Assessing the Adequacy of State Products Liability Lawmaking

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INTRODUCTION

Most torts professors have simply taken for granted that tort law is essentially state law: in America this is the way things are and have always been. In early 1995, however, both houses of Congress passed significant tort reform bills, raising in a dramatic way the question of the proper federal role in tort law.[1] Since then, I have been able to develop my thoughts on the federalism issue at several conferences, including the one sponsored by Yale's two journals.[2] What was unique about the Yale conference on federalism was the extent to which discussion focused on possible biases operating in a variety of policy areas on the state lawmaking process, biases that are conducive to undesirable policy outcomes. In particular, the Yale conference was heavily influenced by the theme of "race to the bottom," and variations on that theme.

Several analysts have indeed applied the "race" theme to products liability, and hence have criticized our products liability system in its current state-oriented form. This Comment restates their argument and provides a critical evaluation of its soundness. The Comment then identifies and assesses recent

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1. A conference committee compromise was finally approved by both the Senate and the House in late March 1996. On May 2 the bill was then vetoed by President Clinton, in part because it would "inappropriately intrude[] on state authority." Neil A. Lewis, *Clinton Vetoes Liability Limits in Product Suits*, N.Y. TIMES, May 3, 1996, at A1, A8. My Comment does not address the particulars of this legislation. Instead, it considers the more general question of the adequacy of the state lawmaking process.

2. The fullest expression of my current views can be found in Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. (forthcoming 1996).

recommendations for solving the problem of structural bias by initially preserving state lawmaking authority but then modifying the choice-of-law rules that accompany and supplement state products liability rules.

I. STRUCTURAL BIAS AS A POSSIBLE PROBLEM

Begin with the standard case in which A is the state of residence, injury, and retail sale, while B is the state of manufacture. Assume furthermore that the court would clearly apply State A's law. What incentives does this give lawmakers in State A as they develop their relevant products liability rules? If those lawmakers increase liability, they benefit in-state residents with larger compensation payments, while exporting the costs of this to out-of-state manufacturers and product consumers (and company shareholders) throughout the nation.[3] All of this can give those lawmakers a bias towards expanding liability. Call this a "race to the top" (where "the top" refers not to the actual quality or efficiency of liability rules but rather the level of the liability rights they confer on accident victims).[4] In a 1988 paper, Michael McConnell, affirming this "structural bias" in products liability lawmaking, observed that "states pursue a persistent and one-directional race towards ever-higher plaintiff recoveries, a race whose outcome does not necessarily represent the considered judgment of decision makers in the several states."[5] In his 1988 book *The Product Liability Mess*,[6] Richard Neely—then a judge on the West Virginia Supreme Court—evaluated modern products liability lawmaking in an essentially similar way.[7]

The structural bias position, then, has been adopted by leading analysts. If the position is accurate, then it would be desirable to replace state lawmaking[8]

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3. The premise here is that there is no practical way in which manufacturers can adjust their prices state-by-state to take into account particular states' liability positions. *See* Edmund W. Kitch, *Can Washington Repair the Tort System?*, *in* NEW DIRECTIONS IN LIABILITY LAW 102, 109-10 (Walter Olson ed., 1988) [hereinafter NEW DIRECTIONS].

4. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1219 (1992) (discussing ambiguity in various versions of "race" terminology).

5. Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS, *supra* note 3, at 90, 92-97.

6. RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS (1988).

7. In the same year, Richard Epstein offered about the same analysis. Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. 311, 312 (1988). Epstein mainly described state legislatures' unwillingness to adopt statutes that would limit products liability rights. But his structural point would equally apply to those legislatures' willingness to expand products liability rights.

