

Tort Law and Federalism: Whatever Happened to Devolution?

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INTRODUCTION

The ascent to power of the Republican-controlled 104th Congress early in 1995 brought with it the promise of "devolution," that is, a reallocation of power from the federal government to state and local governments. The Republican leadership promised legislation to devolve power to the states in areas such as welfare, school lunch programs, legal services for the poor, speed limits on interstate highways, and other spheres in which the federal government had played a dominant role for decades. No longer would we have "one size fits all" government; instead, the Republican leadership vowed, policy would be made and programs would be administered at a level closer to the citizenry, in a manner presumably more responsive to local needs.

In the midst of this devolutionary agenda, the Republicans also promised a series of sweeping proposals for reform of the system of tort litigation. Billed in the Contract with America as the "Common Sense Legal Reform Act," the proposed Republican legislation included "[l]oser pays laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation."¹ Under these reforms, designed "to renew America,"² frivolous litigation would be nipped in the bud, extortionate demands on corporate enterprise would get short shrift, and tasseled-loafered personal injury lawyers would be sent packing.

True to their word, the Republican leaders introduced tort reform legislation shortly after the 104th Congress convened. Bills were introduced in the House and Senate to curtail products liability suits, limit punitive damages, regulate attorneys' fees, and "reform" various other aspects of tort law. The sponsors of this legislation neglected to mention a troublesome but obvious point: Tort law, since the founding of the Republic, has been an area almost exclusively reserved to the states. The Republican proposals would, in effect, nationalize³ many aspects of the tort system.⁴ Thus, while devolving school

1. The Contract with America is a set of promises made by Republican congressional candidates during the 1994 election campaign. It includes a list of bills that the Republicans promised to bring to the floor during the 104th Congress. The "Common Sense Legal Reform Act" is ninth on this list.

2. The phrase "to renew America" is taken from the title of House Speaker Newt Gingrich's book, published in 1994.

3. To the extent possible, I have used the word "nationalize" rather than "federalize." The term "federal" most appropriately refers to a system of division of powers between the national government and the states; to "federalize" might therefore mean no more than to distribute power among the state and national governments. The term "federal government" usually connotes the government based in Washington, but "national" is more precise.

In James Madison's time, the "federalists" advocated the accretion of power by the national, or "federal" government. In today's topsy-turvy, newspeak world, self-proclaimed "federalists" advocate the devolution of power from the federal government to the states.

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lunch programs, legal services for the poor and aid to families with dependent children (not to mention speed limits on interstate highways), under the Republican program, the federal government would assert new authority over areas which had been traditionally state government concerns.

The motivation for such seemingly contradictory proposals seems obvious. In areas (such as welfare) in which the federal government had been deemed too generous to the poor, it would be stripped of authority. In other areas (such as tort litigation) in which the states had recognized individual rights to the detriment of corporate prerogatives, the federal government would assert new-found power to keep the states in line.⁵ The choice between devolution and nationalization was not a matter of constitutional or even political principle; rather, it was a simple matter of whose ox was being gored. Growing hostility to the legal profession—due to lawyer excesses⁶ as well as to the impatience with the legal process that arises when right-wing elements are in ascendancy—had created a politically hospitable atmosphere for measures that had long been the agenda of corporate interests. The new Republican congressional majority was not about to let this opportunity pass it by.

The politics of the moment aside, however, there may be valid reasons for nationalizing certain areas of tort law. The fact that tort law has long been the province of the states does not mean that it should be forever off-limits to federal intervention. Sound bases in constitutional law and public policy might justify congressional action and federal court jurisdiction. Certain causes of action in tort may involve constitutionally-guaranteed rights; others may have

4. At least one Republican lawmaker was forthright about the implications of this legislation. On May 3, 1995, Senator Fred Thompson remarked:

The issue before us essentially is should the U.S. Congress federalize certain portions of our judicial system that, up until now, have been under the province of the States? . . . I would remind many of my Republican brethren that we ran for office and were elected last year on the basis of our strong belief that the government that is closest to the people is the best government; that Washington does not always know best; that more responsibility should be given to the States because that is where most of the creative ideas and innovations are happening. Whether it be unfunded mandates, welfare reform, or regulations that are strangling productivity, we took the stand that the States and local government should have a greater say about how people's lives are going to be run, and the Federal government less.

141 CONG. REC. S6047 (1995).

5. Professor George Priest during this symposium suggested a consistent theme underlying the Republican agenda: to exert pressure to prevent the states from redistributing resources from productive to unproductive sectors. Implicit in this statement is a generalization that tort defendants are, as a rule, productive, whereas tort plaintiffs are unproductive. Viewed charitably, the statement nevertheless reinforces the thesis that the Republican agenda is not a structural one based on federalism, but rather a substantive one based on distribution of wealth.

6. It was a happy coincidence for the Republicans that the seemingly endless O.J. Simpson trial commenced in a Los Angeles courtroom just as the 104th Congress convened. That trial caricatured the very worst suspicions that Americans harbored about lawyers. It portrayed lawyers as preening publicity hounds, quick to make any argument that would work to advantage, but agonizingly slow and inefficient when it came to consumption of court time and public resources. The Simpson trial did for the legal profession what the movie *Marathon Man* did for the dental profession. Indeed, watching the Simpson trial was like having one's teeth pulled without benefit of anesthesia.

a significant impact on interstate commerce; still others may intersect with a federal funding scheme. Sound reasons may remain, however, either as a matter of constitutional law or good policy, to leave significant areas of tort law to the states.

In this Article, I will first describe the constitutional bases for federal involvement in tort law. With the constitutional zones of federal tort intervention circumscribed, I will then consider which areas of tort law are most appropriate for federal intervention as a matter of policy. My analysis will focus primarily on legislative power and policy, and not the related issue of the jurisdiction of the federal courts (although the latter issue will invariably enter the picture).⁷ In this vein, I will examine recent proposals by both the Republican Congress and the Democratic Clinton Administration for both their constitutionality and their policy implications.⁸ Ultimately, I will attempt to set forth a principled basis for federal intervention in tort law, resting upon sound constitutional theory and public policy, rather than partisan, interest-group politics.

I. CONSTITUTIONAL BASES FOR FEDERAL TORT LEGISLATION

It has been long understood that the government of the United States is one of limited powers; that is, that Congress's power to legislate extends only to those areas enumerated in the Constitution. This principle is reinforced by the Tenth Amendment, under which "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁹ Thus, any tort legislation enacted by Congress must be based on a power enumerated under the Constitution.¹⁰

7. For discussions of the appropriate forum for tort litigation, see, e.g., Victor Eugene Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35 (1990); Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97 (1990); Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755 (1995); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

8. I will not attempt to be encyclopedic in this analysis. The fluidity of pending legislation defies comprehensive coverage.

9. Justice O'Connor has explained:

In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. . . . If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941).

New York v. United States, 505 U.S. 144, 155-56 (1992) (most citations omitted).

10. The Supreme Court generally has construed the Constitution so as to give Congress the ability to enact legislation reasonably calculated to carry out its enumerated powers. Article I, § 8 of the Constitution includes not only most of Congress's enumerated powers, but also the "necessary and

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I suggest three constitutional bases for federal involvement in tort law. The first of these involves tort remedies either protecting or infringing upon rights guaranteed by the United States Constitution. The second basis for federal intervention involves activities having an impact on interstate commerce. Finally, Congress might legitimately interfere with tort law while exercising the power of the purse. I shall examine each of these in order.

A. *Tort Remedies Involving Constitutional Rights*

1. *Tort Remedies Protecting Constitutional Rights*

a. *State Action*

Implicit in the Constitution, and somewhat more explicit in Section 5 of the Fourteenth Amendment,¹¹ is Congress's power to enact legislation providing for tort remedies to protect the constitutional rights of private citizens. The most obvious example of such legislation is 42 U.S.C. § 1983, providing a remedy for interference with one's civil rights under color of state law. The statute has long been justified under the Fourteenth Amendment to the United States Constitution.¹² In the absence of an analogous statute providing a remedy for interference with one's civil rights under color of *federal* law, the United States Supreme Court created one in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹³ Indeed, the *Bivens* opinion rested on the notion that where a right exists under the Constitution, it is incumbent on the courts to fashion a remedy to redress its violation.¹⁴

It is therefore well established that Congress has the authority to enact

proper" Clause, explicitly empowering Congress to enact legislation conducive to the exercise of its other powers. This implicit power would probably exist even in the absence of the "necessary and proper" Clause. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 300 (2d ed. 1988). The Court has maintained that the founders' intention was not to enumerate the specific *means* that Congress could adopt to carry out the enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408-09 (1819). Rather, the intent of any constitution is to establish the broad scope of government, not the minute details of its operation. 17 U.S. (4 Wheat.) at 407. Thus, the absence of a constitutional provision specifically empowering Congress to regulate tort litigation does not preclude that body from enacting legislation affecting tort law, so long as it can find its basis in an enumerated power.

There remains the issue of whether Congress can intervene in the tort field, or any other field, using an enumerated power chiefly as a pretext for activity otherwise reserved to the states. In *McCulloch*, Chief Justice Marshall warned that Congress must not abuse its authority by enacting laws "under the pretext" of exercising powers actually granted to it. *Id.* at 423. Thereafter, however, the Supreme Court has been reluctant to inquire into a statute's "real" purposes or its drafters' "true" motives. *See* TRIBE, *supra*, at 302 & n.9. Recent decisions of the Court suggest, however, that it may be prepared to more carefully scrutinize the exercise of congressional power. *See Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 115 S. Ct. 1624 (1995).

11. Section 5 of the Fourteenth Amendment (1868) states, "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Similar language appears in § 2 of the Thirteenth Amendment (1865) and § 2 of the Fifteenth Amendment (1870).

12. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

13. 403 U.S. 388 (1971).

14. *Id.* at 397.

legislation providing for a civil action, i.e., an action in tort, to obtain compensation for injuries to constitutionally protected interests caused by state actors.¹⁵ Because most constitutionally protected interests involve freedom from governmental interference, federal tort remedies of this genre will normally be predicated on state action (or at least action “under color of law”), as in actions brought under § 1983. The literature regarding the appropriate boundaries of such actions is vast,¹⁶ and I will not attempt to summarize it here. For present purposes, it is sufficient to observe that a private cause of action may accrue when a state or state official’s interference with an individual’s rights rises to a constitutional level.¹⁷

Nonetheless, the Court has resisted efforts to make the Fourteenth Amendment “a font of tort law to be superimposed upon whatever systems may already be administered by the States.”¹⁸ Thus, in *Paul v. Davis*, the Court found that a man who had been called an “active shoplifter” in flyers distributed by police suffered no Fourteenth Amendment deprivation resulting from injury to his reputation. In *Parratt v. Taylor*,¹⁹ the Court found that a state’s own tort remedy provided sufficient due process of law to a prisoner whose property had been lost due to the state’s negligence. And in *Daniels v. Williams*,²⁰ the Court decided that a state employee’s negligence that resulted in an inmate’s slip-and-fall on a prison stairway did not give rise to a due process claim, even if the defendant could claim immunity under state law.

b. *Private Actors*

The basis for federal legislation protecting individuals against interference of constitutional rights by *private* actors²¹ is quite complex, and the source and potential extent of such protection are far from clear.²² Title 42 U.S.C. §§ 1981 and 1982 (neither of which explicitly provide for a private cause of action) have been interpreted to allow a cause of action against *private* actors

15. *Monroe*, 365 U.S. at 171-72.

