CONSIDERING THE PROPER FEDERAL ROLE IN AMERICAN TORT LAW

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INTRODUCTION

The House of Representatives passed a broad tort reform bill in March 1995[1]; in April, the Senate approved a considerably narrower bill.[2] At the time President Clinton was understood as being willing to sign a reasonable or moderate bill, such as the one that had cleared the Senate. A Conference Committee was finally appointed in November 1995. The Conference reported out its own recommendation on March 14, 1996.[3] This recommendation considerably resembled the bill earlier supported by the Senate. Nevertheless, on March 16, President Clinton announced his intention to veto the bill, reasoning in part that it entailed "an unwarranted intrusion on state authority."[4] Back in the Senate, a limited number of Democrats joined with Republicans in turning back a filibuster.[5] Both the Senate and the House then approved the Conference Committee's recommendation. On May 3, the President vetoed the bill, complaining that it would "inappropriately intrude[] on state authority."[6]

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1. H.R. 956, 104th Cong., 1st Sess. (1995); H.R. REP. NO. 64, 104th Cong., 1st Sess., pt. 1, at 104–64 (1995); the Senate approved a considerably narrower bill in May.

2. H.R. 956, 104th Cong., 1st Sess. (1995); S. REP. NO. 69, 104th Cong., 1st Sess. 104–69 (1995).

3. H.R. 956, 104th Cong., 1st Sess. (1995); H.R. REP. NO. 481, 104th Cong., 2d Sess. 481 (1996).

4. *See* Jube Shiver, Jr., *Clinton Vows to Veto Measure on Product Liability*, L.A. TIMES, Mar. 17, 1996, at A1.

5. Neil A. Lewis, *Backers of Limits on Lawsuits Win a Victory in the Senate*, N.Y. TIMES, Mar. 21, 1996, at A22.

6. Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1, A8.

In this recent debate about federal tort reform (much of which concerns products liability), principles of federalism were invoked somewhat curiously. Congressional Republicans have generally been favoring the devolution of many federal programs (such as welfare) back to the states, despite strong policy arguments that these programs are best administered at the national level.[7] Yet at the same time congressional Republicans have supported the federalization of much of tort law, which has long been primarily a state responsibility. The evident hypocrisy in this—or at least the inconsistency—has been noted by observers such as Anthony Lewis[8] and Peter Schuck.[9]

Yet look further at a liberal columnist such as Lewis. Until now, in urging the creation and expansion of various federal programs, Lewis has rarely if ever expressed concern about the subordination of state prerogatives. Even so, as he reviewed congressional tort reform, Lewis, noting that tort law has been state law "for 200 years," urged that we "leave substantive tort law to the state courts and legislatures" and denounced the current congressional proposals as a "radical move towards centralization."[10]

Lewis has not been alone in adhering to such a pattern. Joan Claybrook is the President of Public Citizen, one of those Ralph Nader-founded organizations that over the years have consistently recommended and supported new federal initiatives. But when Claybrook focused on the recent federal tort proposals, she identified a states' rights tradition in tort law and condemned the proposals for "infring[ing] upon state sovereignty."[11] Pamela Liapakis, as President-elect of the American Trial Lawyers' Association, employed similar rhetoric, and indeed suggested that the Supreme Court's recent decision in *Lopez*[12] places a real constitutional cloud over the recent congressional proposals.[13] Somewhat similar rhetoric came from a spokesman for the American Bar Association, who told a congressional subcommittee that the pending proposal "would be an unwise and unnecessary intrusion of massive proportions on the longstanding authority of states to promulgate tort law."[14]

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7. *See* PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990). *See also* PAUL E. PETERSON, THE PRICE OF FEDERALISM (1995).

8. Anthony Lewis, *Abroad at Home: Make Haste Slowly*, N.Y. TIMES, May 15, 1995, at A17 (finding that the House bill is in "grotesque conflict with the professed aim of [the House leadership] to cut back the power of the Federal Government").

9. Peter Schuck, *Tortured Logic: Republican Legal Onslaught I.*, NEW REPUBLIC, Mar. 27, 1995, at 11 (indicating that the pending legislation "flagrantly violates the...three central assumptions [of the Contract With America]").

10. *See* Lewis, *supra* note 8.

11. *See* letter from Joan Claybrook to various Senators (Apr. 24, 1995) (urging them to vote against the products liability bill the Senate was then considering) (on file with author). Claybrook was a speaker at the ABA Presidential Showcase Program on Tort Reform at the ABA Annual Meeting in Chicago, Illinois, on August 7, 1995. I served as a panelist at this program; the package of materials that Claybrook provided to panelists included her letter.

12. United States v. Lopez, 115 S. Ct. 1624 (1995).

13. Pamela Liapakis, Address at the ABA Presidential Showcase Program on Tort Reform (Aug. 7, 1995). Liapakis was also a speaker at the ABA tort reform program. The constitutional problem is also taken quite seriously in William Niskanen, *Do Not Federalize Tort Law*, REG., No. 4 1995, at 34. Niskanen seems to ignore the role of congressional findings in the judicial review of congressional enactments.

14. David C. Weiner, Statement at Subcommittee of Consumer Affairs (Apr. 3, 1995), at WL 152031.

It seems clear enough that in this recent tort reform debate, federalism arguments were deployed (and withheld) strategically. If for substantive reasons one favored the tort reforms Congress was considering, one simply ignored the federalism issue. Yet if for substantive reasons one opposed those tort reforms, one invoked the theme of states' rights. All of this is no doubt an old story, as federalism concerns are manipulated for the sake of substantive ends.[15]

For that matter, I can see how I myself might be swayed in my own treatment of federalism by my interest in substantive outcomes. Suppose I were eagerly supporting a particular tort reform. Despite my support, many states have proved unwilling to adopt that reform; yet for whatever reason Congress seems receptive. In all likelihood, I would ignore federalism problems in agreeing to testify at a congressional hearing in favor of a federal bill incorporating the reform I favor.

Even so, at that hearing I would not be surprised if the question of federalism came up, and I would appreciate that the question deserves a fuller answer than my mere statement that the reform itself is socially desirable. That is, I would acknowledge that federalism is a value that deserves independent consideration, both in the halls of Congress[16] and in the larger court of public[17] (and scholarly) opinion.

This paper will look at the federalism issue in tort reform. As one who teaches a local government course as well as a torts course, I accept the view that principles of decentralization (or non-centralization) deserve respect. Whatever the rightness of the result in *Lopez*, that case can be applauded for declining to regard federalism claims as in essence nonjusticiable. To be sure, in all likelihood all of Congress's recent proposals could be supported with findings that would satisfy *Lopez*'s limited constitutional requirements. Yet even in *Garcia*,[18] the Supreme Court, in disparaging the need for judicial review of congressional enactments under Article I, assumed that constitutional federalism is an issue that would and should be vigorously debated within the chambers of Congress.[19]

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> Conservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment. Yet both groups are also quick to wield the power of the Supremacy Clause, while citing vague platitudes about the need for uniformity among the states, whenever a single national rule...furthers their political interests.

Jonathan Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 265 (1990).

16. On the blend of principle and politics that go into congressional decisions, see *infra* text accompanying note 128. Professor Macey seems to assume that congressional decisions about federalism are all (public choice) politics and no principle. Macey, *supra* note 15. Based on this assumption, he makes certain (non-normative) predictions as to what legislation Congress is likely to adopt.

17. The extent to which the public cares about federalism is an interesting question. For one view, see Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488 (1987) ("for most people...issues of federalism take second seat to particular substantive outcomes"). My own view is that public attitudes consist of a combination of a mild anti-Washington bias and a concern for policy outcomes.

18. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

19. *Id.* at 551.

Anyway, my own concern is with federalism as a standard of wise policy rather than as a formal constitutional doctrine. Just as Congress can and should protect equality in ways that go beyond the Constitution's equal protection guarantee,[20] so Congress—while certainly complying with federalism as a constitutional minimum—should also respect federalism as a principle of sound policy.[21] This paper will consider federalism in this second, non-constitutional sense. Indeed, the paper will consider the general question of the proper federal role in American tort law largely *in isolation from* any assessment of the particular reforms that were included in the House bill, the Senate bill, and the Conference Committee recommendation. (Keep in mind that while the current Congress has considered conservative changes in the law, the Congress that passed the National Highway Transportation Safety Act in 1968[22] might have adopted tort reforms that would have expanded liability.[23]) To this extent, my paper does not profess to be timely; rather, it aims at being enduring.

Begin with a review of the common claim that tort law has been state law for over 200 years. It can easily be recognized that this claim contains a major overstatement. At the turn of the century, the most important and controversial sector of American tort law concerned the claims brought by employees against their employers—particularly the claims brought by railroad employees against the railroads.[24] With this standing as the most dramatic topic on the American tort agenda, Congress indeed intervened, enacting in 1908 the Federal Employers' Liability Act (FELA), which preempted state tort law and comprehensively governed the liability claims brought by employees against railroads operating in interstate commerce.[25] Obviously, as railroads have faded as a force in the national economy and as levels of railroad employment have tumbled, American torts scholars have all but forgotten about FELA: it is barely mentioned in any of the torts coursebooks I recently consulted. But the insignificance of FELA in the 1990s should not prevent us from recognizing its enormous significance at the time of its adoption. In terms of practical importance, congressional enactment of FELA in 1908 disrupted "state sovereignty" over tort law at least as much as that "sovereignty" would be

20. Consider the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000(d)–2000(d)(7) (1994)), and the Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973gg(10) (1994)).

21. For effective recent defenses of federalism by scholars located at different points on the political spectrum, see Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995); Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994); McConnell, *supra* note 17.

