should be characterized as procedural.

Even if found substantive, the forum state could reject a foreign repose statute on public policy grounds because its bar can be deemed repugnant to the right to seek a remedy.\(^\text{119}\) The court in *Beard v. J.I. Case Co.*\(^\text{120}\)


116. For example, an automotive design case against any of the domestic big three, where the injured party resides in North Carolina and the accident took place in North Carolina, could be brought in Michigan as North Carolina has a six year repose statute. *See* N.C. Gen. Stat. § 1-50(6) (1996). The manufacturer’s contacts with Michigan could outweigh any purported inconvenience to non-party witnesses.


118. Section 101(15) provides that “[t]he term ‘product liability action’ means a civil action brought on any theory for harm caused by a product.” H.R. 956, 104th Cong. § 101(15) (1996). As there is no federal common law of product liability other than in the law of admiralty, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), all such claims must be predicated on rights granted by existing state law.

119. *See generally* Loucks v. Standard Oil Co., 120 N.E. 198, 202 (1918) (wherein Judge Cardozo recognized that a court could refuse to enforce a claim arising in another jurisdiction which “would violate some fundamental principle of justice, some prevalent
avoided the need to do precisely this by construing a state borrowing statute as applicable to statutes of limitations but not statutes of repose. This construction was required because the court was convinced that had the borrowing statute included the repose provision, forum law would have required a determination that it was unconstitutional.\textsuperscript{121} The court concluded that the action was not time-barred because:

Although Wisconsin’s policy favoring the maintenance of actions is strong, we recognize that it is not absolute. By enacting the borrowing statute, the Wisconsin legislature has also acknowledged the importance of accommodating the concerns of other states. . . . However, Wisconsin’s interest in providing a forum is more seriously implicated in this case, because the plaintiffs may be denied any opportunity to litigate the merits of their claims even though they promptly filed a complaint.\textsuperscript{122}

In the substantial number of states which have a similar open courts provision, the same public policy issue will have to be addressed. Instead of reducing transaction costs and easing the litigation process, this section creates an entirely new set of complex legal issues that will require state by state resolution with a strong potential for conflicting results.

There is a substantial likelihood that states with no repose statutes will become the repository of otherwise remote claims. The national legislation thus fails its primary goal—uniformity—in regard to this vital aspect of litigation. States with no product liability repose statute had better brace for the onslaught.

If an absence of uniformity and an increase in forum shopping with consequent choice of law issues are not sufficient problems, the repose provision will also face the challenge posed by its limitations and its deference to state law. The fact that Congress can preempt in the field of product liability is unquestionable. A wide ranging body of legislation has already done so in regard to many significant product lines. In these areas the question is not whether preemption is permitted, but the extent to which


120. 823 F.2d 1095 (7th Cir. 1987).
121. \textit{Id.} at 1100-05. The forum state, Wisconsin, had a borrowing statute which referenced foreign “periods of limitation.” If this had included a statute of repose the action would have been barred under otherwise applicable Tennessee law in contravention of Wisconsin’s Right to Remedy constitutional provision.
122. \textit{Id.} at 1104-05.
it has taken place.\textsuperscript{123} The repose statute under consideration raises a distinct question for which there is little guidance to aid in the framing of a response.

Traditional preemption issues are well illustrated by decisions addressing the National Traffic and Motor Vehicle Safety Act of 1966\textsuperscript{124} which focuses on one of the most important product areas. Guidance and clarification as to whether the absence of safety devices was actionable could have been provided by the decision in \textit{Freightliner Corp. v. Myrick}.\textsuperscript{125} It was not. The Court determined that a state tort action predicated on the absence of an anti-locking braking system was neither expressly nor impliedly preempted by the Act or by judicially suspended NHTSA Standard 121.\textsuperscript{126} The opinion’s failure to provide adequate guidance to the lower courts is reflected in the continued judicial attention given to the preemptive effect of the statute and its regulations.\textsuperscript{127}

The most recent Supreme Court decision, \textit{Medronic, Inc. v. Lohr},\textsuperscript{128} reveals a highly divided Court addressing the question of whether the Medical Device Amendments preempted negligence or strict liability claims arising from alleged defects in a pacemaker. The express preemption language involved differed in substance, but not approach, from that of the


\textsuperscript{125} 115 S. Ct. 1483 (1995).