16. See, e.g., Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions*, 38 EMORY L.J. 369 (1989); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989); Marshall S. Shapo, *Constitutional Tort, Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965); Michael Wells, *The Past and Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53 (1986); Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

17. Such an action might be subject to a maze of complex immunities for governments and officials. See, e.g., *Hafer v. Melo*, 502 U.S. 21 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); Gary S. Gildin, *The Standard of Culpability in Section 1983 Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557 (1983); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

18. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

19. 451 U.S. 527 (1981).

20. 474 U.S. 327 (1986).

21. That is, neither the state, state officials, nor persons acting under color of state law.

22. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 926 (12th ed. 1991).

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who engage in discrimination.²³ These statutes find their justification in the Thirteenth Amendment and apply to instances of racial discrimination.²⁴

Title 42 U.S.C. § 1985(3), drawn from the Ku Klux Klan Act of 1871,²⁵ provides for a civil action against individuals who conspire to deprive persons “of equal protection of the laws, or of equal privileges and immunities under the laws. . . .”²⁶ In *Griffin v. Breckenridge*, the Supreme Court indicated that “there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action”²⁷ to support an action under § 1985(3). In *Bray v. Alexandria Women’s Health Clinic*,²⁸ the Court stated that “[w]hatever may be the precise meaning of ‘class’ for purposes of *Griffin*’s speculative extension beyond race,” the term did not embrace women seeking abortion.²⁹ It remains unclear as to whether § 1985 is supported only by the Thirteenth Amendment’s prohibition of racial discrimination (supported by § 2 of that amendment), or by the broader coverage of the Fourteenth Amendment (along with the enabling language of § 5). What is fairly clear is that the Court will attempt to avoid “the constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law.”³⁰ Thus the Court has attempted, with respect to both public and private defendants, to delineate constitutional causes of action so as not to create general federal tort law offering protections barely distinguishable from those provided by the states.³¹

Congress reacted to *Bray* by enacting the Freedom of Access to Clinic Entrances Act (FACE)³² in 1994. FACE provides for criminal and civil remedies against anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to

23. *Runyon v. McCrary*, 427 U.S. 160 (1976) (42 U.S.C. § 1981 applied to racial discrimination in admissions to private school held open to public); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (42 U.S.C. § 1982 applied to private racial discrimination in sale of real estate).

24. *Runyon*, 427 U.S. at 179; *Jones*, 392 U.S. at 439.

25. 42 U.S.C.A. § 1985 (West 1985 & Supp. 1995). Congress designed the Act and its criminal counterpart (18 U.S.C. § 241) to combat *private* conspiracies to deprive individuals of their civil rights (common in the chaotic post-Civil War period). Although the Act had potentially enormous scope, it went unused for nearly a century. In 1951, the Supreme Court eviscerated the act by holding that § 1985(3) reached only conspiracies arising under color of state law. *See Collins v. Hardyman*, 341 U.S. 651 (1951). The Court performed an about-face two decades later in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), holding that § 1985(3) provides a remedy against wholly private conspiracies to deprive one of one’s civil rights.

26. *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971).

27. *Id.* at 102.

28. 113 S. Ct. 753 (1993). The case involved a claim against abortion protesters brought by abortion clinics and supporting organizations.

29. *Id.* at 759; *see also United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1982) (denying § 1985(3) claim brought by non-union workers assaulted by union sympathizers).

30. *Griffin*, 403 U.S. at 102.

31. More recently, the Court has curtailed congressional power to abrogate the states’ sovereign immunity with respect to matters outside the Fourteenth Amendment. *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996).

32. 18 U.S.C.A. § 248 (West Supp. 1995).

injure, intimidate or interfere with” any person obtaining or providing reproductive health services³³ or any person “lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.”³⁴ While subsection (a)(1) of FACE (regarding access to abortion clinics) might be justified on Commerce Clause grounds,³⁵ subsection (a)(2) (protecting access to places of religious worship) would almost certainly have to find its justification on the basis of other provisions of the Constitution, most notably the First and Fourteenth Amendments.³⁶ To date, there have been no cases upholding the statute on that basis;³⁷ indeed, the extent of congressional power to enact remedies against private citizens who obstruct the exercise of constitutionally protected rights remains an open question. It would appear, however, that the Court will frown upon congressional efforts to provide remedies against *private* actors for interference with rights protected under the Constitution against only *state* interference.³⁸ The “access to churches” provisions of FACE may therefore fail to pass constitutional muster, unless their proponents can show an interference with a right guaranteed by the Constitution against private interference, such as the right to interstate travel.

2. *Congressional Power to Limit Tort Remedies That Impair the Exercise of Constitutional Rights*

Another question arises as to whether constitutional limitations on tort actions create space for federal legislation. Since 1964, the Supreme Court has actively intervened in one area of tort law—defamation—not to create remedies, but to limit, on First Amendment grounds, remedies under causes of action recognized under state law.³⁹ Does judicial recognition of a federal interest

33. *Id.* § 248(a)(1).

34. *Id.* § 248(a)(2). This unusual combination of protections appears to have been a result of political log-rolling between Senators Kennedy (D-Mass.) and Hatch (R-Utah). See 139 Cong. Rec. S 14,461-71 (1993). Subsection (2) originated as an amendment—sponsored by Hatch—to Kennedy’s original FACE bill. 139 Cong. Rec. S15,655, S15,660 (Nov. 16, 1993). In essence, pro-choice advocates were able to enact subsection (a)(1) by supporting the call by religious advocates for enactment of subsection (a)(2).

35. See *infra* notes 66-68 and accompanying text.

36. The Act in fact recites a Fourteenth Amendment justification. Pub. L. No. 103-259, § 2.

37. In *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), the Seventh Circuit upheld the clinic access provisions of FACE on Commerce Clause grounds. The Court therefore never reached the Fourteenth Amendment question. In a footnote, however, the Court stated, “We fail to see how the dissent can avoid the Fourteenth Amendment issue, however, since Section 5 provides an independent basis of legislative power.” *Id.* at 679 n.4.

38. The Court has been unwilling to apply § 1985(3) against interference with rights that are by definition protected only against state interference (e.g., abortion and association), and has applied it only against interference with rights protected under the Constitution against private interference (i.e., the right to interstate travel and rights under the Thirteenth Amendment). Compare *Bray Alexandria Women’s Health Clinic*, 113 S. Ct. 753, 764 (1993) and *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 830-34 (1982) with *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

39. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 467 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749

in this area invite more substantive federal intervention, such that Congress could fashion a federal defamation remedy to supplant state law? Arguably, Congress's powers⁴⁰ under the Fourteenth Amendment empower it to do just that. Likewise, could Congress enact limitations on actions for misrepresentation, based again on the First Amendment?⁴¹ To date, there has been little congressional interest in either area,⁴² so the question remains largely unanswered.

In several recent cases, the Supreme Court has scrutinized punitive damages awarded under state law (primarily, but not exclusively, in tort claims) to determine whether they violate due process protections embedded in the Constitution.⁴³ In at least one instance, the Court has found a state's *procedural* protections wanting.⁴⁴ This year, the Court found a punitive damages award "grossly excessive" and therefore unconstitutional on substantive grounds.⁴⁵ The Court's recent activity in this area is analogous to that in the defamation cases: in both instances, the Court has read the Constitution as placing limitations on remedies under state causes of action.⁴⁶ In the case of punitive damages as well as defamation, it is fair to ask whether the Court's appropriation of new constitutional ground is an invitation for congressional intervention. This inquiry is not entirely academic, as several recent legislative

(1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For a summary of these and other leading Supreme Court cases involving defamation, see Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 297-99 (1994).

40. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), established that § 5 of the Fourteenth Amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

41. Judicial activism in the field of defamation has not been duplicated with respect to the law of misrepresentation, notwithstanding the First Amendment interests involved in both areas. Commercial speech normally involved in misrepresentation cases has enjoyed less Constitutional protection than the political speech often (but not always—see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)) involved in defamation cases. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). Nevertheless, a Congress intent on protecting commercial interests might seize upon a First Amendment rationale to limit remedies for misrepresentation.

42. But see H.R. 2846, 99th Cong., 1st Sess. (1985) (bill introduced by Rep. Charles Schumer that would have established federal cause of action for libel with declaratory judgment remedy).

43. See, e.g., *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 271 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

44. *Honda Motor Co.*, 114 S. Ct. 2331.

45. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). In addition to articulating due process concerns, the Court stated that the defendant's "status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce." *Id.* at 1604.

46. Conservatives who raised the clarion call of states' rights in objection to the Court's intervention in *Sullivan* and its progeny now cheer the Court's willingness to cast its shadow over punitive damages. Liberals who shed no tears over the evisceration of the law of libel and slander on First Amendment grounds now lament the Court's intrusion on the sacred American right to realize the American dream through an obscene jury award. Again, it appears to be a matter of whose ox is being gored.

proposals include limitations on punitive damages.⁴⁷

B. *Activities Having an Impact on Interstate Commerce*

The most obvious constitutional basis for congressional intervention in tort law is the commerce power. Article I, § 8, cl. 3 of the Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Over time, the Supreme Court has elaborated upon the breadth of the Commerce Clause and the corresponding congressional power. Initially, the Court interpreted the Commerce Clause to limit the scope of Congress’s regulatory power to *interstate* commerce and not to commercial transactions taking place entirely *intrastate*.⁴⁸ Early Supreme Court opinions also distinguished “commerce” from “manufacturing,” “production,” and other activities that were normally controlled by state laws and regulations.⁴⁹

However, in *NLRB v. Jones & Laughlin Steel Corp.*,⁵⁰ the Supreme Court upheld the National Labor Relations Act against a Commerce Clause challenge, departing from the distinction between “direct” and “indirect” effects on interstate commerce.⁵¹ Later, in *Wickard v. Filburn*,⁵² the Court instituted a new test by asking whether or not Congress’s regulation of a farmer’s overproduction of wheat for home consumption had a “substantial economic effect on interstate commerce.”⁵³ Recently, the Court explained that Congress may constitutionally: (1) “regulate the use of the channels of interstate commerce;”⁵⁴ (2) “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;”⁵⁵ and (3) “regulate those activities

47. *E.g.*, H.R. 956, 104th Cong., 1st Sess. § 107 (1995) (version passed by Congress capping punitive damages awards at either: (1) greater of twice sum of economic and non-economic loss awards or \$250,000, subject to additional award by judge up to jury’s original award; or (2) lesser of same computation if defendant is individual with net worth less than \$500,000 or corporation that employs fewer than 25 full-time employees); H.R. 352, 104th Cong., 1st Sess. § 204 (1995) (pertaining to “manufacturers of medical products” and capping punitive damages awards at twice total damages); H.R. 1195, 104th Cong., 1st Sess. § 204 (1995) (capping awards at greater of twice compensatory damages award or \$250,000). Many, if not all, of these proposals could pass constitutional muster on Commerce Clause grounds. *See infra* notes 69-76 and accompanying text.

48. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In a subsequent decision involving tort law, the Court invalidated a statute creating a negligence action against common carriers for personal injuries sustained by employees in the course of employment. *The Employers’ Liability Cases*, 207 U.S. 463 (1908). The Court reasoned that the statute “regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce.” *Id.* at 497.

49. *See United States v. E.C. Knight*, 156 U.S. 1 (1895); *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995).

50. 301 U.S. 1 (1937).

51. *Id.* at 36-38.

52. 317 U.S. 111 (1942).

53. *Wickard*, 317 U.S. at 125; *see also Lopez*, 115 S. Ct. at 1630.

54. *Lopez*, 115 S. Ct. at 1629.

55. *Id.*

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having a substantial relationship to interstate commerce, i.e., those activities that substantially affect interstate commerce.”⁵⁶ With *Jones & Laughlin*, *Wickard* and their progeny,⁵⁷ it became apparent that the Court would give Congress a wide berth for the enactment of legislation based on the commerce power.

In this context, the Court’s 1995 decision in *United States v. Lopez* came as something of a surprise.⁵⁸ In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense to “knowingly . . . possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”⁵⁹ While Justice Breyer’s dissent reasoned that the possession of firearms in and around schools has an adverse effect on education, and that such a burden on education has a detrimental effect on interstate commerce,⁶⁰ the *Lopez* majority focused upon the fact that the wholly intrastate possession of firearms has little effect on interstate economic activities.⁶¹ The language of the opinion is a warning to federal lawmakers that the Court will not allow the wholesale expansion of legislative power based on attenuated arguments invoking the Commerce Clause.

It is difficult at this stage to determine whether the *Lopez* opinion represents a sea change for the Supreme Court, or a mere dogleg in the Court’s otherwise expansive Commerce Clause jurisprudence.⁶² The implications of *Lopez* for tort law are even less clear. In the eight months following the *Lopez* decision, three circuits have had the opportunity to consider the constitutionality of FACE.⁶³ All three circuits upheld the statute on Commerce Clause

56. *Id.* at 1630.

57. Significant among these are *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding public accommodations provisions of 1964 Civil Rights Act on Commerce Clause grounds).

58. 115 S. Ct. 1624 (1995).

59. 18 U.S.C.A. § 922 (q)(1)(A) (West 1976 & Supp. 1995).

60. *See* 115 S. Ct. at 1657.

61. In his majority opinion, the Chief Justice concluded “that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” *Id.* at 1630. Neither the likelihood that the firearm had passed through interstate commerce nor the effect of education on interstate commerce was sufficient under this test. “To uphold the Government’s contentions here,” wrote the Chief Justice, “we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 1634. One commentator has likened the “substantial effect” concept in *Lopez* to the notion of proximate cause in tort law. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 679 (1995).

62. The case was decided by a 5-4 margin. Justice Kennedy wrote a cautious concurring opinion, 115 S. Ct. at 1634, in which Justice O’Connor joined. (Justice Thomas’s concurring opinion, *id.* at 1642, was not nearly so cautious.) The holding need not be viewed as a radical departure from post-New Deal Commerce Clause jurisprudence. It would not take a troglodyte to conclude that the mere possession of a firearm in a school zone is an activity that is neither interstate nor commerce, and that the commerce rationale involved at least one bootstrap too many.

63. 18 U.S.C. § 248. For a description of FACE, *see supra* notes 35-37 and accompanying text.

grounds.⁶⁴ Because these cases involved criminal prosecutions under the “access to clinics” provisions of FACE, they are instructive, but by no means determinative, regarding the reach of the commerce power in tort actions. The distinction between criminal and civil actions in this context may be one without a difference. I can see no basis for holding that the Commerce Clause allows certain activity to be subject to federal prosecution, but not to a federal tort action. But the applicability of the commerce power to FACE’s “access to churches” provisions is far less clear. *Lopez* seems to say that it will be more difficult to show that non-economic activities confined to a single state “substantially affect commerce.” Granted, churchgoers occasionally cross state lines to attend religious services, and the hymnals they use (like the gun Mr. Lopez brought to school) are likely to move in interstate commerce. Whether these activities are *substantial* enough (i.e., like interstate demand for abortion services) to pass through *Lopez*’s filter is another matter.⁶⁵

Notwithstanding *Lopez*, it is apparent that certain areas of activity with direct implications for interstate commerce will continue to be regarded as subject to federal intervention. It is difficult, for example, to read *Lopez* as barring congressional intervention in the law of products liability. Federal products liability regulation may be regarded as an effort to “regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities.”⁶⁶ Furthermore, products liability litigation can be regarded as an activity that “substantially affect[s] interstate commerce.”⁶⁷ While I would hesitate to argue that current state products liability law imposes such a burden on commerce as to implicate the Constitution’s dormant commerce power,⁶⁸ there is ample justification for Congress to act in a proactive manner and even to preempt the field.

As to other areas of potential tort regulation, the Commerce Clause is less viable as a rationale. Products liability aside, most tort actions involve not commercial transactions with interstate repercussions, but rather discrete

64. *United States v. Wilson*, No. 95-1871, 1995 U.S. App. LEXIS 37375 (7th Cir. 1995), *rev’d* 880 F. Supp. 621 (E.D. Wis. 1995); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995).

65. The *Wilson* court found the “substantial relationship test” to be a matter of degree and was willing to grant much deference to specific commerce-related findings of Congress. *Wilson*, 73 F.3d at 697. The Supreme Court had rejected general findings in *Lopez*, 115 S. Ct. at 1632.

66. *Lopez*, 115 S. Ct. at 1629; *see also* *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911).

67. *Lopez*, 115 S. Ct. at 1629-30; *see also* *Maryland v. Wirtz*, 392 U.S. 183, 196 (1969); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

68. Under the dormant Commerce Clause, the Court will invalidate facially neutral state laws that place an “undue burden” on interstate commerce—in other words, where the burden of a state law to interstate commerce is excessive in relation to its putative local benefits. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

conduct that is local in nature. While the interstate movement of motor vehicles⁶⁹ and the increasingly commercial nature of medical practice would almost certainly qualify motor vehicle accidents and medical malpractice for federal regulation under the commerce power, it is doubtful that litigation over a supermarket slip-and-fall would be viewed as having a “substantial effect” on commerce, as *Lopez* requires.⁷⁰ As one moves through a continuum of tort cases—ranging from products liability, through motor vehicle accidents, professional malpractice, supermarket slip and fall cases, to the simplest of cases, that of a small boy pulling a chair out from under an elderly woman⁷¹—one can see a gradual attenuation of the commerce power as a rationale for federal tort legislation.⁷² It would be difficult to say that litigation over a backyard accident “substantially affects” interstate commerce, except for one characteristic common to most, if not all tort claims: insurance.

Insurance links the overwhelming majority of tort claims, whatever their origin, to interstate commerce. But, one might ask, does that characteristic alone provide a sufficient tie to justify pervasive federal intervention in tort cases? Insurance certainly involves interstate commerce, and tort liability may be closely enough linked to insurance markets so as to “substantially affect commerce.” However, it is unclear whether insurance is analogous to the ketchup at Ollie’s Barbeque (which, together with other supplies that had traveled interstate, provided sufficient nexus in *Katzenbach v. McClung*);⁷³ or whether it is more akin to the purchase of the firearm in *Lopez*, which, though a commercial transaction, was too long a bootstrap to bring the Gun Free School Zones Act under the Commerce Clause.

As with the mere possession of a firearm in *Lopez*, tort litigation over localized events may be seen by some future court as not having a substantial effect on interstate commerce. Just as the national market in firearms was

69. It would be ironic if the federal government were to acquire power over automobile accident litigation shortly after it devolved power over speed limits on interstate highways. See National Highway System Designation Act of 1995, Nov. 28, 1995, Pub. L. No. 104-59 § 205 (Repeal of National Maximum Speed Limit Compliance Program).

70. Should a slip-and-fall at a supermarket (which sells goods that have moved in interstate commerce) be likened to discrimination at Ollie’s Barbeque (which sold \$70,000 in foodstuffs that had moved in interstate commerce)? See *Katzenbach v. McClung*, 379 U.S. 294 (1964). Or is it more analogous to the events in *Lopez*, where a student carried a handgun (which had moved in interstate commerce) into a school that used books and other supplies that had traveled in interstate commerce? In each case, it would appear that the purpose underlying the challenged statute had little or no relation to commerce, and that the commerce power was but a pretext for federal intervention. I would have preferred for the Court to have employed the Thirteenth and Fourteenth Amendments as justifications for the civil rights statute upheld in *Katzenbach*; that would make it easier to distinguish from *Lopez*.

71. See *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

72. Professor Deborah Jones Merritt has suggested the use of fuzzy logic in commerce power determinations. Merritt, *supra* note 61, at 738-50. Employing fuzzy logic, we would say that products liability is very much interstate commerce, medical malpractice is somewhat interstate commerce, and a supermarket slip-and-fall is a little bit interstate commerce, etc. See *id.* at 742-743.

73. 379 U.S. 294 (1964).

insufficient in *Lopez*, the existence of a national market in insurance may not satisfy some future court looking for a greater connection between tortious conduct and interstate commerce. Devolutionists' arguments against the wholesale expansion of federal power may return to haunt them if national tort legislation is struck down by a Supreme Court more willing to clip congressional wings.⁷⁴

C. *The Spending Power*

A third rationale for federal intervention in tort law is the spending power. The Constitution grants Congress the authority to collect taxes and make expenditures for the common defense and general welfare of the United States.⁷⁵ Spending, however, is not mandatory. Many government benefits are gratuitous in a constitutional sense, because Congress need not grant them.⁷⁶ It flows from this that Congress has the lesser power to condition the grant of public funds, because it has the greater power not to grant the funds in the first place.⁷⁷ Congress might therefore indirectly influence state tort law by conditioning the flow of federal largess on the enactment of certain measures affecting tort litigation.⁷⁸

Historically, Congress has in fact used the power of the purse to regulate indirectly in a number of fields that had been traditionally state concerns. These efforts have almost always been upheld by the Supreme Court. For example, in *South Dakota v. Dole*,⁷⁹ the Court upheld a statute under which federal highway funds were to be withheld from any state that failed to enact legislation prohibiting the purchase or possession of alcoholic beverages by persons under the age of twenty-one. The Court found the statute consistent with each of the four limitations on the spending power: (1) The exercise of the

74. Senator Thompson recognized this irony, stating:

It is ironic that all of this is occurring at a time when the philosophical battle that we have been fighting for so many years is finally being won. Several recent Federal court decisions, including the recent Supreme Court decision in the *Lopez* case, have finally begun to place some restrictions on Congress's use of the Commerce Clause to regulate every aspect of American life. . . . Now the courts have let Congress know that there are limitations to Congress's authority to legislate in areas only remotely connected to interstate commerce. And yet as we won the war, we take the enemy's position. We are now the ones who seek to legislate and regulate medical procedure in every doctor's office in every small town in America. And we are the ones who now seek to legislate and regulate the fee structure between a lawyer and his client in any small town in America.

