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## Campbell-Ewald Co. v. Gomez: Diminishing the Derivative Sovereign Immunity Doctrine and the Social Costs of Increasing Liability to Government Contractors

W. Logan Lewis

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*CAMPBELL-EWALD CO. V. GOMEZ*: DIMINISHING THE  
 DERIVATIVE SOVEREIGN IMMUNITY DOCTRINE AND THE  
 SOCIAL COSTS OF INCREASING LIABILITY TO  
 GOVERNMENT CONTRACTORS

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## INTRODUCTION

“Destined for something big? Do it in the navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call 1-800-510-2074.”<sup>1</sup> This text message, received May 10, 2006, formed the basis of Jose Gomez’s claim against Campbell-Ewald Company, an advertising and marketing communications agency contracted in 2000 by the Navy to handle all of its advertising.<sup>2</sup> Notably, Campbell-Ewald did not send the text message or even identify Gomez as a potential Navy recruit.<sup>3</sup> Instead, MindMatics, a subcontractor specializing in mobile marketing, “handled the deployment, transmission and delivery of the text messages, including the use of its own SMS short code.”<sup>4</sup>

In 2006, Navy Recruiting Command (NRC), the recruitment division of the Navy, in coordination with Campbell-Ewald, adopted a wireless recruiting strategy aimed at recruiting nearly 38,000 active duty Navy sailors by primarily targeting males between the ages of seventeen-and-a-half and twenty-four.<sup>5</sup> To implement the plan, Campbell-Ewald requested bid proposals from subcontractors with expertise in mobile marketing.<sup>6</sup> MindMatics responded, suggesting a direct text message program targeting “cell phones of 150,000 Adults 18-24 from an opt-in list of over 3 million [individuals].”<sup>7</sup>

Before proceeding, Campbell-Ewald sought and obtained the Navy’s approval.<sup>8</sup> The NRC provided oversight and approval of Campbell-Ewald’s text message recruiting campaign on behalf of the Navy.<sup>9</sup> Lee Buchschacher, Deputy Director of the Marketing and Advertising Plans Division for the NRC, and “Cornell Galloway, an Enlisted Program Advertising Manager, ‘authorized and approved

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1. *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237, at \*2 (C.D. Cal. Feb. 22, 2013), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663 (2016).

2. *See id.* at \*1-3.

3. *See id.* at \*3.

4. *Id.*

5. *Id.* at \*1-2.

6. *Id.*

7. *Id.* at \*2.

8. *Id.*

9. *Id.*

the text message campaign proposed by MindMatics.”<sup>10</sup> Moreover, Buchschacher “reviewed, revised, and approved” the Navy’s text message.<sup>11</sup>

MindMatics sent the text messages approved by the Navy between May 10 and May 24, 2006.<sup>12</sup> Gomez, who alleged that he had not opted-in to receive text messages but had erroneously received a message,<sup>13</sup> brought a class action lawsuit pursuant to the Telephone Consumer Protection Act (TCPA)<sup>14</sup> on behalf of himself and “all persons in the United States and its Territories who received one or more unauthorized text message advertisements.”<sup>15</sup>

The TCPA was passed originally in 1991 as an amendment to the Communications Act of 1934.<sup>16</sup> The idea was to place restrictions on telephone solicitations and to set limitations on the use of automated telephone equipment in telemarketing.<sup>17</sup> The TCPA prohibits anyone from making an automated call, without first obtaining express consent, to the cellular phones of individuals within the United States.<sup>18</sup> Notably, a text message constitutes a call for the purposes of the TCPA.<sup>19</sup> Moreover, Gomez was able to sue Campbell-Ewald instead of MindMatics because of the doctrine of vicarious liability.<sup>20</sup> Although the TCPA does not speak to whether vicarious

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10. *Id.*

11. *Id.*

12. *Id.* at \*3.

13. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874 (9th Cir. 2014) (stating that Gomez “did not consent to receipt of the text message,” and “that he was 40 years old at the time he received the message, well outside of the Navy’s target market”), *aff’d*, 136 S. Ct. 663 (2016).

14. 47 U.S.C. § 227 (2012).

15. *See* Class Action Complaint at 2, 4-5, *Gomez*, 2010 WL 11240892 (No. CV 10-02007 DMG (CWx)).

16. Telephone Consumer Protection Act (TCPA) of 1991, Pub. L. No. 102-243, Sec. 3, 105 Stat. 2394, 2395 (codified as amended at 47 U.S.C. § 227 (2012)).

17. *See* 137 CONG. REC. 36,300 (1991) (statement of Sen. Hollings) (“The bill includes provisions to restrict telephone calls that use an automated or computerized voice. These calls are a nuisance and an invasion of our privacy. The complaints received by the Federal Communications Commission ... indicate that people find these calls to be objectionable regardless of the content of the message or the initiator of the call. Restricting such calls is constitutionally acceptable as a reasonable place and manner restriction.”).

18. 47 U.S.C. § 227(b)(1)(A)(iii).

19. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663 (2016).

20. *See id.* at 877. Vicarious liability in the context of independent contractors is defined as follows: “A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether

liability applies, courts ordinarily interpret silence from Congress to imply that “Congress intended to apply the traditional standards of vicarious liability.”<sup>21</sup>

Campbell-Ewald, however, would still seem to have an airtight defense to avoid liability. It was acting as an agent of the United States as a contractor for the Navy, and thus may invoke derivative sovereign immunity,<sup>22</sup> an affirmative defense that shields contractors from liability when performing work for a government body.<sup>23</sup> Because Congress did not authorize TCPA suits against the federal government, the Navy cannot be sued for violating the TCPA.<sup>24</sup> Thus, it would seem that Campbell-Ewald, which worked closely with the Navy and received its oversight and approval at different steps throughout the process, would be immune from liability under the doctrine of derivative sovereign immunity.<sup>25</sup>

Yet, the Supreme Court of the United States rejected this argument, concluding that Campbell-Ewald did not qualify for derivative sovereign immunity in this case.<sup>26</sup> The Court reasoned that the doctrine did not apply because the contractor violated the TCPA by sending text messages to recipients who had not consented to receive such messages.<sup>27</sup> More abstractly, the Court held that “[w]hen a contractor violates both federal law and the Government’s explicit instruction ... no ‘derivative [sovereign] immunity’ shields the contractor from suit by persons adversely affected by the violation.”<sup>28</sup>

While this holding might ostensibly follow common sense, this Note demonstrates that the Court’s much-overlooked holding

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joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.” RESTATEMENT (THIRD) OF TORTS § 13 (AM. LAW INST. 2000).

21. See *Gomez*, 768 F.3d at 877 (quoting *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012), *aff’d*, 582 F. App’x 678 (9th Cir. 2014)).

22. See *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237, at \*6 (C.D. Cal. Feb. 22, 2013), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663 (2016).

23. See *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940) (establishing that the doctrine of derivative sovereign immunity shields private entities contracted by the government unless the contractor exceeds the authority granted by the government or that authority was not validly conferred).

