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Can Tort Reform and Federalism Coexist?

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Executive Summary

Critics of federal tort reform have usually come from the political left and its allies among the trial lawyers, who favor a state-based system that can be exploited to redistribute income from deep-pocketed corporations to "deserving" individuals. We offer a totally different criticism—constitutional in origin—that embraces the need for reform but reaffirms this principle: The existence of a problem, however serious, does not justify federal remedies outside the scope of Congress's enumerated powers.

We begin with the Commerce Clause but find that interstate trade does not, by itself, justify federalizing tort law. On the basis of examples involving fast food, guns, and medical malpractice, we argue that substantive federal reforms are neither necessary nor proper. If states persist in imposing unjust rules on out-of-state defendants, federal procedural remedies are available.

Next, we consider the Due Process Clause of the Fourteenth Amendment and dissect the Supreme Court's recent *State Farm* decision covering punitive damages. We also discuss the controversies over judicial activism and substantive due process. Despite the limitations of substantive due process, we conclude that the Court was correct to rein in punitive awards.

Most important, we recommend reforms that are compatible with the tenets of federalism. Some reforms can be implemented at the state level—including solutions to excessive punitive awards, curbs on joint and several liability, payment of attorneys' fees when government is the losing party in a civil lawsuit, the prohibition of contingency fee contracts between government and private lawyers, and restraints on litigation by government to recover expenditures made on behalf of private parties.

At the federal level, we endorse two procedural reforms. The first involves state "long-arm" jurisdiction, which determines whether an out-of-state entity can be sued in a local court. Currently, out-of-state businesses find it exceedingly difficult to avoid oppressive state tort laws. A second federal reform concerns "choice-of-law" rules that determine which state's laws control a multistate suit. A federal choice-of-law rule would prevent states from exporting discriminatory tort regimes.

Taken together, state substantive reforms and federal procedural reforms can curtail abuses while respecting time-honored notions of dual-sovereignty federalism.

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We must find a source of constitutional authority for each proposed tort reform.

Introduction

"A billion here, a billion there, and pretty soon you're talking about real money." When the late Sen. Everett M. Dirksen from Illinois offered that famous quip 40 years ago about government spending, no one imagined that the same words might be used today to describe damage awards in tort cases. Yet last year a Florida jury somehow conjured up punitive damages of $145 billion for a class of plaintiffs. The year before, a California jury recommended a $28 billion treasure trove for a single claimant. And in 1998 four major cigarette companies agreed to the grandmother of all awards—a quarter-trillion-dollar settlement supposedly to reimburse the states for the Medicaid costs of smoking-related illnesses.

So it goes. Not just tobacco; but guns, asbestos, and a cross section of American industry that has morphed into the Mass Tort Monster: "DDT, Bendectin, DES, swine flu vaccine, Copper-7, PCBs, the Dalkon Shield, Shiley heart valves, heart catheters, pickup-truck fuel tanks, blood products, silicone breast implants, pedicle screws, penile implants, intraocular lenses, . . . lead pigment, latex, dietary supplements, fen-phen, Rezulin, L-tryptophan, Duract, Parlodel, Synthroid, Propulsid and so forth almost *ad infinitum*."[1]

According to the U.S. Chamber of Commerce, our tort system is wrecking our economy. Since 1930 growth in litigation costs has been four times that of the overall economy. The chamber reports that federal class actions tripled over the past 10 years, while similar filings in state courts ballooned by more than 1,000 percent.[2] One chamber official estimates that the annual cost of the tort system translates into $809 per person—the equivalent of a 5 percent tax on wages.[3] The share going to trial lawyers—roughly $40 billion in 2002—was half again larger than the annual revenues of Microsoft or Intel and twice those of Coca-Cola.[4] The estimated aggregate cost of the tort system in 2002 was $233 billion, says Tillinghast-Towers Perrin, a respected actuarial firm. That cost represented 2.23 percent of the U.S. gross domestic product.[5] Over the next 10 years, the total "tort tax" will likely be $3.6 trillion.[6]

When costs explode, proposals for reform are never far behind—especially when the electoral season is upon us. Thus, we have been deluged by congressional schemes to curb class action litigation, ban lawsuits against gun makers and fast food distributors, cap medical malpractice awards, and otherwise enlist the federal government in the battle against allegedly biased state judges and juries.

Our primary objective in this paper is not to document that tort reform is necessary or desirable. That task has been ably and effectively performed by several others.[7] Instead, we seek to explore the methods by which reforms might be implemented—especially the extent to which various proposals are compatible with our system of dual-sovereignty federalism. Our underlying premise is straightforward: No matter how worthwhile a goal may be, if there is no constitutional authority to pursue it, then the federal government must step aside and leave the matter to the states, or to citizens in the private ordering of their affairs.

Congress can proceed only from constitutional authority, not from good intentions alone. That means we must find a source of constitutional authority for each proposed tort reform. One possible source, which we examine in the next section, is the all-encompassing Commerce Clause. As the country grew and some people believed that all of its problems required national regulatory solutions, Congress sought to earmark a specified constitutional power that would justify an ambitious federal agenda. The Commerce Clause became the vehicle of choice.

Yet the central reason that the clause appeared in the Constitution was quite different. Under the Articles of Confederation of 1776, the national government lacked the power to regulate interstate commerce. Each state was free to advance local interests and to create barriers to trade, without regard to possible prejudice to out-of-state interests.

That process devolved into what Justice William Johnson characterized as a "conflict of commercial regulations, destructive to the harmony of the States."[8] The solution: a constitutional convention at which, according to Justice Johnson, "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."[9]

Today, instead of serving as a shield against interference by the states, the commerce power has become a sword wielded by the federal government in pursuit of a boundless array of socioeconomic programs. But the mere fact that goods and services subject to tort litigation are transported across state lines and sold to customers in several states does not justify federal intervention under the Commerce Clause. To legitimately invoke the commerce power, Congress must show that federal tort reform is "necessary" *and* that it is "proper"—that is, it does not violate other constitutional principles—to ensure the free flow of interstate commerce. As we shall see—on the basis of examples involving fast food distributors, the firearms industry, and medical malpractice—substantive federal reform is neither necessary (procedural remedies would do the trick) nor properly harmonized with traditional concepts of federalism.

Following our look at the Commerce Clause, we turn to an alternative source of constitutional authority, the Due Process Clause of the Fourteenth Amendment. Ratified in 1868, the Fourteenth Amendment states, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." If confiscatory state court decisions have the effect of denying due process to defendants in tort litigation, federal courts are empowered by the Fourteenth Amendment to intercede. And section 5 of the amendment authorizes Congress "to enforce, by appropriate legislation" the Due Process Clause.

The question, then, is whether state courts have gone so far as to deprive tort defendants of due process. If so, federal remedies might be in order. Perhaps, for example, a damage award is so excessive that it breaches constitutional safeguards. Then again, perhaps "due process" imposes no substantive limits on state tort awards, just procedural guarantees such as advance notice of the existence of a rule and an opportunity to defend oneself against a claim. Or perhaps substantive and procedural protections merge when damage awards are so capricious and unpredictable that defendants cannot know with any assurance how to conform their conduct to the dictates of the law.

In our section on the Fourteenth Amendment, we weigh those issues by analyzing the Supreme Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[10] That case specifically addressed punitive damages, although many of the principles debated by the Court are applicable to tort reform more broadly. In dissecting *State Farm*, we discuss the purpose of punitive damages, the need for reform, past efforts at reform, and the current controversy over so-called judicial activism and substantive due process.

Although we recognize the limitations of what is known as substantive due process, and in fact urge the Court to reconsider the Privileges or Immunities Clause of the Fourteenth Amendment as an alternative justification for striking down certain state laws, we nonetheless conclude that the majority in *State Farm* was correct in curbing punitive damages. That said, we proceed in the following section, "Reconciling Tort Reform and Federalism," to recommend a series of reforms that avoid the inconsistencies of substantive due process while respecting the notion that states should serve as experimental laboratories of competing tort systems.

First among our suggested reforms are those that can be implemented at the state level. We begin by offering several solutions to the problem of excessive punitive awards. Then we advocate state-based reforms in other areas, like curbing joint and several liability, shifting attorneys' fees when govern-

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ment is the losing party in a civil lawsuit, prohibiting contingency fee contracts between government and private lawyers, and restraining litigation by government to recover expenditures made on behalf of private parties.

Switching to federal reforms, we support two changes that are procedural in nature.[11] The first change is federal reform of state "long-arm" jurisdiction—the rules that determine whether an out-of-state entity can be sued in a local court. A sensible application of the Due Process Clause would exempt businesses from local court jurisdiction unless they have sufficient dealings within the state. Currently, out-of-state businesses find it exceedingly difficult to avoid oppressive state tort regimes.

The second federal reform that we endorse is a change in "choice-of-law" rules, which determine which state's laws control a suit involving litigants from more than one state. Frequently, tort defendants will be disadvantaged when plaintiffs select jurisdictions that have plaintiff-friendly choice-of-law rules. The concern is that the tort laws of some states discriminate against out-of-state corporate defendants. If that were to happen on a large scale, it could impede interstate commerce—the very problem that the Commerce Clause was intended to redress. By establishing a federal choice-of-law rule—a procedural solution that does not intrude on state sovereignty, because it leaves underlying state substantive law in place—the federal government can effect meaningful tort reform without trampling on principles of federalism.

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Tort Reform, Federalism, and the Commerce Clause

Background

Our review of the federal government's venture into tort reform starts with recent efforts by Congress to expand its already copious power to regulate interstate commerce. A few examples:

1. Legislation that would cap medical malpractice awards and limit attorney fees cleared the House 229 to 196 on March 13, 2003.[12] That was the seventh attempt at federal malpractice reform since Republicans took over the House in 1995.[13]
2. In the aftermath of the September 11, 2001, terrorist attacks, Congress passed the Air Transportation Safety and System Stabilization Act, which created a federal cause of action for property and personal injury claims related to 9/11. At the same time, the act capped the airlines' liability at the amount of their insurance coverage.[14]
3. In 2001 the House and Senate passed separate versions of the Patients' Bill of Rights, which provided for an expansion of patients' right to sue health plans in state courts while limiting damages for pain and suffering and punitive damages.[15]

On the subject of tort reform, hypocrisy on both sides of the aisle is thick enough to slice. Democrats opposed to federal tort reform suddenly profess abiding faith in federalism. Yet those same Democrats were beside themselves when the Supreme Court held in 1995 that federal power to create criminal law is not plenary.[16] Meanwhile, Republicans, self-styled ardent defenders of decentralization, now argue that malpractice (for instance) is a "national problem." But under our federal system, every *national* problem does not ipso facto become a *federal* problem.

Several commentators have proposed that state tort rules should give way to uniform national rules in order to help federal courts cope with ever-increasing mass tort cases.[17] Legislators have proposed several bills that would alter "diversity jurisdiction," allowing federal courts to hear tort class actions even if some plaintiffs reside in the same state as some defendants.[18] Some observers have suggested that federal law alone should govern punitive damages.[19] Federalization of tort law is also occurring indirectly through executive

branch agencies. That means defendants in tort suits may be able to avoid liability by arguing that they have complied with all applicable federal statutes and regulations, which would preempt irreconcilable state rules.[20]

In the face of those pressures to federalize tort law, our constitutional principles must be recalled and enforced. The general principle cannot be repeated often enough: *Our federal government is one of limited and enumerated powers.* The making of tort law is not one of those powers. The Constitution does provide, as we have noted, that Congress can "regulate Commerce . . . among the several States."[21] Over the past 65 years, courts have read the Commerce Clause very broadly, using it to uphold federal legislation concerning noncommercial activity.[22] In so doing, the courts have allowed Congress to turn the commerce power on its head. Instead of using it to strike down state barriers to interstate trade, Congress has in fact *erected* federal barriers that prevented free trade.