141 CONG. REC. S6047 (1995).

75. U.S. CONST., art. I, § 8, cl. 1.

76. See generally Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. Rev. 247, 250 (1990) (discussing difference between right and privilege).

77. See *id.* at 263-64 (discussing this view).

78. In the wake of *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (curtailing congressional power to invoke federal jurisdiction over states), the power of the purse, together with § 5 of the Fourteenth Amendment, may be the only remaining ways for Congress to get the states to do what it wants them to do.

79. 483 U.S. 203 (1987).

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spending power was in pursuit of the general welfare, “especially in light of the fact that the concept of welfare or the opposite is shaped by Congress”;⁸⁰ (2) Congress had conditioned the States’ receipt of federal funds unambiguously, “enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation”;⁸¹ (3) the condition was related to the federal interest in particular projects or programs, in this case, safe interstate highway travel;⁸² and (4) no other constitutional provision provided an independent bar to the conditional grant of federal funds.⁸³ This was the most serious area of contention, inasmuch as the Twenty-First Amendment “grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”⁸⁴ Nevertheless, the Court determined that Congress may regulate indirectly, through the spending power, that which it may not regulate directly.⁸⁵

The spending power could be a potent force in federal regulation of tort law. For example, a Clinton-type health care plan, in which a federal subsidy would guarantee universal health care coverage, could serve as a rationale for federal intervention in the law of medical malpractice. Indeed, current federal funding of Medicare and Medicaid, as well as federal assistance to hospitals, could provide a similar rationale. Other areas of tort law could be affected as well. If federal highway spending can be used as a wedge for federal regulation of the drinking age (which affects non-drivers as well as drivers), it certainly could justify indirect federal regulation of litigation over motor vehicle accidents.⁸⁶

The spending power has its limitations, however. The *Dole* opinion acknowledged, for example, that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁸⁷ Indeed, congressional pressure turned into unconstitutional compulsion in *New York v. United States*, a case to which we now turn.

80. *Id.* at 208 (quoting *Helvering v. Davis*, 301 U.S. 619, 645 (1937)). In this case, the Court saw the condition as “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.” *Id.* at 208.

81. *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

82. *Id.* at 208.

83. *Id.* at 209-12.

84. *Id.* at 205 (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

85. *Id.* at 206, 209.

86. With the repeal of the federally mandated fifty-five mile speed limit on interstate highways, the federal government now effectively regulates the drinking age of drivers and non-drivers alike, but not the speed limits on interstate highways.

87. *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

D. *New York v. United States and the Problem of Unfunded Mandates*

It is clear that Congress may directly regulate a number of activities, including many activities involving tort law, through the commerce power. It is also clear that Congress can indirectly regulate in an area outside its enumerated powers through the spending power, subject to the limitations set forth in *South Dakota v. Dole*. What Congress may not do, however, is *compel* the states to regulate, even in areas subject to Congress's enumerated powers. That is the essence of *New York v. United States*,⁸⁸ a case with potentially significant implications with respect to federal regulation of tort law.

New York v. United States involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985.⁸⁹ The Act created three incentives for states to dispose of low-level radioactive waste. The Court's opinion focused on the third incentive, which required states to either provide for the disposal of all such waste generated within the state or compact region by January 1, 1996, or take title and possession of the waste.⁹⁰ The "take title" provision was held unconstitutional because it forced states into one of two coercive "choices": Either comply with federal regulations by January 1, 1996, or take title to the radioactive waste, with all of its costly implications. The Court explained that while "Congress may attach conditions on the receipt of federal funds,"⁹¹ and could engage in "a program of cooperative federalism,"⁹² it may not "commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."⁹³ To do so would infringe upon the sovereignty of the states in violation of the Tenth Amendment and basic principles of federalism.

More recently, federal district courts have held unconstitutional a provision of the Brady Act which imposed upon local law enforcement officers a duty to make a reasonable effort to perform background checks on prospective purchasers of handguns. For example, in *Printz v. United States*,⁹⁴ the court held that Congress substantially and unconstitutionally commandeered state executive officers and the Montana legislative process in order to administer

88. 505 U.S. 144 (1992).

89. 42 U.S.C. §§ 2021-2021j.

90. 42 U.S.C. § 2021e (d)(2)(C). The first two incentives involved: (1) a monetary incentive for states to join a regional compact or develop a disposal facility; and (2) an access incentive for states that failed to meet certain deadlines. The first two types of incentives were viewed by the Court as legitimate exercises of the commerce and spending powers. *New York*, 505 U.S. at 152-53.

91. *New York*, 505 U.S. at 167 (quoting *Dole*, 483 U.S. at 206).

92. *Id.* at 167 (quoting *Hodel*, 452 U.S. at 289). The Court stated that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* (quoting *Hodel*, 452 U.S. at 288).

93. *Id.* at 170 (quoting *Hodel*, 452 U.S. at 288).

94. 854 F. Supp. 1503 (D. Mont. 1994).

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a federal program.⁹⁵ The federal courts seem to be taking seriously *New York's* admonition against commandeering state officials into a federal regulatory role.

At least one tort proposal in the 104th Congress appears to have been drafted in light of that admonition. H.R. 1195, entitled the "Healthcare Liability Reform Act of 1995," includes provisions calling for states to set up mandatory alternative dispute resolution processes with respect to healthcare liability claims. Section 201(a)(1) of the proposed Act provides that a healthcare liability action may not be brought in state court unless the claim that is the subject of the action has been initially resolved under a federally certified alternative dispute resolution system or, in the case of a state in which such a system is not in effect, under an alternative federal system established under § 212(b) of the Act. The alternative federal system would appear to be consistent with notions of "cooperative federalism." While under *New York v. United States* Congress could not direct a state to create an ADR system, it can give the state a choice of either creating its own ADR system or allowing claims to be processed through an alternative federal system.⁹⁶

A mandatory ADR requirement also existed under the ill-fated Clinton Health Care Reform Plan.⁹⁷ The Clinton proposal would have imposed the requirement of setting up ADR systems on the regional alliances established under the plan. That would have passed constitutional muster also, as it did not involve the commandeering of state government. A more recent Democratic proposal, the "Affordable Healthcare for All Americans Act,"⁹⁸ provides incentives in the form of grants to states to create state-based malpractice reforms or professional practice guidelines for medical personnel to ease the determination of negligence at trial. By providing for incentives instead of mandates, the bill remains consistent with the spending power, and its enactment would not amount to congressional coercion.

1. *Striking the Proper Balance*

A good example of the creative use of federal regulation in tandem with state tort law is provided by a rule promulgated a decade ago by the United States Department of Transportation.⁹⁹ The rule required installation of passive restraints (such as air bags or automatic seat belts) in all new cars beginning with the model year 1990 unless, prior to that time, mandatory seat belt usage laws that covered at least two-thirds of the United States population

95. *Id.*; see also *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994).

96. *New York*, 505 U.S. at 166.

97. H.R. 3600, 104th Cong., 2d Sess. (1995).

98. S. 168, 104th Cong., 1st Sess. (1995). This bill, introduced by Senator Kennedy, retains some aspects of the Clinton Plan.

99. 49 C.F.R. § 571.208 (1984) [hereinafter DOT Rule].

had been enacted. The DOT Rule involves an area clearly within federal competence—automobile safety. It mandates installation of a safety mechanism unless, prior to a deadline, the states enact legislation more traditionally within their purview, for example, criminal and civil sanctions for failure to use an available safety device. Here, the federal regulation had a salutary, but not a coercive effect. If the states did not act on the problem in a manner consistent with their competence, then (and only then) would the federal government act, in a manner traditionally within its competence. Legitimate federal policy was thereby advanced, while principles of federalism were preserved.

2. *Some Current Proposals*

A number of proposals before the 104th Congress would impose limitations and conditions on tort actions normally brought in state courts. Some of these provisions would place caps on damages;¹⁰⁰ some would alter the basis of liability;¹⁰¹ some would relax rules of joint civil liability;¹⁰² others would shorten statutes of limitation.¹⁰³ Again, assuming that these measures are a legitimate exercises of Congress's commerce power, there would appear to be little *constitutional* problem with the fact that Congress would be altering the rules that have applied in the state courts. It is well established that Congress has the power to enact laws enforceable in state courts.¹⁰⁴ Whether or not such interventions are good policy is yet another matter, to which we shall now turn.

II. POLICY CONSIDERATIONS AFFECTING FEDERAL TORT LEGISLATION

As recently as one year ago, we might have confidently stated that the commerce power is broad enough to encompass virtually any tort legislation Congress might enact. *Lopez* threw that proposition into doubt; hence the foregoing analysis of other constitutional bases for federal tort law. *Lopez* notwithstanding, the Constitution remains malleable enough to allow a wide variety of congressional interventions. But while the Constitution may set limits on federal involvement, a question remains as to the proper function of the federal government within these limits. The fact that proposed legislation

100. *See, e.g.*, H.R. 1195, 104th Cong., 1st Sess. § 204 (1995) (placing \$250,000 cap on non-economic damages).

101. *See, e.g.*, H.R. 956, 104th Cong., 1st Sess. (1995) (imposing only negligence liability on retailers and other sellers in most products liability actions). The measure was passed by both houses of Congress, but was vetoed by President Clinton in 1996.

102. *See, e.g.*, H.R. 1195, 104th Cong., 1st Sess. § 205 (1995); S. 454 § 104.

103. *See, e.g.*, H.R. 1195, 104th Cong., 1st Sess. § 202 (1995) (shortening statutes of limitation to 3 years); S. 454 § 104 (shortening statutes of limitation to 2 years); H.R. 917 § 8 (shortening statutes of limitation to 2 years).

104. *New York v. United States*, 505 U.S. 144, 178 (1992); *Palmore v. United States*, 411 U.S. 389 (1973); *Testa v. Katt*, 330 U.S. 386 (1947).

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passes constitutional muster does not in itself guarantee that federal intervention is good policy. We should therefore consider when, as a matter of sound policy, Congress should intervene (or even preempt state law) and when it should leave well enough alone.

I begin with the premise that the national government should intervene only when a particular function cannot be performed adequately by the states. This premise is based on three concepts. First is the Jeffersonian notion that the threat of tyranny is diminished when the national government exercises the minimum power necessary. Division of power between two levels of government, with most of the routine tasks of government divided in turn among fifty smaller entities, prevents the concentration of too much power in a limited number of hands. Just how much tyranny is threatened by nationalization of tort law remains a fair question, to which I shall return.¹⁰⁵

Second is the practical notion, oft-repeated by Republicans,¹⁰⁶ that all else being equal, the government closest to the people will best be able to tailor solutions that address their problems. This is particularly true in tort law, where there appear to be few economies of scale to be obtained through national legislation. Admittedly, the homogenization of modern society has blurred regional distinctions, and it is difficult to justify many differences in tort law on the basis of local conditions. But the states have succeeded in fashioning systems of tort law that, for the most part, seem to suit their purposes. While elements of these systems are in need of repair, it seems pointless to impose an across-the-board national "fix" without a clearly articulated justification.