24. See *Gomez*, 2013 WL 655237, at \*4.

25. See *id.* at \*6.

26. See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

27. See *id.* at 672-74.

28. *Id.* at 672.

undermines the very purpose of derivative sovereign immunity, and thus should be overturned in an appropriate subsequent case.<sup>29</sup> This Note further argues that the Supreme Court's holding in *Campbell-Ewald Co. v. Gomez* runs counter to the Court's jurisprudence and could have far-reaching inefficient implications, including monetarily incentivizing the federal government to integrate vertically the production of goods and services that could otherwise be provided by the private market at lower social costs.<sup>30</sup>

This Note proceeds in four Parts. Part I analyzes the development and history of derivative sovereign immunity. Part II focuses on how the holding in *Campbell-Ewald* contradicts the Court's jurisprudence and argues that the Court's unworkable standard will create uncertainty for private entities that contract with the government. Part III considers the unintended consequences of *Campbell-Ewald's* holding, including the increased costs of using government contractors who will inevitably increase prices to offset the costs of expected litigation. Part III also predicts that the quality of services and products available to the government will diminish, as potential independent contractors who lack the risk appetite sufficient to take on the increased risk imposed by the Court's *Campbell-Ewald* holding will exit the market. Part IV argues that the increased monetary costs to the government of outsourcing projects to private firms could lead the government to integrate vertically to take over the functions in question because it will incur lower pecuniary costs in doing so. The Note concludes that this result would be both normatively undesirable and economically inefficient because the private sector could produce the relevant good or service at a lower social cost.

## I. HISTORY OF DERIVATIVE SOVEREIGN IMMUNITY

This Part analyzes the development and history of derivative sovereign immunity. The first Section discusses *Yearsley v. W.A. Ross Construction Co.*, the landmark case in which the Supreme

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29. Notably, neither Chief Justice John Roberts nor Justice Samuel Alito addressed this holding in their dissents. *See id.* at 677-83 (Roberts, J., dissenting); *id.* at 683-85 (Alito, J., dissenting); *see also infra* Part II.

30. *See infra* Part IV.

Court recognized the government contractor defense for the first time,<sup>31</sup> and how derivative sovereign immunity developed in the area of public works. The next Section explores the development of the derivative sovereign immunity doctrine in the area of products liability and in the military contractor context. The final Section examines the Court's application of derivative sovereign immunity to § 1983 cases, which illustrates how the Court has expanded the doctrine of derivative sovereign immunity to include service contracts as well as contracts for manufactured goods and public works.

#### *A. Derivative Sovereign Immunity's Foundations in Public Works*

In its seminal derivative sovereign immunity case, the Supreme Court held that there is no liability on the part of a contractor when the government has validly conferred on it the authority to execute a project and that project is within the authority of the government to undertake.<sup>32</sup> In *Yearsley*, the government hired a contractor to improve navigation on the Missouri River, which required building several dikes along the river.<sup>33</sup> The plaintiffs in the case sued the contractor after the construction had caused flooding of ninety-five acres of the plaintiffs' farmland.<sup>34</sup> The Supreme Court held that the contractor was not liable for the resulting damages based on an agency theory of derivative sovereign immunity, concluding that "[t]he action of the agent is 'the act of the government.'"<sup>35</sup> Thus, the *Yearsley* rule afforded protection to contractors from liability when the contractor had followed the government's guidelines, had acted under authority that has been validly conferred, and had served as an agent of the government.<sup>36</sup>

The Fifth Circuit Court of Appeals applied *Yearsley* to an environmental case, concluding that private companies could not be liable for alleged environmental damages caused by their dredging activities performed pursuant to contracts with the federal government.<sup>37</sup>

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31. 309 U.S. 18, 20-21 (1940).

32. *See id.*

33. *Id.* at 19.

34. *Id.* at 19-20.

35. *See id.* at 21-22 (quoting *United States v. Lynah*, 188 U.S. 445, 465-66 (1903)).

36. *See id.* at 20-21.

37. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206-07 (5th Cir. 2009).

There was no allegation that the companies lacked authority to develop or maintain the Mississippi River Gulf Outlet (MRGO).<sup>38</sup> The Fifth Circuit held that the companies were executing Congress's will in dredging the MRGO, as evinced by the fact that the federal government paid companies to dredge the MRGO on an annual basis.<sup>39</sup> Finally, there was no allegation that the companies deviated from Congress's direction or expectations.<sup>40</sup> Thus, the Fifth Circuit, relying on *Yearsley*, confirmed that, when a contractor has performed the will of the government and the government conferred the authority properly, the government contractor is not liable for any resulting damages to private parties.<sup>41</sup>

More recently, a federal district court in Texas distinguished the Supreme Court's holding in *Campbell-Ewald* on the ground that the decision left undisturbed the Court's *Yearsley* holding when it comes to government contractors in the context of public works.<sup>42</sup> In *Benson v. Russell's Cuthand Creek Ranch, Ltd.*, the federal government had authorized Ducks Unlimited (DU) to construct a levee system in furtherance of a public works project designed to protect and restore wetlands.<sup>43</sup> The dispute arose over whether constructing the levee system at its present location on the property was negligent.<sup>44</sup> There was no dispute, however, "that DU had the authority [from the government] to build a levee system on the ... property in furtherance of the [Wetlands Reserve Program]."<sup>45</sup>

The court concluded that DU had a viable defense against the Texas Water Code because "there can be no reasonable dispute that the contract and specifications under the contract called for DU to build a levee system for the government on the Russell property pursuant to a public project, and that DU did not exceed its authority by building the levee system."<sup>46</sup> Thus, the court applied the

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38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See Benson v. Russell's Cuthand Creek Ranch, Ltd.*, 183 F. Supp. 3d 795, 805-06 (E.D. Tex. 2016).

43. *Id.* at 799.

44. *See id.* at 799-801.

45. *Id.* at 806.

46. *Id.* at 809.



more permissive *Yearsley* framework to the public works context, extending to DU the protection of derivative sovereign immunity.<sup>47</sup>

*B. Derivative Sovereign Immunity's Development Through Products Liability*

Some commentators have noted that *Yearsley*, which serves as the clearest example of derivative sovereign immunity under agency theory, is difficult to apply.<sup>48</sup> That is because in certain contexts, especially with regard to military contractors, it can be difficult to establish an agency relationship between the contractor and the government.<sup>49</sup> To preserve the force of the doctrine of derivative sovereign immunity, the Court moved toward a contract specification defense, meaning that, when a contractor adheres to the specifications given by the government, the contractor will not be liable “if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.”<sup>50</sup>

The contract specification defense developed in response to what has become known as the *Feres-Stencel* doctrine.<sup>51</sup> In *Feres v. United States*—a consolidated decision arising out of a circuit split involving three actions<sup>52</sup> against the United States based on the Federal

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47. *See id.* at 806, 809.

48. *See, e.g.*, Michael Overly, Note, *Boyle v. United Technologies Corp.: The Turning Point for the Government Contractor Defense?*, 21 LOY. L.A. L. REV. 935, 939-41 (1988).