22. The linkage between the ideas underlying the Act and the ideas supporting broader products liability are discussed in Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 612–14 (1992).

23. Consider also Congress's adoption of the liberal FELA in 1908, discussed just below.

In a current article, Stephen Sugarman recommends that Congress, in considering the problem of personal injury, adopt a liberal program affording compensation to all injury victims. Stephen D. Sugarman, *Should Congress Engage in Tort Reform?*, 1 MICH. J.L. & POL'Y (forthcoming 1996).

24. *See* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1768–72 (1981); *see also* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 692–715 (1989).

25. *See* TRANSPORTATION RESEARCH BD., COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT (1994) (The Federal Employers' Liability Act is codified at 42 U.S.C.A. §§ 51, 54, 56, 60 (West 1994)).

interfered with by the package of proposals that Congress is currently considering.

FELA, then, serves as an important limitation on the claim that in America tort law has always been state law. To be sure, the lessons that should now be drawn from the FELA experience may be complex, as will be suggested below.[26] Furthermore, FELA can be recognized as a somewhat isolated example. Beginning with Franklin Roosevelt's New Deal and continuing with Lyndon Johnson's Great Society, and then the (surprisingly liberal) Nixon and Bush administrations,[27] the national government has assumed an increasing number of responsibilities, in doing so displacing state lawmaking authority. Yet during all that period, Congress had fully respected tort law as a state prerogative. Back in 1938, as the United States Supreme Court was affirming the constitutionality of important New Deal legislation,[28] that Court was almost concurrently expanding the jurisdiction of state common law in dealing with traditional tort problems.[29]

During the last eighty-five years, then, the tradition of state tort law has held up remarkably well. It should be noted, however, that this tradition is uniquely American; in every other country, tort law is essentially a national responsibility.[30] Apart from the United States, the most prominent instances of federalism are India, Switzerland, Canada, and Australia.[31] In India and Switzerland, tort law is all national law (in the case of Switzerland, law derived from the country's civil code). In Canada and Australia, tort doctrines are originally developed by the judiciary of each province or state; but as disagreements emerge they can be resolved by the national supreme court.[32]

Yet if decentralized tort law is an American exception to the general worldwide pattern, the general tradition of American exceptionalism is something we have always taken seriously.[33] Certainly, the tradition of tort law operating at the state level is one that is deeply familiar to all of us. This tradition certainly commands respect and accordingly strengthens the perception that the recent congressional proposals were jarring.[34] One can be curious, then, about the justification for those proposals.

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26. *See infra* text accompanying note 168.

27. On the creation of new domestic programs under Nixon, see Schwartz, *supra* note 22, at 611–12. President Bush happily signed the Americans With Disabilities Act and a major expansion of the Clean Air Act.

28. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

29. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

30. *See* Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, *in* THE LIABILITY MAZE 28 (Peter W. Huber & Robert E. Litan eds., 1991).

31. All but India are identified in S. RUFUS DAVIS, THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING 169 (1978). The remainder of this paragraph draws on conversations with Mark Galanter, Alors Rimle, Jody Freeman, Lewis Klar, and David Partlett.

32. To be sure, provincial or state legislation can take precedence over national common law.

33. For a recent study, see SEYMOUR M. LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996).

34. Richard Revesz relies (in essence) on the tradition of federalism in concluding that proposals for federal intervention in environmental law require "affirmative justification". Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992). Revesz's sense of the relevant traditions seems somewhat odd, however: he seems at times

I. MEDICAL MALPRACTICE: THE ADEQUACY OF STATE LAW

The most obvious justifications for federal law that supersedes state law is that state law produces effects that are felt beyond the territorial limits of the states themselves or that there is some significant need for national uniformity in the content of legal rules. With these criteria in mind, we can look first at medical malpractice, noting in doing so that the House's original tort reform bill would have placed a cap on pain-and-suffering damages in malpractice actions.[35] The typical physician provides medical services within a particular state. He and his patients are all typically residents of that same state. Any suit brought by a patient against the doctor is generally brought in state court. A malpractice insurance company frequently is formed and operates within some particular state.[36] Even when companies themselves do business in several states, the insurance policies they write and the premiums they set are drafted with each particular state's malpractice experience in mind. Indeed, premiums are typically decided on at the level of the region within the state—an even more local level than the state itself.

Given all of this, the federal interest in malpractice is doubtful: malpractice seems strikingly lacking in either spill-over effects or a clear uniformity need.[37] Moreover, what has been said here about malpractice law could also be said of the law of auto motorist liability and the law of landowner liability: the residence of the defendant and the plaintiff, the conduct of the defendant, and the injury to the plaintiff are all typically concentrated within a particular state. Indeed, similar observations can be made about most of the categories of traditional tort law: in the usual case, almost everything is located within an individual state.[38] Hence the long tradition of tort law developed and administered at the state level is an eminently logical and rational tradition, one that is tied to the point that traditional tort situations are lacking in extraterritorial impacts.

From the perspective of federalism, then, the House's original proposal to regulate medical malpractice damage awards was certainly curious. At an ABA session on tort reform in summer 1995,[39] I indicated my doubts about that proposal, and invited responses from Sherman Joyce, the Director of the American Tort Reform Association, and Ben Cotten, the Executive Director of the House Republican Policy Committee. The only response I received was that the malpractice system adds to the cost of medical care, and that through Medicare and Medicaid the federal government pays a significant fraction of the nation's health care bills. In fact, studies *do* show that pain-and-suffering caps decrease the costs borne by malpractice insurers and hence (by inference)

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unaware that job safety, fair labor standards, and minimum wages are currently regulated primarily at the federal level. *See id.* at 1246.

35. H.R. 956, 104th Cong., 1st Sess., § 203 (1995).

36. *See* FRANK A. SLOAN ET AL., INSURING MEDICAL MALPRACTICE 79 (1991).

37. It does not appear that significant numbers of physicians move their practices (and their residences) out of a particular state because of that state's high malpractice standards or litigation rates. A high rate of physician mobility would complicate the argument presented here in the text.

38. The most obvious exception to this pattern concerns the tort liability of interstate railroads. And here, the precedent of FELA is instructive.

39. *See supra* note 11.

hold down the price of malpractice insurance.[40] But if this is the *only* rationale offered on behalf of the House proposal, an obvious observation is that the rationale does not get the job done. For the rationale at best supports capping pain and suffering awards in malpractice suits brought by Medicare and Medicaid patients;[41] it provides no reason for capping the awards in malpractice claims brought by all other Americans.[42]

To be sure, the Clinton health care bill in 1994 would have included a number of restrictions on the system of malpractice liability.[43] One explanation for these restrictions was clearly political. By including them, the Clintons could offer advantages to the medical profession in an effort to bring that profession into the coalition supporting the Clinton bill—or at least to reduce the profession's opposition to that bill.[44] But the malpractice restrictions could be explained in terms of policy as well as politics. The Clinton bill, in dramatically expanding health insurance coverage, could have been responsible for significantly increasing the costs of the health-care system. It was therefore reasonable for that proposal to look for ways in which it could constrain this cost increase.

Moreover, the broad changes in the health care system proposed by the Clinton bill afforded a policy logic for some of its malpractice restrictions. One of them would have abrogated the collateral source rule in malpractice cases in the rule's application to health insurance.[45] But the Clinton bill would itself have altered the very nature of health insurance as a collateral source. Under the bill, all Americans would have been covered by health insurance, without any regard to individual choice, and with most of the cost of insurance being borne (at least in form) by employers and by the federal government itself. When health insurance is arranged in this way, the commonsense notions of fairness that underlie the collateral source rule all but disappear.[46] Hence the transformation in health insurance called for by the Clinton bill would have gone a long way toward justifying the bill's rejection of the collateral source rule as applied to health insurance benefits.

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40. *See, e.g.*, W. Kip Viscusi & Patricia Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. LEGAL STUD. 463 (1995).

41. For an example of federal malpractice reform with a limited target, consider legislation adopted by Congress in late 1995. Federally Supported Health Center's Assistance Act of 1995, Pub. L. No. 104–73, 109 Stat. 777 (1995). In this statute, Congress assumed responsibility for paying the liability costs of community health centers that are largely funded by federal grants; in the same statute, Congress imposed certain restrictions on malpractice claims brought against those centers. (The legislation brings such claims under the Federal Tort Claims Act; by doing so, it replaces trial by jury with trial by judge, and eliminates the possibility of punitive damages.) As one spokesman stated, "money that isn't spent on malpractice insurance is money that can be spent on immunizations." Edward Felsenthal, *Group Sees Ills in Laws Designed to Improve Medical Care for Poor*, WALL ST. J., Feb. 6, 1996, at B5.

42. Admittedly, many Americans receive health insurance from their employers, which is somewhat subsidized by favorable federal tax treatment. Assume Congress were to cite the desirability of economizing on this "tax expenditure" in support of a pain-and-suffering cap. This would probably comply with the minimal constitutional requirements of Article I; it seems unsatisfying, however, as a response to the question of federalism when that question is posed at the level of wise policy.

43. S. 1757, 103d Cong., 1st Sess. §§ 5301–5312 (1993).

44. If this effort was unsuccessful, it was partly because the bill did not go far enough, and did not include the restriction that physicians wanted most: a pain and suffering cap.

45. *See* Gary T. Schwartz, *A National Health Care Program: What Its Effect Would be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1341–49 (1994).

In short, a federal takeover of the system of delivering medical services would carry with it a justification for federal control of malpractice rules. But the Clinton bill, proposing such a federal plan, went down to a resounding political defeat. Isolated as it is from any general provisions on health-care reform, the section in the original House bill imposing a pain-and-suffering cap in medical malpractice actions was unprincipled.