This brings us to our third concept: there is too much law. In an age of full-time legislatures (and no legislature fits this description better than Congress), there is a temptation to enact measures to respond to every crisis and resolve every problem. A doctor is shot at an abortion clinic in Florida, a courthouse is bombed in Oklahoma, and the urge to legislate, to *do* something, to do *anything*, is too great to resist. The urge persists even though ample legislation may already exist to address a perceived problem, and even though some problems simply do not avail themselves of a legislative solution. Many a redundant statute is enacted because there is a political itch that needs to be scratched. In many such cases, what is needed is not more law, but more effective enforcement of existing law.

As often as not, these laws already exist on the state level. My resistance to redundant federal intervention does not stem from fastidiousness alone. While state legislatures are as prone as Congress to react to the crisis of the moment, tort law is the product of years of judicial and legislative shaping on

105. See *infra* notes 178-86 and accompanying text.

106. See, e.g., Remarks of Senator Fred Thompson, *supra* note 4.

the state level, and accordingly, it at least represents an effort to fashion a body of law on a coherent, comprehensive basis. Scattergun federal intervention in response to the perceived crisis of the moment results in measures that sometimes overlap and are occasionally inconsistent, but rarely complement existing state law in a coherent fashion. It is as if a developer, working overnight, were to erect a mega-mall in the middle of a downtown business district consisting of fifty old and quaint business establishments.¹⁰⁷

The temptation to resolve all problems through a national solution should therefore be resisted, unless certain conditions justifying federal intervention are met. To a great extent, these conditions parallel, but do not mimic, the constitutional analysis. As guiding principles, I suggest that federal tort legislation is good policy: (1) where it protects rights guaranteed under the Constitution that are inadequately protected by state law; (2) where it addresses matters having a significant impact beyond the borders of a single state; and (3) where tort regulation dovetails with a major national endeavor, such as a comprehensive federal funding scheme.

A. *Protection of Constitutional Rights*

To a great extent, where tort actions in support of constitutional rights are needed, the right to bring such actions has been established.¹⁰⁸ For example, there is obviously a need for a cause of action for deprivation of fundamental rights under color of state law. Official lawlessness resulting in the deprivation of fundamental rights cannot be tolerated in a society that values liberty, and it is only appropriate to provide aggrieved individuals with a cause of action to redress such deprivations.¹⁰⁹ That the availability of such an action is implicit in the Fifth and Fourteenth Amendments, and finds explicit support in 42 U.S.C. § 1983, is altogether logical and just.

107. Continuing the metaphor, the legal equivalent of the Mall of America takes the form of civil remedies under The Racketeer and Corrupt Organizations Act, 18 U.S.C.A. § 1964(c) (West 1984) [hereinafter RICO]. Grafted onto a statute imposing criminal penalties for interstate racketeering, RICO has grown like kudzu, snarling everything in its path. See Frederick C. Boucher, *Closing the RICO Floodgates in the Aftermath of Sedima*, 31 N.Y.L. SCH. L. REV. 133 (1986); Phillip A. Lacovara & Geoffrey F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-86).

108. Repeated, serious abuses inevitably give rise to lawsuits, at least in a society in which legal counsel is widely available. Thanks to our system of contingent fees and statutory fee awards, it usually is. See, e.g., 42 U.S.C.A. § 1988 (West 1994 & Supp. 1995) (providing reasonable attorney's fee to prevailing party in civil rights action). Lawsuits provide courts the opportunity to declare what the law is; the more egregious the defendant's conduct, the more likely the plaintiff is to prevail, and to make favorable law in the course of doing so. Where the plaintiff has suffered a relatively trivial harm, or where the defendant is acting within reason, or at least without malice, the plaintiff is more likely to forego a legal remedy, or the parties are more likely to settle. See Marc Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). Situations murmuring only weakly for redress are less likely to establish a clear legal pathway.

109. See Shapo, *supra* note 16.

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Far less clear, however, is the need for a federal cause of action against private individuals who obstruct access to abortion clinics.¹¹⁰ To the extent a serious wrong has occurred in this context, it is likely to find redress through a common law cause of action in the state courts. If there has been harmful or offensive contact, a battery has occurred;¹¹¹ if there has been an imminent threat of such contact, there has been an assault; if the plaintiff has been physically detained, and cannot break free, a false imprisonment has been established; if the conduct has been outrageous, and the plaintiff has suffered severe emotional distress, the plaintiff should be able to make out a *prima facie* case of intentional infliction of emotional distress;¹¹² if the clinic has informed the obstructor that her presence is unwanted, and she persists in remaining on the premises, there has been a trespass to land. I do not wish to appear too callous (nor do I wish to jeopardize a woman's right to choose), but it appears that any remaining harm not cognizable under state law is *de minimis*. Must we make a federal case of it?

I might feel differently about the criminal sanctions provided under FACE. If, for example, state prosecutors were unwilling to bring charges against abortion protestors who violated the state's criminal law (not an unlikely scenario), Congress might have ample reason to enact a statute empowering the United States Attorney to step in.¹¹³ Where the state has in effect denied protection to a class of citizens, it is altogether appropriate for the national government to intervene to provide due process and equal protection of the law as guaranteed by the Fourteenth Amendment. Federal intervention is most warranted when the states are doing an inadequate job of protecting fundamental rights. This may occur due either to a gap in the substantive law¹¹⁴ or to

110. Such a cause of action exists under 18 U.S.C.A. § 248 (West Supp. 1995), the Freedom of Access to Clinic Entrances Act [hereinafter FACE].

111. The ability of the courts to adapt traditional torts to new situations, some of which involve interference with federally protected rights, is demonstrated in *Fisher v. Carousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). In that case, an employee of the defendant hotel rudely snatched a plate from the plaintiff, declaring loudly that the hotel did not serve "Negroes." *Id.* at 628-29. The incident caused considerable embarrassment to the plaintiff, who was attending a professional conference. The court recognized a cause of action for battery (i.e., an offensive touching), and awarded damages not only for the slight physical interference, but for the more significant emotional harm.

112. The relatively new tort of intentional infliction of emotional distress demonstrates that state common law courts are capable of developing new causes of action as the need arises. See *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952); RESTATEMENT (SECOND) OF TORTS § 46. It is true that under the widely accepted Restatement view, damages will be awarded only for truly outrageous conduct, and only when the plaintiff has suffered severe emotional distress. But this is a strength, not a weakness, of this cause of action. The courts cannot provide redress for every trivial offense. See Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 667-72, 688-91 (1995).

113. See H.R. Rep. No. 306, 103rd Cong., 1st Sess. § 10, (1994) (finding then-existing state and local criminal statutes insufficient to restrain nationwide violent conduct aimed at abortion clinics).

114. Some state courts adopt a pigeonhole mentality: If a new fact situation does not fit into a familiar pattern, relief is denied. *E.g.*, *Cucinotti v. Ortmann*, 159 A.2d 216 (Pa. 1960) (denying action for assault due to technical defects in pleading).

a failure to enforce existing law on the state level. The post-Civil War civil rights statutes¹¹⁵ were utilized to this effect in the 1960s, when lawlessness against civil rights workers went unpunished by southern officials.¹¹⁶

A cause of action in tort is enforceable without the cooperation of state prosecutors, so federal intervention is less warranted in the civil than in the criminal arena.¹¹⁷ That remains the case so long as the state courts are available to entertain such actions. Sovereign and official immunities have the effect of making courts unavailable for certain claims against the states and their officials; in these instances, the states fail to provide legal protection for redress against their own transgressions.¹¹⁸ When this rises to a constitutional level,¹¹⁹ it is imperative to have a federal cause of action available, along with resort to the federal courts.

115. 42 U.S.C. §§ 1981 (insuring right to contract), 1982 (protecting property rights), 1983 (action for violation of civil rights under color of state law), 1985 (action for injuries due to private conspiracy), 1986 (action against individuals who negligently fail to prevent § 1985 violations). *See also* 18 U.S.C. §§ 241, 242 (criminalizing deprivations of civil rights).

116. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961) (seminal § 1983 case); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (allowing § 1985 to reach private conspiracies); *United States v. Guest*, 383 U.S. 745 (1966) (upholding prosecution under 18 U.S.C. § 241); *Miller v. United States*, 404 F.2d 611 (5th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969) (prosecution under 18 U.S.C. § 242). The criminal statutes would have been unavailing without the determined intervention of a pro-civil rights administration in Washington.

117. If civil actions were piggy-backed onto criminal prosecutions, as in many civil law countries, it might make more sense to provide parallel remedies in a federal statute.

118. I doubt that this, without more, will give rise to an equal protection claim under the Fourteenth Amendment. While access to the courts would appear to be a fundamental right protected by the Seventh Amendment, that Amendment incorporates the rules of common law, which, at the time of the Bill of Rights, included the doctrine of sovereign immunity. The Supreme Court has held that the Fourteenth Amendment does not prevent a state from immunizing its officials where there is a rational basis for doing so. *Martinez v. California*, 444 U.S. 277 (1980). A rational (if not altogether convincing) basis has frequently been articulated for sovereign immunity. *E.g.*, *Garcia v. Albuquerque Bd. of Educ.*, 622 P.2d 699 (N.M. Ct. App. 1980) (holding New Mexico Tort Claims Act does not violate Equal Protection Clauses of U.S. and New Mexico Constitutions because there were rational bases for reinstatement of sovereign immunity); *Commonwealth v. Smith*, 516 A.2d 703 (Pa. 1986) (establishing limitation of damages does not violate equal protection provisions of U.S. or Pennsylvania Constitutions); *Aubertin v. Board of County Comm'rs of Woodson City*, 588 F.2d 781 (10th Cir. 1978) (holding constitutional Kansas statutory scheme granting immunity to county).

119. In *Daniels v. Williams*, 474 U.S. 327 (1986), the Supreme Court was unwilling to transform a common tort claim against a state or state official into a Fourteenth Amendment claim, even where the defendant could assert a defense of sovereign immunity. However, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court ruled that the states' immunities under the Eleventh Amendment may be trumped by Congress, acting pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. *Id.* at 456. It nevertheless remains fairly clear that the underlying claim must rest on Fourteenth Amendment grounds, and that a garden variety tort claim will not do. *See also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996).

The federal courts are probably not the appropriate forum in which to adjudicate every bus accident involving a municipal transit authority. This is not the type of evil against which the Constitution was designed to protect. It is instructive that under the Federal Tort Claims Act (the most comprehensive federal tort legislation adopted to date) the applicable state law of torts controls, notwithstanding the exclusive jurisdiction of the federal courts. 28 U.S.C.A. § 2674 (West 1994 & Supp. 1995); 28 U.S.C.A. § 1346 (b) (West 1993 & Supp. 1995).

B. *Matters Having an Impact Beyond the Borders of a Single State*

Matters having an impact beyond the borders of a single state may be deserving of federal treatment. This impact can be felt in several ways: (1) a rule of tort liability may have a discriminatory impact on those outside the state imposing liability; (2) states may be tempted to engage in a “race for the bottom” in order to compete for the favor of certain enterprises; (3) the limited reach of state law, or inconsistent rules between states, may result in externalization of accident costs;¹²⁰ and (4) enterprises conducting business in several states may be encumbered by a lack of uniformity among states.