49. *See* *Bynum v. FMC Corp.*, 770 F.2d 556, 564 (5th Cir. 1985) (“The problem with applying the *Yearsley* defense in the context of the military contractor is the apparent requirement that the contractor possess an actual agency relationship with the government.”); *see also* Overly, *supra* note 48, at 940.

50. Overly, *supra* note 48, at 941-42 (quoting RESTATEMENT (SECOND) OF TORTS § 404 cmt. a (AM. LAW. INST. 1965)).

51. The doctrine developed from the holdings of two Supreme Court cases. *See Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the government was not liable under the Federal Tort Claims Act for injuries to servicemen arising out of or in the course of activity incident to military service); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 670-74 (1977) (holding that the United States was not liable under the Federal Tort Claims Act to indemnify the manufacturer of an ejection system found liable for the death of a U.S. serviceman on the theory that any malfunction in the ejection system was due to faulty government specifications and components).

52. The first action was the *Feres* case. *Feres*, 340 U.S. at 136-37. In that case, the executrix of *Feres*'s estate sued the United States to recover for death caused by negligence.

Tort Claims Act—the Court sought to resolve the question of “whether the Tort Claims Act extends its remedy to one sustaining ‘incident to the service’ what under other circumstances would be an actionable wrong.”<sup>53</sup> The Court ultimately concluded that the government was not liable under the Federal Tort Claims Act for injuries to servicemen arising out of, or in the course of, activity incident to military service.<sup>54</sup>

The result of this holding was that members of the military or their representatives began suing military contractors who had manufactured the government-designed equipment that caused their injuries.<sup>55</sup> In many instances, however, manufacturers had only minimal discretion in the design specifications that caused the injuries.<sup>56</sup> While *Feres* increased the risk of liability to government contractors, whether contractors would be able to seek indemnification from the government was ostensibly an undecided issue.

*Stencel Aero Engineering Corp. v. United States* foreclosed this potential remedy, holding that government contractors could not sue

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*Id.* She alleged that Feres, who burned to death in the barracks at Pine Camp, New York, while on active duty, died due to the government’s negligence in “quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch.” *Id.* at 137. The District Court dismissed the action, and the Second Circuit Court of Appeals affirmed. *Id.* at 136-37.

The second action was the *Jefferson* case. *Id.* at 137. In that case, the plaintiff had an abdominal operation while in the Army. *Id.* About eight months later, during another operation after plaintiff was discharged, a towel “marked ‘Medical Department U.S. Army,’ was discovered and removed from his stomach.” *Id.* The complaint alleged that the army surgeon negligently left it there. *Id.* After trial, the district court concluded that the Torts Claim Act does not charge the United States with liability in this type of case. *Id.* The Fourth Circuit Court of Appeals affirmed. *Id.*

The third action was the *Griggs* case. *Id.* In that case, Griggs’s executrix alleged that, while Griggs was on active duty, he died “because of negligent and unskillful medical treatment by army surgeons.” *Id.* The district court dismissed, but the Tenth Circuit Court of Appeals reversed. *Id.*

53. *Id.* at 138.

54. *See id.* at 146.

55. R. Todd Johnson, Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U. L. REV. 219, 226 (1986).

56. *See, e.g.,* Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985) (finding that the government’s design specifications did not include roll-over protection on the front end loader); McKay v. Rockwell Int’l Corp., 704 F.2d 444, 451 (9th Cir. 1983) (concluding that the ejector system designed by Rockwell conformed with the government’s specifications); Sanner v. Ford Motor Co., 364 A.2d 43, 44 (N.J. Super. Ct. Law Div. 1976) (noting that government contractual specifications “did not include the installation of seat belts, roll bars or side doors”), *aff’d*, 381 A.2d 805 (N.J. Super. Ct. App. Div. 1977).

the government to recover for damages the contractor had paid to injured military servicemen.<sup>57</sup> Notably, this holding barred government contractors from recovering even when the contractor manufactured the equipment causing the injuries in accordance with government specifications.<sup>58</sup> The Court reasoned, “[T]he third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action ... is barred by *Feres*.”<sup>59</sup> Moreover, the Court rested its analysis on the policy that it was improper to allow claims—either direct actions by injured servicemen or actions for indemnity by contractors to recover damages paid—when the trial would require second-guessing military decisions.<sup>60</sup> Thus, as one commentator noted, it seemed that “[t]he *Feres-Stencel* doctrine presented an insurmountable obstacle for government contractors.”<sup>61</sup>

But the *Feres-Stencel* doctrine, although developed by the Supreme Court, did not doom government contractors in all products liability cases involving a military contract. In *Sanner v. Ford Motor Co.*, the New Jersey Superior Court, Appellate Division, just six months after the *Stencel* decision, affirmed a lower court’s decision, which held that Ford could not be liable for any defect in a jeep manufactured for the military.<sup>62</sup> This was because the defendant “had no discretion with respect to the installation of seatbelts and ... strictly adhered to the plans and specifications owned and provided by the Government.”<sup>63</sup> Importantly, the *Sanner* court recognized the need for derivative sovereign immunity in cases where the government contractor had manufactured a product in strict compliance with the federal government’s specifications.<sup>64</sup>

Similarly, the Ninth Circuit laid the foundation of the modern government contractor defense just five years later, holding that the

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57. *See Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673-74 (1977).

58. Overly, *supra* note 48, at 946.

59. *Stencel Aero Eng'g Corp.*, 431 U.S. at 673.

60. *See id.*

61. Overly, *supra* note 48, at 947.

62. 381 A.2d 805, 806 (N.J. Super. Ct. App. Div. 1977) (per curiam).

63. *Id.*

64. *See Sanner v. Ford Motor Co.*, 364 A.2d 43, 47 (N.J. Super. Ct. Law Div. 1976) (“A manufacturer is bound to comply with plans and specifications provided to it by the Government in the production of military equipment. If it does it is insulated from liability.”), *aff'd*, 381 A.2d 805 (N.J. Super. Ct. App. Div. 1977).

contractor was not liable for damages in cases in which the United States reviewed and approved a detailed set of specifications, and the contractor complied with the specifications.<sup>65</sup> The Ninth Circuit justified its ruling in *McKay v. Rockwell International Corp.* by adhering to the logic of the *Feres-Stencel* doctrine.<sup>66</sup> First, it reasoned that holding the manufacturer liable in government contractor cases when the manufacturer adhered to precise standards set by the government would undermine one of the purposes of sovereign immunity itself because “military suppliers, despite the government’s immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales.”<sup>67</sup> Second, the court reasoned that holding “military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions.”<sup>68</sup> This would have directly contradicted *Stencel*, which prohibited anyone—let alone courts—from second-guessing military decisions.<sup>69</sup>

Finally, the Ninth Circuit underscored the importance of the government contractor defense in the military context.<sup>70</sup> Rather than risk discouraging collaboration between contractors and the government, the court stated that the “defense provides incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment.”<sup>71</sup> The Ninth Circuit’s public policy rationale was to promote precision of design for military equipment that would otherwise not be achievable in the absence of the government contractor defense.<sup>72</sup>

Several years later, the Supreme Court weighed in on the issue again, deciding under what circumstances “a contractor providing

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65. See *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 450-51 (9th Cir. 1983).