To be sure, state laws, including tort rules, often "affect" commerce. But that is not enough to justify federal intervention unless the flow of trade among the states is impeded by such laws. In 1995 the Supreme Court took a step toward reaffirming that important principle. In *United States v. Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which purported to ban the possession of guns within 1,000 feet of any school, exceeded Congress's authority under the Commerce Clause, in part because Congress made no finding that the possession of firearms near schools affected interstate trade.[23] In 2000 the Court extended *Lopez* in *U.S. v. Morrison*, which held that a statutory federal tort suit for sexual battery under the Violence Against Women Act was unconstitutional, even though Congress had issued fig-leaf findings that sexual assaults affected interstate commerce.[24]

State laws regularly affect interstate commerce without raising constitutional concerns. California, for example, requires special catalytic converters on cars sold in that state. That's a permissible use of California's police power that doesn't directly affect interstate trade.[25] But if California tried to regulate catalytic converters on every car that crossed its state boundary, that would provoke stronger Commerce Clause questions. Cars traveling interstate would have to stop at the border and turn back—clearly a burden on interstate commerce.

Can federalism be squared with Washington's current tort reform proposals? In a word, no. Federal intervention is rarely authorized for the purpose of altering substantive rules of state tort law. Most tort suits involve "internal" activities, like negligent driving,[26] doctoring, lawyering, and so forth, and pit an in-state individual plaintiff against an in-state individual defendant. When litigated in a state court before a local jury, that type of case creates no intrinsic predisposition against either party. What is sometimes termed a "public choice" problem[27] is absent: The plaintiff cannot persuasively ask the jury to bring "outside" money into the locality without harming anyone locally. Even when parties are insured, both in-state and out-of-state insurance companies are exposed to the same liability regime.

Other, noncommercial kinds of bias (against the social class or race of either party, for example) are of course possible in those cases, as in all lawsuits. Such biases might raise Fourteenth Amendment concerns. However, race and class biases are not intrinsic to a party's status as plaintiff or defendant. In any case, parties can attempt to guard against those biases through challenges to the jury venire.[28] Thus, there is no valid structural reason for the federal government to intervene in the ordering of behavior through state tort law.

A second type of tort suit—exemplified by negligence claims invoking *respondeat superior* (suits against an employer for damages caused by wrongful behavior by its employee)[29]—usually sets in-state *individual* plaintiffs against in-state *corporate* defendants. Because juries are always composed of individuals and never of corporations, corporate defendants might experience systemic prejudice here: A jury may be tempted to transfer

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wealth from an entity that does not "feel pain" to a suffering real person with whom it can identify. But such temptations may be offset by the jury's desire to maintain employment and economic activity in its own locality, especially if the defendant corporation maintains a large local presence. It is hard to predict how those offsetting incentives will ultimately unfold in a specific case.[30] In any event, those problems derive from the *corporate* nature of the defendant, not its state of domicile. Thus, state tort law can alleviate any anti-corporate biases that may exist. Few states want existing employers to pack up and leave.

To the extent that abusive state tort rules operate like a tax on productive activity, the greater the abuse, the greater the decline in productivity or wealth. Customers will pay more for in-state services if the providers of those services have to pay for injuries they did not wrongfully cause. Physicians will avoid practicing in jurisdictions with unreasonable malpractice rules. Local children and their parents will suffer if playgrounds cannot be built without the park authority being held liable for inevitable accidents. Those costs produce powerful in-state lobbies for tort reform. Predictably, since the so-called torts crisis of the mid-1980s, almost all 50 states have enacted some form of tort reform for intrastate activity.[31]

The reforms have varied substantially—from caps on punitive damages to the creation of statutes of repose (limiting the time period within which claims can be filed) to the modification of joint and several liability (whereby each one of multiple defendants is held liable for the entirety of a plaintiff's damages, irrespective of the extent of the individual defendant's culpability).[32] Some state reforms have arguably been misguided—and more than a few have been declared by state supreme courts to violate state constitutions[33]—but misguided or nonexistent state reform is no justification for federal lawmakers to intervene. When voters realize that they pay a price if their state persists in applying dysfunctional tort rules, state lawmakers have every incentive to respond. The same types of incentives that dissuade states from imposing exorbitant income or sales taxes can operate to create a rational tort system.

Early product liability suits tended to be of the intrastate kind. Most products were manufactured near their place of consumption, as transportation costs made far-flung markets unreachable. Thus, many lawsuits concerning allegedly defective products were filed by local individual plaintiffs against local corporate defendants.[34] But with the advent of "paradigm shifters"[35] such as assembly-line production, interstate highways, and electronic auctions, markets for goods (though not yet services) have today become largely national. Modern product liability suits characteristically set in opposition an *in-state* individual plaintiff and a corporate *out-of-state* defendant.[36]

In a typical product liability suit today, a consumer purchases a product, is allegedly injured while using it, and sues its far-off manufacturer[37] to recover damages. Most purchases take place close to home; almost all product use takes place near the home or the workplace;[38] and no state is home to a majority of manufacturers' head offices or factories. The confluence of those factors means that a plaintiff ordinarily files a product liability suit in her home state, which is also the state where she was injured and where she purchased the allegedly defective product. In the vast majority of cases, however, the product was designed and manufactured in another state.

Assume for a moment that the victim sues in her home state. There, the court agrees it has jurisdiction to try the suit and concludes that its own product liability law applies to resolve the dispute. Such a suit would now pit a local individual against an out-of-state corporation, in the local plaintiff's court and subject to the local plaintiff's state law. That situation creates a risk of bias that is unlikely to be remedied by political and economic forces within the state. Such a situation is ripe for federal tort reform. Even then we will conclude that *substantive* (as opposed to pro-

cedural) federal tort legislation is neither needed nor beneficial.

First, however, we look at pending federal tort reform proposals in three industry-specific areas—fatty foods, guns, and medical malpractice. None of those reforms is authorized by the Commerce Clause, and each offends basic tenets of federalism.

The Case against Substantive Federal Tort Reform: Three Examples

Fatty Foods. The most recent area where preemptive federal legislation has been proposed is that of fatty foods. Sen. Mitch McConnell (R-KY) drafted a bill that would ban certain liability suits against food sellers and manufacturers.[39] In the House, Rep. Ric Keller (R-FL) introduced the Personal Responsibility in Food Consumption Act.[40] His bill would forbid civil suits, in both federal and state courts, against food manufacturers, distributors, or restaurateurs for obesity or other supposed deleterious effects of eating noncontaminated food. The bill has 108 cosponsors and, of course, the backing of industry groups.

Because the fatty food lawsuits are groundless,[41] we understand and sympathize with the objectives of both bills. Still, good intentions are not a substitute for constitutional authorization. Moreover, it's easy to exaggerate the litigation problem. A 2003 case brought by obese New York teenagers against McDonald's claimed that the restaurant should be responsible for the plaintiffs' health problems.[42] In another case, Oreo cookies and Big Daddy ice cream were alleged to have misled customers about their products' nutritional content.[43] But those suits have not succeeded.[44] Indeed, every court that has considered similar litigation has refused to allow it to go forward.[45] Nonetheless, one day a sympathetic state court will likely be found, perhaps in one of America's "judicial hellholes."[46] Senator McConnell's and Representative Keller's bills are meant to nip those future decisions in the bud.

Yet where in the Constitution does the federal government find authority to ban lawsuits against fast food manufacturers? According to McConnell's bill, the answer is—to no one's surprise—the all-purpose Commerce Clause. In a nutshell, fatty food suits are said to hinder interstate commerce in ingredients, and therefore to invite federal intervention. Undoubtedly, frivolous lawsuits against food manufacturers would jeopardize legitimate businesses that may be important to our national economy. The geographic scope of the problem does not, however, demand that it be resolved by Congress. Lawsuits against food manufacturers affect commerce in multiple states. But so does just about every state regulation or court decision. The Commerce Clause would not permit the federal government to override state minimum wage laws, for example, even if high in-state wages discourage out-of-state employers from setting up shop.

Procedural choice-of-law rules, as we will explain below, can resolve interstate problems that might be caused by baseless state fatty food liability decisions—without sacrificing state sovereignty over the substantive rules of tort law. The fatty food legislation must be trimmed.

Guns. The same considerations underlie our view of federal proposals to ban state and local suits against firearm manufacturers. But here there is one additional factor: The right of individual and collective self-defense, enshrined in the Second Amendment, may be undermined by undue state interference with firearms manufacturers. Accordingly, we distinguish between federal intervention under Commerce Clause auspices, which would not be justified, and federal intervention to secure the rights guaranteed by the Second Amendment—as applied to the states through the Fourteenth Amendment—which may be justified, depending on the specific provisions of the legislation authorizing the intervention.

Let us make clear at the outset that most lawsuits against firearms manufacturers for anything other than manufacturing defects[47] are barely disguised extortion attempts. Here are the two principal legal theories recently

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asserted by dozens of municipalities against gun makers:

1. "Negligent Marketing." According to this newfangled theory of tort law, gun manufacturers "flood" suburban jurisdictions with more guns than are "legitimate" for local suburban demand, knowing that dealers will connive to sell illegally the excess supply to criminals from the inner city, where gun laws are typically more restrictive.
2. "Design Defect." Under this theory, guns are defective and unreasonably dangerous because they do not have design features that would minimize their use by criminals.

Both theories are shot full of holes.[48] Courts across the nation—without the help of Congress—have concluded that gun makers are not the proximate cause of, and therefore not responsible for, the criminal misconduct of a very small percentage of their customers.[49] Those are the right results. But wrong results might one day occur.[50] Would that justify federal intervention? Yes, it might—*unlike* the fatty food example—but only if one condition were satisfied. If the federal government declared forthrightly that gun ownership by law-abiding citizens was a guaranteed Second Amendment right, which Congress could therefore protect from undue state encroachment by virtue of the Fourteenth Amendment, federal intervention could be appropriate. But if protection of firearm manufacturers is premised on Commerce Clause grounds, then the idea of federal intervention is flawed. If Congress's Commerce Clause authority is misused to allow the federal government to impose rules that restrict state gun lawsuits, it could one day similarly be misused to impose federal rules that impose more severe liability on gun manufacturers and distributors.

The National Rifle Association, which has vigorously backed a federal ban on firearms lawsuits, would not like that. NRA attorneys would argue that the Commerce Clause was intended to ensure free trade, not to establish a federal police power. How do we know that would be the NRA's view? Because in 1995, after Congress enacted the Violent Crime Control and Law Enforcement Act of 1994,[51] the NRA sued, contending that Congress exceeded its powers under the Commerce Clause when it prohibited the manufacture, transfer, and possession of semiautomatic weapons.[52] It cannot be that the Commerce Clause did not authorize a federal ban on the sale and manufacture of assault weapons in 1995—a position we certainly endorse—while in 2004 that same Commerce Clause permits the federal government to commandeer state courts and tell them what kind of product liability suits they can entertain.

Federal intervention is not needed to rein in municipal litigation against gun makers. Since the first of the state firearms suits was filed, 33 states[53] have enacted legislation that prevents them. In those jurisdictions where the suits have not been barred, the firearms industry has not lost a single case.