8. Bruce Hay assumes that state lawmakers express their preference for in-state victims by manipulating not just the doctrines of products liability but the *combination* of those doctrines *and* choice-of-law rules. Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. REV. 617, 627 (1992). Under Hay's account, the games that state lawmakers play are even more complex than the game suggested in my text above. But the problem of state lawmaking biased in favor of in-state interests remains the same. As it happens, as Hay considers the strategies that

with national lawmaking. For at the national level, the particular problem of bias that might afflict state lawmaking is all but eliminated. National lawmakers are in a satisfactory position to balance the interests of all consumers and all manufacturers.[9]

Does the position accurately describe reality, however? On this score, one interesting item of evidence is Judge Neely's own opinion, on behalf of the West Virginia Supreme Court, in *Blankenship v. General Motors Corporation*.[10] In its first holding in *Blankenship*, the court adopted the doctrine of crashworthiness liability. In doing so, the court indicated doubts about the wisdom of this doctrine.[11] Nevertheless, the court noted that the doctrine had been adopted in almost every other jurisdiction in the country. Perceiving that West Virginia residents were already paying for the crashworthiness doctrine as applied nationwide by way of the product liability premium markup in the cost of cars sold in West Virginia, the court ruled that West Virginia should join the national consensus as to crashworthiness liability.[12] Next, the court considered the "causation" issue in crashworthiness cases. At the time of *Blankenship*, American jurisdictions were divided between the *Huddell* rule,[13] requiring the plaintiff to prove what added injuries were due to the absence of crashworthiness features, and the *Fox*[14] rule, requiring, in effect, car manufacturers to bear the burden of proof on the issue of the second injury. Encountering this division, the *Blankenship* court decided to adhere to *Fox*. Indeed, the court ruled—even more broadly (and open-endedly)—that "in any crashworthiness case where there is a split of authority [among states] on any issue . . . we adopt the rule that is most liberal to the plaintiff."[15]

Blankenship afforded Judge Neely an interesting opportunity to document

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state lawmakers would develop in manipulating both liability rules and choice of law rules, he ends up unable to tell whether state products liability rules are likely to be less efficient than a federal products liability regime would be. *See id.* at 651 & n.91.

Hay's general analysis is marred by the apparent inaccuracy in his key assumption about the substance of choice-of-law doctrine. Hay perceives that modern courts apply a "governmental interest" conflicts rule in products cases—and he assumes that this rule gives the plaintiff "the benefit of either his own state's law or that of the [defendant's state], whichever is more favorable to [the plaintiff]." *Id.* at 627. This assumption seems incorrect, insofar as it presents as a firm rule what is at best a partial tendency in the case law. Its apparent incorrectness reduces the relevance of the specifics of Hay's analysis.

9. Law at the national level would comply with McConnell's desire for lawmaking by an "autarky": a jurisdiction that is "a self-sufficient economy, all of whose production and consumption [takes] place within its own borders." McConnell, *supra* note 5, at 91. McConnell briefly and skeptically discusses the possibility of federal legislation; he mentions the difficulty of amending federal legislation, and the existence of regional variations in public preferences. But even he acknowledges that "[t]he advantages of state over federal legislation should not be exaggerated." *Id.* at 100.

10. 406 S.E.2d 781 (W. Va. 1991).

11. *Id.* at 783.

12. *Id.* at 784-85.

13. Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

14. Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978).

15. *Id.* at 786.

his own diagnosis of the problem of bias in products liability decision-making. Yet if one is looking for convincing confirmation of the Neely diagnosis, *Blankenship* does not suffice. For the *Blankenship* opinion is coy and self-conscious: plainly Judge Neely was deliberately trying to draw attention to what he saw as an inherent defect in the products liability lawmaking process. Indeed, the court's broad "split of authority" ruling seems almost deliberately outrageous. In his book, Judge Neely had suggested that the bias in products liability lawmaking closely resembles the forms of state legislative bias that in other contexts have encouraged the United States Supreme Court to hold state statutes unconstitutional under the Commerce Clause.[16] It is reasonable to believe that the open-ended "split of authority" holding in *Blankenship* was included by Judge Neely in order to attract the attention of the Supreme Court and hence invite that Court to reverse his own opinion on Commerce Clause grounds.[17]

Blankenship, then, should be put to one side in inquiring whether state lawmaking systematically promotes in-state interests in the crass way that Neely suggests. In considering the McConnell-Neely claim of structural bias, several lines of analysis suggest the need for real caution.