66. *Id.* at 449.

67. *Id.*

68. *Id.*

69. See *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673 (1977).

70. See *McKay*, 704 F.2d at 450.

71. *Id.*

72. See *id.*

military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.”<sup>73</sup> On appeal to the Supreme Court, Boyle’s chief contention was that there was “no justification ... for shielding Government contractors from liability for design defects in military equipment.”<sup>74</sup> Justice Antonin Scalia, writing for a five-to-four majority, disagreed.<sup>75</sup> The Court held that liability of independent contractors performing work for the federal government is an area of uniquely federal concern, despite the absence of legislation specifically immunizing a government contractor from liability for design defects.<sup>76</sup> As such, the Court held that state tort law must yield to the federal concern so that the manufacturer can avoid liability because “imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.”<sup>77</sup> To determine when displacement of state law will occur, Justice Scalia adopted the Ninth Circuit’s test from *McKay*, holding that liability for design defects in military equipment cannot be imposed “when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.”<sup>78</sup>

The Court’s holding reflected that the federal government has a paramount interest in the military procurement process.<sup>79</sup> Indeed, “[f]ew, if any, other contracts rival the interest of the federal government in military procurement.”<sup>80</sup> Similar to performance contracts, the federal government must also rely on civilian contractors

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73. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 502 (1988).

74. *Id.* at 503.

75. *Id.* at 504.

76. *Id.* at 504-06.

77. *Id.* at 507.

78. *Id.* at 512.

79. *Id.* at 506 (“[I]t is plain that the Federal Government’s interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties.”).

80. See John R. Secrest & Scott R. Torpey, *U.S. Supreme Court Adopts and Expands the Government Contractor Defense*, 68 MICH. B.J. 132, 133 (1989).

to design or manufacture military products.<sup>81</sup> Thus, the Court reasoned that the federal government's reliance on nongovernment entities in the military procurement area in particular justified extending the doctrine of derivative sovereign immunity and the government contractor defense to civilian procurement contractors to mirror the treatment of civilian performance contracts.<sup>82</sup>

### *C. Derivative Sovereign Immunity's Expansion to § 1983 Cases*

Beyond public works contracts and military defense contracts, the doctrine of derivative sovereign immunity has also played a role in § 1983 cases, civil actions for deprivation of civil rights, which cannot be brought against the state or federal government.<sup>83</sup> The question of derivative sovereign immunity is pivotal in § 1983 cases in which a litigant brings an action against a private actor contracted by the state, because the statute holds liable any private person who, "under color of any statute, ordinance, regulation, custom, or usage, ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."<sup>84</sup> Thus, if derivative sovereign immunity extends to the private contractor, the contractor will be immune from liability under the statute.<sup>85</sup> Notably, the expansion of the doctrine of derivative sovereign immunity to include § 1983 cases is critical to this Note's analysis of *Campbell-Ewald*, as these cases involve contractors who provide services rather than merely manufactured goods.

Two cases illustrate how the Supreme Court has shifted its jurisprudence from withholding immunity from private actors to

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81. *See id.*

82. *Boyle*, 487 U.S. at 506 ("The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction."); *see Secrest & Torpey*, *supra* note 80, at 133.

83. 42 U.S.C. § 1983 (2012); *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989) ("Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity." (citation omitted)).

84. 42 U.S.C. § 1983.

85. *See Will*, 491 U.S. at 66.

extending it to those performing a traditionally public function in § 1983 cases. In 1997, the Court, in a five-to-four decision, held that prison guards who are employees of a private prison management firm are not entitled to qualified immunity from suit by prisoners charging a violation of § 1983, because history does not reveal a firmly rooted tradition of immunity applicable to privately employed prison guards, and the immunity doctrine's purposes do not warrant immunity for private prison guards.<sup>86</sup> The Court reasoned that history does not support the claim of derivative sovereign immunity because "correctional facilities have never been exclusively public"<sup>87</sup> and there was "no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions."<sup>88</sup>

The Court, however, reversed course in 2012, when Chief Justice John Roberts, writing for the majority, held that an attorney who was retained by a city to assist in investigating a firefighter's potential wrongdoing was entitled to the protection of the sovereign's immunity in a firefighter's § 1983 claim, even though the attorney was not a permanent, full-time employee of the city.<sup>89</sup> The Court stated that the attorney, who was performing the same work as government employees, was entitled to seek protection of qualified immunity because the common law drew no distinction between government employees and others working on behalf of the government.<sup>90</sup>

The Court underscored that one of the reasons for extending sovereign immunity to an attorney hired to work part-time for the city was "to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits."<sup>91</sup> By affording immunity to private individuals who work on behalf of the government, the Court attempted to ensure that talented individuals or firms are not deterred from working on

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86. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

87. *Id.* at 405.

88. *Id.* at 407.

89. *Filarsky v. Delia*, 566 U.S. 377, 393-94 (2012).

90. *Id.*

91. *Id.* at 389-90 (quoting *Richardson*, 521 U.S. at 409-11).

behalf of the government for fear of private suit.<sup>92</sup> Moreover, the Court recognized the need to protect private individuals working in close coordination with public employees, who might be immune from liability.<sup>93</sup> While immunity would protect public employees, private individuals or firms working alongside government employees “could be left holding the bag—facing full liability for actions taken in conjunction with government employees.”<sup>94</sup> The need to protect private individuals in these circumstances is obvious, the Court said, because “any private individual with a choice might think twice before accepting a government assignment.”<sup>95</sup>

Thus, as recently as 2012, the Court has demonstrated its commitment—through its jurisprudence in the public works, products liability, and § 1983 contexts—to extending the doctrine of derivative sovereign immunity to private individuals and firms to protect those individuals from liability from which government employees are immune. The Court did so in order to ensure performance of government duties free from distractions and to incentivize the most qualified parties to work for the government.<sup>96</sup> Diminishing the doctrine of derivative sovereign immunity disserves the public interest by exposing private firms and individuals to liability when working with the government and incentivizes them to avoid government contract work altogether.<sup>97</sup> For “uncertain immunity is little better than no immunity at all.”<sup>98</sup>

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92. *Id.*

93. *See id.* at 391.

94. *Id.*

95. *Id.*; *see also* Frank H. Stoy, Comment, *Should Outside Counsel Be Left out in the Cold? An Examination of Opposing Standards Regarding Qualified Immunity: Delia v. City of Rialto and Cullinan v. Abramson*, 50 DUQ. L. REV. 645, 657 (2012) (“Specifically, the Court granted qualified immunity to outside counsel, because to decide otherwise would not only be contrary to the purpose of qualified immunity, but it would also have a negative practical impact on the way in which public sector lawyers represent their clients.”).