II. PRODUCTS LIABILITY: THE INADEQUACY OF STATE LAW

A. The Fifty-State Non-Uniformity Problem

Having reached the conclusion above that preserving state authority over medical malpractice ordinarily makes good sense, let me now contrast medical malpractice with products liability. One obvious point is that most of the products that give rise to products liability claims are distributed by their manufacturers throughout the nation. A second point is that the imperatives of mass production require the manufacturer to sell the same product throughout the nation. But in doing so, the manufacturer encounters products liability rules emanating from fifty different state jurisdictions.

Just on the face of things, this looks bizarre. The need for uniformity seems huge,[47] given the obvious inefficiencies involved in requiring the manufacturer to reckon with fifty separate bodies of law.[48] These points can be documented by either of two analogies. One analogy comes from the European Community (EC). Over the last three decades the EC has been endeavoring to identify the limited number of functions that ought to be conducted at the supra-national Community level. So far as one can tell, there has been no interest at all within the Community in disturbing the jurisdiction of individual member states over all problems of medical malpractice, landowner liability, and motorist liability. Nevertheless, in 1985 the EC Council of Ministers promulgated a Directive on Products Liability, and this Directive now essentially governs most of the content of member states' products liability systems.[49] The Directive seems designed, at least in part, to advance the general EC objective of encouraging the free circulation of goods within the Community.

The second analogy begins with the perception that the primary goal of modern products liability is to give manufacturers incentives to properly design their products. To this extent, products liability operates as a system of quasi-regulation.[50] By way of analogy, think now of programs that would overtly

46. *Id.* at 1343–49.

47. The theme of uniformity plays a significant role in the Conference Committee's recommendation. H.R. 956, 104th Cong., 1st Sess. § 2(a)(3), (8), (b)(1) (1995).

48. My observations here resemble those offered a decade ago by Judge Posner. RICHARD A. POSNER, THE FEDERAL COURTS 179, 190 (1985). For a recent concurrence, see Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996).

49. *See* Schwartz, *supra* note 30, at 41–44. Most but not all: the Directive reserves a few important matters for member-state option. *Id.* at 43, 44.

50. Several federal statutes establishing national programs of product regulation are explicit in preempting state laws that impose any "requirement or prohibition" that goes beyond those contained in the federal statutes. The Supreme Court has sometimes held that a products liability obligation affirmed by a state's judicial system is a "requirement or prohibition," and

regulate product safety. Take a product that is mass produced and nationally distributed, and assume that an individual state professes to regulate the safety features of the product whenever it is sold within that state. Almost all would appreciate the enormous undesirability of state regulatory programs of this sort. Indeed, in such a situation the dormant Commerce Clause might well revive. A significant question would be raised as to whether the state program casts an undue burden on interstate commerce.[51]

Since the early 1960s, state courts have relied on the implications of the mass production and mass distribution of products in developing a separate body of doctrine that imposes especially strong obligations on product manufacturers. Whether courts have been correct in deriving these substantive implications from the premise of mass production-and-distribution is a question that need not be considered here. It suffices to say that this very premise of mass production does cast doubt on the appropriateness of *state* courts as the source of liability rules. As noted above, because traditional tort law typically addressed situations that were thoroughly in-state, there has been a strong policy logic favoring tort law as a state prerogative. Given the quite different geography of modern products problems, that same policy logic highlights the desirability of a centralized products liability regime.

But is it possible that the above account has exaggerated the need for centralized products liability rules? It can be pointed out, for example, that many enterprises that do business in a number of states do not seem seriously disadvantaged by diverse systems of state tort law.[52] Take a major chain of fast-food restaurants, with locations in every state. There is currently an interesting variety in the liability rules that state tort systems impose on fast-food operations.[53] The costs that the fast-food chain incurs in developing and implementing a risk management program would certainly be somewhat reduced if the rules on landowner liability were national in scope rather than state-by-state. Still, safety services are themselves largely delivered at the local level; and it may not be all that burdensome for the chain to have its outlets in one state implement one set of safety standards, while allowing outlets in other states to adhere to other standards. A defendant operating in several states can therefore adjust its conduct in each state so as to adequately respond to variations in state liability rules.

Yet while such an analysis works well enough in justifying state authority over many sectors of tort law, it does not work well at all in products liability. Given the overwhelming economic logic in favor of mass production and mass distribution, product manufacturers are simply not able to tailor their products to take variations in state law into account.

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hence is preempted. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); *see also* Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2259 (1996) (Breyer, J., concurring). In an earlier book chapter, I supported and justified the *Cipollone* result by referring to the undesirability of allowing non-uniform rulings from state to state as to the extent of cigarette companies' warning obligations. *See* Gary T. Schwartz, *Tobacco Liability in the Courts*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 131, 151 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

51. For a discussion of relevant Commerce Clause standards, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–7 (2d ed. 1988).

52. *See* Sugarman, *supra* note 23.

53. *See* Steven D. Winegar, *Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. REV. 861, 888 (1994).

But might there be overstatement in these references to an "overwhelming economic logic"? A possible claim of overstatement might build on the observation that American auto companies separately design the cars they sell in foreign countries such as Japan. Of similar interest is the federal program on autos and air pollution, which allows California to establish regulatory standards stronger than those that Congress is enforcing nationwide—an option that California has in fact implemented.

These, however, are the kinds of exceptions that prove the rule of the economic logic of mass production. Japan, after all, has a population of 125 million; moreover, the market for cars in Japan and the preferences of Japanese consumers differ in so many ways from the situation in the United States that the separate design of cars headed for Japan is economically inevitable. As for California, its population, at over 30 million, is almost one-eighth of the entire national population. And there are objective and dramatic circumstances in California—relating to air basins and preexisting pollution levels—that provide an enormous justification for requiring cars in California to include additional air pollution features.[54] Not surprisingly, California is the only state that has been given the right by Congress to depart from federal air pollution standards.[55]

Putting to one side, then, the special example of air pollution in California, one can confirm that the economies of mass production necessitate that products sold nationwide have uniform designs and originate in uniform manufacturing processes. Yet Steve Sugarman identifies another way in which manufacturers could respond to liability standards that vary from state to state: manufacturers could adjust the price of the products they sell in particular states to respond to the liability level in that state.[56]

This solution is unsatisfactory.[57] The *main* reason for this is that the primary goal of tort doctrine (especially products liability) is to encourage defendants to comply with the standards that tort law imposes. Allowing defendants to pay damages when they fail to comply is merely a second-best outcome the system falls back on when the first-best outcome of tort avoidance is not achieved. A *second* reason that price differentiation is an unsatisfactory solution concerns choice of law. A car sold at retail in Arizona to an Arizonan resident may produce an injury to a California pedestrian in California that gives rise to a lawsuit in California that would be covered by California law. Choice-of-law problems will be discussed further below;[58] it suffices here to say that the manufacturers' imperfect ability to predict which state's law will govern a products liability claim makes it all but impossible for the manufacturer to put into effect any intelligent system of price differentiation that could take into account the variations in state tort doctrine.

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54. For general discussions of federalism and national environmental programs, see James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—and Why It Matters*, 54 MD. L. REV. 1226 (1995); Revesz, *supra* note 34.

55. S. REP. NO. 1196, 91st Cong., 2d Sess. 32 (1970); *see* 42 U.S.C. § 7416 (1995).

56. Sugarman, *supra* note 23.

57. The option of differential pricing is also considered, and rejected as unfeasible, in Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92–93 (Walter Olson ed., 1988) and in Edmund W. Kitch, *Can Washington Repair the Tort System?*, *in* NEW DIRECTIONS IN LIABILITY LAW 103, 109–110 (Walter Olson ed., 1988).

Manufacturers, then, must distribute a uniform product on a nationwide basis and cannot modify the price they charge for each product to account for state-law variations in that product's liability exposure. Consider now another explanation offered by Professor Sugarman (and Professor Schuck as well) as to why a regime of state products liability law is acceptable. While conceding that tort law has long been administered on a state-by-state basis, they suggest there is a high degree of uniformity in the positions states in fact have taken. According to Sugarman, "state tort laws today are broadly the same in product injury cases," although there are some differences "around the edges."[59] As Schuck puts it, states' tort rules "have tended to converge."[60]

Of course, state tort law has largely been a matter of state common law, and the common law incorporates a process that enables and requires the courts in any one state to give considerable attention to what courts in other states have done in the past. This process inevitably reduces the extent of non-uniformity among the states.[61] Medical malpractice serves as a good example of an area in which the variations in doctrine among state tort systems are not dramatic. There is some unevenness as to how physicians' compliance with custom is treated;[62] also, there are variations on how the causation issue is handled in informed consent cases;[63] and there is an interesting split among states as to the acceptance of the "lost chance" doctrine.[64] All of these divergences can plausibly be regarded as either subtle or at least limited in scope.