\textsuperscript{126} Id. at 1487-88.


repose statute.129 Part III of the plurality opinion, endorsed by a majority of the Court, reiterated the standard of Cipollone v. Liggett Group, Inc.130 stating that interpretation of express preemption language need not go beyond its language to ascertain congressional intent, but that the domain preempted required identification.131 Moreover, absent a clear manifestation of intent, state law is not to be superseded. The focal point for determination of the extent of preemption is congressional purpose.132 The judgment of the Court was that the “requirement” language of the Act did not preempt plaintiff’s common law actions.133 In reaching this decision, emphasis was placed on the role of the Food & Drug Administration ("FDA") and the manner in which various exceptions to preemption could be recognized by FDA action.134

Nothing in the opinions addresses a congressional blanket recognition of differing state regulations with no review by the executive branch. Throughout the plurality opinion, emphasis is placed upon the wide exemption power granted to the FDA.135 The Court has no difficulty in permitting Congress to establish a regulatory system which allows executive branch discretion in regard to preemption. This discretion permits the executive to assure compliance with governmental objectives and policy as well as individual state needs.

The FDA regulations and any exemptions granted are all process based. A specific determination is necessary in each instance. The FDA is perceived as “uniquely qualified to determine whether a particular form of state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ and, therefore, whether it should

129. The language, consistent with that of other federal Acts provides:
   Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
   (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
   (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.
131. Medronic, 116 S. Ct. at 2250 (quoting Cipollone, 505 U.S. at 517).
132. Id. at 2250-51.
133. Id. at 2259.
134. Id. at 2255. Part V of the opinion, reflecting a majority position, recognized that: “Congress explicitly delegated to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA—an authority that necessarily requires the FDA to assess the pre-emptive effect that the Act and its own regulations will have on state laws.” Id. at 2255-56.
135. Id.
be pre-empted.\textsuperscript{136} The repose provision allows no discretion. Rather, Congress has decided that conflicting state law will not be preempted provided that the state law is harsher than its federal counterpart. In at least two other Acts, Congress has permitted states to impose stricter standards than a federal preemptive statute.\textsuperscript{137} In both, the deference to state law permitted different substantive law and regulation to better protect or benefit the public. In neither did the legislation bear upon the time within which an action had to be brought.

In taking this approach, Congress paradoxically promotes conflicting objectives. Section 102 was carefully drawn to advance the purpose of uniformity in the law. Various substantive provisions of House Bill 956 achieve this goal.\textsuperscript{138} In doing so they are consistent with various findings that support the need for a national Act. Section 106, however, advances a lack of uniformity and is inconsistent with the findings that support the need for the Act. Section 106 serves only the objective of terminating the rights of injured parties.

A possible outcome is that the courts will enforce Section 102 as written but find Section 106(2) invalid. Whether this determination is predicated on equal protection, due process, or an open courts approach is irrelevant. What is relevant is that this exception to preemption cries out for such an outcome. The exception allowing application of shorter state repose provisions is mean spirited, ineffective in the vast majority of cases, and not worth the litigation it will spawn.

The third concern is one of potentially serious constitutional magnitude. The interplay between the Fourteenth and Tenth Amendments may become a focus of the courts and constitutional scholars. By limiting the preemptive effect of the repose provision, Congress has changed the preemption game. There is nothing novel about the concept of partial preemption by which Congress permits consistent state substantive law to remain in effect.\textsuperscript{139} In each of these instances, the state law involved is substantive or regulatory in nature.