96. *Filarsky*, 566 U.S. at 389-90.

97. *Id.*

98. *Id.* at 392.



## II. *CAMPBELL-EWALD CO. V. GOMEZ* AND DERIVATIVE SOVEREIGN IMMUNITY'S IMPORTANCE

This Part analyzes the *Campbell-Ewald* holding in light of Part I. This Part focuses on why the Court's holding is inconsistent with its jurisprudence and why the rule from *Campbell-Ewald* will prove to be an unworkable standard for courts to apply. Moreover, this Part discusses the uncertainty this ruling will likely create for private entities that contract with the government.

Derivative sovereign immunity case law illustrates that the availability of derivative sovereign immunity to private individuals and firms working for the government is important in several respects.<sup>99</sup> As Chief Justice Roberts noted in *Filarsky v. Delia*, exposing private individuals and firms to liability while sovereign immunity shields their public employee counterparts with whom they are working offends logic and equitable principles; moreover, it discourages the private sector from contracting with the government to serve the public's needs.<sup>100</sup> Furthermore, derivative sovereign immunity also indirectly protects the government—the very purpose of sovereign immunity in the first place—because imposing liability on government contractors will alter the terms of future contracts between the government and private firms or individuals because contractors either will raise prices or will decline to work for the government altogether.<sup>101</sup> Thus, any threat to the doctrine of derivative sovereign immunity could have far-reaching consequences on the government's ability to procure the goods or services it needs at a price feasible to the public.<sup>102</sup> The Supreme Court's holding in *Campbell-Ewald* threatens to diminish the important safeguards provided by the doctrine of derivative sovereign immunity, as it reverses the Court's trend of expanding the scope of derivative sovereign immunity.<sup>103</sup>

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99. See, e.g., *id.* at 389-90.

100. See *id.* at 391.

101. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

102. See *id.*

103. See *supra* Part I.

At the outset, it is important to note a self-inflicted limitation of the Court's holding: it only applies when a contractor faces liability for violating federal law.<sup>104</sup> Thus, courts should interpret *Campbell-Ewald* as leaving undisturbed the Court's holding in *Boyle*, in which Justice Scalia held that displacement of state law is appropriate when the state law conflicts with uniquely federal interests, such as when the government contracts with private individuals or firms to procure goods or services.<sup>105</sup> Instead, the *Campbell-Ewald* Court, without enumerating a reason, narrowly held that derivative sovereign immunity does not protect contractors from liability "[w]hen a contractor violates both federal law and the Government's explicit instructions."<sup>106</sup>

In its brief rejection of Campbell-Ewald's derivative sovereign immunity defense, the Court surprisingly asserted that derivative sovereign immunity, while it ostensibly insulates private parties from liability, does not necessarily bestow on a private firm or individual "the Government's embrace immunity."<sup>107</sup> But this statement directly contradicts the Chief Justice's conclusion not even four years before, namely that, "uncertain immunity is little better than no immunity at all."<sup>108</sup>

The *Campbell-Ewald* Court cited *Filarsky*, but failed to distinguish this case on any substantive grounds.<sup>109</sup> Instead, the Court only pointed out that *Filarsky* was a § 1983 case involving "qualified immunity," while the instant case involved complete immunity.<sup>110</sup> But this is a distinction without difference for the derivative sovereign immunity analysis because the rationale of *Filarsky* was that the common law did not distinguish between how to treat full-time government employees on the one hand and private firms or

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104. See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) ("When a contractor violates ... federal law ... no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation.").

105. See *Boyle*, 487 U.S. at 507-08.

106. *Campbell-Ewald Co.*, 136 S. Ct. at 672.

107. *Id.* ("Campbell asserts 'derivative sovereign immunity,' but can offer no authority for the notion that private persons performing Government work acquire the Government's embrace immunity." (citation omitted)).

108. *Filarsky v. Delia*, 566 U.S. 377, 392 (2012).

109. *Campbell-Ewald Co.*, 136 S. Ct. at 673.

110. See *id.*

individuals working on behalf of the government on the other.<sup>111</sup> Thus, whether government employees are entitled to full or only qualified immunity is of no moment because the doctrine of derivative sovereign immunity focuses only on extending to private individuals and firms working for the government the same protections afforded to public employees.<sup>112</sup>

The Court also attempted to distinguish *Yearsley* from the present case on the ground that there was no liability in *Yearsley* because the contractor had performed its work as the government had directed.<sup>113</sup> Thus, the Court implied that Campbell-Ewald was subject to liability because it had either exceeded its authority or had not received validly conferred authority in the first place.<sup>114</sup> But the facts of the case, as recorded by the district court, require the opposite conclusion, namely, (1) that the Navy validly conferred upon Campbell-Ewald the authority to contract with MindMatics to identify potential Navy recruits and to send the Navy-approved text message; and (2) that at no point did Campbell-Ewald exceed the authority granted to it by the Navy.<sup>115</sup>

In the alternative, the Court suggested that Campbell-Ewald was vicariously liable for the text messages sent to individuals who had not opted in, even though MindMatics—and not Campbell-Ewald—sent the messages because “there is vicarious liability for TCPA violations.”<sup>116</sup> The Court pointed out that the Navy had contracted

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111. *Filarsky*, 566 U.S. at 393-94 (“Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky’s claim to the protection accorded Wells, Bekker, and Peel solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions.”).

112. *See id.* at 392-94.

113. *Campbell-Ewald Co.*, 136 S. Ct. at 673; *see also* *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

114. *Campbell-Ewald Co.*, 136 S. Ct. at 673 (“The Court contrasted with *Yearsley* cases in which a Government agent had ‘exceeded his authority’ or the authority ‘was not validly conferred’; in those circumstances, the Court said, the agent could be held liable for conduct causing injury to another.”).

115. *See* *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237, at \*2 (C.D. Cal. Feb. 22, 2013) (explaining that the Navy authorized and approved the text message campaign proposed by MindMatics), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663 (2016).

116. *Campbell-Ewald Co.*, 136 S. Ct. at 674; *see also* *In re* Joint Petition Filed by Dish Network, LLC, 28 FCC Rcd. 6574, 6582 (2013) (“Our rules have long drawn a distinction between

with Campbell-Ewald and relied on its expertise to send text messages using an opt-in list so as not to violate any local or federal laws.<sup>117</sup> The Court then suddenly concluded, “In short, the current record reveals no basis for arguing that Gomez’s right to remain message-free was in doubt or that Campbell complied with the Navy’s instructions.”<sup>118</sup> While Gomez certainly had a right to avoid the Navy’s recruitment text message, Campbell-Ewald did exactly what the Navy instructed it to do, even if the result happened to violate federal law.<sup>119</sup>

The Navy closely collaborated with Campbell-Ewald on the May 2006 recruitment text message campaign, providing both “oversight and approval.”<sup>120</sup> Moreover, the Navy “reviewed, revised, and approved” the text message itself.<sup>121</sup> Indeed, the Navy approved every move made by Campbell-Ewald throughout the process, including the decision to rely on MindMatics to identify an opt-in list of potential Navy recruits and subsequently send the messages.<sup>122</sup> Much like in *Filarsky*, where the private attorney worked in close coordination with public officials,<sup>123</sup> the Navy and Campbell-Ewald worked harmoniously as they planned the Navy’s text message recruitment campaign.<sup>124</sup> Thus, the Navy, as much as Campbell-Ewald, was responsible for Gomez receiving a text message in error, because both the Navy and Campbell-Ewald had jointly decided to rely on MindMatics to send the text messages to individuals on an opt-in list.<sup>125</sup> *Filarsky* and the way in which the doctrine of derivative sovereign immunity has developed indicate that Campbell-Ewald should enjoy the same immunity available to the Navy.<sup>126</sup>

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the telemarketer who initiates a call and the seller on whose behalf a call is made. In accordance with those rules, as we explain below, we clarify that a seller is not directly liable for a violation of the TCPA unless it initiates a call, but may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer.”).