On October 7, 1999, Ohio Judge Robert Ruehlman dismissed with prejudice Cincinnati's suit, calling it "an improper attempt to have this court substitute its judgment for that of the legislature, something which this court is neither inclined nor empowered to do."[54] On December 10, 1999, Superior Court Judge Robert F. McWeeny threw out the city of Bridgeport's suit, writing, "[T]he court finds as a matter of law that the plaintiffs lack standing to litigate these claims; thus, the court is without jurisdiction to hear this case."[55] On December 13, 1999, Florida Circuit Judge Amy Dean dismissed Miami-Dade County's lawsuit against the industry with a similar decision, stating, "Public nuisance does not apply to the design, manufacture, and distribution of a lawful product."[56]

Here are three other examples of state supreme court rulings against frivolous firearms lawsuits:

1. On April 3, 2001, the Louisiana Supreme Court voted 5 to 2 to dismiss the City of New Orleans' suit, the first of its kind to

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be filed, upholding the state law that forbids municipalities in Louisiana from bringing those types of suits. In October 2001 the U.S. Supreme Court allowed the Louisiana court's decision to stand, by refusing to review the case on appeal.[57]

2. On August 6, 2001, the California Supreme Court issued a 5-to-1 ruling that gun manufacturers cannot be held responsible when their products are used to commit crimes. The decision referred to a 1983 California law prohibiting that type of lawsuit.[58]
3. On October 1, 2001, the Connecticut Supreme Court upheld the 1999 ruling that dismissed Bridgeport's suit because the city lacked "any statutory authorization to initiate . . . claims" of liability against the firearms industry.[59] After the rejection of the New Orleans suit, Bridgeport's mayor Joseph Ganim told the Associated Press that an appeal of his city's suit to the U.S. Supreme Court was "probably not a likely route for us" and "[i]t's not likely we're in a very strong position."[60]

Clearly, state legal and political processes have produced the correct outcomes—both in the courts and in the legislatures. To the extent that the mere filing of lawsuits, and the attendant cost of litigation, is a burden on the firearms industry, that problem can be remedied by procedural reforms, which we discuss at greater length in our section on "Reconciling Tort Reform and Federalism."

When the bill to ban selected lawsuits against the gun industry was first introduced in the 107th Congress,[61] its only constitutional pedigree was the Commerce Clause. By the time the bill was reported in the House nearly 17 months later, it included a finding that "[c]itizens have a right, under the Second Amendment . . . to keep and bear arms." And one of the expressed goals of the legislation was to "preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes." Later, in the 108th Congress, the Second Amendment justification was preserved in S. 659,[62] along with the original Commerce Clause rationale. S. 659 contained this finding, which reflects both sources of constitutional authority:

> The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, *threatens the diminution of a basic constitutional right and civil liberty*, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.[63]

Because our focus is on the Commerce Clause, we do not intend to parse the specific provisions of S. 659 to determine whether each type of lawsuit that it attempts to ban would, if litigated, offend the Second Amendment. Yet we do argue that securing Second Amendment rights is the only legitimate basis on which federal intervention might be justified.

With respect to the Commerce Clause rationale, it's time for Congress, the NRA, and the Supreme Court to draw a line in the sand. Plain and simple, an outright ban on selected state tort lawsuits is not a regulation of interstate trade.

Interestingly, at this writing, the Senate has done the right thing; it has overwhelmingly rejected S. 659. The bill's own sponsors turned against it, as did its NRA supporters. But, sad to say, the senators were not suddenly concerned about the bill's Commerce Clause or federalism implications. Rather, they voted the bill down because opponents had added "poison pill" amendments, including one that would have extended a soon-to-expire ban on so-called assault weapons.[64]

Very likely, the industry's supporters in Congress will mount another effort to

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immunize gun makers from unfounded litigation. That may be warranted from a public policy perspective. But public policy arguments cannot confer federal authority where none exists. Under our Constitution, the commerce power was meant to ensure the free flow of interstate trade, not to dictate substantive product liability rules in each and every state. Yes, municipal lawsuits against gun makers have been baseless and extortionate. But that, in and of itself, does not make the substantive rules of state tort law the business of Congress.

Medical Malpractice. When it comes to federal incursions into traditional state functions, it's not only the legislative branch that has overreached. President Bush used his support for federal malpractice tort reform measures to distinguish himself from Al Gore during the 2000 presidential campaign. And he's doing so against his Democratic opponents in 2004. Of course, the president is a former governor who says he is committed to principles of federalism. Yet he defends the federalization of malpractice law: "People say, well, is [medical malpractice] a federal responsibility?" "It's a national problem," he responds, "that requires a national solution. The federal government ought to set a minimum federal standard to reform the medical liability system."[65] Again, however, the fact that a problem exists in more than one state does not make it a *federal* responsibility.

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The administration's legal strategy in defense of federal intervention appears to be twofold.[66] First, federal limitations on medical malpractice suits are supposedly warranted because the federal government spends money on health care, and the Constitution's spending power[67] presumably allows Congress to impose conditions on parties that benefit from those expenditures. Not only does the federal government fund Medicare and Medicaid, it also provides direct care to members of the armed forces, veterans, and patients served by the Indian Health Service, as well as tax breaks to workers who obtain health insurance through their employers. The administration projects savings of at least $25 billion a year if its proposed medical malpractice reforms are put in place. "[A]ny time a malpractice lawsuit drives up the cost of health care, it affects taxpayers. It is a federal issue," the president declared in a North Carolina speech.[68]

In essence, the argument is that Washington pays the states for *a lot* of health care; therefore Washington can enforce state malpractice reform, which would affect how *all* health care money is spent. But the Supreme Court has invalidated conditions imposed on the recipients of federal spending unless, among other things, the conditions are unambiguous and reasonably related to the aim of the expenditure.[69] In this instance, Congress has not linked the receipt of federal health funding to malpractice reform, nor has the federal government shown that the goals of Medicare and Medicaid depend on such reforms. Moreover, the scope of proposed federal malpractice intervention extends, though it need not logically do so, to all health care lawsuits—not just those brought by or against parties who receive federal funds.

Second, the administration posits a Commerce Clause argument.[70] Physicians are "forced" to move to another state, or to retire from practice altogether (thus removing their services from the "stream of interstate commerce"), by hikes in malpractice premiums.[71] At the margin, malpractice abuse has surely steered some patients across state lines to find better health care. But intrastate regulation of in-state conduct is simply not interference with interstate commerce—otherwise there is no area immune from federal jurisdiction. Naturally, there's an effect on commerce when any individual or company withdraws from a state. But if the withdrawal is related to unjust in-state negligence claims, absent discrimination against out-of-state defendants, then the effect is not uniquely related to the *interstate* aspect of commerce.

In objecting to the president's assertion of federal jurisdiction, we do not dismiss potential problems associated with excessive med-

ical malpractice decisions in certain states. Fear of malpractice liability may lead doctors to order redundant and expensive diagnostic tests[72] and operations.[73] High malpractice insurance premiums may encourage competent physicians to retire prematurely, leaving whole geographic areas underserved.[74] On the other hand, those allegations are disputed. Indeed, some well-respected academic sources suggest that there may be too little medical malpractice liability.[75]

But we need not enter the substantive debate on medical malpractice reform here. It is sufficient to show that federal intervention is neither necessary nor proper. The two litigants in a medical malpractice suit are usually a local (in-state) plaintiff and a local (in-state) physician. As a result, excessive liability will be directly felt in the local state, where it will translate into high insurance premiums for doctors and high costs for patients. Doctors can of course retire from practice or relocate to other states if they find liability too onerous. That will exert pressure on both juries and legislatures to temper excesses.

State medical malpractice reform is ubiquitous.[76] More than three dozen states have passed damage caps. All 50 states have passed or considered some kind of medical malpractice reform.[77] If a state legislature has chosen not to enact medical malpractice reform—and to suffer an increase in the cost or a decline in the quantity of medical care, or both, from a presumed "optimal" level—that is not a federal crisis. Rather, that is a matter for the state's voters to resolve.

Nonetheless, H.R. 5 and S. 607, the Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act,[78] set damage caps and limited attorney fees, among other things. Rep. Tom Feeney (R-FL), usually a defender of federalism, claims to have "wrestled with the issue."[79] But he and his fellow Republicans seem to have concluded that a partial federal takeover of state tort law is necessary.

Yet there is no constitutional right to health care. Moreover, the Commerce Clause rationale invoked by H.R. 5 and S. 607 is unconvincing. Shocking malpractice damage awards, if indeed they are systemically too high, are not commerce and seldom interstate.

Tort Reform, Federalism, and the Fourteenth Amendment

Because the Commerce Clause has been distended to accommodate all manner of federal mischief, some proponents of federal tort reform have endorsed an alternative source of constitutional authority, the Fourteenth Amendment. Here's their argument: Advocates of states' rights too often have a crabbed, essentially mistaken conception of federalism. Federalism is not just about states' rights. To be sure, the framers originally established a federal government of enumerated powers. And the Tenth Amendment, ratified in 1791, provides that those powers not delegated to the United States are reserved to the individual states or to the people. But in 1868, when the Fourteenth Amendment was ratified, the relationship between federal and state governments was fundamentally restructured. And those politicians who rail against federal legislative incursions and judicial activism may not have fully grasped the significance of the post–Civil War transformation.

The Fourteenth Amendment to the federal Constitution addresses the violation of constitutionally guaranteed rights by state governments. Both the legislative and judicial branches of the federal government are empowered to remedy those violations. And within that framework, the U.S. Supreme Court may prevent a state court from denying rights to citizens inside and, a fortiori, outside the state. That is not mere activism—at least not in the sense of fabricating entitlements never grounded in the Constitution. Rather, it is judicial responsibility, allegiance to the law and to the Constitution, rooted in a theory of rights. Arguably, one of those rights, enshrined in the Due Process Clause

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The Court had to grapple with federal intervention, via the Fourteenth Amendment's Due Process Clause, to prevent states from violating substantive rights.

of the Fourteenth Amendment, is protection against grossly excessive or arbitrary punishments. We turn next to that topic, in the context of punitive damage awards.

Punitive Damages: A Case for Federal Reform

Perhaps the most business-friendly of the Supreme Court's recent opinions was its 2003 reversal of a bloated $145 million punitive damages award against State Farm Insurance.[80] Ironically, that holding overcame separate dissents from the Court's conservative stalwarts, Justices Antonin Scalia and Clarence Thomas. Justice Ruth Bader Ginsburg also dissented. The same three justices had dissented from the Court's 1996 decision overturning a punitive damage award against BMW.[81] In that case, Chief Justice William H. Rehnquist dissented as well. But in *State Farm*, he switched sides without explanation.

The odd lineup of the justices is a healthy sign, say many Court watchers. It suggests that law and politics operate within separate realms. An alternative explanation, however, is that the current Court has no coherent jurisprudential compass. *State Farm* may simply be the latest case in which the Court has struggled to reconcile traditional state-based lawmaking—in this instance, tort law—and federalism. Once again, the Court had to grapple with federal intervention, via the Fourteenth Amendment's Due Process Clause, to prevent states from violating substantive rights that some people believe are secured by the U.S. Constitution.

Contrasting the majority opinion in *State Farm* with the terse dissents by Scalia and Thomas, we hope to shed light on the battle between conservatives who want to rein in runaway punitive damage awards and other conservatives who reluctantly find no federal judicial power to do so. First, we set the stage with a few comments on the nature of punitive damages, the need for reform, and the Court's major stab at the problem in the case of *BMW v. Gore*. Then we analyze the *State Farm* opinion and explore the controversy over the Court's substantive due process jurisprudence.

Our conclusion: *State Farm* was a close call, but the majority successfully made its case for federal judicial intervention. Nevertheless, there are better approaches to tort reform. We will address those approaches in a later section on "Reconciling Tort Reform and Federalism."

Nature of Punitive Damages. Compensatory damages are supposed to redress any loss that the plaintiff suffers because of the defendant's wrongful conduct. Punitive damages serve a different purpose. They "are aimed at deterrence and retribution."[82] The logic goes like this: A defendant whose misbehavior causes injury will neither be adequately punished nor deterred from similar misbehavior in the future if he is held accountable only for the losses he causes. That's because some wrongful acts, especially premeditated and intentional ones, are concealed or for some other reason never litigated. Therefore, proper deterrence requires hiking up the compensatory award.[83] Still, advocates of tort reform argue that judges and juries have allowed punitive damage awards to explode without regard to their harmful impact on the economy and without a rational link to the real need for deterrence. The evidence seems to support that view.