But in other sectors of tort law, there are variations among states that clearly should be classified as (quite) significant rather than (merely) subtle. As for landowner liability, for example, there is a clearly important split between states adhering to traditional law (which sharply distinguishes between invitees, licensees, and trespassers), states that have accepted the *Rowland*[65] innovation (which abolishes these distinctions and holds the landowner to a general negligence standard), and states that have compromised by accepting the English practice of preserving landowner limited liability to trespassers while abolishing the line between invitees and licensees.[66]

Products liability is certainly one tort sector in which there has been special turbulence, both in doctrine itself and in the theory underlying doctrine. This turbulence has given rise to a high degree of variability in state products

58. *See infra* text accompanying notes 96–99.
59. Sugarman, *supra* note 23.
60. Schuck, *supra* note 9, at 11.
61. Of course, if "convergence" would reduce the non-uniformity problem surrounding state law, convergence would likewise indicate that states are doing little by way of genuine experimentation. Convergence would therefore suggest that the diversity benefits achieved by a scheme of state tort law are no more than limited.
62. *Compare* Osborn v. Irwin Memorial Blood Bank, 7 Cal. Rptr. 2d 101 (Ct. App. 1992) (accepting compliance with custom as complete defense) *with* United Blood Servs. v. Quintana, 827 P.2d 509 (Colo. 1992) (holding that compliance with custom merely establishes a rebuttable presumption of non-negligence).
63. *Compare* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) (objective standard) *with* Arena v. Gingrich, 748 P.2d 547 (Or. 1988) (subjective standard).
64. *Compare* Herskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983) (accepting doctrine) *with* Fennell v. Southern Md. Hosp., 580 A.2d 206 (Md. 1990) (rejecting doctrine).
65. Rowland v. Christian, 443 P.2d 561 (Cal. 1968).
66. The cases are collected in Carter v. Kinney, 896 S.W.2d 926, 929–30 nn.3–4 (Mo. 1995).

liability doctrine. Consider, for example, the basic standards for design liability.[67] In some states, design defectiveness is determined by considering reasonable alternative designs, with little or no attention given to consumer expectations;[68] in other states, compliance or non-compliance with consumer expectations is the sole criterion for design liability, with no attention paid to alternative designs;[69] in another group of states, plaintiffs can recover by showing either a reasonable alternative design or a departure from consumer expectations.[70] In Pennsylvania, a manufacturer is a "guarantor" of the safety of its product in ordinary use, though trial courts serve a screening function.[71] In Missouri, with its extreme confidence in the wisdom of the jury, design cases go to the jury with an instruction that merely asks whether the product's design is "unreasonably dangerous."[72]

In light of this range of views, states can reach dramatically different results in terms of whether the plaintiff has raised a jury question[73] on the issue of design defect. Consider, for example, simple cigarette lighters. Is the manufacturer under an obligation to incorporate child-resistant features into these lighters' designs? In cases involving Pennsylvania law,[74] Alabama law,[75] and New York law,[76] the answer currently is yes, as courts have applied an analysis focusing on reasonable alternative designs. But in cases involving Illinois law,[77] Michigan law,[78] and Missouri law,[79] the answer currently is no,

67. Moreover, state law is in noteworthy disarray on a variety of somewhat lesser issues that still can significantly influence findings of design defect. In ordinary tort cases, every state accepts the Learned Hand idea that compliance with custom is some evidence of non-negligence, but no more than that. *See* The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932). Yet this unanimity breaks down in products liability cases. Jurisdictions are divided between those that accept the negligence analogy and hence deem compliance with custom as some evidence of non-defectiveness, and those that reject the analogy and regard evidence of custom compliance as not even admissible in a design defect case. *See* David A. Urban, *Custom's Proper Role in Strict Products Liability Actions Based on Design Defect*, 38 UCLA L. REV. 439 (1990). In negligence cases generally, courts are unanimous in regarding evidence of the defendant's subsequent repairs as inadmissible. *See, e.g.*, FED. R. EVID. 407. But there is no such unanimity in products liability: jurisdictions accepting the negligence analogy treat evidence of the manufacturer's subsequent design improvements as inadmissible, while jurisdictions rejecting the negligence analogy allow this evidence in. For a collection of cases and statutes, see JAMES A. HENDERSON & AARON D. TWERSKI, PRODUCTS LIABILITY 647–51 (2d ed. 1991).

68. *E.g.*, Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (Mich. 1984).

69. *E.g.*, Woods v. Fruehauf Trailer Corp., 765 P.2d 770 (Okla. 1988).

70. *E.g.*, Knitz v. Minster Mach. Co., 432 N.E.2d 814 (Ohio 1982), *cert. denied sub nom.* Cincinnati Milacron Chem., Inc. v. Blankenship, 459 U.S. 857 (1982).

71. Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa. 1978).

72. Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986).

73. Of course, this basic practice of trial by jury facilitates an obvious measure of non-uniformity in products liability cases. But the doctrinal issues identified in my text concern whether the plaintiff can even take his case to the jury, or whether instead the defendant can get out of the case by a motion to dismiss. All of this spotlights how a regime of state tort law introduces a whole new realm of non-uniformity. Juries reach non-uniform results only within the confining framework of a particular state's tort doctrine. When that framework itself can vary from state to state, the range of non-uniformity is sharply magnified.

74. *See* Griggs v. BIC Corp., 981 F.2d 1429 (3d Cir. 1992).

75. *See* Bean v. BIC Corp., 597 So. 2d 1350 (Ala. 1992), *cert. denied,* BIC Corp. v. Bean, 116 S. Ct. 1045 (1996).

76. *See* Campbell v. BIC Corp., 586 N.Y.S.2d 871 (Sup. Ct. 1992).

77. *See* Todd v. Societe BIC, S.A., 21 F.3d 1402 (7th Cir.), *cert. denied,* 115 S. Ct. 359 (1994).

78. Kirk v. Hanes Corp., 16 F.3d 705 (6th Cir. 1994); Boumelhem v. BIC Corp., 535 N.W.2d 802 (Mich. Ct. App. 1995).

79. *See* Sedlock v. BIC Corp., 741 F. Supp. 175 (W.D. Mo. 1990).

as courts have found such an analysis inapplicable to simple products whose dangers are obvious to the ordinary adult. Take also the manufacturer of a factory product, which is quite satisfactory so long as its safety device remains in place, but which becomes somewhat dangerous if the employer removes that device. If the removal is deemed foreseeable, does the manufacturer have an obligation to design against this danger? In cases in a number of states (including Maine,[80] New Jersey,[81] and Minnesota[82]) the answer currently is yes. In cases arising in many other states (including New York,[83] Kentucky,[84] and Rhode Island[85]) the answer is no.[86]

Within products liability, then, the inter-state variations in common law doctrine are both more frequent and more significant than they are in other sectors of the common law of torts. In any event, comparing *common law* systems is only a partial way of assessing the variations among *tort* systems from state to state. For in almost every state, the common law has been supplemented by significant measures of statutory tort reform (reforms that often apply across the board to all sectors of tort law).[87] When one goes beyond the common law to take into account statutory tort reform, any claim of "convergence" becomes clearly untenable. Some states have capped pain-and-suffering damages, many other states have not; many states have abolished the collateral source rule, but in other states the rule remains in effect. Many but not all states have altered the traditional rule of joint and several liability; moreover, states' new rules bearing on joint and several liability are all over the lot. Look at cases in which the manufacturer's responsibility is foreseeably small relative to the responsibility of other (insolvent) tortfeasors: cases, for example, in which a product is allegedly defective only because it exposes its user to the hazards of a motorist's drunk driving.[88] In such cases, depending on the state's version of joint and several, the manufacturer's liability burden can

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80. Marois v. Paper Converting Mach. Co., 539 A.2d 621, 624 (Me. 1988).

81. *See* Soler v. Castmaster, Div. of H.P.M. Corp., 484 A.2d 1225 (N.J. 1984).

82. *See* Johnson v. Southern Minn. Mach. Sales, 442 N.W.2d 843 (Minn. Ct. App. 1989).

83. Robinson v. Reed Prentice, Div. of Package Mach., 403 N.E.2d 440 (N.Y. 1980).

84. KY. REV. STAT. ANN. § 411.320(i) (Michie/Bobbs–Merrill 1992).

85. R.I. GEN. LAWS § 9–1–32 (1985).

86. If one essential issue in tort law is the standard of defendant liability, another issue—almost as essential—is the status of victim misconduct as an affirmative defense. In tort cases generally, courts now apply doctrines of comparative negligence when the plaintiff has been at fault. Yet in products liability cases, states are divided between applying comparative negligence or instead adhering to the earlier Restatement view that ordinary contributory negligence is no defense at all. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). The cases are discussed in RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 12 Reporters' Note, cmt. a, at 304–05 (Tentative Draft No. 2, 1995) [hereinafter PRODUCTS LIABILITY RESTATEMENT].

87. *See* Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 56, 59.

88. *See, e.g.*, Bigbee v. Pacific Telephone & Telegraph Co., 665 P.2d 947 (Cal. 1983) (because of alleged defect in telephone booth door, plaintiff was unable to escape from booth as drunk driver plunged car off highway and collided into booth). At the time of *Bigbee*, California adhered to traditional joint-and-several liability. *See* American Motorcycle Ass'n v. Superior Court, 578 P.2d 899 (Cal. 1978). In the late 1980s, a voter initiative, while retaining joint-and-several liability for the victim's economic losses, eliminated joint-and-several liability for noneconomic losses. *See* Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988) (affirming Proposition 51). This change in California's law on joint-and-several liability has profoundly affected the significance of precedents such as *Bigbee*.

foreseeably be five percent of the plaintiff's losses, fifty percent, or one-hundred percent.

Given, then, the variations in those state-law doctrines that apply in products cases, and given as well the needs of mass production and mass distribution, the current regime of state lawmaking is a very clumsy means for enabling states to achieve their own substantive goals. Indeed, the present regime may well induce manufacturers to simply ignore tort doctrine in individual states. In fact, manufacturers have long reported that they regard state court products liability rulings as mere random noise.[89] Of course, that manufacturers neglect particular state liability rulings does not mean that those rulings have had no effect on manufacturer conduct. Facing quite extensive yet quite uncertain liability, manufacturers can appreciate that they can reduce their liability exposure by improving the safety of their products. For one thing, safer products produce fewer injuries, and hence fewer (potential) lawsuits. For another, whatever the vagaries of the relevant products liability precedents, manufacturers can still appreciate that in any particular case a safer product is less likely to lead to a finding of defectiveness and hence to the imposition of liability. Even a confusing regime of state court rulings, then, can exert a beneficial effect on manufacturer conduct. Still, manufacturers may well be making no or little effort to design their products so that they can comply with products liability doctrine in any particular state.