\textsuperscript{136} Id. at 2255 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
\textsuperscript{138} Key substantive sections which contain no exception for application of state law include Section 104 establishing a substance abuse defense, Section 105 mandating uniform laws for misuse and alteration of products and resolving the need for uniformity in the treatment of workplace injury related product claims with further modification through Section 111, and Section 110 regulating the law of joint and several liability. Cf. Section 108's limited preemption regarding punitive damages which creates issues similar to those of the repose provision, \textit{i.e.}, whether the ceiling on damages is constitutional and whether allowing harsher state law is valid.

No prior federal Act seems to utilize a partial preemption in regard to a statute of repose. Although permitting the application of a harsher rule is consistent with limited congressional precedent, it would not serve the same purpose as those prior legislative precedents. In the prior Acts, the allowance of a stricter standard advanced a goal of protecting the public. In the case of a statute of repose, application of the harsher standard deprives the consumer of protection in regard to the safety of goods marketed and compensation for injury sustained.

A new question now comes into play: Does the Supremacy Clause allow for this form of partial preemption when doing so creates diverse classes of injured parties who will gain or lose rights based solely on which of multiple repose statutes is applicable? Certainly, each state is free to set its own repose standard and is equally free not to set such a standard. Assuming constitutionality, the federal government is free to remove this right by exercise of its interstate commerce power and creation of a national repose statute applicable to all product liability claims. Query: Can that government, consistent with the Constitution, declare that: (1) there is a federal limit of fifteen years, but (2) any state is free to set a shorter limit?

The most likely response is affirmative. This approach maximizes the protection afforded to manufacturers and others in the chain of product distribution. Congress appears to see this as a means of imparting greater fairness to the system. Under a rational basis analysis, this will likely suffice to support the state line based classification, and comport with equal protection, as it is consistent with the purpose of “establishing greater fairness, rationality, and predictability in the civil justice system.” This approach also permits the states to exercise their power in an area that is traditionally one of state concern. That the entire repose statute is ill-advised, and that the additional harshness of this provision exacerbates the problem, reflects on congressional wisdom and judgment rather than constitutionality.

VI. CONCLUSION

Any statute of repose raises questions of constitutional dimension. Although a national repose statute may survive constitutional scrutiny, enactment of such a statute is unnecessary and ill-advised. In the form enacted by Congress, the fifteen-year repose period fails to serve the purposes of the Common Sense Product Liability Legal Reform Act on several levels. First, it is of such a limited application as to have no substantial effect upon the number of product liability cases that will be filed. Reduction of the number of cases filed is far better served by other substantive provisions of the same Act. Second, by allowing application of

shorter state repose statutes, the objective of uniformity is defeated, forum shopping is encouraged, and constitutional concerns are raised.

From the traditional perspective of the objectives of any statute of limitations, this statute of repose adds little to the benefits of the general statute of limitations contained in the Act. A two year limitation period, coupled with a discovery rule, provides adequate protection to product liability defendants while permitting injured consumers an opportunity to seek fair compensation. The potential for loss of witnesses with the passage of time is real, but this will have a far more detrimental effect upon plaintiffs than upon defendants. Product liability defendants, taking advantage of modern technology, will be able to defend the integrity of their products regardless of when suit is brought. Plaintiffs, who may no longer have the product involved and require the assistance of eyewitnesses and the "human" element in the litigation process, are far more likely to suffer through the passage of time.

The minimal advantage that a repose statute may provide to manufacturers and other product liability defendants is outweighed by the harm it creates. The harm is found in the increase of transaction litigation costs that will surround enforcement of the section for years to come and in the abject attack such a statute makes upon basic principles of fairness. Thus, a "common sense" effort at reform is needed. The repose statute lacks such common sense and should be repudiated. Repudiation will have the additional benefit of increasing the likelihood of enactment of necessary national product liability reform.