117. *Campbell-Ewald Co.*, 136 S. Ct. at 673-74.

118. *Id.* at 674.

119. *See id.* at 673-74.

120. *Gomez*, 2013 WL 655237, at \*2.

121. *Id.*

122. *Id.*

123. *See Filarsky v. Delia*, 566 U.S. 377, 393-94 (2012).

124. *Gomez*, 2013 WL 655237, at \*2.

125. *Id.*

126. *See supra* Part I; *see also, e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988); *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673-74 (1977); *Feres v. United*

While the Court erred in its judgment, its more detrimental misstep was to announce a new rule of derivative sovereign immunity that contradicts the Court's precedent and will likely prove to be an unworkable standard whenever a contractor violates federal law.<sup>127</sup> According to the Court, a government contractor is not entitled to derivative sovereign immunity "[w]hen a contractor violates both federal law and the Government's explicit instructions."<sup>128</sup> The first prong of the test is useful only in that it limits the Court's holding to scenarios that invoke federal—rather than state—law.<sup>129</sup> Otherwise, it has no value. After all, contractors only benefit from the doctrine of derivative sovereign immunity when they have broken a law.<sup>130</sup> On the other hand, the second element that ostensibly requires contractors not to deviate at all from the government's explicit instructions is much more problematic.<sup>131</sup>

For starters, did Campbell-Ewald fail to follow the government's explicit instructions? The Court says so, because the Navy authorized Campbell-Ewald to use MindMatics to send text messages to individuals on an opt-in list, and Gomez was not on the list.<sup>132</sup> But how exactly did Campbell-Ewald fail to follow the government's instructions? Campbell-Ewald worked closely with the Navy, receiving approval at every stage in the development of the campaign, and relied on MindMatics only after the Navy said to do so.<sup>133</sup> In fact, Campbell-Ewald did not deviate from the Navy's explicit instructions by even one iota.<sup>134</sup>

Applying the logic from *Campbell-Ewald* to *Yearsley* underscores how the holding in *Campbell-Ewald* diminished the doctrine of derivative sovereign immunity and created uncertainty regarding the extent to which private firms and individuals may access the protections afforded to their governmental counterparts. In *Yearsley*, the plaintiffs, landowners along the Missouri River, sued W.A.

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States, 340 U.S. 135, 142 (1950); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

127. See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

128. *Id.*

129. See *id.*

130. See *id.*

131. See *id.*

132. *Id.* at 673-74.

133. *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237, at \*2 (C.D. Cal. Feb. 22, 2013), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016).

134. See *id.*

Ross Construction Company, alleging that the company's construction of dikes along the river had resulted in the erosion of acres of farmland.<sup>135</sup>

In that case, the issues were twofold: (1) whether the alleged erosion constituted a taking, and (2) whether the construction company, as a government contractor, could be held liable.<sup>136</sup> The Eighth Circuit acknowledged that the trial court determined that

[t]he evidence established that two dikes built in the river above, and one dike built opposite, [plaintiffs'] land had diverted the channel or the current of the river ... and that, as a result, the 'accretion land' of the plaintiffs to the extent of perhaps 95 acres had been eroded and carried away.<sup>137</sup>

Moreover, there was evidence that "in extending the dike opposite the plaintiffs' land ... the contractor ... accelerated the erosion of the plaintiffs' land."<sup>138</sup>

Nevertheless, the Eighth Circuit and the Supreme Court held that the government contractor was not liable because Congress had authority to confer upon the contractor the task of building dikes along the Missouri River and the contractor had not exceeded its authority.<sup>139</sup> Notably, the *Yearsley* Court never considered whether the contractor violated the government's explicit instructions.<sup>140</sup> Had it done so, the Court might have reached a different conclusion after evaluating whether the contractor had used the exact methods of construction prescribed by the government—if any were prescribed at all. But the *Yearsley* Court and others have not endeavored to determine whether a contractor inadvertently failed to follow precisely the government's explicit instructions because doing so actually discourages collaboration between the contractor and the government.<sup>141</sup>

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135. *W.A. Ross Constr. Co. v. Yearsley*, 103 F.2d 589, 590-91 (8th Cir. 1939), *aff'd*, 309 U.S. 18 (1940).

136. *See id.* at 591.

137. *Id.*

138. *Id.*

139. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

140. *See id.*

141. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988) ("[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process,

The Court's new rule, which it incorrectly applied in *Campbell-Ewald* itself, has the potential to undermine the government's ability to work closely with contractors. Contractors might reasonably fear that they will face liability if they receive explicit instructions from the government and something goes wrong, even if the error was beyond the contractor's control, as it was in *Campbell-Ewald*.<sup>142</sup> As a result, the number of private individuals and firms willing to work for the government will likely shrink.<sup>143</sup> Moreover, the cost to the government of contracting work with private contractors will also increase.<sup>144</sup> This might be due not only to a smaller supply of contractors willing to work for the government but also the contractors' fear that collaborating too closely with the government will expose them to liability under *Campbell-Ewald*.<sup>145</sup>

### III. THE EXTERNAL COSTS OF *CAMPBELL-EWALD CO. V. GOMEZ*

This Part considers the unintended consequences of *Campbell-Ewald's* holding. The first Section focuses on the potential increase in costs for outsourcing government projects as government contractors increase prices to offset the heightened risk of liability. This Section also argues normatively that there are public policy reasons for allowing the government as the consumer to avoid internalizing the risk of liability that might result from litigation. Moreover, this Section argues that these same public policy reasons underlie the doctrine of sovereign immunity and bolster the rationale for extending derivative sovereign immunity to government contractors.

The second Section discusses the potential decrease in quality of services and products available to the government, as the supply of potential independent contractors will shrink because many contractors will lack the risk appetite sufficient to take on the increased risk. This Section also argues that the reduction in the number of firms available to provide goods or services to the federal govern-

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placing the contractor at risk unless it identifies all design defects.”).

142. See *Gomez v. Campbell-Ewald, Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237, at \*2 (C.D. Cal. Feb. 22, 2013), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016).