An initial point is that products liability doctrine originally comes from judges rather than legislators. Even given the increasing significance of contested judicial elections at the state level,[18] state court judges remain far less burdened by the requirements of electoral politics than state legislators. Judges therefore do not need to cater to voters in the same way that legislators do. Indeed, most observers assume that judges do decide cases mainly along the lines of their own perceptions of the public interest. Judge Neely himself, while describing state court judges as "political hacks,"[19] appraises them as seeking "the most practical way to achieve their vision of the just social contract."[20] Jonathan Macey, even while emphasizing the tendency for legislatures to deliver statutes to well-organized interest groups, believes that the independence of the judiciary is meaningful and that judges can and do decide cases in a public-interest way.[21] Although Judge Posner has developed an interest-group theory of regulation,[22] he believes that judges decide

16. NEELY, *supra* note 6, at 79.

17. In fact, the defendant, bypassing its opportunity, did not apply for a certiorari writ.

18. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). Judge Posner's observation is that "state judges are on average less independent from political influences . . . than federal judges." RICHARD A. POSNER, THE FEDERAL COURTS 191 (1985).

19. NEELY, *supra* note 6, at 128.

20. *Id.* at 135.

21. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

22. *See* Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

important cases in accord with their own actual "values."[23] George Priest, while regarding modern products liability as a disaster, assumes that this disaster has been produced by judicial views as to the public interest (views that Priest regards as inaccurate).[24]

I share in the understanding that judges decide cases mainly in accordance with their own sense of the public interest. Yet despite this understanding, there is at least a variation of the argument about structural bias in judicial decision-making that may well be appropriate. It is not hard to find state court products opinions which, in expanding liability, seem to devalue manufacturers' arguments that the proposed expansion would treat manufacturers unfairly or would impose excessive costs on manufacturers. It may be easy for state courts to neglect those added costs when the judges can intuit that the costs will not be borne by in-state actors; and state court judges can more conveniently neglect a defendant's claim of unfairness when the defendant is not part of the judges' own political community.[25] Put it this way: even judges seeking to promote the public interest might, at least implicitly,[26] define the "public" in terms of the "state."[27]

Yet I should stress the limited import of my assessment as an explanation for the expansion of modern products liability doctrine. Consider the following landmark judicial opinions: *Larsen v. General Motors Corporation*,[28] establishing liability for crashworthiness; *Borel v. Fibreboard Paper Products Corporation*,[29] providing the framework for asbestos litigation; *Davis v.*

23. RICHARD A. POSNER, OVERCOMING LAW 132 (1995); *see also id.* at 121 ("[J]udges impose their political vision on society.").

24. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

25. Michigan is a state of auto makers, who are frequently sued for alleged design failings. And the Michigan Supreme Court has conservatively ruled that design claims sound in negligence only. *See* Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (Mich. 1984); Owens v. Allis-Chalmers, 326 N.W.2d 372 (Mich. 1982) (forklift). Moreover, a Michigan intermediate court has recently adopted a conservative rule on burden-of-proof in auto crashworthiness cases. *See* Sumner v. General Motors Corp., 538 N.W.2d 112 (Mich. Ct. App. 1995). Many drug manufacturers are located in New Jersey; and the New Jersey Supreme Court backed away from the doctrine of liability for unknowable hazards in a case involving a drug-company defendant. *See* Feldman v. Lederle Laboratories, 479 A.2d 374 (N.J. 1984). Given the limited weight that modern choice-of-law rules place on the state of the defendant's residence, the actual benefit that auto makers and drug manufacturers received from these courts' rulings was limited. Even so, the courts' results were undoubtedly influenced by the courts' appreciation of the valid interests of the defendant industries; and this appreciation was naturally facilitated by the industry's conspicuous presence within the state.

26. Judge Posner suggests that state court judges might—in an "unconscious" way—identify primarily with in-state interests. POSNER, *supra* note 18, at 177.

27. Given the limited incentive I am here ascribing to state court judges, I certainly would not expect those judges to play the very exotic game developed by Professor Hay, a game that would involve manipulating the combination of substantive rules and choice-of-law rules so as to maximize in the long run the level of in-state benefits. *See supra* note 8.