1. *Products Liability: A Good Candidate for National Law*

The field of products liability would appear to satisfy most of the foregoing criteria. A state’s products liability law is likely to be felt beyond its borders, because most manufacturers will conduct the majority of their business outside the state in which the injury occurs.¹²¹ A rule imposing excessive liability on out-of-state manufacturers could have a discriminatory impact; in fact, a state might be inclined to impose excessive product liability on (presumably) out-of-state manufacturers for the protection of its citizens.¹²² States therefore may be tempted to engage in a consumer-oriented variation of the race for the bottom.¹²³

While long-arm statutes minimize problems of externalization,¹²⁴ some externalization may result from inconsistent rules applied by different states. For example, in the DES litigation,¹²⁵ some state courts embraced a theory under which several drug companies marketing an identical product could be

120. While state long-arm statutes have minimized the likelihood that a state will not be able to reach a tortfeasor, certain conduct, such as environmental damage that crosses state lines, may be difficult for state law mechanisms to redress.

121. For this reason, demanding products liability laws should not place American manufacturers at a competitive disadvantage. A Japanese or German product that causes injury in the United States is subject to American products liability law, as is its American counterpart.

122. The impact is not discriminatory in the sense that out-of-state manufacturers are not being treated any worse than in-state manufacturers, so as to invoke the dormant commerce power. *Compare* *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (invalidating local ordinance discriminating against non-local milk processors) *with* *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (allowing state to impose non-discriminatory tax on multi-state business). But a state could penalize a class of litigants (i.e., products liability defendants, who are *likely* to come from out of state) to the advantage of another class of litigants (i.e., products liability plaintiffs, who are likely to come from the state whose law is applied).

123. *See infra* notes 167-79 and accompanying text.

124. In the absence of a long-arm statute, a manufacturer could be insulated against liability for harm it causes outside its home state.

125. Hundreds of women have alleged that they were injured by DES, a drug ingested during pregnancy by their mothers and manufactured by several defendants. *See, e.g.*, *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989); *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980).

held liable to a large group of plaintiffs in proportion to the defendants' respective market shares. Some of these courts (for example, those in California and New York) have defined the market as a national one; others (e.g., Wisconsin and Washington) have allowed the market to be determined individually in each case. Under the Washington scheme, the relevant market could be defined as "a particular pharmacy, or county, or State, or even the country, depending on the circumstances the case presents."¹²⁶ The potential for externalization in such instances is evident. A pharmaceutical company marketing drugs only in the Pacific Northwest could be held liable under a localized market theory in Washington, while at the same time it could be held liable under a national market theory in New York, even though it had never marketed DES in New York. Meanwhile, a competing company that had marketed only in the East would have its liability diluted in the New York litigation, while being spared liability in Washington. A consistent national rule as to market share would avoid such externalization.¹²⁷

Finally, manufacturers and other suppliers operating across state lines may be encumbered by a lack of legal uniformity. An individual state's *regulatory* measure (such as California's rule regarding catalytic converters in automobiles) might impose additional costs on manufacturers, who would undergo the additional expense of complying with that state's special requirements. Such a measure might have extraterritorial effects as well. Since manufacturers in a national market find differentiation more difficult than compliance with the requirements of the most demanding state, that state's legislature would in effect take on the role of a national legislature. A state's products liability law, however, is unlikely to operate in similar fashion. Do manufacturers differentiate between the type of product they must produce for California (with its strict liability standard)¹²⁸ and that which they can get away with in North Carolina (with its negligence standard)?¹²⁹ If strict liability means imposing liability on a manufacturer despite its exercise of reasonable care, will a manufacturer somehow still be more careful because it is cognizant of California's more demanding rule?¹³⁰ Will it be a little less careful as to Oregon-bound products because that state (which imposes a form of strict

126. *Hymowitz*, 539 N.E.2d at 1077 (citing *George v. Parke-Davis*, 733 P.2d 507, 511-12 (1987)).

127. It would not matter which rule was chosen; as long as all courts were obliged to follow one rule or the other, externalization would be avoided.

128. See *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1963).

129. See *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504 (N.C. 1980) (declining to adopt strict liability).

130. Judge Posner has suggested that the manufacturer will not exercise any more care, but might use its superior information regarding the product's unavoidable risks in pricing the product. The higher price will induce consumers to turn to other, presumably safer products. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 175-79 (4th ed. 1992). If manufacturers spread the risk nationwide through the pricing mechanism, California's more demanding rule will protect North Carolina consumers and will have an extraterritorial effect.

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liability)¹³¹ requires plaintiffs to show the feasibility of alternative designs,¹³² while California does not?¹³³ I can see how a manufacturer's insurance premiums would be higher for marketing products in California (because liability will be imposed more frequently), but I cannot see how its behavior would be altered. If this thesis is accurate, it would appear that variations in state law have a minimal effect on the design, manufacturing and marketing of products.¹³⁴

The greatest inefficiencies to be addressed by a uniform law might involve transaction costs. Nationwide distributors of products require specialized legal counsel in every state, and their insurance underwriters must separately calculate their exposure in accordance with each state's products liability law.¹³⁵ The variety of legal hurdles manufacturers must clear in each state might be viewed as tariffs imposed by the individual states to the detriment of the national economy. This was precisely the type of problem the Framers tried to avoid by abandoning the Articles of Confederation in favor of the Constitution.¹³⁶

Ironically, the states themselves have nationalized commercial law by enacting the Uniform Commercial Code. This code addresses the issue of products liability through the warranty provisions of Article 2.¹³⁷ Just as the UCC was gaining widespread acceptance, however, states began to recognize additional products liability theories through common law adjudication.¹³⁸ The problem has been compounded by the federal government's establishment

131. *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974).

132. *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978).

133. *See Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).

134. Professor Gary Schwartz has indicated at least two instances in which competing standards might place manufacturers in a quandary. First, some states recognize an "obvious dangers" defense, whereas others require a manufacturer to employ reasonable alternative designs to eliminate even obvious dangers. Professor Schwartz suggests that a manufacturer distributing cigarette lighters under the second rule will feel obliged to incorporate child-resistant features into the design, whereas under the first rule, it will not. Second, some jurisdictions impose an obligation to make reasonable design changes to prevent dangerous modifications of industrial machinery; others recognize such modifications as a defense available to the manufacturer. A manufacturer will feel obliged to make these modifications in the first type of jurisdiction; this effort would be unnecessary in the second type. For further discussion of this issue, see Gary T. Schwartz, *Assessing the Adequacy of State Products Liability Lawmaking*, in *YALE JOURNAL ON REGULATION/YALE LAW & POLICY REVIEW*, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 359 (1996).

135. Even here, I am not sure that the inefficiencies are substantial. Even with a national products liability law, manufacturers would have to retain local counsel to try cases. Would it be any less expensive for such counsel to be current on national law than on state law? Likewise, insurance underwriters still may have to make regionalized calculations, based on factors such as degree of market penetration and generosity of juries in a given locality. Accordingly, scale economies under a national rule would likely be insignificant.

136. *See* TRIBE, *supra* note 10, at 404.

137. U.C.C. §§ 2-313 (express warranties), 2-314 and 315 (implied warranties), 2-318 (third party beneficiaries), 2-715 (incidental and consequential damages), 2-719 (contractual limitation of remedy).

138. The parade was led by California, with *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1963). At least one state's high court has declined to accept *Greenman* because in its view, the U.C.C. preempted the field. *Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968 (Del. 1980).

of agencies with important regulatory authority in this field, e.g., the Consumer Product Safety Commission, the Department of Transportation, and the Food and Drug Administration.¹³⁹ Problems of preemption invariably abound, providing full employment for attorneys, but restless nights and considerable expense for litigants.¹⁴⁰ A comprehensive, preemptive federal products liability statute would eliminate this and related problems.¹⁴¹

Unfortunately, most products liability legislation currently under consideration takes a piecemeal approach. The legislation, if enacted, would not fully supplant state law. Instead, it would graft federal limitations onto state causes of action, in the form of punitive damage caps,¹⁴² special rules pertaining to retailers,¹⁴³ and statutes of repose.¹⁴⁴ The labyrinth of conflicting standards of liability, imposed largely through state common law adjudication, would remain, with an additional layer of complexity imposed by the federal government. The result would not be conducive to the uniformity so desperately needed in this area.¹⁴⁵ Instead, it would provide gainful employment for lawyers, who could bill countless hours reconciling underlying state products liability law with the new federal provisions. New and wondrous preemption issues would arise.

The current state of products liability law resembles that of antitrust law just prior to its codification. A little over a century ago, the law of antitrust was a matter of state common law, for which the principal remedy was the tort of unfair competition. Starting with the Sherman Act, antitrust became largely a matter of federal statutory law. This was entirely appropriate, due to the ramifications of anti-competitive practices on interstate commerce. The law of

139. Admittedly, advocates of a diffusion of power among governments might applaud the fact that general deterrence (in the form of tort liability) is controlled by the states, while specific deterrence (in the form of regulatory measures) is in the hands of the national government. For definitions of general and specific deterrence, see *infra* note 183.

140. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied sub nom.*, *Ford Motor Co. v. Tebbetts*, 1996 U.S. LEXIS 487, 64 U.S.L.W. 3484 (1996). In products liability cases, juxtaposition of a federal regulatory scheme over a system of state common law gives rise to two issues: (1) whether the federal regulation preempts the field, to the exclusion of state tort liability (an issue of federal law, under the Supremacy Clause); and (2) whether a manufacturer's compliance with federal regulations renders a product non-defective per se (a question of state law).

141. A federal statute would be preferable to a uniform law. The former would require enactment by only one legislature. As Professor Priest points out, it is more convenient to deal with a single national legislature than with fifty state legislatures. Then again, a prominent Republican once remarked, "You can fool all of the people some of the time, and some of the people all of the time, but you can't fool all of the people all of the time." A series of legislative hurdles may provide good protection against folly. Perhaps more significantly, a national products liability law would ultimately be interpreted by a single court (the Supreme Court), thereby making the law truly uniform.

142. H.R. 956, 104th Cong., 1st Sess. § 108 (1995) This bill was passed by both Houses, but vetoed by President Clinton in 1996.

143. *Id.* § 103.

144. *Id.* § 106.

145. Section 5 of the legislation would, however, impose a uniform rule as to product misuse or alteration, thereby addressing one of Professor Schwartz's dilemmas. See *supra* note 134.

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products liability should undergo a similar transformation. Unlike antitrust law, however, federal products liability law should be preemptive. It would provide little relief from the present state of affairs if a federal products liability statute were to stand alongside as many as fifty-one state schemes.¹⁴⁶

Professor Morton J. Horwitz has suggested that the Supreme Court's decision in *Swift v. Tyson*¹⁴⁷ heralded a regime of "general commercial law" that served business interests for almost a century.¹⁴⁸ Arguably, a federal products liability statute would do much the same thing, at a time in which business interests are in ascendancy in Congress.¹⁴⁹ But notwithstanding one's politics, nationalization of products liability law is justified on the basis of neutral principles.¹⁵⁰ The allocation of responsibility among the state and federal governments should be a matter of sound principle, not political expedience.