Need for Reform. Consider the recent *Engle* tobacco class action litigation,[84] in which an inflamed Florida jury resolved to assess $145 billion in punitive damages against cigarette manufacturers. Trial judge Robert Kaye, notwithstanding an advisory opinion to the contrary from the state's attorney general, permitted the jury to quantify punitive damages for the entire class, after hearing evidence on only three of the claimants and before *any* tort liability to the remaining claimants had been established.[85]

No one knew the names of the other class members. No one even knew how many smokers were in the class; estimates ranged from 30,000 to nearly a million. No one knew anything about their alleged injuries or how much if any compensatory damages might

be warranted. Yet Judge Kaye approved an award of punitive damages in the aggregate, as if it did not matter whether 50,000 plaintiffs had a raspy throat or 500,000 died from lung cancer, whether they started smoking as kids or as consenting adults, and whether they were ever influenced by the industry's so-called deceptive ads. Ultimately, a Florida appellate court decertified the class and reversed the punitive damages award because there had been no prior determination of compensatory damages. The *Engle* case demonstrates the enormous potential for mischief when local juries impose punitive damages on out-of-state defendants.

But the *Engle* fiasco is not the only evidence that punitive damage awards are dangerously out of control. According to the *National Law Journal*, the largest punitive award in 2002 was $28 billion. Five verdicts exceeded $500 million and 22 exceeded $100 million. The total of the top 100 verdicts for 2002 was nearly three and a half times the total for 2001. Longer term, 38 verdicts topped $20 million in 1991; 66 verdicts were over $20 million in 1996. But in 2002, $20 million did not make the top 100 list.[86] No doubt nine U.S. Supreme Court justices were aware of that general trend. Perhaps that's why, seven years ago, the Court took a first step toward reform.

BMW v. Gore. When Dr. Ira Gore discovered that his new BMW had been repainted before delivery, he sued BMW of North America for fraud. The distributor conceded that its policy was not to notify consumers if repairs for predelivery damage to a new car cost less than 3 percent of the suggested retail price. Gore's car, scratched during shipment and touched up at a cost of approximately $600, had sold for $40,000. On the basis of testimony that a repainted car loses 10 percent in value, an Alabama jury found BMW liable for $4,000 in compensatory damages, then imposed an additional $4 million in punitive damages, computed by multiplying the compensatory award by roughly 1,000 similar repairs nationwide. On appeal, the Alabama Supreme Court concluded that only in-state sales should have been considered, then reduced the punitive award to a "mere" $2 million, without explaining how it arrived at that figure. The U.S. Supreme Court declared that state sovereignty and comity prevented one state from imposing its policy choices on other states. In remanding the case, the Court held that the punitive award violated BMW's rights under the Due Process Clause of the Fourteenth Amendment.

The Court noted, first, that Gore's loss was purely economic. None of the aggravating factors associated with reprehensible conduct causing physical injury was present. Second, the ratio of punitive damages to compensatory damages was 500 to 1, which the Court felt was clearly outside any acceptable range. Third, Alabama's statutory penalty for retailer fraud was only $2,000—an amount so much lower than the punitive award that out-of-state defendants would not have had fair notice of their exposure to a multi-million-dollar sanction.

Gore's three-part test—"the degree of reprehensibility . . .; the disparity between the harm . . . suffered [and the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases"[87]—provided the business community with some minimal predictability and offered hope that the punitive damages crisis was defused. Regrettably, it did not turn out that way. During the seven years after *Gore*, punitive awards continued their upward spiral. *State Farm v. Campbell* was a poster child for what could go wrong.

State Farm v. Campbell. Curtis Campbell, trying to pass six vans on a two-lane highway, faced a head-on collision with an oncoming car driven by Todd Ospital. To avoid a collision, Ospital swerved, lost control of his car, and hit Robert Slusher, who suffered permanent disabling injuries. Ospital was killed. Campbell was unharmed. Slusher and Ospital's estate sued.

Campbell's insurer, State Farm, rejected settlement proposals for the policy limit of $50,000. Instead, State Farm decided to litigate, assuring Campbell and his wife that

The *Engle* case demonstrates the enormous potential for mischief when local juries impose punitive damages on out-of-state defendants.

their "assets were safe," they had "no liability," and they did not need separate counsel.[88] The jury had other ideas, however, and found the Campbells liable for roughly $186,000. Initially, State Farm refused to cover the excess liability of $136,000; Campbell had, after all, purchased only $50,000 of coverage. Somewhat callously, State Farm advised the Campbells to "put for sale signs on your property to get things moving."[89] The Campbells then hired their own lawyer to appeal the jury verdict against them. They lost in the Utah Supreme Court. At that point State Farm changed its mind and agreed to pay the entire judgment.

Still, the Campbells sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. Because State Farm had ultimately paid the full $186,000 award, a Utah trial court threw out Campbell's new suit. That ruling was overturned on appeal, however, and the case was returned to the trial court, which then determined that State Farm's refusal to settle had been unreasonable.

Next, the trial court was to address fraud, emotional distress, and damages. But meanwhile the U.S. Supreme Court had decided *Gore*. In that case, to recall, the Court disallowed evidence of out-of-state conduct that was lawful where it occurred and had no impact on in-state residents. On the basis of *Gore*, State Farm asked the trial court to exclude evidence of conduct in unrelated cases outside Utah. The court denied that request and proceeded to weigh State Farm's alleged fraudulent practices nationwide. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the judge reduced to $1 million and $25 million, respectively. That satisfied no one; both the Campbells and State Farm appealed to the Utah Supreme Court.

Purporting to apply *Gore*'s three guideposts, relying on evidence about State Farm's nationwide practices, and considering State Farm's "massive wealth," the Utah Supreme Court reinstated the $145 million punitive damages award.[90]

Justice Anthony Kennedy put it bluntly: "[T]his case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award."

The reinstatement was short-lived. Justice Anthony Kennedy, writing for a six-member majority of the U.S. Supreme Court, put it bluntly: "[T]his case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award."[91] The high court returned the case to Utah with this advice: "An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."[92]

Then Kennedy proceeded to address in some detail the first two guideposts of *BMW v. Gore*—the reprehensibility of the conduct and the ratio of punitive to compensatory damages. He also discussed at length the propriety of evidence related to the defendant's out-of-state conduct and net worth. As to *Gore*'s third guidepost, comparable fines, Kennedy dismissively noted, "The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine."[93]

Regarding reprehensibility, Kennedy concluded that the Utah courts were justified in awarding punitive damages, but "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."[94] That conclusion stemmed in major part from the state courts' misplaced reliance on State Farm's dissimilar out-of-state conduct. Such conduct should not itself be punished, declared Kennedy, even if it was unlawful.[95] Nonetheless, he added, it may assist the judge or jury in assessing the reprehensibility of similar *in*-state conduct for which the defendant may be liable.[96] The key to Kennedy's reprehensibility analysis is the similarity between in-state and out-of-state acts. The Campbells had shown no conduct by State Farm similar to that which harmed them.

Turning to the 145-to-1 ratio of punitive-to-compensatory damages, Kennedy made it clear that the Utah courts had overreached. He did not impose a bright-line ratio, but he

did volunteer that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[97] That guideline is somewhat elastic. "[R]atios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[98]

Applying that framework to the injuries suffered by the Campbells, Kennedy wrote:

> The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. . . . Much of the distress was caused by the outrage and humiliation the Campbells suffered. . . . Compensatory damages, however, already contain this punitive element.[99]

Future plaintiffs will find little to cheer about in Kennedy's explanation. But he did hint at one qualification: The Court was dealing with a case in which only economic, not physical, harm had occurred. That suggests the Court might condone a more generous allowance for punitive damages in product liability cases involving injury or death.

One other aspect of the *State Farm* opinion has especially cheered defense attorneys: the Court's reluctance to consider the defendant's net worth as an appropriate ground for measurement of punitive damages. As Justice Kennedy wrote, "[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences."[100] He also noted that State Farm's assets are what other insured parties in Utah and elsewhere must rely on for payment of claims. Accordingly, he concluded, "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[101]

By declaring that a defendant's wealth cannot justify an "otherwise unconstitutional" punitive damages award, the Court left ample wiggle room for trial courts and juries. Even if Kennedy's 10-to-1 ratio of punitive-to-compensatory damages were a rigid upper constraint, an award somewhere between zero and ten times a dollar amount that included both economic losses and retribution for pain and suffering might still be deemed constitutional. Within that expansive range, evidence of net worth can legitimately be used by a jury to decide on a specific punitive award.

Judicial Activism? That brings us to the dissenting opinions. We begin with Justice Ginsburg, who balked at the Court's substitution of its judgment for that of Utah's decisionmakers.[102] If the Utah legislature or the Utah Supreme Court had decided to set single-digit and 1-to-1 punitive damage benchmarks, that would have been within their purview, she stated. But "a judicial decree imposed on the States by this Court . . . seem[s] to me boldly out of order."[103]

Concern over federal judicial usurpation of state authority is more often associated with conservatives who rail against "judicial activism." Columnist George Will, for example, put it this way: "What, other than the justices' instincts, provides criteria of proportionality and arbitrariness? . . . And what principle makes the justices' instincts superior to the jury's . . .? Furthermore, even if the jury's award was unjust, the idea that 'unjust' and 'unconstitutional' can be synonymous gives [the Court] a license to legislate."[104]

Literally applied, the Ginsburg-Will formulation could preclude judicial review. Obvi-

Concern over federal judicial usurpation of state authority is more often associated with conservatives who rail against "judicial activism."

Judicial restraint does not consist in deferring to a legislature that has exceeded its constitutional authority.

ously, some unjust outcomes are unconstitutional. Judicial restraint does not consist in deferring to a legislature that has exceeded its constitutional authority. Statutes that are unconstitutional cannot stand, nor should unconstitutional outcomes imposed by trial judges or juries. Intervention by the U.S. Supreme Court is our final shield against abuse of government power and our final bulwark against violation of individual rights.

The crucial question, therefore, is whether the legislative enactment or the common-law-based verdict of a federal or state court violates the U.S. Constitution. In deciding such questions, Supreme Court justices should not impose their own policy preferences; rather, they should apply the Constitution according to a proper theory of that document grounded in the framers' notions of limited government, separation of powers, federalism, and individual liberty.

If an egregious punitive damages award breaches constitutional safeguards, then the justices are authorized to do something about it. Their remedy might be couched in the broadest terms, as in *Gore*, or it might be somewhat more concrete, as in *State Farm*. Indeed, *State Farm* affords a particularly strong argument for judicial benchmarks. No statute dictated the outcome—just an unprecedented application of the common law of tort by judge and jury. An appellate court is uniquely qualified to review the common-law decision of a lower court. So the real debate in *State Farm* centers not on separation of powers but on federalism. And that debate, in turn, recalls the muddle over substantive due process—the doctrine intermittently invoked by federal courts to prevent states from violating substantive rights presumably secured by the U.S. Constitution and applied to the states via the Due Process Clause of the Fourteenth Amendment.

Substantive Due Process

The Court should not have imposed its judgment on Utah "under the banner of substantive due process," insisted Justice Ginsburg.[105] Her concern over the scope of that doctrine was echoed by Justices Thomas and Scalia, both of whom cited Scalia's earlier dissent in *Gore*.

Thomas's *State Farm* dissent is little more than one sentence: "[T]he Constitution does not constrain the size of punitive damage awards."[106] Scalia's dissent, in relevant part, is not much longer: "[T]he Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."[107]

In short, Scalia believes the U.S. Constitution guarantees defendants that the *process* followed in determining a punitive award, including judicial review, will be reasonable but not that the award itself will be reasonable. Assurances regarding the appropriate size of an award must come, if at all, from state courts, state statutes, and state constitutions.

At first blush, the 1993 majority opinion by Justice John Paul Stevens in *TXO Production Corp. v. Alliance Resources Corp.*, upholding an enormous punitive damages award, seemed to agree.[108] But Justice Stevens distinguished semantically between "unreasonable" awards, which are not foreclosed by the Constitution, and "grossly excessive" awards, which are foreclosed.