28. 391 F.2d 495 (8th Cir. 1968).

29. 493 F.2d 1076 (5th Cir. 1973).

Wyeth Laboratories, Inc.[30] and *Reyes v. Wyeth Laboratories*,[31] broadening the liability of the producers of vaccines. All these milestones in the expansion of liability came not from state court judges, but rather from judges on federal courts of appeals—sitting, moreover, in three-judge panels, in which no more than one judge was even a resident of the state whose law was under review. The presence of these federal-judge liability-expanding landmarks makes it difficult to believe that state-court judges, in expanding liability, have been influenced in any major way by mere in-state preferences. On balance, while I am willing to acknowledge some problem of neglect of out-of-state interests in state court products liability lawmaking, the problem seems only a limited one.

The discussion above has downplayed the claim of structural bias by emphasizing the traditional role of the judiciary in developing products liability doctrine. Admittedly, however, products liability at the state level is increasingly being managed by state legislatures. For such decisionmakers, the claim of structural bias has far more appeal, given the responsiveness of those legislators to the preferences of local voters. Still, there are offsetting points.

First, any premise that legislators are driven exclusively by a desire for reelection is overstated. As most observers agree, legislators are influenced at least in part by the ideas they hold or the ideologies they adhere to relating to the public interest.[32] A perhaps realistic assessment is that a statutory proposal, to secure enactment, must be backed up by a combination of a favorable political configuration and a plausible public-policy rationale. A second point draws on the reasoning in products liability opinions themselves. Those opinions typically build on the premise that consumers underestimate the risks of product-related injuries.[33] Yet if consumers do underestimate these risks, then consumers, in their role as voters, will likewise underestimate the value of products liability rights that state lawmakers may bestow on them. If so, then they will insufficiently reward legislators who expand those rights.[34]

But perhaps an even more basic point is this. Even if narrowly rational lawmakers care primarily about their reelection prospects, those prospects depend in significant part on their success in fundraising. Manufacturers—even those whose principal places of business are out-of-state—are few enough in

30. 399 F.2d 121 (9th Cir. 1968).

31. 498 F.2d 1264 (5th Cir. 1974).

32. *See, e.g.*, JOHN H. ALDRICH, WHY PARTIES? 4, 278 (1995); DANIEL FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 23-33 (1991); RICHARD FENNO, HOME STYLE 214-32 (1978); BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING 10-11 (1995); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 80-87 (1990).

33. *See, e.g.*, Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

34. *See* Mark Giestfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803 (1994).

number as to minimize free-rider problems as they mount fundraising and lobbying efforts. By contrast, product consumers—even those located within a particular state—remain a diffuse group, in a poor position to engage in fundraising and lobbying. Even out-of-state manufacturers, then, may be able to lobby effectively with state legislatures.[35] Given this point, it is not surprising that most of the products liability reform statutes adopted by states in the mid-1970s and the mid-1980s contained provisions favoring manufacturer-defendants rather than consumer-plaintiffs. In 1987, my own state, California, adopted a reform statute providing tobacco companies with an explicit liability shelter.[36] It is no secret in California that Willie Brown, then the Speaker of the California Assembly, was receiving mammoth campaign contributions from tobacco companies.

To recap, the problem of structural bias identified by McConnell and Neely may be present, but is far less serious than they suggest. At the legislative and judicial levels, it is no more than a moderate problem. Even so, the problem exists, and has relevance in any review of the desirability of state control of products liability doctrine.

II. CHOICE OF LAW SOLUTIONS

Part I has discussed an apparent problem of structural bias in the current system of state products liability lawmaking, which could result in excessive levels of liability. The prospect of bias to one side, I can acknowledge my own view that a state products liability regime creates a significant problem of non-uniformity in legal doctrine.[37] Having identified these problems, I can turn to solutions that certain analysts have identified—solutions that would preserve products liability lawmaking at the state level (rather than entrusting products liability to national lawmakers). All these solutions involve adjusting the choice-of-law rules that apply to products liability claims. In a 1987 article that opposed the federalization of products liability, Harvey Perlman acknowledged the bias or cost spill-over problem in state products liability lawmaking.[38] To preserve state lawmaking yet remedy the problem, Perlman suggested that manufacturers in selling products "be permitted to designate the state law applicable to their liability."[39] Michael McConnell's recommended solution to the structural bias problem is a federal choice-of-law rule under which the

35. The political advantages enjoyed by manufacturers in the products liability reform process are heavily emphasized in NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 192-95 (1994).