143. See *infra* Part III.A.

144. See *infra* Part III.A.

145. See *infra* Part III.A.

ment is more problematic than a reduction in the number of firms selling goods and services to the private sector because the government has specialized needs, especially in the area of military defense, that do not compare to the demands of private individuals and firms.

*A. The Increased Costs of Independent Contractors*

The Court's holding in *Campbell-Ewald*, because it broke with the Court's well-established trend of expanding the scope of immunity available to government contractors, casts doubt upon whether the doctrine will prove sufficient to protect private individuals and firms who work for the government in the future.<sup>146</sup> This uncertainty translates to business risk for potential government contractors that the cost of doing business on behalf of the government will be higher than originally anticipated due to the threat of litigation costs.<sup>147</sup> These private parties who still wish to perform work on behalf of the government will have to take steps to insulate themselves from the risk.<sup>148</sup>

Most likely, private firms or individuals will increase the price of the goods or services they provide to offset the added risk.<sup>149</sup> Notably, the price increase is not inefficient; instead, the increase merely makes the government internalize the social cost of doing business with a private firm or individual subject to liability by paying higher prices.<sup>150</sup> However, this result is troubling from a normative perspective.

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146. See *supra* Part II.

147. Cf. RICHARD JONES, SUPPLY IN A MARKET ECONOMY 44-45 (Charles Carter ed., 1976) (explaining that total cost of production of a good or service must consider both fixed and variable costs).

148. Cf. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988) (“[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.”).

149. See Chester A. Nicholson, *Agent Orange Products Liability Litigation*, 24 A.F. L. REV. 97, 105 (1984) (“[T]he contractor defense makes sense because in its absence contractors would ... raise prices to cover the added risks.”).

150. See R.H. COASE, THE FIRM THE MARKET AND THE LAW 97 (1988) (explaining that a market is efficient when the liable business “has to pay for all damage caused and the pricing system works smoothly” to reflect those costs).



Throughout the development of the doctrine, courts have reasoned that one of the public policy rationales for having a doctrine of derivative sovereign immunity is to insulate the federal government from higher prices for essential goods and services, especially those with military implications.<sup>151</sup> This rationale tracks the reason that the sovereign immunity doctrine itself exists—to eliminate the risk that the government will have to bear higher costs when executing its will for the sake of the public.<sup>152</sup> Thus, the *Campbell-Ewald* holding directly undermines the interests of the federal government by exposing private individuals and firms to greater liability, which the private parties will eventually pass on to the government in the form of higher prices for the same goods and services.<sup>153</sup>

### *B. The Diminished Quality of the Independent Contractor Market*

Increased prices are likely not the only negative results stemming from the uncertainty created by the Court's holding in *Campbell-Ewald*. There is also the risk that there will be a decrease in the quality of services and products available to the government, as the

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151. See, e.g., *Boyle*, 487 U.S. at 507 (“The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.”); *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) (“[H]olding the supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product’s design and specifications would subvert the *Feres-Stencel* rule since military suppliers, despite the government’s immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales.”); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965) (concluding that holding a contractor liable for the government’s bad judgment would result in increased prices to the government to cover the contractor’s risk of loss from possible harmful effects); *Hunt v. Blasius*, 370 N.E.2d 617, 621-22 (Ill. App. Ct. 1977) (“A government contract must of necessity be different in nature from private undertakings. Nearly all government purchases and contracts are taken by open bidding; necessity exists to obtain the widest possible field of bidders in order to preserve tax revenues. Should bidders feel apprehensive that they might be sued for following specifications, either of two untoward results could ensue: (1) There would be no bids, or (2) bids would be inflated to take care of any potential liability. Public policy dictates that bidders who comply strictly with governmental specifications should be shielded from liability in any respect in which the product complies.”), *aff’d*, 384 N.E. 2d 368 (Ill. 1978).

152. See *Boyle*, 487 U.S. at 507.

153. See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

supply of potential independent contractors will shrink, because many contractors will lack the risk appetite sufficient to take on the increased risk.<sup>154</sup> Moreover, there is a risk that, even if suppliers do not exit the market entirely, government contractors will be reluctant to work too closely with the government for fear that they will be held liable under *Campbell-Ewald* for violating one of the government's explicit instructions.<sup>155</sup> Either result underscores the necessity of a strong derivative sovereign immunity doctrine to insulate government contractors from the unpredictability of litigation while performing work for the government.

Other commentators and courts have noted that maintaining a strong government contractor defense is especially important in the military context to ensure the highest quality of product or service provided by the private sector to the federal government.<sup>156</sup> Furthermore, as the government contractor defense weakens, there will be greater pressure to secure contractual indemnities between the government and the contractor, because contractors will find it increasingly difficult to obtain insurance coverage to mitigate the risk of potential litigation.<sup>157</sup>

As a result of the increased costs and the limited availability of insurance, many private individuals and firms likely will be unable to bear the additional risk of doing business with the government in the absence of a strong derivative sovereign immunity doctrine.<sup>158</sup> Naturally, many of the potential contractors will exit the government contractor market, reducing the supply of private individuals and firms available to perform the government's work, as demand either remains the same or increases.<sup>159</sup> While it will be more ex-

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154. See *Boyle*, 487 U.S. at 507.

155. See *supra* Part II.

156. See *Boyle*, 487 U.S. at 513 (“[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.”); see also Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 440-41 (2009) (concluding that the interests in protecting contractors from civil suit are strong where the government exercises effective control over contractors, and where the defense is necessary to protect military decision-making and military discipline).

157. See Frank P. Grad, *Contractual Indemnification of Government Contractors*, 4 ADMIN. L.J. 433, 436 (1991).

158. See Nicholson, *supra* note 149, at 105.

159. See *Hunt v. Blasius*, 370 N.E.2d 617, 621-22 (Ill. App. Ct. 1977), *aff’d*, 384 N.E. 2d 386 (Ill. 1978).

pensive for the government to procure goods and services from the private market, it is also likely that the government will pay a higher price for goods or services that are of lower quality than they had paid before the supply of contractors shrank.<sup>160</sup> That is, because the higher risk of liability will drive some suppliers out of the market, the market will become both less competitive and more expensive.<sup>161</sup>

#### IV. POTENTIAL PITFALL OF DIMINISHED DERIVATIVE SOVEREIGN IMMUNITY: INEFFICIENT VERTICAL GOVERNMENT INTEGRATION

This Part argues that the increased monetary costs to the government of outsourcing projects to private firms could lead the government to take over the function in question. That is, the increased costs as a result of the diminished doctrine of derivative sovereign immunity will incentivize the government to integrate vertically because it will incur lower pecuniary costs in doing so, even though the private sector could produce the relevant good or service at a lower social cost.<sup>162</sup> Such a result would be both normatively undesirable and economically inefficient.