Admittedly, the number and range of variations in products liability doctrine from state to state does suggest the vitality of decentralized decision making, a vitality that is enhanced by federalism. States vary not only in terms of the doctrines they endorse, but even in the terms of the theories they regard as appropriate. The wide variety of rationales for "strict" products liability—and the variations from state to state in the commitment to the very notion of "strict" liability—suggest the vitality of decentralized decision making. Often, decentralization is tied to the value of experimentation. This, of course, was the classic Brandeis rationale for federalism;[90] in the modern era, Harvey Perlman has praised the process of "experimentation" that takes place in state court products liability cases.[91]

Up to a point, I can accept this rationale for a decentralized products liability and can regard the last thirty years of products liability lawmaking at the state level as having been valuable. The ideas that judges have advanced in products liability opinions have been reviewed by waves of scholars and other judges; those ideas have been considered, analyzed, critiqued, rehabilitated, then critiqued all over again. Still, at some point this process of intellectual experimentation should produce whatever results it is capable of producing. The time for such experimentation runs out, and the time arrives for more mature and experienced decision making. After thirty years with products liability at the state level, that time has probably come.[92]

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89. *See* GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 107 (1983).

90. New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

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

92. For similar views, see Aaron Twerski, *From A Reporter's Perspective: A Proposed Agenda*, 10 TOURO L. REV. 5, 19 (1993).

Keep in mind, moreover, how truncated the relevant experiments have been—since as a practical matter manufacturers lack the ability to modify their products (or even adjust their prices) in order to take into account the liability position a particular state might adopt. These state-law experiments, then, are dramatically lacking in the feedback that valid experiments generally need. By now there are a number of studies as to how manufacturers have responded to the general national regime of products liability.[93] There are no studies, however, as to how manufacturers have responded to the particular liability systems in Pennsylvania, California, Nebraska, or any other state. Furthermore, there is (of course) nothing out there for researchers to study: manufacturers are unable to modify their operations to take into account any one state's liability positions. Given these circumstances, the experimentation rationale for state-law control of products liability is decidedly unsatisfactory.

The problem of choice of law has been introduced above, as I discussed whether a manufacturer can adjust its product's price to take variations in state liability law into account.[94] That problem can now be given more attention. In many products cases, the plaintiff is a resident of State *A*, has purchased the product in State *A*, and has suffered injury in State *A*. However, the manufacturer of the product that is (allegedly) defective has its principal place of business in State *B*, and has designed and manufactured the product in that state.[95]

Assume that the common law rules in State *A* are relatively pro-consumer while the common law rules in State *B* are relatively pro-manufacturer. On the choice-of-law issue, the court will probably decide to apply the law of State *A*. Moreover, this decision is relatively easy, since *A* is the state whose "significant contacts" predominate.[96] (*A* is the state of the plaintiff's residence, of the occurrence of the injury, of the original retail sale, and of the forum as well.) Still, in the course of promoting State *A*'s tort policies, the court will necessarily be subverting the tort policies adhered to by State *B*. Any regime of state products liability law is hence inconvenient as a

93. They are discussed in Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 405–13 (1994).

94. *See supra* text accompanying note 58.

95. At the very least, all of this means that the victim can sue the manufacturer in federal court, under diversity jurisdiction. To be sure, there is a jurisdictional minimum of $50,000. But almost all products liability cases exceed this. (Typically, an experienced plaintiffs' lawyer won't take a products case unless the victim's common law damages exceed $50,000.) Suits thus can be brought—and frequently are brought—in federal court. Any number of very important products liability cases have been decided by federal courts. *See infra* notes 124–27 and accompanying text. All of this raises the issue of federal judges guessing about state law under *Erie*. In terms of the orderly development of the law and the proper deployment of the time available to federal court judges, this is disadvantageous. Consider the absurdity of the Seventh Circuit going en banc in order to guess about the meaning of Illinois risk-benefit test in its application to a BIC lighter. Todd v. Societe BIC, S.A., 21 F.3d 1402 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 359 (1994).

96. Bruce Hay perceives that modern courts apply a "governmental interest" conflicts rule in products cases—and he assumes that this rule gives the plaintiff "the benefit of either his own state's law or that of the [defendant's state], whichever is more favorable to [the plaintiff]." Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617, 627 (1992). This assumption seems incorrect, insofar as it presents as a firm rule what is at best a partial tendency in the case law. Its apparent incorrectness reduces the relevance of the specifics of Hay's analysis. Still, one of Hay's more general points is quite interesting. *See infra* note 104.

means for expressing state values. That regime enables State *A* to express its sovereignty only by subordinating the sovereignty of State *B*.

Moreover, in many cases the choice-of-law issue is far more difficult, since various things happen in various states. It may be, for example, that a defective component part comes from State *C*, is incorporated into the final product in State *D*, is sold to a purchaser (for example, an employer) in State *E*, is then used by the employer in its job site in State *F*, and then injures an employee who likewise lives in State *F*. In these cases, the products liability claim needs to deal at the threshold with a choice-of-law issue that can be maddeningly difficult. For an example of such a case, consider *Kaczmarek v. Allied Chemical Corp.*,[97] in which Judge Posner's opinion condemns modern interest-analysis reasoning as hopelessly inadequate,[98] yet plows ahead anyway, and in doing so perceives "interests" that other judges would never have recognized.[99]

In short, under a state products liability system some significant fraction of all cases will present at the threshold a confounding problem of choice of law. This highlights one real administrative disadvantage of such a system, since vexing choice-of-law problems could of course be avoided if products liability were to become a national responsbility. Secondly, in most products liability cases, the court, in applying the law of one state, decides in essence to ignore or subordinate the law of other interested states. Such decisions make clear the vulnerability of any state-sovereignty rationale for the current system. In any event, foreseeable choice-of-law complications make it all but impossible for manufacturers to adjust the price of products they sell in various states to take into account each state's precise products liability standards. The state in which the manufacturer sells its product may—or may not—be the state identified by a modern choice-of-law analysis; and which state that analysis will eventually identify is often beyond the manufacturer's power to predict in advance.

B. The Structural Bias Problem

Begin here with the more standard case in which *A* is the state of residence, injury, and retail sale, while *B* is the state of manufacture. Assume furthermore that the court would clearly apply State *A*'s law. What incentives does this give lawmakers in State *A* as they develop their relevant products liability rules? If those lawmakers increase liability, they benefit in-state residents with larger compensation payments, while exporting the costs of this to out-of-state manufacturers and product consumers (and company shareholders) throughout the nation. All of this can give those lawmakers a bias

97. 836 F.2d 1055 (7th Cir. 1987). In this case, the plaintiff, who lived in Illinois, worked for an Indiana employer, *A*. At *A*'s request, the plaintiff drove a truck from *B*'s plant in Illinois to *C*'s plant in Indiana. The truck was transporting a cargo of sulfuric acid. As the plaintiff was unloading the acid at *C*'s plant, the acid squirted on him, allegedly because of a defect in a hose manufactured by *D* (whose principal place of business was neither Illinois nor Indiana). Urgently needing to wash himself, the plaintiff rushed towards the showers at *C*'s facility. But terrible litter on *C*'s premises delayed him considerably. The plaintiff sued *B*, *C*, and *D*.

98. *Id.* at 1057.

99. Although the plaintiff was not suing his employer, Judge Posner noted that the employer was an Indiana firm, which bore liability to the plaintiff under workers' compensation. From this observation, Judge Posner derived a number of Indiana interests in the outcome. *Id.* at 1058.

towards expanding liability. Call this a "race to the top" (where "the top" refers not to the actual quality or efficiency of liability rules but rather the level of the liability rights they confer on accident victims).[100] In a 1988 paper, Michael McConnell, affirming this "structural bias" in products liability lawmaking, observed that "states pursue a persistent and one-directional race towards ever-higher plaintiff recoveries, a race whose outcome does not necessarily represent the considered judgment of decision makers in the several states."[101] In his 1988 book "The Product Liability Mess,"[102] Richard Neely—then a judge on the West Virginia Supreme Court—evaluated modern products liability lawmaking in an essentially similar way.[103]

The structural bias position, then, has been adopted by leading analysts. If the position is accurate, then it would be desirable to replace state lawmaking[104] with national lawmaking. For at the national level, the particular problem of bias that might afflict state lawmaking is all but eliminated. National lawmakers are in a satisfactory position to balance the interests of all consumers and all manufacturers.[105]

Does the position accurately describe reality, however? On this score, one interesting item of evidence is Judge Neely's own opinion, on behalf of the West Virginia Supreme Court, in *Blankenship v. General Motors Corp.*[106] In its first holding in *Blankenship*, the court adopted the doctrine of crashworthiness liability. In doing so, the court indicated doubts about the wisdom of this doctrine.[107] Nevertheless, the court noted that the doctrine had been adopted in almost every other jurisdiction in the country. Perceiving that West Virginia residents were already paying for the crashworthiness doctrine as applied nationwide by way of the products liability premium markup in the cost of cars sold in West Virginia, the court ruled that West Virginia should join the

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100. On the ambiguity of such "race" concepts, see Revesz, *supra* note 34, at 1219.