> Justice Scalia's assertion notwithstanding, we do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . [S]tate law generally imposes a requirement that punitive damages be "reasonable." A violation of a state law "reasonableness" requirement would not, however, necessarily establish that the award is so "grossly excessive" as to violate the Federal Constitution.[109]

Stevens reminds us that "our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award."[110]

Revealingly, Justice Kennedy's *TXO* concurring opinion rejected the distinction

between "reasonable" and "grossly excessive" in no uncertain terms:

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? . . . [W]e are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution.[111]

Instead of a "grossly excessive" standard, Kennedy preferred to focus on the jury's reasons for an award—that is, whether the "award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution."[112] Fast forward one decade. In *State Farm*, Kennedy now opts for benchmark ratios and cites binding precedent that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments."[113]

Kennedy's earlier apprehension about unmanageable standards like "grossly excessive" remains Scalia's concern today, and Thomas's as well. Still, both Scalia and Thomas have by and large honored the doctrine of *stare decisis*—that is, respect for past decisions now well settled in law. In that light, their peremptory refusal to invoke substantive due process in *State Farm* is difficult to square with a case dating back to 1907 holding that Due Process imposes substantive limits "beyond which penalties may not go"[114] or a 1915 case in which the Court actually set aside a penalty because it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause.[115]

Moreover, Scalia and Thomas might have sidestepped substantive due process by authorizing federal intervention on procedural rather than substantive grounds. Arguably, remedies have as much to do with procedure as with substance, in the following sense: Proper procedure requires advance notice of the law. Private parties must be able to determine what behavior is required to comply with the law, and legal outcomes must be reasonably predictable. As the Court stated in *State Farm*, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[116] By violating those norms, outrageous punitive damages do not provide adequate notice and therefore offend *procedural* due process.

If the Court's conservatives are serious about resolving the substantive vs. procedural quandary implicit in the Due Process Clause, maybe it is time for them to revisit the Fourteenth Amendment's nearly forgotten Privileges or Immunities Clause. Indeed, Justice Thomas and Chief Justice Rehnquist have indicated a willingness to do so "in an appropriate case."[117] Other conservatives, like former judge Robert Bork, demur because "we do not know what the clause was intended to mean."[118] Yet that critique is no more persuasive when applied to the Privileges or Immunities Clause than it would be if applied to the General Welfare Clause, the Necessary and Proper Clause, or the Commerce Clause. A compelling case can be made that the Court has misinterpreted every one of those clauses, but to our knowledge, no one has suggested that they not be interpreted at all.

An excellent discussion of the Privileges or Immunities Clause appears in a 1998 Cato Institute monograph by professor Kimberly Shankman and Cato scholar Roger Pilon. Here's their recap of the rise and fall of the clause:

> Shortly after the Civil War, the American people amended the Constitution in an effort to better protect individuals against state violations of their rights. Under the Privileges or Immunities

Proper procedur requires advance notice of the law. Private parties must be able to determine what behavior is required to comply with the law, and legal outcomes must be reasonably predictable.

If the Privileges or Immunities Clause is revived, a more coherent doctrine of the Fourteenth Amendment and federalism is likely to emerge.

> Clause of the new Fourteenth Amendment, constitutional guarantees against the federal government could be raised for the first time against state governments as well. . . . But . . . in 1873, in the infamous *Slaughter-House Cases*,[119] a deeply divided Supreme Court effectively eviscerated the Privileges or Immunities Clause. Since then courts have tried to do under the Due Process and Equal Protection Clauses of the amendment what should have been done under the more substantive Privileges or Immunities Clause.[120]

If *Slaughter-House* is overturned and the Privileges or Immunities Clause is revived, a more coherent doctrine of the Fourteenth Amendment and federalism is likely to emerge. Along the way, the debate over the substantive content of the Due Process Clause will inevitably diminish.

Reconciling Tort Reform and Federalism

While we wait patiently for an "appropriate case" to revisit Privileges or Immunities, the general problem of tort reform and the specific problem of confiscatory state punitive damage awards need not be irreconcilable with dual-sovereignty federalism. First, various remedies can be implemented by the states themselves, without federal involvement. Second, federal reform of long-arm jurisdiction and choice-of-law rules will curb tort law abuse yet fit comfortably within a federalist regime.

State-Based Reforms

One cure for inflated punitive damage awards might be to take the dollar decision away from the jury. For example, the jury might be instructed to vote yes or no on an award of punitive damages, with the amount then set by a judge in accordance with pre-set guidelines. If the judge complied with the guidelines, an appellate court would grant deferential review. But should the trial court exceed the guidelines, appellate review would be more rigorous. The rationale for a diminished jury role, from a 1989 article by our current solicitor general, goes like this:

> Juries are well constituted to perform as factfinders and determiners of liability. But here they are being given in effect the public function of sentencing—of deciding how high a penalty someone should pay for violating a public standard. Juries are remarkably ill-equipped for that task because they sit in only one case, hear evidence only in that case, and are then given very vague guidance with which to form a judgment. . . . Jurors are drastically swayed by such factors as the wealth, success, or personal demeanor of a defendant, even how far away the defendant lives from the location of the litigation. The jurors are frequently told to send a message back to such and such a corporate headquarters. After being instructed to set aside emotion, bias, and prejudice, juries are bombarded with arguments that are based almost exclusively on emotion, bias and prejudice.[121]

A similarly skeptical view of jurors' competence to assess punitive damages comes from attorney Mark Klugheit, who specializes in class actions and mass tort litigation.

> Jurors are hardly expected to be experts in social engineering or economic analyses. They are not likely to understand, let alone apply, any kind of reason-based analyses to punitive damage determinations. Yet in most jurisdictions the law requires lay jurors to decide claims involving millions, or sometimes billions, of dollars with virtually no guidance about how to translate abstractions like the need for punishment or deterrence into an appropriate verdict. Instructions predicated on amorphous concepts like "punishment," "deter-

rence," and the "public good," . . . make the imposition of punitive damages a standardless, if not haphazard, exercise.[122]

A second suggestion for reform at the state level is to limit punitive damages to cases involving intentional wrongdoing or gross negligence. In fact, an even higher standard has had a salutary effect in Maryland, where punitive damages are permitted in a tort case only if the plaintiff has proved that the defendant acted with actual malice.[123] Whatever the heightened standard, the idea is that accidental injuries arising out of ordinary, garden-variety negligence are unlikely to require the deterrence for which punitive damages are designed.

Third, states might effect procedural guarantees similar to those inherent in criminal law. In *State Farm*, Kennedy observed that punitive awards "serve the same purposes as criminal penalties [but] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding."[124] Among the protections that might be offered:

- A higher burden of proof than the usual civil standard, which is preponderance of the evidence. Thirty-one states now require clear and convincing evidence for punitive awards.[125]
- No double jeopardy. Current rules allow "multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."[126] Victor Schwartz, a noted torts scholar, has proposed that "punitive damage awards be reduced by the sum of all previous awards for the same misconduct. The result would be what amounts to a single 'rolling' award."[127]
- No coerced self-incrimination, which criminal defendants can avoid by pleading the Fifth Amendment. In civil cases, however, compulsory discovery can be self-incriminating.

Fourth, the states could codify the Eighth Amendment's prohibition of excessive fines and apply it to punitive damages. At present, because the Eighth Amendment is primarily directed at prosecutorial abuse, the excessive fines provision does not cover civil damages. That principle was spelled out in the *Browning-Ferris* case.[128] But Justice Sandra Day O'Connor's dissent,[129] covering the history of fines, convincingly showed that punitive damages, unless they were merely symbolic, were always treated as fines. Moreover, after *Browning-Ferris*, several states modified their statutes to provide that punitive damages would be, in part, payable to the state.[130]

Indeed, making punitive awards payable to the state is a fifth possible reform. Because the purpose of punitive damages is deterrence, not compensation for injury, the identity of the recipient is irrelevant to that purpose, and receipt by the plaintiff is beyond what is necessary to make him whole. We recognize, of course, that states would become an interested party in tort suits if they stood to receive punitive awards. That could exacerbate the expansion of tort liability. Perhaps the experience in states that are implementing this solution will help us determine whether that happens.

If punitive damages are received by the state rather than the plaintiff, adequate incentive must be provided for the plaintiff's attorney to seek those damages. That incentive might be in the form of court-ordered attorneys' fees with the amount set by a judge. Much of the abuse that now exists can be traced to enormous contingency-based fees paid not to "public officials, who are accountable to the citizenry and have a long tradition of ethics and restraint, but private citizens and lawyers whose only interest is the size of the award they can bring in."[131]

Sixth—broadening our focus to cover not just punitive damages but the larger area of tort law—states ought to dispense with joint and several liability. That's the "deep pockets" rule that permits plaintiffs to collect all of a damage award from any one of multiple defendants, even if the paying defendant was

Much of the abuse that now exists can be traced to enormous contingency-based fees paid t "lawyers whose only interest is the size of the award they can bring in."

responsible for only a small fraction of the harm. The better rule is to apportion damages in accordance with the defendants' degree of culpability—especially if the state has adopted a comparative negligence standard, which holds that the plaintiff himself is not "jointly liable" when he too is negligent. What's sauce for the goose is sauce for the gander.

Seventh, government should pay attorneys' fees when a governmental unit is the losing party in a civil lawsuit. Coordinated actions by multiple government entities can impose enormous legal fees on defendants. As a result, those actions have been used to extort money even when the underlying case is without merit. Listen to former Philadelphia mayor Edward G. Rendell (D) calling for dozens of cities to file concurrent suits against gun makers: They "don't have the deep pockets of the tobacco industry," Rendell explained, and multiple lawsuits "could bring them to the negotiating table a lot sooner."[132] Never mind that the suits were baseless; after five years of litigation, not a single claim has prevailed. Indeed, the cities were pursuing not law but extortion parading as law.

One effective way to stop unwarranted litigation is to implement a "government pays" rule for legal fees if a state or municipality or other government agency loses a civil lawsuit. In the criminal sphere, defendants are already entitled to court-appointed counsel if needed; they're also protected by the requirement for proof beyond reasonable doubt and by the Fifth and Sixth Amendments to the Constitution. No corresponding safeguards against abusive public-sector litigation exist in civil cases. By limiting the rule to cases involving government plaintiffs, access to the courts is preserved for less affluent, private plaintiffs seeking redress of legitimate grievances. Yet defendants in government suits will be able to resist meritless cases that are brought by the state solely to ratchet up the pressure for a large financial settlement.

Government should pay attorneys' fees when a governmental unit is the losing party in a civil lawsuit.

Eighth, contingency fee contracts between private lawyers and government entities should be prohibited. When a private lawyer subcontracts his services to the government, he bears the same responsibility as a government lawyer. He is a public servant beholden to all citizens, including the defendant, and his overriding objective is to seek justice. Imagine a state attorney paid a contingency fee for each indictment that he secures, or state troopers paid per speeding ticket. The potential for corruption is enormous. Still, the states in their tobacco suits doled out multi-billion-dollar contracts to private counsel—not per hour fee agreements, which might occasionally be justified to acquire unique outside competence or experience, but contingency fees, a sure-fire catalyst for abuse of power. And those contracts were frequently awarded—without competitive bidding—to lawyers who bankrolled state political campaigns.[133]

Government is the sole entity authorized, in narrowly defined circumstances, to wield coercive power against private citizens. When that government functions as prosecutor or plaintiff in a legal proceeding in which it also dispenses punishment, adequate safeguards against state misbehavior are essential. That is why in civil litigation we rely primarily on private remedies with redress sought by, and for the benefit of, the injured party and not the state. As the Supreme Court cautioned more than 60 years ago, an attorney for the state "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[134] Put bluntly, contingency fee contracts between government and a private attorney should be illegal. We cannot in a free society condone private lawyers enforcing public law with an incentive kicker to increase the penalties.