36. CAL. CIV. CODE ANN. § 1714.45(a)(2) (West Supp. 1995-96) (effective Jan. 1, 1988).

37. This position is developed in Schwartz, *supra* note 2.

38. Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L. J. 503, 508 (1987).

39. *Id.*

law of the state in which the product is originally sold is applied.[40] William Niskanen, in a current article, opposes the federalization of products liability, yet acknowledges problems with state lawmaking.[41] He too would solve those problems by having Congress establish a new choice of law rule. What Niskanen recommends is that Congress specify that courts hearing products liability cases apply the law of the jurisdiction in which the manufacturer has its largest number of employees.[42]

Note, first of all, that while all these proposals oppose Congressional authority over products liability doctrine, they all assign to Congress at least the responsibility for determining choice-of-law rules: to this extent, they support a limited measure of nationalization. McConnell's recommendation is designed to cure the problem of structural bias by enabling manufacturers—now aware of the solid new choice-of-law rule—to adjust their prices to take account of whatever liability doctrines prevail within the state of sale. Yet the McConnell recommendation offers no solution to the problem of 50-state non-uniformity. That problem would, however, be solved by acceptance of either the Perlman or the Niskanen recommendation.[43] This is the necessary and intended result of Niskanen's recommendation, since a manufacturer can only have one principal place of business. It is the likely result of Perlman's recommendation, since a manufacturer would probably see a strong advantage in designating a single state's law to apply to *all* of its product sales.

While the Perlman and Niskanen proposals would hence solve the problem of non-uniform state law, the very meaning of state law under either recommendation would be unusual. Under Perlman's proposal, a state would adopt product liability rules without any idea about (or control over) which claims by which consumers against which manufacturers would be governed by that rule.[44] Under these circumstances, the notion of democratic self-government at the state level seems misplaced. That notion of state democracy likewise has little application to the model of state corporate law that Niskanen uses by way of analogy. Under that model, as developed by Roberta Romano,[45] corporations pay to a state such as Delaware an annual incorporation fee and receive in exchange the body of corporation law that a state such as Delaware has developed. But the manufacturer that legally incorporates in

40. *See* McConnell, *supra* note 5, at 98. This is an alternative also endorsed by Perlman, *supra* note 38, at 508.

41. William Niskanen, *Do* Not *Federalize Tort Law*, REGULATION, 1995, No. 4, at 34, 36-37.

42. *Id.* at 37.

43. It should be noted, however, that this problem does not really trouble Perlman. His recommendation is designed mainly to solve what he sees as a possible problem of structural bias. Perlman, *supra* note 38, at 508.

44. On the extent to which Perlman's recommendation goes well beyond what courts currently tolerate by way of allowing parties to a contract to designate which state's law applies, see Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 261-66 (1993).

45. ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

Delaware almost always has its primary business operations located elsewhere. Under the Romano model, Delaware is not really engaging in democratic self-government; rather, it is offering for sale a particular body of law that corporations might be inclined to purchase. Niskanen's recommendation is, from the perspective of local democracy, somewhat less odd: the manufacturer would at least be a resident of the state whose law would be applied when the manufacturer is a products liability defendant.

Moreover, the Perlman and Niskanen recommendations, each in its own way, raise the prospect of a "race to the bottom"—where "bottom" relates not to the low quality or inefficiency of products liability rules but rather to the low level of rights they confer on accident victims.[46] Perlman's recommendation assumes that individual states would adopt their own products liability rules somewhat randomly, for reasons that each state finds satisfactory. Still, the manufacturer, given the option of designating the state whose law would apply, would be inclined to choose the state with lenient rules. Thus, if the doctrine of crashworthiness liability is accepted in many states but rejected in Virginia,[47] then General Motors, in offering its cars for sale, might well opt for Virginia law. Under Niskanen's quite different proposal, a drug company, in expanding its workforce, might locate its job site in a state whose liability rules are favorable to such companies. Moreover, manufacturers which are already located within a particular state would seek to lobby that state's legislature (and encourage that state's courts) to render more lenient that state's products liability standards. An auto manufacturer located in Michigan, for example, would be in a position to fight for more lenient design defect rules and more stringent affirmative defenses.