101. McConnell, *supra* note 57, at 92–97.

102. RICHARD NEELY, THE PRODUCT LIABILITY MESS (1988).

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

104. Professor Hay assumes that state lawmakers express their preference for in-state victims by manipulating not just the doctrines of products liability but the *combination* of those doctrines *and* choice-of-law rules. Hay, *supra* note 96. Under Hay's account, the games that state lawmakers play are even more complex than the game suggested in my text above. But the problem of state lawmaking biased in favor of in-state interests remains the same. As it happens, as Hay considers the strategies that state lawmakers would develop in manipulating both liability rules and choice-of-law rules, he ends up unable to tell whether state products liability rules are likely to be less efficient than a federal products liability regime would be. *See id.* at 651 n.91. Hay's analysis is marred by the apparent inaccuracy in his key assumption about the substance of choice-of-law doctrine. *See supra* note 96.

105. Law at the national level would comply with McConnell's desire for lawmaking by an "autarky": a jurisdiction that is "a self-sufficient economy, all of whose production and consumption [takes] place within its own borders." McConnell, *supra* note 57, at 91. McConnell briefly and skeptically discusses the possibility of federal legislation in *id.* at 100; here he mentions the difficulty of amending federal legislation, and regional variations in public preferences. But even he acknowledges that "the advantages of state over federal legislation should not be exaggerated." *Id.*

106. 406 S.E.2d 781 (W. Va. 1991).

107. *Id.* at 783.

national consensus as to crashworthiness liability.[108] Next, the court considered the "causation" issue in crashworthiness cases. At the time of *Blankenship*, American jurisdictions were divided between the *Huddell* rule,[109] requiring the plaintiff to prove what added injuries were due to the absence of crashworthiness features, and the *Fox*[110] rule, requiring, in effect, car manufacturers to bear the burden of proof on the issue of the second injury. Encountering this division, the *Blankenship* court decided to adhere to *Fox*. Indeed, the court ruled—even more broadly (and openendedly)—that "in any crashworthiness case where there is a split of authority [among states] on any issue, ...we adopt the rule that is most liberal to the plaintiff."[111]

Blankenship afforded Judge Neely an interesting opportunity to document his own diagnosis of the problem of bias in products liability decision making. Yet if one is looking for convincing confirmation of the Neely diagnosis, *Blankenship* does not suffice. For the *Blankenship* opinion is coy and self-conscious: plainly Judge Neely was deliberately trying to draw attention to what he saw as an inherent defect in the products liability lawmaking process. Indeed, the court's broad "split of authority" ruling seems almost deliberately outrageous. In his book, Judge Neely had suggested that the bias in products liability lawmaking closely resembles the forms of state legislative bias that in other contexts have encouraged the United States Supreme Court to hold state statutes unconstitutional under the Commerce Clause.[112] It is reasonable to believe that the openended "split of authority" holding in *Blankenship* was included by Judge Neely in order to attract the attention of the Supreme Court and hence invite that Court to reverse his own opinion on Commerce Clause grounds.[113]

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

An initial point is that products liability doctrine originally comes from judges rather than legislators. Even given the increasing significance of contested judicial elections at the state level,[114] state court judges remain far less burdened by the requirements of electoral politics than state legislators. Judges therefore do not need to cater to voters in the same way that legislators do. Indeed, most observers assume that judges do decide cases mainly along the lines of their own perceptions of the public interest. Judge Neely himself, while describing state court judges as "political hacks,"[115] appraises them as seeking "the most practical way to achieve their vision of the just social contract."[116] Jonathan Macey, even while emphasizing the tendency for legislatures to deliver

108. *Id.* at 784–85.
109. Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).
110. Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978).
111. *Blankenship*, 406 S.E.2d at 786.
112. NEELY, *supra* note 102, at 79.
113. In fact, the defendant, bypassing its opportunity, did not apply for a certiorari writ.
114. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). Judge Posner's observation is that "state judges are on average less independent from political influences...than federal judges." POSNER, *supra* note 48, at 191.
115. NEELY, *supra* note 102, at 128.
116. *Id.* at 135.

statutes to well-organized interest groups, believes that the independence of the judiciary is meaningful and that judges can and do decide cases in a public-interest way.[117] Although Judge Posner supports an interest-group theory of regulation,[118] he believes that judges decide important cases in accord with their own actual "values."[119] George Priest, while regarding modern products liability as a disaster, assumes that this disaster has been produced by judicial views as to the public interest (views that Priest regards as inaccurate).[120]

I share in the understanding that judges decide cases mainly in accordance with their own sense of the public interest. Yet despite this understanding, there is at least a variation of the argument about structural bias in judicial decision making that may well be appropriate. It is not hard to find state court products opinions which, in expanding liability, seem to devalue manufacturers' arguments that the proposed expansion would treat manufacturers unfairly or would impose excessive costs on manufacturers. It may be easy for state courts to neglect those added costs when the judges can intuit that the costs will not be borne by in-state actors; and state court judges can more conveniently neglect a defendant's claim of unfairness when the defendant is not part of the judges' own political community.[121] Put it this way: even judges seeking to promote the public interest might, at least implicitly,[122] define the "public" in terms of the "state."[123]

Yet I should stress the limited import of my assessment as an explanation for the expansion of modern products liability doctrine. Consider the following landmark judicial opinions: *Larsen v. General Motors Corp.*,[124] establishing liability for crashworthiness; *Borel v. Fibreboard Paper Products Corp.*,[125] providing the framework for asbestos litigation; *Davis v. Wyeth Laboratories,*

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

118. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 524–28 (4th ed. 1992).

119. RICHARD A. POSNER, OVERCOMING LAW 132 (1995). *See also id.* at 121 ("[J]udges impose their political visions on society.").

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

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

122. See Judge Posner's suggestion that state court judges might—in an "unconscious" way—identify primarily with in-state interests. POSNER, *supra* note 48, at 177.

123. Given the limited incentive I am here ascribing to state court judges, I certainly would not expect those judges to play the very exotic game developed by Professor Hay, a game that would involve manipulating the *combination* of substantive rules and choice-of-law rules so as to maximize in the long run the level of in-state benefits. *See supra* note 104.

124. 391 F.2d 495 (8th Cir. 1968).

125. 493 F.2d 1076 (5th Cir. 1973), *cert. denied sub nom.* Fibreboard Paper Prod. Corp. v. Borel, 419 U.S. 869 (1974).

Inc.[126] and *Reyes v. Wyeth Laboratories*,[127] broadening the liability of the producers of vaccines. All these milestones in the expansion of liability came not from state court judges, but rather from judges on federal courts of appeals—sitting, moreover, in three-judge panels, in which no more than one judge was even a resident of the state whose law was under review. The presence of these federal judge liability-expanding landmarks makes it difficult to believe that state court judges, in expanding liability, have been influenced in any major way by mere in-state preferences. On balance, while I am willing to acknowledge some problem of neglect of out-of-state interests in state court law products liability decision making, the problem seems only a limited one.

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

First, any premise that legislators are driven exclusively by a desire for reelection is overstated. As most observers agree, legislators are influenced at least in part by the ideas they hold or the ideologies they adhere to relating to the public interest.[128] A perhaps realistic assessment is that a statutory proposal, to secure enactment, must be backed up by a combination of a favorable political configuration and a plausible public-policy rationale. A second point draws on the reasoning in products liability opinions themselves. Those opinions typically build on the premise that consumers underestimate the risks of product-related injuries.[129] Yet if consumers do underestimate these risks, then consumers, in their role as voters, will likewise underestimate the value of products liability rights that state lawmakers may bestow on them. If so, they will insufficiently reward legislators who expand those rights.[130]

But perhaps an even more basic point is this. Even if narrowly rational lawmakers care primarily about their reelection prospects, those prospects depend in significant part on their success in fundraising. Manufacturers—even those whose principal places of business are out-of-state—are few enough in number as to minimize free-rider problems as they mount fundraising and lobbying efforts. By contrast, product consumers—even those located within a particular state—remain a diffuse group, in a poor position to engage in fundraising and lobbying. Even out-of-state manufacturers, then, may be able

126. 399 F.2d 121 (9th Cir. 1968).

127. 498 F.2d 1264 (5th Cir.), *cert. denied sub nom.* Wyeth Lab. v. Reyes, 419 U.S. 1096 (1974).

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

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

130. *See* Mark Giestfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 715 (1994).

to lobby effectively with state legislatures.[131] Given this point, it is not surprising that most of the products liability reform statutes adopted by states in the mid-1970s and the mid-1980s contained provisions favoring manufacturer-defendants rather than consumer-plaintiffs. In 1987, my own state, California, adopted a reform statute providing tobacco companies with an explicit liability shelter.[132] It is no secret in California that Willie Brown, then the Speaker of the California Assembly, was receiving mammoth campaign contributions from tobacco companies.

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

C. Choice-of-Law Solutions

Part II.A has described a significant problem of non-uniformity entailed by state products liability lawmaking, while part II.B has discussed an apparent problem of structural bias in that lawmaking. Having dealt with those problems, I can identify here certain solutions that scholars have identified, solutions that would preserve products liability lawmaking at the state level. All these solutions involve adjusting the choice-of-law rules that apply to products liability claims. In a 1987 article that opposed the federalization of products liability, Harvey Perlman acknowledged the bias or cost spill-over problem in state products liability lawmaking.[133] To preserve state lawmaking yet remedy the problem, Perlman suggested that manufacturers in selling products "be permitted to designate the state law applicable to their liability."[134] Michael McConnell's recommended solution to the structural bias problem would be a federal choice-of-law rule requiring calling for application of the law of the state in which the product is originally sold.[135] William Niskanen, in a current article, opposes the federalization of products liability, yet acknowledges problems with state lawmaking.[136] He too would solve those problems by having Congress establish a new choice-of-law rule. What Niskanen recommends is that Congress specify that courts hearing products liability cases apply the law of the jurisdiction in which the manufacturer has its largest number of employees.[137]

Note, first of all, that while all these proposals oppose congressional authority over products liability doctrine, they all assign to Congress at least the responsibility for determining choice-of-law rules: to this extent, they support a limited measure of nationalization. McConnell's recommendation is designed to cure the problem of structural bias by enabling manufacturers—now aware

131. The political advantages enjoyed by manufacturers in the products liability reform process are heavily emphasized in NEIL KOMESAR, IMPERFECT ALTERNATIVES 192–95 (1994).