From a federalism perspective, it's instructive to examine an alternative proposal to deal with scandalous attorneys' fees—almost all of which were contingency based—that were collected by private lawyers who represented the states in their Medicaid recovery suits against the major cigarette companies. The Hudson Institute's Michael Horowitz reports that some attorneys stood to make $200,000 an

hour for late-filed, copycat suits that never went to court.[135] To reclaim some of that money for the taxpayers, Horowitz would treat all attorneys receiving contingency fees in large class action litigation as fiduciaries under the Internal Revenue Code, then limit their fees to amounts that are "reasonable and risk-based"—perhaps as high as six times normal hourly rates. Any excess would be either refunded to the states or taxed by the federal government at a 200 percent rate.

However well-intentioned, that remedy raises more problems than it solves.[136] Most important for purposes of this paper, Horowitz's scheme would flout principles of federalism. Some 70 years after the New Deal Court eviscerated the constitutional doctrine of enumerated powers, the Rehnquist Court has begun reviving it. That revival, long overdue, would be dealt a body blow if conservatives, supposed champions of federalism, vested the national government with extended powers merely because the outcome might be congenial to business interests and adverse to the hated trial lawyers. Where in the Constitution is there an express or implied power to manipulate the Internal Revenue Code to punish disfavored groups?

Moreover, why should the federal government—or even state government for that matter—be regulating contingency fees paid by private parties? If the right to contract and respect for free markets mean anything, they mean that private parties should be able to negotiate fee arrangements for legal representation without government interference. Otherwise we should not be surprised when fiduciary standards are extended to the fees charged by doctors, accountants, architects, investment managers, you name it. The contingency fee contracts that must be regulated—indeed prohibited—are those between *government* and private lawyers. And the purpose of the prohibition is to remove incentives that might otherwise lead to the abuse of public power.

Finally, in the area of state-based tort reform, legislators should consider the Fairness in Litigation Act, a model statute proposed by the American Legislative Exchange Council.[137] The act provides that the same legal rules applicable to a private claim by an injured party will also be applicable if the government sues to recover indirect economic losses related to the same injury. Recall the states' lawsuits against the tobacco industry to recoup Medicaid outlays for smoking-related illnesses. For more than 40 years, cigarette companies had regularly prevailed against smokers' claims—by disputing that tobacco was the cause of a particular person's ailment and by demonstrating that the plaintiffs had assumed the risk of smoking, in which case they were personally responsible for the adverse health effects.

That set the stage for some legal legerdemain—a fresh wave of litigation by state attorneys general, beginning in 1994, grounded in a new claim that gave the states more legal rights than any aggrieved smoker. Florida became the first state to codify the new claim by amending its Medicaid Third-Party Liability Act in 1990 and 1994.[138] First, "causation and damages . . . may be proven by use of statistical analysis" without showing any link between a particular smoker's illness and his use of tobacco products. Second, "assumption of risk and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources."

Before the new dispensation, the state could assert only those theories of recovery against cigarette makers that an injured patient could assert. But that had not worked for smokers, so the states simply wiped that rule off the books and then, for good measure, made the new rules apply retroactively to illnesses supposedly caused by cigarettes sold decades earlier. As the president of the Maryland Senate blurted to the *Washington Post* in an unguarded moment: "We agreed to change tort law, which was no small feat. We changed centuries of precedent in order to assure a win in this case."[139]

Under the proposed Fairness in Litigation Act, the same rules of evidence, the same

Federalism would be dealt a body blow if conservatives vested the national government with extended powers merely because the outcome might be congenial to business interests.

standards of responsibility, and the same burden of proof would apply to the state standing in a plaintiff's shoes as to a plaintiff suing on his own behalf.

Federal Reform of Long-Arm Jurisdiction

In addition to state-imposed tort reforms, there are at least two areas where the federal government can intervene without intruding on long-established state prerogatives. A guiding principle is that the federal legislature and courts are authorized to act when there is a high risk that state legislatures or courts will systematically appropriate wealth from the citizens of other states. One federal reform that is consistent with that principle is to amend the rules that control state exercise of so-called long-arm jurisdiction over out-of-state businesses.

The federal legislature and courts are authorized to act when there is a high risk that state legislatures or courts will systematically appropriate wealth from the citizens of other states.

Rather than apply the Due Process Clause to control, for example, the size of a punitive damages award, a federal court could instead use that same clause to preclude a local court from hearing a case unless the defendant engages directly in business activities within the state. Sensible rules should protect a firm from being hauled into court unless the firm does in-state business. Those rules would give firms an exit option—that is, if they withdrew from a state, they could avoid the risk of an unrestrained in-state jury. Unfortunately, federal limits on state long-arm statutes remain lax or ambiguous.

Law and economics scholars Paul Rubin, John Calfee, and Mark Grady outline the problem:

> If Alabama juries demonstrate bad judgment in pharmaceutical cases, manufacturers might refuse to sell in Alabama, denying Alabamians drugs that expose the manufacturer to inappropriate punitive damages awards. Middlemen, however, might fill this lacuna by purchasing and reselling drugs in Alabama at a higher cost to compensate for liability, and manufacturers might not be able to escape liability under existing long-arm statutes.[140]

An overhaul of the Court's jurisdictional rules would entail a significant shift in its prior case law. First, under *International Shoe Co. v. Washington*,[141] the Court held that an out-of-state corporation could be sued within the state if the corporation had "minimum contacts" in state. International Shoe was sued in Washington even though it had no office and made no contracts there to buy or sell merchandise. Because the company employed salesmen who resided and solicited business in Washington, it was subject to the jurisdiction of the state's courts.

Encouragingly, 35 years later, in *World-Wide Volkswagen Corp. v. Woodson*,[142] the Court signaled that state jurisdiction triggered by nominal ties might violate the Due Process Clause. The Robinsons purchased an Audi from a New York dealership that had acquired the car from a regional distributor. Later, the Robinsons were injured when their car was involved in an accident in Oklahoma, where neither the dealer nor the distributor did business. The Court said the defendant might have foreseen that an automobile bought in New York would be driven through Oklahoma, but noncommercial contact with Oklahoma was insufficient to confer jurisdiction on that state's courts.

That hopeful outcome was mostly undone by the Court's 1987 opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*.[143] Valves made by Asahi, a Japanese corporation, were installed by another company on Taiwanese tires that were involved in a California accident. The Court refused to confer jurisdiction on the California courts, mainly because the burden on Asahi of litigating in California outweighed the state's interest in adjudicating the case. But Justice O'Connor could not command a majority of the Court to support this more restrictive proposition: "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[144] If that rule had won the day, exit from a state with a confiscatory tort regime

would be feasible. But only three other justices agreed with O'Connor.

Rubin, Calfee, and Grady conclude that "the economically harmful effects of excessive punitive damages awards by unrestrained juries in particular states could . . . largely be ameliorated by a clear and realistic 'minimum contacts' doctrine. Justice O'Connor's opinion in *Asahi* suggests how such a doctrine could be formulated, but the Court has not accepted her approach."[145]

By tightening state long-arm jurisdiction, the national government would simultaneously be broadening the procedural guarantees of the Due Process Clause and encouraging nondiscriminatory tort laws that promote interstate commerce.

Regrettably, because the Supreme Court continues to apply capacious jurisdictional rules, oppressive state tort laws remain a threat to out-of-state defendants. Thus, the expansion of product liability arises in part, not because of increased wrongdoing by defendants or increased risk aversion on the part of plaintiffs, but because some states' legal arrangements are intrinsically biased in favor of local plaintiffs suing nonresident defendants.[146]

If manufacturers could avoid unfair tort regimes—for example by not doing business in a particular state—juries would not be able to impose liability and damage awards extraterritorially. Then consumers in each state would decide whether they wanted confiscatory tort law or plentiful goods and services. But to the extent that manufacturers cannot avoid a state's jurisdiction—because long-arm statutes overreach—a different remedy is necessary. The remedy that raises the fewest federalism concerns is a federal choice-of-law rule,[147] which would allow manufacturers to exert some control over governing law.

Federal Choice-of-Law Rules

Basically, choice of law is the doctrine that determines which state's laws control litigation when litigants from more than one state are involved. If a suit is filed in state court, there are a number of different and complex rules used by that court to decide choice-of-law questions. If the suit is filed in federal court, or removed to federal court at the request of the defendant, the federal court will apply the choice-of-law rules of the state in which the federal court is sitting. Federal courts may exercise so-called diversity jurisdiction over tort suits even when they involve questions of state law. Basically, the prerequisites for diversity jurisdiction are that the plaintiffs be from different states than every defendant and that the amount in controversy exceed $75,000 per plaintiff.[148]

Whether the forum turns out to be a federal court or a state court, the underlying substantive tort law will be state law, not federal.[149] The Supreme Court recognized that it must preserve state law even in federal diversity cases. Otherwise, diversity jurisdiction would effectively nationalize areas of law that were meant to be left to the states. In other words, federal diversity jurisdiction provides procedural protection to out-of-state litigants but not substantive uniformity across states. A citizen of one state is not immune from the laws of another state, but his out-of-state citizenship should not subject him to prejudice from a state court.[150]

That still means that plaintiffs will select the most favorable forum state, basing their choice in part on the choice-of-law rules of each state. The resultant tort law will no doubt be least hospitable to the defendant and might even be contrary to the defendant's home-state law in important respects. The defendant, in essence, will be at the mercy of the plaintiff.

Of course, there would be no involuntary extraterritoriality and less of a liability crisis if consumers and sellers could choose both their forum and their law by contract. Transacting parties should be able to designate the state whose laws will govern any disputes arising out of their agreements. Unfortunately, however, many transactions are not covered by written agreements, and choice-of-law clauses in consumer contracts are generally unenforceable.[151]

By tightening state long-arm jurisdiction, the national government would be encouraging nondiscriminatory tort laws that promote interstate commerce.

The choice-of-law inquiry is a *federal* question; no state has the authority to create binding law for a neighbor state.

Accordingly, if the forum state's rules call for applying the law of the state where injury occurred, out-of-state manufacturers will have difficulty avoiding oppressive regimes. But suppose a federal choice-of-law rule were enacted for those cases in which the plaintiff and defendant are from different states. Suppose further that the applicable law were based on the location where the product was originally sold. A manufacturer could thus stamp products by state of sale and price them differentially to allow for anticipated product liability verdicts.

Naturally, prices would be higher in plaintiff-friendly states than in defendant-friendly states. The price premium would be similar to buying product liability insurance—but instead of paying for an insurance policy that would reimburse the buyer for injuries suffered, the higher price would pay for a "better" set of legal rules if a dispute over such an injury were to arise. Of course, differential pricing may be costly and cumbersome to manufacturers, and the federal government would have to mandate common labeling requirements so that original and subsequent purchasers would know where the product was first sold.

To bypass those complexities, the applicable law might instead be that of the state where the manufacturer was located or had the largest number of employees.[152] That would obviate the need to price differentially or to identify where the sale occurred. A manufacturer would decide where to locate, and its decision would dictate the applicable legal rules. Consumers, in turn, would evaluate those rules when deciding whether to buy a particular manufacturer's product.

Would there be a race to the bottom by manufacturers searching for the most defendant-friendly tort law? Perhaps. Then again, states might balance their interest in attracting manufacturers against the interest of in-state consumers who want tougher product liability laws to ensure adequate redress for injuries.[153] In effect, healthy competition among the states would enlist federalism as part of the solution rather than raise federalism as an excuse for failing to arrive at a solution.

In any event, as federalism scholar Michael Greve has observed, it might be impossible to precisely mimic a neutral, competitive world in which each state structures its legal arrangements as if it were a self-sufficient and independent nation.[154] The search for perfection is beside the point. "The sensible question," continues Greve, "is whether a competitive products-liability world, operating under approximately efficient (if imperfect) choice of law rules, will be preferable to the existing game of mutually assured regulatory aggression and, at the other extreme, to any set of monopolistic, national rules that are likely to emerge." Greve concludes that "the answer to that question is almost certainly in the affirmative."