Thought should be given to issues regarding jurisdiction over federal tort claims, in products liability and other fields. Most federal products liability bills have included a provision depriving the federal district courts of subject matter jurisdiction;¹⁵¹ such a provision is not conducive to the goal of uniformity. It is instructive that the European Union has targeted the law of

146. That federal antitrust law does not preempt state law may be a historical accident. At the time of the Sherman Act (1890), the commerce power was not nearly as extensive as it is today. *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). Restraints on trade therefore could not be regulated through congressional action alone. *See* ROBERT H. BORK, *THE ANITRUST PARADOX* 20 (1978). Today, the commerce power is broad and deep enough to allow comprehensive national regulation of both antitrust and products liability.

147. 41 U.S. 1 (1842). In *Swift*, the Supreme Court stated that in the exercise of diversity jurisdiction, federal courts were bound not by state law, but could decide cases on the basis of "the general principles of commercial law." *Id.* at 22. *Swift* was overruled in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), in which the Court held that state law would be applied as to substantive issues in diversity cases.

148. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 245-56 (1977).

149. The federal district courts, under the Civil Justice Reform Act of 1990, have enacted a series of local procedural rules. Together with the nationalization of substantive law, these rules might return us to the pre-*Erie*, pre-Federal Rules days in which federal court procedure was local and substantive law was national.

150. A comprehensive federal products liability statute, friendlier to plaintiffs than those presently under consideration, was proposed approximately fifteen years ago. S. 2631, 97th Cong., 2d Sess. (1982). The proposal originated in the Carter Administration's Commerce Department as a potential uniform law, but was later introduced by Senator Kasten (R-Mo.) as a federal act that would preempt state law. The measure was opposed by consumer advocates and plaintiffs' personal injury lawyers, who hoped for further advances in the state courts. In fact, the law of products liability had reached a high water mark for plaintiffs, whose interests might have been best served by codifying the law as it stood at that time.

151. *See, e.g., H.R. 956 § 302*. These provisions are prompted by concern over a burgeoning federal caseload. But in reality, most state court dockets suffer from far more overcrowding than their federal counterparts. CONFERENCE OF STATE COURT ADMINISTRATORS, STATE JUSTICE INSTITUTE, AND NATIONAL CENTER FOR STATE COURTS, *STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992* (1994) (noting that the more than 93 million cases that were filed in trial courts in 1992 underscores the fact that state courts are the primary arena for resolution of legal disputes in the United States); *see also* Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1995, at A29. In defense of H.R. 956, the bill in § 301 makes decisions of federal appeals courts mandatory precedent within their respective circuits, thereby aiding uniformity of application.

products liability as the one area of tort law in which uniformity was deemed vital, issuing a directive to that effect in 1985.¹⁵² Jurisdiction over efforts to comply with the directive lies in the European Court of Justice, much as ultimate jurisdiction over any federal products liability law should reside with our Supreme Court.

2. *Professional Malpractice and Beyond*

Beyond products liability, the case for federal tort legislation is not nearly as clear. Were Congress to enact a universal health insurance plan, as once envisioned by President Clinton, federal regulation of malpractice actions might be justified as a cost containment measure. I am not yet convinced, however, that federal involvement in Medicare and Medicaid funding is sufficient justification for a national law of medical malpractice. Despite the growth of tertiary care facilities, medical practice remains largely local. Current Republican efforts to regulate medical malpractice claims may allow doctors to have their cake and eat it, too: Having defeated the Clinton health care plan (which would have expanded federal involvement in the provision of medical services), doctors may now enjoy federal limitations on malpractice actions that only a plan such as Clinton's would have justified.¹⁵³

In other areas of tort law, proponents of federal reform proposals have a substantial burden of persuasion. I have already discussed how insurance might provide a constitutional justification for federal control of tort litigation, including even "backyard" torts that otherwise involve neither civil rights nor interstate commerce.¹⁵⁴ But Congress has historically deferred to the states for purposes of insurance regulation,¹⁵⁵ and most insurance underwriting therefore proceeds on a state-by-state basis. The insurance industry is indeed concerned with national markets, but those markets are as likely to be on Wall Street and in real estate as in our courtrooms.¹⁵⁶ While insurance might provide a nexus with interstate commerce, that nexus would be no more than a pretext for federal intrusion into matters that are for the most part local: garden variety torts such as parking lot fender benders and premises liability.

152. Council Directive 210/29, Liability for Defective Products, 1985 O.J.; see also Ferdinando Albanese and Louis F. Del Duca, *Developments in European Product Liability*, 5 DICK. J. INT'L L. 192, 195 (1987).

153. For example, H.R. 3103, 104th Cong., 2d Sess. (1996) originated as an act to assure health insurance portability. House Republicans thereafter added a series of Christmas tree ornaments to reduce physicians' exposure to malpractice suits. See *id.* §§ 271-283.

154. See *supra* text accompanying note 73.

155. See, e.g., 29 U.S.C.A. § 1144(b)(2)(A) (West 1985 & Supp. 1995) (ERISA legislation deferring to state regulation of insurance industry).

156. Critics of insurance industry tort reform proposals claim that these measures are prompted largely by the ebb and flow of real estate and financial markets, and not excessive tort liability. See Robert M. Ackerman, *Medical Malpractice: A Time for More Talk and Less Rhetoric*, 37 MERCER L. REV. 725, 727 (1986); Glen O. Robinson, *The Medical Malpractice Crisis of the 1970s: A Retrospective*, 49 L. & CONTEMP. PROBS. 5, 9 (1986).

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While a legitimate federal interest in traffic on interstate highways might carry along the former class of cases, it is hard to find a legitimate justification for federal involvement in the latter.

Despite the globalization of legal practice,¹⁵⁷ regulation of the legal profession remains largely a state matter, and it is difficult to justify federal regulation of lawyer conduct (e.g., through provisions limiting contingent fees) in tort litigation alone.¹⁵⁸ As I have stated elsewhere, the litigation explosion of the past few decades is attributable more to a growth in commercial litigation than to tort actions.¹⁵⁹ While the 104th Congress has moved to curtail stockholders' derivative suits,¹⁶⁰ it has done little to reduce the volume of corporate litigation that currently clogs the courts. Nor has Congress moved to assess fees to offset the subsidy of corporate dispute resolution provided by the federal and state governments through their respective court systems.¹⁶¹ Again, I sense that it is a matter of whose ox is being gored.

3. *Tort Reform and the Race to the Bottom*

Fear that a Gresham's law of competition between states might produce undesirable results has served as an argument for nationalizing certain areas of law. This thesis has been articulated by Professor William L. Cary in the context of corporate law.¹⁶² In 1974 Professor Cary suggested that Delaware had attracted far more than its share of incorporations by enacting laws giving maximum flexibility to corporate managers and minimum protection to shareholders. He feared that states would engage in a "race for the bottom"¹⁶³ in which they would attempt to outdo each other for the favor of corporate managers, to the ultimate detriment of shareholders. His solution was the enactment of federal legislation that would create a fairer playing field for

157. See, e.g., Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code*, 7 GEO. J. LEGAL ETHICS 1, 345 (1993).

158. One Republican proposal, the "Common Sense Legal Reforms Act of 1995," H.R. 10, 104th Cong., 1st Sess., includes an "attorney accountability" provision stating that it is the "sense of Congress" that each state should require written disclosure as to services performed and hours expended under contingency fee agreements. *Id.* § 104. No mandate is imposed, however, consistent with *New York v. United States*, 505 U.S. 144 (1992).

A national system of bar admission, similar to that enjoyed by physicians, might indeed have merit. It might lower barriers to competition and make legal services more widely available. However, it could stifle efforts by individual states to adopt more creative standards of bar admission than the rigid, doctrinal bar examinations that now predominate.

159. See Ackerman, *supra* note 112, at 687-88.

160. Private Securities Litigation Reform Act of December 22, 1995, Pub. L. No. 104-67, 1995 U.S.C.C.A.N. (109 Stat.) 737.

161. See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 392-93 (1986).

162. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

163. *Id.* at 666, 705.

corporations, managers, and stockholders.¹⁶⁴

In the context of tort law, a state could conceivably try to attract certain enterprises by easing the burdens imposed on those enterprises through the law of torts. For example, a state might create an atmosphere more hospitable to polluters by repealing environmental regulations which, directly or indirectly, create standards used in environmental tort litigation.¹⁶⁵ Alternatively, a state (through its legislature or its courts) might impose higher burdens on plaintiffs attempting to prove environmental claims, for example, by tightening up rules of causation. States might engage in a scramble to lure polluters through these devices, thereby engaging in a race for the bottom in which the public interest gets short shrift.

There is far less likelihood of a corporate-oriented race for the bottom in the context of product liability law. Defective products cause accidents in their state of use, not in their state of manufacture. States are therefore unlikely to attract manufacturers by enacting lenient products liability laws. In a products liability suit, the plaintiff is far more likely than the defendant to be a resident of the controlling state. Legislators and judges looking to advance the interest of their state's citizens are, therefore, likely to promote the most demanding products liability laws.¹⁶⁶ Therefore, if products liability were to involve a race for the bottom in the form of bad law, it would be a race to the advantage of accident victims and to the disadvantage of corporate interests.¹⁶⁷

The law pertaining to retailers might provide an exception to the above analysis. A retailer sued in a products liability suit is likely to be located in the state whose law is applied. A state wishing to create an attractive climate for retailers might, therefore, enact product liability legislation friendlier to retailers if not manufacturers. Several states have, in fact, done so.¹⁶⁸

164. *Id.* at 700-04.

165. As a practical matter, it is far more likely that states attempting to attract or retain polluters will simply ease up on the enforcement of environmental regulations. The recent experiences of Pennsylvania and New York under newly-elected Republican governors may be instructive in that regard.

166. This thesis was most emphatically asserted in a book by Justice Richard Neely of the West Virginia Supreme Court. RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM STATE COURT POLITICS* (1988). Justice Neely later "proved" his own thesis in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W.Va. 1991). These events are very neatly described by Professors Eaton and Talarico. Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, in *CONSTRUCTING A NEW FEDERALISM*, *supra* note 134, at 371, 374-76.

167. Consumer advocates might call this a "race for the top," but adherents of the Chicago School of legal economics would almost certainly take exception. *See, e.g.*, Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982). Were states inclined to overly penalize foreign manufacturers through their products liability law, the result would be inefficient and unfair.

168. GA. CODE ANN. §§ 105-106.1 (Harrison 1991); IND. CODE ANN. § 33-1-1.5-3 (Burns Supp. 1995); OHIO REV. CODE ANN. § 2307.78 (Baldwin 1994) (seller not strictly liable); N.D. CENT. CODE § 28-01.3-05. (Supp. 1995); TEX CIV. PRAC. & REM. CODE ANN. § 82.002 (West Supp. 1996) (manufacturer to indemnify seller).