Attention should be given to the likely efficacy of such a company's lobbying efforts. Even if a company's principal place of business is within a particular state, when that state toughens liability standards the burden will primarily be borne by shareholders and/or consumers located throughout the nation. To this extent, the in-state manufacturer is in the same lobbying position as an out-of-state manufacturer. Even so, the principal-place-of-business state that is revising products liability rules has an interest in preventing employment losses, and for that matter creating employment gains; likewise, that state wants to preserve and increase the revenues derived from business-related taxes. Accordingly, the state has a strong interest in dissuading manufacturers from quitting the state and indeed encouraging manufacturers to relocate into the state.[48] Moreover, at the state level the managers of an in-

46. On the ambiguity of "race" terminology, see Revesz, *supra* note 4 and accompanying text.

47. *See* Sloane v. General Motors Corp., 457 S.E.2d 51 (Va. 1995). While *Sloane* rejects any separate doctrine of "crashworthiness," the case seems to allow crashworthiness claims to be pleaded under the general heading of negligence.

48. *See* Revesz, *supra* note 4, analyzing this in Prisoner's Dilemma terms.

state company can be expected to be effective lobbyists. Those managers can speak for the company itself, and also for its workforce, which would be harmed by either relocation or layoffs; moreover, those managers would likely serve as effective spokesmen for the entire in-state business community. An additional point is that the Niskanen plan would give manufacturers of the same genre of products an interest in concentrating their locations within a particular state. Thus, auto manufacturers could all locate in Michigan, in a way that would make them a potent lobby for products liability reforms that would be of special relevance in motor vehicle cases. Similarly, drug companies could congregate in New Jersey, where they could effectively lobby New Jersey lawmakers for the relaxation of particular rules that can be onerous to drug companies as tort defendants.

Of course, any tendency to conduct a race to the bottom could be offset by market pressures operating on manufacturers. This is Perlman's understanding: "If Californians wanted liberal liability recovery, they could purchase 'California' products which would be priced accordingly. If they preferred 'Nebraska' products with reduced liability protection, they might be permitted to buy them."[49] This is Niskanen's evaluation as well, as he compares the market for consumer products to the stock market for company shares:[50] just as the need to satisfy potential investors encourages companies to incorporate in states with efficient rules on corporate law,[51] so manufacturers' interest in attracting consumers will incline them to select a state which provides consumers with an efficient set of products liability rights.

Niskanen's comparison of the market for consumer products and the market for corporate equities is a problem, however. Investors have lots of choices: there are, after all, 500 companies in the Standard & Poor's 500, and the investor in dealing with a single stockbroker can purchase shares in any of these companies. A consumer seeking to purchase a power tool or an automobile faces a far more restrained range of choices. Moreover, stock market investors are typically sophisticated. Roughly half of all corporate equities are now held by institutions;[52] and even individuals who buy stocks typically purchase publications such as Barrons in order to learn what they think they need to know. The average consumer buying a product in the marketplace lacks this element of sophistication.

At the least, the consumer's lack of information and/or bargaining

49. Perlman, *supra* note 38, at 508.

50. Niskanen, *supra* note 41, at 37.

51. This is the model of state incorporation law originally asserted by Ralph Winter and more recently developed by Roberta Romano. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); ROMANO, *supra* note 45.