If the price to the federal government of contracting with private firms increases, or the market of private firms willing to incur more liability as a result of the diminished doctrine of derivative sovereign immunity shrinks, the federal government might consider a drastic alternative. Due to increased monetary costs of outsourcing projects to private firms, the government could reasonably decide to produce the products or services in question itself. This decision would be akin to vertical integration in the private sector.<sup>163</sup> The problem with this solution is that it focuses on monetary costs without properly accounting for all transaction costs associated with vertical integration, including the costs to society more generally.<sup>164</sup>

An analogous problem arises in the private sector due to antitrust restrictions under section 1 of the Sherman Act.<sup>165</sup> For instance, the

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160. *See id.*

161. *See id.*

162. *See* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5, 9-10 (2004).

163. *See* OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 85-86 (1985).

164. *See id.* at 87.

165. Sherman Act § 1, 15 U.S.C. § 1 (2012).

imposition of antitrust liability on various forms of partial vertical integration in the private sector could induce firms to integrate completely, even if production and distribution via complete integration consumes more resources than production and distribution via partial integration.<sup>166</sup> Put another way, courts' application of antitrust laws, which seek to maximize wealth in a competitive market, has actually resulted in inefficient consequences by privileging complete integration over partial integration.<sup>167</sup>

If the doctrine of derivative sovereign immunity fails to protect private firms from the increased risk of litigation costs, the government might choose to integrate vertically in order to conserve monetary resources. That is, the federal government faces the same decision matrix as private firms in choosing whether to integrate vertically: whether it is more cost effective to solicit bids from qualified suppliers for the requisite goods and services or to produce the goods and services itself.<sup>168</sup>

Missing from the analysis, however, is what the transaction cost approach has added to the field of economics—an emphasis on organizational structure and efficient practices of market actors.<sup>169</sup> Part of the analysis necessarily involves considering whether such an organizational structure maximizes social welfare.<sup>170</sup> For instance, monopolies are disfavored, even though monopolistic firms might take advantage of economies of scale, because the lack of competition hurts consumers by imposing on them a higher price than a competitive market would yield.<sup>171</sup> In other instances, vertical

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166. See, e.g., Meese, *supra* note 162, at 9-10 (arguing that antitrust law should treat certain forms of partial and complete vertical integration as lawful per se to remove incentives that yield socially inefficient outcomes).

167. See *id.* (“While complete integration can confer more thorough control on a single, unified firm, such integration often comes with costs of its own. Partial integration can avoid these costs while at the same time producing many of the control benefits associated with complete integration.... As a result, courts should apply the same standards [to each method of integration].”).

168. See WILLIAMSON, *supra* note 163, at 88.

169. See *id.* at 89 (“In fact, however, technology and organizational modes ought to be treated symmetrically; they are decision variables whose values are determined simultaneously.”).

170. See Meese, *supra* note 162, at 14.

171. See Herbert Hovenkamp, *Antitrust Policy and the Social Cost of Monopoly*, 78 IOWA L. REV. 371, 371 (1993) (“The social cost of monopoly is equal to the loss produced by monopoly pricing and monopoly behavior, minus any social gains that monopoly produces.”).

integration might be inefficient “because of the incentive and bureaucratic disabilities of internal organization in production cost control respects.”<sup>172</sup>

This is precisely the problem the federal government would face if it were to elect to produce all goods and services it requires itself rather than to procure them on the open market. Instead of capitalizing on the expertise and efficiencies of private firms, the federal government would have to invest in infrastructure as well as expertise in order to provide goods and services of a similar quality as those available in the market.<sup>173</sup> Notably, even if the monetary costs of creating infrastructure and hiring individuals with the requisite expertise is less than the monetary cost of acquiring the same goods or services on the open market, vertical integration might still be socially inefficient.<sup>174</sup> This is because efficiency must account for the opportunity cost to the government (and by extension, its citizens) of producing goods, which are already available in the market, instead of investing its limited resources of time and money in other projects.<sup>175</sup>

### CONCLUSION

The purpose of the doctrine of derivative sovereign immunity is to protect private firms and individuals working on behalf of the government as if they were government employees.<sup>176</sup> This Note has illustrated that the doctrine is important because it enables the government to take advantage of the experience and expertise of private contractors without exposing those contractors to liability, which would inevitably raise the price of goods or services.<sup>177</sup> Moreover, this Note has demonstrated that the doctrine of derivative sovereign immunity has expanded over the last seventy years

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172. WILLIAMSON, *supra* note 163, at 91.

173. *See id.* at 88.

174. *See id.* at 91.

175. *Cf. id.* at 88 (“[T]here is no compelling neoclassical reason to prefer integration over market procurement.”).

176. *See Filarsky v. Delia*, 566 U.S. 377, 387 (2012) (“[I]t should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.”).

177. *See supra* Part III.

to apply in a variety of contexts, including public works, products liability, and civil rights actions, highlighting the usefulness of the government contractor defense.<sup>178</sup> Because the Supreme Court's holding in *Campbell-Ewald* unnecessarily casts doubt on the viability of the government contractor defense in situations in which the contractor allegedly violated federal law and the government gave the contractor explicit instructions,<sup>179</sup> the Supreme Court should overrule *Campbell-Ewald* at its earliest opportunity.

The Court's *Campbell-Ewald* holding burdens the derivative sovereign immunity doctrine when federal laws are at issue and also discourages contractors and the government from working closely together to avoid the appearance that the government gave the contractor "explicit instructions" in the event that something goes wrong.<sup>180</sup> This perverse incentive flies in the face of the public policy rationale for derivative sovereign immunity, which is to encourage the government and contractors to collaborate to achieve the ends of the government.<sup>181</sup>

As a result of the increased risk of liability to private contractors, individuals and firms willing to work on behalf of the government will likely raise prices to account for the added risk.<sup>182</sup> Those contractors unwilling or unable to stomach the added risk will leave the market, ensuring that prices will go up while the quality of products and services available to the government will diminish.<sup>183</sup>

The most damaging effect of the Court's holding, however, lies in the way the federal government could reasonably search for an alternative to paying higher pecuniary costs for inferior products and services. The federal government might vertically integrate to produce goods and services that it had previously acquired from private contractors if it could do so at a lower pecuniary cost.<sup>184</sup> The problem with this solution is that it fails to consider whether the private

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178. *See supra* Part I.

179. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) ("When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation.").

180. *See id.*

181. *See supra* Part II.

182. *See supra* Part III.A.

183. *See supra* Part III.B.

184. *See supra* Part IV.

sector could produce the relevant good or service at a lower social cost. If this occurs, an inefficient outcome is likely because vertical integration by the government will require expanding the size of the federal bureaucracy, investing in infrastructure, and paying a premium for expertise, while foregoing other opportunities for more productive investment—while private resources go wasted.

*W. Logan Lewis\**

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\* J.D. Candidate 2018, William & Mary Law School; M.A. 2013, Vanderbilt University; B.A. 2012, Davidson College. I would like to thank Professor Alan Meese, whose guidance proved invaluable. Additionally, I am thankful to my colleagues on the *William & Mary Law Review* for their dedicated efforts throughout the publication process. Most importantly, thank you to Heidi for the unwavering support.