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Interestingly, the most prominent product liability reform legislation before the 104th Congress would have preempted such a race for the bottom by providing its most significant protection to retailers.¹⁶⁹

As a practical matter, I doubt that the law of torts plays a significant role in attracting or repulsing businesses to or from a given state.¹⁷⁰ Labor conditions, the amount of direct government regulation, and, above all, taxes play far more significant roles in this regard than indirect regulation through the law of torts.¹⁷¹ However, tort-sensitive enterprises, such as medicine, might be the object of a race for the bottom. A state known to be hospitable to medical malpractice claims might indeed drive away physicians, particularly in high risk specialties. This appears to have prompted some states to enact medical malpractice reform legislation during the 1980s.¹⁷² A nation that cared about the rational, fair, and efficient distribution of medical services might therefore wish to avoid a race for the bottom by enacting a uniform law of medical malpractice.

Unfortunately, one medical malpractice reform measure now before Congress serves only to perpetuate a race for the bottom in that field. The proposed "Health Care Liability Reform Act of 1995"¹⁷³ would, *inter alia*, limit economic and punitive damages and attorneys' fees, eliminate the collateral source rule, provide for periodic payments of future losses, and eliminate joint liability in health care liability actions. By its terms, the Act would supersede state law, except for those provisions of state law imposing

169. H.R. 956, the "Common Sense Product Liability Legal Reform Act of 1996," would have imposed liability only for negligence, and not strict liability, on sellers of products who are not manufacturers, except under limited circumstances. *Id.* § 103.

170. My intuitive skepticism regarding a race for the bottom with respect to products liability is borne out by Professors Eaton's and Talarico's empirical research. Eaton & Talarico, *supra* note 166, at 399-410.

171. From March, 1989 to March, 1993, New York State lost over half a million jobs. James Traub, *Dollface*, NEW YORKER, Jan. 15, 1996, at 29. It is no coincidence that New York had the highest state and local taxes in the nation during this period, or that it had a regulatory environment that businesses came to regard as oppressive. *Id.*

172. See, e.g., FLA. STAT. ANN. CH. 766.303 (Harrison 1994) (Florida Birth-Related Neurological Injury Compensation Plan); VA. CODE ANN. § 38.2-5002 (Michie Supp. 1995) (Virginia Birth-Related Neurological Injury Compensation Program). Both of these measures have no-fault provisions which, while protecting physicians from ruinous liability, provide a modicum of protection to injured parties.

173. H.R. 1195, 104th Cong., 1st Sess. (1995).

greater restrictions on liability or damages than the Act.¹⁷⁴ The Act therefore permits (and perhaps encourages) a scramble among states to enact health care liability measures offering greater protection to health care providers and commensurately less protection to malpractice victims.

C. Major National Endeavors

Were we to become serious about a national health care plan and enact universal health care coverage under a single-payer system, then a national no-fault insurance plan for medical mishaps might make a good deal of sense. The transaction costs of tort litigation would be largely eliminated, and universal health coverage would in itself provide a no-fault remedy for a major part of the malpractice victim's out-of-pocket costs. Evidence that there is little correlation between malpractice claims and actual incidents of malpractice¹⁷⁵ lends further support to the idea of a no-fault remedy. The New Zealand experience suggests, however, that an across-the-board national no-fault system, supplanting virtually *all* common law tort actions, may remove safety incentives from too great a range of human endeavors.¹⁷⁶

It would be difficult to envision a truly comprehensive no-fault accident or health plan on a state-by-state basis. Cradle-to-grave schemes enacted by individual states are likely to encounter externalization through adverse selection in a nation with as much interstate mobility as ours. Unhealthy people will move to states with more generous plans, thereby bankrupting them.¹⁷⁷

174. Section 102(b) of the proposed Act provides:

The provisions of this Act will supersede any State law . . . only to the extent that State law permits the recovery of a greater amount of damages by a plaintiff than that authorized under section 204, permits the awarding of a greater amount of attorneys' fees than what is authorized under section 203, reduces the applicability or scope of the regulation of periodic payment of future damages authorized under section 204(b), or establishes a longer period during which a health care liability claim may be initiated than that permitted under section 202. The provisions of this Act shall supersede any Federal or State law which mandates reimbursement from the plaintiff's recovery for the cost of collateral source benefits. The provisions of this Act shall not preempt any State law that imposes greater restrictions on liability or damages than those provided herein.

175. See Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 N. ENG. J. MED. 245 (1991).

176. In 1972, New Zealand enacted a comprehensive no-fault scheme to supplant most forms of liability in tort. Preliminary data indicate that accident rates have risen significantly since adoption of the plan, suggesting that incentives for safety may diminish in the absence of traditional tort liability. Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1, 43-45 (1989). But see Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976, 984-94 (1985) (indicating no increase in motor vehicle accident rates during 1964 to 1980 time period).

177. No fault workers compensation schemes do not encounter this problem, because they are based on a closed system involving an employee, his/her employer, and possibly an insurer. No fault motor vehicle insurance schemes impose insurance requirements on out-of-state motorists and thereby have extraterritorial effects. E.g., COLO. REV. STAT. § 10-4-711(4)(a) (1994 & Supp. 1995); CONN. GEN. STAT. ANN. § 38a-371(a)(2) (West 1992 & Supp. 1995); MINN. STAT. ANN. § 65 B. 48 (West 1986 & Supp. 1995). They also create overlapping insurance requirements and duplicative costs.

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Only a national plan could deal with this problem comprehensively. Yet a national no-fault plan would be a major, radical step, with potentially dramatic consequences. The widespread resistance to President Clinton's health care plan in 1994 suggests that the nation is not prepared to give the federal government sweeping control over such a broad system of compensation.

D. "States' Rights" and Other Myths

I have argued on the preceding pages for a presumption against federal intervention in tort law, suggesting that clear justification is necessary before wresting this or any other area of regulation from the states. Nevertheless, I must express a degree of skepticism whenever the mantra of "states' rights" is used to justify public policy. In my youth, "states' rights" was code for officially-sanctioned racism, and a century earlier it served as a laundered rationale for slavery. My fear now is that it is being used to cover a similarly pernicious agenda.¹⁷⁸

In terms of basic political principle, I can see nothing in the natural order of things that reposes rights in what are essentially political subdivisions of a national government. In international relations, states indeed have rights with respect to each other, but the rights of the American states as sovereigns have their basis in historical accident rather than in any justice-based notions that survive to the present day. States do not have rights; *people* do. As Justice O'Connor has stated:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."¹⁷⁹

As with separation of powers, division of powers promotes the objective of maximizing liberty and minimizing the threat of government tyranny through

178. My concerns were aptly articulated by the Tappitt brothers, Click and Clack, of National Public Radio's *Car Talk*, in a July, 1996, broadcast:

Click: The dingalings in Congress who voted to repeal the 55 mile an hour limit . . . they're all jerks . . . They should all be ashamed of themselves!

Clack: It's a matter of reasserting states' rights . . . They want to get it so that the states that are in favor of having higher speed limits can have them, and then they will just take this a step further and they can do things like reinstitute slavery and some of the other things that have been usurped from the states over the years.

179. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1990) (Blackmun, J., dissenting)).

concentration of powers in a single government.¹⁸⁰ But the nationalization of tort law poses a rather small threat of government tyranny. While I might doubt the wisdom of federal micromanagement through the enactment of FACE, or of federal intermeddling with attorneys' fees, neither measure brings forth visions of jack-booted stormtroopers or even orderly Redcoats marching on Concord.

Unless it involves state-sponsored social insurance, tort law does not entail massive government spending or taxation, nor does it involve governmental compulsion. Rather, the law of torts addresses primarily the remedies that the courts will allow for the breach of duties owed by and to private persons.¹⁸¹ As a consequence, tort law involves only indirect limitations on liberty. It requires no action on the part of an individual unless prior action has been taken.¹⁸² It involves not the specific deterrence of direct regulation, but only general deterrence in the form of a damage remedy incurred when the failure to take adequate precautions results in injury.¹⁸³ It requires no bureaucracy aside from the judiciary, the "least dangerous branch"¹⁸⁴ of government.

It is therefore difficult to see how the accretion of power in the national government with respect to the law of torts would result in a serious threat to individual liberty. Perhaps the greatest threat posed by federalization of tort law involves the magnification of error: If a mistake is made with respect to a national law of torts, it is likely to be a substantial one, with a nationwide impact, rather than an impact limited to a single state. To the extent innovation is desirable, it may be preferable to pursue the Brandeisian concept of the states as our laboratories,¹⁸⁵ rather than engaging in nationwide experimentation. This is entirely in keeping with Gingrichian notions of devolution. Social tinkering may have a salutary effect on a state-by-state basis, but it is potentially dangerous on a national basis.¹⁸⁶ The rule of unintended consequences is bound to raise its ugly head.

180. TRIBE, *supra* note 10, at 18.

181. The major exception involves governmental torts, discussed *supra* notes 12-22 and accompanying text.

182. Compare, for example, the military draft, which compels private individuals to serve their country simply by reason of citizenship.

183. Specific deterrence, a collective approach, uses the political process to regulate directly, for example, through a proscriptive government regulation. General deterrence uses the market to determine the degree to which accidents will be allowed. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 69, 95 (4th ed. 1975).

184. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

185. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

186. Conservatives, who have justifiably criticized liberals for engaging in social experiments, now promote an agenda replete with such experiments, based more on theoretical formulas than on concrete evidence of effectiveness.

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The foregoing discussion suggests a paradox. As suggested earlier, some measures (like universal no-fault health and accident insurance) are likely to be effective only if implemented on a nationwide basis. Yet national measures involve substantially greater risks. Striking the proper balance is not easy. To date, however, it appears that our system of checks and balances has deterred the federal government from embarking on grandiose, harebrained schemes. There is something to be said for legislative gridlock.

CONCLUSION

In this era of the “new federalism,” it is only fair to recall some rather extraordinary accomplishments of our national government. Professor Walter Dellinger has recently stated:

[Our national government] is the government that with extraordinary courage successfully fought the war to end slavery; it is the government that marshalled the resources to bring the nation out of the Great Depression; it is the government that liberated Europe from the darkness of the Third Reich; it is the government that created a social safety net for older citizens, and it is the government that brought an end to state-sponsored racial segregation.¹⁸⁷

These are rather extraordinary achievements, which came about in response to grave crises and required the marshalling of significant resources beyond those available to the individual states. Perhaps the national government had best focus on these major enterprises rather than engaging in micro-management of the law of torts. Federal intervention is most justified where it protects fundamental rights, addresses matters with significant interstate impact, or advances a major national endeavor.

In a sense, I wish I could present an overarching theory as to the respective roles of the national and state governments in tort law. But the very complexity of our federal system renders it unavailing of any single, universal “fix.” This is a blessing. The matrix of governments, branches, and interlocking constituencies serves as a barrier to zealots touting a “cure all” for the nation’s ills. Our solutions are therefore likely to be found in a dynamic mixture of constitutional theory, sound policy, and practical politics.

187. Walter E. Dellinger, III, Remarks at Session on The Anti-Federalist Revival, Association of American Law Schools Annual Meeting (Jan. 6, 1996).