The central constitutional concern, according to Greve, is not the prospect of federal intervention to resolve the choice-of-law question but rather the prospect of federal abdication. He finds it anomalous, as do we, "that the field should have been ceded in the first place to state courts and their choice-of-law rules, which are systematically biased against sister-states and their citizens."[155]

In essence, the choice-of-law inquiry is, Whose law governs in disputes involving more than one state? By its very nature, that inquiry is a *federal* question; no state has the authority to create binding law for a neighbor state. Moreover, the Privileges and Immunities Clause of Article IV forecloses discrimination by a state in favor of its own citizens. The Full Faith and Credit Clause, also in Article IV, gives Congress the authority to prescribe the effect that each state's public acts and judicial proceedings will have in every other state. And the Commerce Clause of Article I authorizes federal choice-of-law rules in multistate litigation if states use tort law in a manner that impedes the free flow of trade across state borders.

Each of those constitutional pedigrees circumvents the difficult controversy over substantive due process. And each is perfectly consistent with time-honored principles of federalism.

The touchstone of federalism is not states' rights but dual sovereignty—checks and balances designed to promote liberty by limiting excessive power in the hands of either state or federal government. When a state exercises jurisdiction beyond its borders to impose grossly excessive damages on out-of-state businesses, and applies tort laws that deny both procedural and substantive protection against quasi-criminal punishment, the federal government not only may but must intervene. Otherwise, federalism becomes a pretext for constricting rather than enlarging liberty.

Conclusion

Defenders of modern tort law would have nearly every "victim" compensated by corporate America. Such theories have penetrated deeply into the psyches of many judges and jurors. As a result, the cost of insurance and of goods and services now includes a "tort premium" that far exceeds the true costs of corporate misbehavior. And those who produce the goods and services that make the American economy strong have come to believe that no matter what they do, no matter how responsibly they behave, they are going to be held liable for the negligence of others.

Those problems are indeed real. But however real the problem, if there is no constitutional authority, Congress may not intercede. States have reformed, and can continue to reform, their own tort law. When and where they have not done so, the federal government may occasionally act, but only if state substantive rules violate a substantive federal constitutional right, or are so capricious that they rise to the level of a due process violation—that is, they deny to defendants sufficient notice of the law to conform their conduct to its dictates.

Otherwise, time-honored principles of federalism command that the states continue to exercise dominion over the substantive rules of tort law. To ensure that state sovereignty does not extend beyond a state's borders, the federal government may and should enact procedural reforms that tighten state long-arm jurisdiction and implement federal choice-of-law rules.

Notes

1. Martin F. Connor, "Taming the Mass Tort Monster," National Legal Center for the Public Interest, October 2000, p. 4.

2. See Tresa Baldas, "Verdicts Swelling from Big to Bigger," *National Law Journal*, November 25, 2002, pp. A1, A6.

3. David Hechler, "Study Sees Rise in Cost of Tort System. Is It Right?" *National Law Journal*, December 22, 2003, p. 12.

4. Center for Legal Policy, "Trial Lawyers Inc.," Manhattan Institute, 2003, p. 2.

5. Hechler, "Study Sees Rise in Cost of Tort System," p. 12.

6. Center for Legal Policy, p. 5.

7. See, e.g., Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (New York: St. Martin's, 2003); Catherine Crier, *The Case against Lawyers* (New York: Broadway Books, 2002); and Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (New York: Warner Books, 1994).

8. *Gibbons v. Ogden*, 9 Wheat. 1, 224 (1824) (Johnson, J., concurring in the judgment).

9. Ibid. at 231.

10. 123 S. Ct. 1513 (2003).

11. Class action reform is a third procedural change that we would support at the federal level. We exclude that important topic from this paper only because Cato senior fellow Mark Moller will soon be publishing a Policy Analysis devoted exclusively to that subject.

12. Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong., 1st sess. (March 13, 2003).

13. Juliet Eilperin, "House Struggles to Find Its Place on Hill; Feeling Ignored, Members Say Most High-Profile Issues Are Decided in Senate," *Washington Post*, April 4, 2003, p. A4.

14. Air Transportation Safety and System

Stabilization Act of 2001, Pub. L. No. 107-42 (2001), codified at 49 U.S.C. § 40101 (2003).

15. Bipartisan Patient Protection Act, H.R. 2563, 107th Cong., 1st sess. (August 2, 2001); and S. 1052, 107th Cong., 1st sess. (June 29, 2001).

16. See *United States v. Lopez*, 514 U.S. 549 (1995).

17. Betsy J. Grey, "The New Federalism Jurisprudence and National Tort Reform," *Washington and Lee Law Review* 59 (2002): 477 and accompanying footnotes.

18. Ibid. Currently, under 28 U.S.C. § 1332 (2002), federal courts can exercise "diversity jurisdiction" over litigation even if state legal questions are at issue, but only when each and every plaintiff is from a different state than each and every defendant, and more than $75,000 per plaintiff is in dispute.

19. Grey, p. 477.

20. Ibid.

21. U.S. Const. Art. I, § 8, cl. 3.

22. See Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 1, 3d ed. (St. Paul: West Group, 1999), § 4.8.

23. *Lopez* at 562–63.

24. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

25. See Gene Healy and Robert A. Levy, "Federalism under the Gun," *Human Rights* 29 (Fall 2002): 24.

26. According to a Department of Justice study, 31.9 percent of all state tort trials in the nation's 75 largest counties involved automobile accidents. Carol J. DeFrances and Marika F. X. Litras, "Civil Trial Cases and Verdicts in Large Counties, 1996," *Bureau of Justice Statistics Bulletin* (U.S. Department of Justice), September 1999, p. 2.

27. Public choice problems often arise when money is transferred from "the many" to "the few." Those transfers provoke more intense support from the few who reap the benefits than they do opposition from the many who bear the burden. As a result, inefficient transfers from the many to the few typify public policy in mass democracies. See James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1965): pp. 31–39.

28. *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (racial bias in jury selection violates Equal Protection Clause).

29. *Respondeat superior* holds an employer vicariously liable for negligent behavior by an employee while on the job. *Hern v. Nichols*, 91 Eng. Rep. 256 (Ex. 1708).

30. See Neal Miller, "An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction," *American University Law Review* 41 (1992): 408–9 (attorneys responding to a survey indicated that out-of-state status was more frequently the cause of jury bias than corporate status or type of business); and Alexander Tabarrok and Eric Helland, "Court Politics: The Political Economy of Tort Awards," *Journal of Law and Economics* 42 (1999): 161–64.

31. For a summary of state tort reform laws, see American Tort Reform Association, "Tort Reform Record," December 2003, http://www.atra.org/files.cgi/7668_Record12-03.pdf.

32. Ibid.

33. Ibid.

34. See, e.g., *Osborne v. McMasters*, 41 N.W. 543 (Minn. 1889) (early product liability suit against a local apothecary, who had mislabeled a drug, resulting in poisoning of the victim). See also Michael I. Krauss, "Product Liability and Game Theory: One More Trip to the Choice-of-Law Well," *Brigham Young University Law Review* (2002): 772–84 and accompanying footnotes.

35. See Thomas J. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

36. See Theodore Eisenberg, "Judicial Decision-making in Federal Products Liability Cases, 1978–1997," *DePaul Law Review* 49 (1999): 326 ("Plaintiffs, their lawyers, and most other observers of the legal system believe the jury to be more sympathetic to plaintiffs, on average, than the judge. Plaintiffs therefore route a weaker set of cases to juries.").

37. The retailer may also be sued, but recovery is typically against the manufacturer. Because the retailer is usually local, its inclusion as a codefendant may be designed to foreclose federal court jurisdiction, which requires that all plaintiffs reside in a different state than all defendants. See, e.g., *Guerrero v. Gen. Motors Corp.*, 892 F. Supp. 165, 166 (S.D. Tex. 1995).

38. This is true even for automobiles, most driv-

ing almost certainly takes place near one's home and in one's state of residence.

39. Commonsense Consumption Act of 2003, S. 1428, 108th Cong, 1st sess. (July 17, 2003).

40. H.R. 339, 108th Cong., 1st sess. (January 27, 2003).

41. See Michael I. Krauss, "Suits against 'Big Fat' Tread on Basic Tort Liability Principles," Washington Legal Foundation Legal Backgrounder 18, no. 6 (March 14, 2003).

42. *Pelman v. McDonald's Corp.*, 2003 WL22052778, Slip Op. (S.D.N.Y. 2003).

43. Emily Johns, "Living XX-Large: Pending Bill Fights Suits Filed against the Food Industry," *Minneapolis Star Tribune*, February 9, 2004, p. A6. Ironically, the Big Daddy settlement allowed customers with receipts to receive a refund for ice cream they had purchased—or two free cups of Big Daddy ice cream.

44. Krauss, "Suits against 'Big Fat' Tread on Basic Tort Liability Principles."

45. One settlement did arise when a group of vegetarian and Hindu students sued McDonald's for not publicizing the beef flavoring in its french fries. See Sandra Guy, "24 Groups to Share $10 Mil. McD's Vegetarian Award," *Chicago Sun-Times*, May 20, 2003, p. 49. Allegedly, McDonald's misrepresented that the fries were cooked in 100 percent vegetable oil. The plaintiffs received a whopping $10 million, with another $2.5 million going to their lawyers. That litigation had nothing to do, however, with the obesity claims that have been the central focus of the suits that the McConnell and Keller bills would ban.

46. The American Tort Reform Association has characterized 13 jurisdictions as "judicial hellholes." See http://www.sickoflawsuits.org/news/03_11_06.cfm; and American Tort Reform Association, "Bringing Justice to Judicial Hellholes," http://www.atra.org/reports/hellholes/report.pdf.

47. Lawsuits involving a manufacturing defect (e.g., a gun explodes when fired and injures its user) are traditional tort actions that do not raise novel or bizarre legal theories.

48. See Michael I. Krauss, *Fire and Smoke: Government Lawsuits and the Rule of Law* (Oakland, CA: Independent Institute, 2000), for a detailed refutation of these suits.

49. See, e.g., *Moore v. R.G. Indus.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington & Richardson*, 743 F.2d 1200 (7th Cir. 1984); *Hamilton v. Accu-tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996); *Delahanty v. Hinkley*, 564 A.2d 758 (D.C. 1989); *Rhodes v. R.G. Indus.*, 325 S.E.2d 469 (Ga. 1985); *Forni v. Ferguson*, No. 132994/94, slip op. (N.Y. Sup. Ct. Aug. 2, 1995), aff'd, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996); and *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985).

50. A few trial court rulings, declining to dismiss firearms suits and ordering a full trial, are still in litigation.

51. Pub. L. No. 103-322, 103 Stat. 1796 (September 13, 1994).

52. See *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272 (6th Cir. 1997).

53. The 33 states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

54. *Cincinnati v. Beretta U.S.A. Corp.*, 1999 WL 809838 (Ohio C.P. Oct. 7, 1999), aff'd, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000), appeal allowed, 740 N.E.2d 1111 (Ohio 2001), rev'd, 768 N.E.2d 1136 (Ohio 2002).

55. *Ganim v. Smith & Wesson Corp.*, 26 Conn. L. Rptr. 39 (Conn. Super. Ct. 1999), aff'd, 258 Conn. 313 (Conn. 2001).

56. *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), aff'd, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001).

57. *Morial v. New Orleans*, 785 So.2d 1 (La.), cert. denied, 534 U.S. 951 (2001).

58. *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465 (Cal. 2001).

59. *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313 (Conn. 2001), aff'g 26 Conn. L. Rptr. 39 (Conn. Super. Ct. 1999).

60. "Bridgeport Mayor: Appeal of Gun Lawsuit Decision Unlikely," *Associated Press Newswires*, October 9, 2001.