132. CAL. CIVIL CODE § 1714.45(a)(2) (West Supp. 1996).

133. Perlman, *supra* note 91, at 508.

134. *Id.*

135. *See* McConnell, *supra* note 57, at 98. This is an alternative also endorsed by Perlman. Perlman, *supra* note 91, at 508.

136. Niskanen, *supra* note 13, at 36–37.

137. *Id.* at 37.

of the solid new choice-of-law rule—to adjust their prices to take account of whatever liability doctrines prevail within the state of sale. Yet the McConnell recommendation offers no solution to the problem of fifty state non-uniformity. That problem would, however, be solved by acceptance of either the Perlman or the Niskanen recommendation.[138] This is the necessary and intended result of Niskanen's recommendation, since a manufacturer can only have one principal place of business. It is the likely result of Perlman's recommendation, since a manufacturer would probably see a strong advantage in designating a single state's law to apply to *all* of its product sales.

While the Perlman and Niskanen proposals would hence solve the problem of non-uniform state law, the very meaning of state law under either recommendation would be somewhat odd. Under Perlman's proposal, a state would adopt products liability rules without any idea about (or control over) which claims by which consumers against which manufacturers would be governed by that rule.[139] Under these circumstances, the notion of democratic self-government at the state level seems misplaced. That notion of state democracy likewise has little application to the model of state corporate law that Niskanen uses by way of analogy. Under that model, as developed by Roberta Romano,[140] corporations pay to a state such as Delaware an annual incorporation fee and receive in exchange the body of corporation law that a state such as Delaware has developed. But the manufacturer that legally incorporates in Delaware almost always has its primary business operations located elsewhere. Under the Romano model, Delaware is not really engaging in democratic self-government; rather, it is offering for sale a particular body of law that corporations might be inclined to purchase. Niskanen's recommendation is, from the perspective of local democracy, somewhat less odd: the manufacturer would at least be a resident of the state whose law would be applied when the manufacturer is a products liability defendant.

Moreover, the Perlman and Niskanen recommendations—each in its own way—raise the prospect of a "race to the bottom"—where bottom relates not to the low quality or inefficiency of products liability rules, but rather to the low level of rights that they confer on accident victims.[141] Perlman's recommendation assumes that individual states would adopt their own products liability rules somewhat randomly, for reasons that each state finds satisfactory. Still, the manufacturer, given the option of designating the state whose law would apply, would be inclined to choose the state with lenient rules. Thus, if the doctrine of crashworthiness liability is accepted in many states but rejected in Virginia,[142] then General Motors, in offering its cars for sale, might well opt for Virginia law. Under Niskanen's quite different proposal, a drug company, in expanding its workforce, might locate its job site in a state whose liability

138. It should be noted, however, that this problem does not really trouble Perlman. His recommendation is designed mainly to solve what he sees as a possible problem of structural bias. Perlman, *supra* note 91, at 508.

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

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

141. On the ambiguity of "race," see *supra* note 100 and accompanying text.

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

rules are favorable to such companies. Moreover, manufacturers which are already located within a particular state would seek to lobby that state's legislature (and encourage that state's courts) to render more lenient that state's products liability standards. An auto manufacturer located in Michigan, for example, would be in a position to fight for more lenient design defect rules and more stringent affirmative defenses.

Attention should be given to the likely efficacy of such a company's lobbying efforts. Even if a company's principal place of business is within a particular state, when that state toughens liability standards the burden will primarily be borne by shareholders and/or consumers located throughout the nation. To this extent, the in-state manufacturer is in the same lobbying position as an out-of-state manufacturer. Even so, the principal-place-of-business state that is revising products liability rules has an interest in preventing employment losses, and for that matter creating employment gains; likewise, that state wants to preserve and increase the revenues derived from business-related taxes. Accordingly, the state has a strong interest in dissuading manufacturers from quitting the state and indeed encouraging manufacturers to relocate into the state.[143] Moreover, at the state level the managers of an in-state company can be expected to be effective lobbyists. Those managers can speak for the company itself, and also for its workforce, which would be harmed by either relocation or layoffs; moreover, those managers would likely serve as effective spokesmen for the entire in-state business community. An additional point is the Niskanen plan would give manufacturers of the same genre of products an interest in concentrating their locations within a particular state. Thus, auto manufacturers could all locate in Michigan, in a way that would make them a potent lobby for products liability reforms that would be of special relevance in motor vehicle cases. Similarly, drug companies could congregate in New Jersey, where they could effectively lobby New Jersey lawmakers for the relaxation of particular rules that can be onerous to drug companies as tort defendants.

Of course, any tendency to conduct a race to the bottom could be offset by market pressures operating on manufacturers. This is Perlman's understanding: "If Californians wanted liberal liability recovery, they could purchase 'California' which would be priced accordingly. If they preferred 'Nebraska' products with reduced liability protection, they might be permitted to buy them."[144] This is Niskanen's evaluation as well, as he compares the market for consumer products to the stock market for company shares:[145] just as the need to satisfy potential investors encourages companies to incorporate in states with efficient rules on corporate law,[146] so manufacturers' interest in attracting consumers will incline them to select a state which provides consumers with an efficient set of products liability rights.

Niskanen's comparison of the market for consumer products and the market for corporate equities is a problem, however. Investors have lots of choices: there are, after all, 500 companies in the Standard & Poor's 500, and

143. *See* Revesz, *supra* note 34, analyzing this in Prisoner's Dilemma terms.
144. Perlman, *supra* note 91, at 508.
145. Niskanen, *supra* note 13, at 37.
146. This is the model of state incorporation law originally asserted by Ralph Winter and more recently developed by Roberta Romano. ROMANO, *supra* note 140; Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1971).

the investor in dealing with a single stockbroker can purchase shares in any of these companies. A consumer seeking to purchase a power tool or an automobile faces a far more restrained range of choices. Moreover, stock market investors are typically sophisticated. Roughly half of all corporate equities are now held by institutions;[147] and even individuals who buy stocks typically purchase publications such as *Barrons* in order to learn what they think they need to know. The average consumer buying a product in the marketplace lacks this element of sophistication.

At the least, the consumer's lack of information and/or bargaining sophistication is a major premise in both products liability theory and doctrine. For example, current products liability doctrine holds that because consumers lack both knowledge and bargaining power, they cannot be allowed to disclaim by contract their tort liability rights.[148] For similar reasons, products liability doctrine basically does not recognize the defense of assumption of risk: the consumer can sue, complaining about the absence of a possibly desirable safety device, even though the consumer in purchasing or agreeing to use the product was well aware that the safety device was absent.[149] Consider, moreover, an employer who provides to its employees an industrial product it has purchased from the manufacturer. Since the employer contracts upstream with the manufacturer and downstream with its employees, economists would insist that an indirect contractual relationship runs from the manufacturer to the employees. Yet modern products liability, in routinely allowing such employees to sue the manufacturer, ignores this indirect contract, and essentially treats these employees as though they were little more than innocent bystanders.

Given these basic themes in the modern products liability regime, the recommendations extended by Perlman and Niskanen cannot be regarded as mere amendments seeking to improve or perfect that regime. Rather, they incorporate reasoning that has the ability to undermine that regime. Indeed, this seems to be precisely Niskanen's purpose. In a recent presentation, he was explicit in expressing his view that modern products liability has committed fundamental error in the way that it has allowed contract to be subordinated to tort.[150]

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

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

148. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965); PRODUCTS LIABILITY RESTATEMENT, *supra* note 86, § 13.

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

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

comparisons ignores the Coasian costs of information, and the asymmetry of those costs between consumers and manufacturers. To be sure, consumers might be aided by negative advertising. But economists have long appreciated that negative advertising does not always work well. One problem is that negative advertising is in a sense a public good, which the market therefore underproduces. Assume that General Motors (under Perlman's proposal) adopts Virginia law,[151] and that Ford is considering running an advertisement which points out that General Motors is depriving consumers of the full protection of crashworthiness liability. While that advertisement might cut into General Motors' sales, it will provide benefits not only to Ford, but also to Chrysler, Toyota, Honda, and Nissan. Aware of this, Ford will be less likely to run the ad itself.

III. PRODUCTS LIABILITY: THE DISADVANTAGES OF FEDERAL LAW

In short, the current state regime of products liability law presents a limited problem of structural bias and a clearly significant problem of non-uniformity. Moreover, these problems cannot be solved in a satisfactory way by merely inviting Congress to modify the current state rules on choice of law.

A solution could be provided, however, by adopting a federal products liability regime. Yet such a regime would itself entail major disadvantages. One set of disadvantages, recently highlighted by William Powers,[152] concerns all of the practical problems that would be encountered in incorporating a federal products liability bill into the larger body of tort law. If the federal bill covers only a limited number of products liability issues, then in any particular products liability claim the court would need to apply an awkward complex of rules, some of them federal and others state.[153] Should a new federal statute cover all of products liability, then courts will need awkwardly to juggle state and federal law whenever a plaintiff brings concurrent claims against a product manufacturer and some other defendant. To be sure, there is nothing either unprecedented or necessarily unprincipled in awkwardness of this sort. Political scientists have long reported that modern American federalism resembles a "marble cake" rather than a "layer cake."[154] Nevertheless, the practical problems of administration might prove daunting. Furthermore, the limited set of new federal rules might place odd substantive strains on preexisting state doctrines. Consider, for example, the Conference Committee's position abolishing joint and several for non-economic losses in products liability cases.[155] Take the pedestrian who is injured by a combination of the gross negligence of an insolvent motorist, the negligence of a truck driver, and a

151. *See supra* note 142 and accompanying text.