52. *See* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 692-93 (1995).

sophistication is a major premise in both products liability theory and doctrine. For example, current products liability doctrine holds that because consumers lack both knowledge and bargaining power, they cannot be allowed to disclaim by contract their tort liability rights.[53] For similar reasons, products liability doctrine basically does not recognize the defense of assumption of risk: the consumer can sue, complaining about the absence of a possibly desirable safety device, even though the consumer in purchasing or agreeing to use the product was well aware that the safety device was absent.[54] Consider, moreover, an employer that provides to its employees an industrial product it has purchased from the manufacturer. Since the employer contracts upstream with the manufacturer and downstream with its employees, economists would insist that an indirect contractual relationship runs from the manufacturer to the employees. Yet modern products liability, in routinely allowing such employees to sue the manufacturer, ignores this indirect contract, and essentially treats these employees as though they were little more than innocent bystanders.

Given these basic themes in the modern products liability regime, the recommendations extended by Perlman and Niskanen cannot be regarded as mere amendments seeking to improve or perfect that regime. Rather, they incorporate reasoning that has the ability to undermine that regime. Indeed, that seems to be precisely Niskanen's purpose. In a recent presentation, he was explicit in expressing his view that modern products liability has committed fundamental error in the way that it has allowed contract to be subordinated to tort.[55]

In this Comment it is *not* my general purpose to defend or justify that regime's anti-contract assumptions. Still, I can observe that the particular form of market reasoning which Perlman and Niskanen endorse is difficult to accept. It seems unreal to assume that consumers have, or can easily acquire, an adequate understanding of the differences between products liability doctrines in states such as Nebraska, New York, and Washington. I myself am a scholar specializing in products liability; yet in shopping for products, I would be hard-pressed to explain how the products liability doctrines in these states compare and contrast. To assume that ordinary consumers could make the relevant comparisons ignores the Coasian costs of information, and the asymmetry of those costs between consumers and manufacturers. To be sure, consumers might be aided by negative advertising. But economists have long appreciated

53. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965); RESTATEMENT OF THE LAW—TORTS: PROD. LIAB. § 13 (Tentative Draft No. 2, 1995).

54. See the new Restatement's rejection of an "open and obvious" limitation on design liability. *Id.* at § 2 cmt. c.

55. In his after-dinner speech on October 13, 1995, at a conference held by the *Michigan Law & Policy Review*, Niskanen relied heavily on the condemnation of modern products liability contained in Paul Rubin, *Fundamental Reform of Tort Law*, REGULATION, 1995, No. 4, at 26.

that negative advertising is often counterproductive or insufficient. One problem is that negative advertising is in a sense a public good, which the market therefore underproduces. Assume that General Motors (under Perlman's proposal) adopts Virginia law,[56] and that Ford is considering running an advertisement which points out that General Motors is depriving consumers of the full protection of crashworthiness liability. While that advertisement might cut into General Motors' sales, it will provide benefits not only to Ford, but also to Chrysler, Toyota, Honda, and Nissan. Aware of this, Ford will be less likely to run the ad itself.

CONCLUSION

Is there a structural bias in state products liability lawmaking that leads to an inappropriate level of liability? Certainly, the argument on behalf of bias is intellectually intriguing. Yet when several complicating factors are taken into account, the argument loses much—though not all—of its force. A quite separate argument against state products liability lawmaking dwells on all the practical disadvantages of non-uniformity in legal doctrine. Several analysts have contended that state products liability lawmaking can be preserved—and these problems solved—by making appropriate modifications in the choice-of-law rules that supplement products liability doctrine. These arguments are likewise intriguing. But similarly, they do not hold up well under analysis. One specific point is that the various choice-of-law recommendations essentially rest on the premise that the liability of manufacturers to injured product users can properly be dealt with on a contractual basis. Yet there is a lack of realism in the specific contractual claim that choice-of-law reformers advance—that consumers, in shopping for products, can intelligently compare the particular combinations of products liability rules in effect in various states. In any event, the entire body of national products liability doctrine rests on an explicit premise that a tort approach and not a contract approach is what the law of products liability needs. Whether or not that premise is correct, it is the premise on which the structure of doctrine has been constructed. The choice-of-law recommendations therefore are not merely efforts to somewhat improve the current system of products liability lawmaking. Rather, they attempt, either explicitly or implicitly, to subvert the existing liability regime. The recommendations should hence be understood and evaluated in those terms.

56. *See supra* note 47, and accompanying text.