61. Protection of Lawful Commerce in Arms Act, H.R. 2037, 107th Cong., 1st sess. (May 25, 2001).

62. Protection of Lawful Commerce in Arms Act, S. 659, 108th Cong., 1st sess. (March 19, 2003).

63. Ibid. at § 2(a)(5) (emphasis added).

64. See Edward Epstein, "Gun Liability Bill Shot Down in Senate; Defeat Comes after Assault-Ban Proposal Passes," *San Francisco Chronicle*, March 3, 2004.

65. White House, "President Proposes Major Reforms to Address Medical Liability Crisis," news release, July 25, 2002, http://www.white house.gov /news/releases/2002/07/20020725-1. html.

66. Allison H. Eid, "Tort Reform and Federalism: The Supreme Court Talks, Bush Listens," *Human Rights* 29 (Fall 2002): 10, 11.

67. Technically, there is no "spending power" in the Constitution. Some authorities believe that the spending power is implicit in the power to tax; see U.S. Const. Art. I, § 8, cl. 1. Other authorities, ourselves included, believe that spending is authorized only if it is necessary and proper; see U.S. Const. Art. I, § 8, cl. 18, for executing powers enumerated elsewhere in the Constitution. We need not resolve that controversy here; the constitutionality of federal spending for medical care in the context of malpractice reform has not been challenged. The dispute here is not whether federal medical spending is itself legitimate but whether malpractice reform can be and has been legitimately imposed as a condition on state recipients of the spending.

68. White House.

69. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).

70. Eid, p. 11.

71. White House.

72. See Laura-Mae Baldwin et al., "Defensive Medicine and Obstetrics," *Journal of the American Medical Association* 274 (1995): 1606–10; and Daniel Kessler and Mark McClellan, "Do Doctors Practice Defensive Medicine?" *Quarterly Journal of Economics* 111 (1996): 359.

73. See Lisa Dubay et al., "The Impact of Malpractice Fears on Cesarean Section Rates," *Journal of Health Economics* 18 (1999): 491–522.

74. See Gary M. Fournier and Melayne Morgan McInnes, "The Case for Experience Rating in Medical Malpractice Insurance: An Empirical Evaluation," *Journal of Risk and Insurance* 68 (2001): 274 (physicians, especially rural obstetricians, are choosing to limit practice or self-insure rather than pay soaring premiums unrelated to their own claims experience); "Echo Malpractice Mess," editorial, *Charleston Gazette and Daily Mail*, January 3, 2002, p. 4A (physicians are leaving West Virginia because lawsuits are increasing the cost of insurance coverage); Ovetta Wiggins, "Doctors to Protest Premium Increases," *Philadelphia Inquirer*, April 23, 2001, p. B1 (Pennsylvania Medical Society asserts that 11 percent of Pennsylvania physicians "have either moved out of state, retired [prematurely], or scaled back their practices [due to] 'skyrocketing' malpractice insurance rates."); and Patricia Poist-Reilly, "Malpractice Maelstrom: Skyrocketing Malpractice Insurance Premiums Have Doctors and Healthcare Professionals Here—and Around the State—Clamoring for Reform," *Lancaster New Era/Intelligencer Journal/Sunday News*, December 17, 2001, p. 1 (high jury awards pushing up insurance rates and forcing physicians to retire early, move to more rate-friendly states, or limit patient access to medical care).

75. See, e.g., David M. Studdert et al., "Can the United States Afford a 'No-Fault' System of Compensation for Medical Injury?" *Law and Contemporary Problems* 60 (1997): 33–34; Paul C. Weiler, "Fixing the Tail: The Place of Malpractice in Health Care Reform," *Rutgers Law Review* 47 (1995): 1165; Richard L. Abel, "The Real Tort Crisis—Too Few Claims," *Ohio State Law Journal* 48 (1987): 448; Paul C. Weiler et al., *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* (Cambridge, MA: Harvard University Press, 1993): pp. 61–76; and Philip Slayton and Michael J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978).

76. See generally Nancy K. Bannon, *AMA Tort Reform Compendium* (Chicago: American Medical Association, 1989) (detailing tort reforms then in effect); and American Tort Reform Association, "Tort Reform Record," June 30, 2002, http://www. atra.org/wrap/files.cgi/7469_record602.htm.

77. See American Tort Reform Association, "Tort Reform Record," December 2003, http://www. atra.org/files.cgi/7668_Record12-03.pdf, for a summary of state reforms enacted since 1986.

78. H.R. 5, 108th Cong., 1st sess. (February 5, 2003); and S. 607, 108th Cong., 1st sess. (March 13, 2003).

79. Rebecca Adams, "Democrats Argue Federalism Case As Committee Approves Malpractice Bill," *Congressional Quarterly Daily Monitor*, March 5, 2003.

80. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). This section of the paper and the following sections through "Reconciling Tort Reform and Federalism" are

extracted in major part from Robert A. Levy, "The Conservative Split on Punitive Damages: State Farm Mutual Automobile Insurance Co. v. Campbell," *Cato Supreme Court Review* 2 (2003): 159–86.

81. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

82. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

83. In *State Farm*, for example, the Utah Supreme Court relied on trial testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability." Quoted in *State Farm*, 123 S. Ct. at 1519.

84. See *Liggett Group v. Engle*, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. May 21, 2003).

85. For further commentary on the *Engle* case, see Robert A. Levy, "Tobacco Class Decertified in Florida: Sanity Restored," *The Hill*, June 11, 2003, http://www.thehill.com/news/061103/ss_tobacco.aspx.

86. David Hechler, "Tenfold Rise in Punitives," *National Law Journal*, February 3, 2003, p. C3.

87. *Gore* at 575.

88. *State Farm*, 123 S. Ct. at 1518.

89. Ibid.

90. *Campbell v. State Farm Mutual Automobile Insurance Co.*, 65 P.3d 1134 (2001).

91. *State Farm*, 123 S. Ct. at 1521.

92. Ibid. at 1526.

93. Ibid. (citation omitted).

94. Ibid. at 1521.

95. Ibid. at 1522.

96. Ibid.

97. Ibid. at 1523.

98. Ibid. (quoting *Gore* at 582).

99. Ibid. at 1524–25.

100. Ibid. at 1520 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

101. Ibid. at 1525.

102. Ibid. at 1527 (Ginsburg, J., dissenting).

103. Ibid. at 1531.

104. George F. Will, "License to Legislate," *Washington Post*, April 17, 2003, p. A23.

105. *State Farm*, 123 S. Ct. at 1531 (Ginsburg, J., dissenting). Notably, Justice Ginsburg has been willing to invoke substantive due process in other contexts. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), which she joined, holding that substantive due process protects an unenumerated right to private conduct as a component of liberty.

106. Ibid. at 1526 (Thomas, J., dissenting) (quoting *Cooper Inds.*, 532 U.S. at 443 (Thomas, J., concurring) (citing *Gore*, 517 U.S. at 599 (Scalia, J., joined by Thomas, J., dissenting))).

107. Ibid. at 1526 (Scalia, J., dissenting).

108. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

109. Ibid. at 458 n. 24 (internal references omitted).

110. Ibid.

111. Ibid. at 466–67 (Kennedy, J., concurring in part and concurring in the judgment).

112. Ibid. at 467.

113. *State Farm*, 123 S. Ct. at 1519–20 (citing *Cooper Inds* at 433; *Gore* at 562).

114. *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907) (cited in *State Farm*, 123 S. Ct. at 454).

115. *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915) (cited in *State Farm*, 123 S. Ct. at 454).

116. *State Farm*, 123 S. Ct. at 1520 (quoting *Gore* at 574).

117. *Saenz v. Roe*, 526 U.S. 489 (1999) (Thomas, J., dissenting, joined by Rehnquist, C.J.).

118. Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), p. 180.

119. *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873).

120. Kimberly C. Shankman and Roger Pilon, "Reviving the Privileges or Immunities Clause to Redress the Balance among States, Individuals,

and the Federal Government," Cato Institute Policy Analysis no. 326, November 23, 1998, p. 1.

121. Theodore Olson, "Some Thoughts on Punitive Damages," Manhattan Institute Civil Justice Memo, no. 15, June 1989, http://www.manhattan-institute.org/html/cjm_15.htm.

122. Mark A. Klugheit, "Where the Rubber Meets the Road: Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation," *Syracuse Law Review* 52 (2002): 806 (footnotes omitted).

123. See, e.g., *Darcars Motors of Silver Spring v. Borzym*, 818 A.2d 1159, 1164 (2003).

124. *State Farm*, 123 S. Ct. at 1520.

125. Connor, p. 21.

126. *State Farm*, 123 S. Ct. at 1523.

127. Connor, p. 23.

128. See *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

129. Ibid. at 282 (O'Connor, J., concurring in part and dissenting in part).

130. See, e.g., Roy C. McCormick, "Punitive Damages Defined and Reviewed for Questions and Changes Ahead," *Rough Notes*, November 1995, p. 68.

131. Olson.

132. Quoted in Fox Butterfield, "New Orleans Takes on Gun Manufacturers in Lawsuit," *New York Times*, November 4, 1998, online edition.

133. Carolyn Lochhead, "The Growing Power of Trial Lawyers," *Weekly Standard*, September 23, 1996, p. 21.

134. *Berger v. United States*, 295 U.S. 78, 88 (1935).

135. Michael Horowitz, "Can Tort Law Be Ethical?" *Weekly Standard*, March 19, 2001, p. 16.

136. See Robert A. Levy, "Twisted Tobacco Logic," *Washington Times*, April 11, 2001, p. A12.

137. Kristin Armshaw ed., "Disorder in the Court: A Guide for State Legislators," American Legislative Exchange Council, June 2003, especially pp. 7–14.

138. Fla. Stat. Ann. § 409.910 (1995).

139. Sheila R. Cherry, "Litigation Lotto," *Insight on the News*, April 3, 2000, p. 10.

140. Paul H. Rubin, John Calfee, and Mark Grady, "BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages," *Supreme Court Economic Review* 5 (1997): 203–4.

141. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

142. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

143. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

144. Ibid. at 112.

145. Rubin, Calfee, and Grady, p. 210.

146. See Krauss, "Product Liability and Game Theory," pp. 759, 761.

147. See, e.g., Michael McConnell, "A Choice-of-Law Approach to Products-Liability Reform," in *New Directions in Liability Law*, ed. Walter Olson (New York: Academy of Political Science, 1988), p. 90.

148. See 28 U.S.C. § 1332 (2002).

149. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

150. See Krauss, "Product Liability and Game Theory," pp. 775, 826. The Supreme Court has limited the availability of federal diversity jurisdiction by interpreting federal statutes to require "complete diversity"—i.e., that each plaintiff be from a different state than each defendant. See *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267, 267–68 (1806). As a result, plaintiffs have been able to guarantee a state court forum by including an in-state defendant—typically a retailer in a product liability suit—in the litigation. To get around that problem, the Court's holding in *Strawbridge* would have to be reversed, or Congress would have to provide that "minimal diversity"—i.e., when any plaintiff is from a state different than any defendant—is sufficient to trigger federal jurisdiction in specified tort suits. (At this writing, Congress is considering a minimal diversity provision in connection with a federal class action reform package.)

151. See Michael Greve, "Eulogy for a Lost Clause," *National Law Journal*, May 26, 2003, p. 27.

152. See William Niskanen, "Do Not Federalize Tort Law," *Regulation*, no. 4 (1995): 18.

153. One problem, not addressed here, is the inequity that could arise if an innocent bystander is injured by a defective product purchased in a juris-

diction with a defendant-friendly tort regime. The bystander could neither decline to purchase the product, nor pay less, to offset the prospect of uncompensated injury. See Krauss, "Product Liability and Game Theory," p. 824, for a suggested solution to this problem.

154. Michael S. Greve, "Torts, Federalism, and the Constitution," American Enterprise Institute, undated, http://www.federalismproject.org/masterpages/tort/torts,fed,cnt.html.

155. Ibid.

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