152. William Powers, Jr., *Some Pitfalls of Federal Tort Reform Legislation*, 38 ARIZ. L. REV. 909 (1996).

153. The Conference Committee recommendation calls for "several" rather than "joint" liability for "non-economic loss" in a "product liability action." H.R. 956, 104th Cong., 2d Sess. § 110 (1996). But by now, states have taken a wide variety of positions on the applicability of joint liability for a plaintiff's economic losses. Integrating, within a single products liability case, the new federal rule on joint liability for pain-and-suffering with diverging state rules on liability for remaining elements of damages could be a mess.

154. *See, e.g.*, MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 8 (Daniel J. Elazer ed., 1966).

155. H.R. 956, 104th Cong., 2d Sess. § 110 (1996).

defect in the truck's brakes. The federal law reduction in the truck manufacturer's de jure liability for non-economic losses would lead to a de facto increase in the trucking company's liability for those same losses, since the plaintiff now would be required to bear down on that company as the source of compensation for pain-and-suffering. This increase in the company's effective liability is hardly a result that Congress intended or regarded as desirable.

Yet any assessment of the disadvantages of federal law can go well beyond these problems of administration and harmonization. That further assessment can begin with the observation that while at the state level products liability law—at least until recently—has primarily been judicial law, at the federal level products liability law would presumably be law adopted by Congress. This shift from (state) judicial lawmaking to (federal) legislative lawmaking would of course affect the extent to which the resulting laws are public-interest oriented. As noted above,[156] legislators, far more than judges, are influenced by considerations relating to reelection self-interest.[157]

If one line of inquiry concerns the extent to which judges and legislators take the public interest into account, another inquiry concerns the comparative accuracy of judges' and legislatures' understanding of the public interest. Certainly judges can vary dramatically in how they conceive the public interest.[158] Moreover, the conception held by any one judge (or group of judges) might be partly wrong, or even very wrong. Judges can, for example, become trapped by a set of ideas set up ideas about tort law that are the judicial conventions—the judicial cliches—of the era. Yet even conceding all of this, one can still believe that legislators are less informed about the public interest issues in tort law than are state judges themselves; judges may have a sophistication about tort policy that legislators lack.[159] The public interest as understood by judges may be more a matter of genuine tort principle; the public interest as understood by legislators, more a matter of sincere distributional preferences. At the least, one can be very uncomfortable with a process that would allow legislators' perceptions of the tort-law public

156. *See supra* notes 114–23 and accompanying text.

157. Illustrations of this can be found at the level of the recent federal activity. President Clinton's veto of the congressional bill is being assessed by many (including Democratic Senator Rockefeller) as a sellout to the trial lawyers who are major contributors to the Clinton reelection campaign. *See* Lewis, *supra* note 8.

In fall 1995, Congress' Republican leadership seemed unwilling to resolve the differences between the bills earlier passed by the House and the Senate. One explanation given for the leadership's disinclination was that keeping the tort reform issue open would make it easier for Republicans to engage in fundraising from business groups as the calendar moves in the direction of the November 1996 congressional elections. *See* Neil A. Lewis, *Push for Limits on Lawsuits Seems to Have Lost Its Way*, N.Y. TIMES, Sept. 11, 1995, at A1. This was an evident example of "rent extraction" by politicians. *See* Fred McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987). *See also* Jill Abramson, *Product-Liability Bill Provides Opportunity for Long-Term Milking of PACs by Congress*, WALL ST. J., June 21, 1990, at A16.

158. Compare the reasoning of the majority in Becker v. IRM Corp., 698 P.2d 116 (Cal. 1985), with both the reasoning in the *Becker* dissent and the reasoning in Peterson v. Superior Ct., 899 P.2d 905 (Cal. 1995). *Becker* affirms—but *Peterson* rejects—the landord's strict liability for product defects in premises rented out by the landlord.

159. Granted, judges lack the accountability of legislators. Yet the absence of accountability is more of a problem with judicially declared constitutional law than with judge-made common law.

interest—simplistic and uninformed as they sometimes can be—to determine the content of products liability doctrine.[160]

Of course, in suggesting that the choice between state law and federal law involves the choice between state judges and national legislators, I have been assuming the congressional adoption of a comprehensive federal tort statute. In fact, the tort reform bills passed by Congress dealt only with a selected list of topics. Moreover, on a state-by-state basis, tort reform by legislatures has already become a commonplace; and most of the tort reforms contained in the current congressional bills deal with topics that have already been addressed by state tort reform statutes: punitive damages, pain-and-suffering damages, joint-and-several liability, retailer liability, and "repose" protections.[161] Indeed, joint and several in its pure common law form is now adhered to only by a limited number of state tort systems; and the particular revision of joint and several included in Congress's bill[162] is already in effect in my own state, California, on account of a one-sided victory in a statewide referendum.[163] Moreover, if many state tort reform statutes are "strong," others are extremely complicated. The reader is invited to try to make sense of the modifications of the joint-and-several doctrine that have been approved by the legislatures in New York[164] and Texas.[165] To argue, then, that congressional tort reform would enable statutory law to displace judicial common law is valid only in part. Accordingly, this particular objection to congressional tort reform is—at least as applied to Congress's current proposals—not as strong as it might have seemed at first.

A further series of points begins with the observation that if there is to be a congressional products liability statute, it is very desirable that that statute be written in clear and understandable terms. Such a statute would best achieve the objectives of uniformity and ease-of-compliance that help support the recommendation for congressional action. In fact, however, whatever statute is passed by Congress and signed by the President would be the outcome of the political process—of legislative compromise. It is likely that such a statute would contain a number of awkward and ambiguous provisions.[166] In many cases, the ambiguities would be calculated—as different interest groups agree on a form of words but disagree about what they want those words to mean.

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160. Torts professors like myself who have both testified before legislative committees and worked on judicial appellate briefs can probably confirm this sense of discomfort.

161. *See* Middleton, *supra* note 87, at 59.

162. *See supra* notes 153 and 155 and accompanying text.

163. *See* Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988) (upholding the constitutionality of Proposition 51).

164. *See* N.Y. CIV. PRAC. L. & R. §§ 1601–1602 (McKinney 1996).

165. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (West 1996) (statute adopted in 1987, amended in 1995).

166. See the monstrously complicated section in the Conference Committee bill placing limits on punitive damages in products liability cases. H.R. 956, 104th Cong., 2d Sess. § 108 (1996). See also § 110, eliminating joint liability for non-economic losses for "each defendant" in a "product liability action." "Products liability action" is itself defined as "a civil action brought on any theory for harm caused by a product." *Id.* § 101(15). Take a pedestrian injured in a car accident that can be explained in terms of both driver negligence and a defect in the car. Suits are brought both against the driver and the manufacturer. While the pedestrian is claiming the ordinary negligence of the driver, the pedestrian has undeniably been hit by a car, whose dangers have been unleashed by the driver's negligence. Given this, should the suit against the driver be deemed a "product liability action"?

These ambiguities would of course need to be resolved in court. Decisions would come in the first instance from state courts, and from federal courts hearing cases under diversity jurisdiction. Inevitably, courts would resolve these ambiguities differently. There would be conflicts among state courts, conflicts among federal courts, and conflicts between the state court and the federal court each of which has jurisdiction over the same geographical territory.[167] All of these predictable conflicts would impair the uniformity that a regime of federal law would be seeking to achieve. To reduce this impairment, section 301 of the bill approved by Congress in March 1986 would have required a state supreme court to accept the interpretation of the federal tort reform statute previously endorsed by the federal court of appeals whose territory includes that state. But any such proposal would be hotly and deservedly controversial, insofar as it would disparage the traditional decision-making authority of state courts themselves.

In any event, whatever conflicts develop in the interpretation of the federal statute would need eventually to be resolved by the United States Supreme Court. The composition—and hence the policy preferences—of that Court obviously change over time, and change in somewhat erratic and unpredictable ways. Given the inevitable ambiguities in any congressional products liability statute, the proponents of that statute would be betting a lot on the United States Supreme Court—placing many of their eggs in the baskets of nine Supreme Court Justices. If one is inclined to find this disconcerting, one's inclination can be supported by considering how the United States Supreme Court chose to interpret the Federal Employers' Liability Act in the 1930s through the 1960s, transforming it from a sensible measure of good-faith tort reform into a quite different arrangement that combines full common law damages with something approaching workers'-compensation-like automatic liability.[168] Even if the transformed FELA might be supportable as a matter of liability-rule policy, the point remains that FELA in its current judicial construction bears no resemblance to the FELA which Congress thought it was enacting.

Of course, if the recognition of the leverage the Court would enjoy seems perplexing, this emotion implicates a concern about undue centralization—in this context, the centralization of the judiciary. The United States Supreme Court can properly be perceived as unusually "political" in a way in which the Court (and its Justices) conceive their role. But those Justices are no doubt encouraged to understand their role in broad political terms partly because of the finality, the unreviewability of many of the decisions they render. Indeed, part of the politics of the Supreme Court consists in allocating the Court's

167. Consider the conflict between the Third Circuit (Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)) and the New Jersey Supreme Court (Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990)) that led the United States Supreme Court to agree to hear *Cipollone*, the famous cigarette-labeling preemption case. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). Even commentators who argue that state courts in considering federal common law issues ought to defer to the previous rulings by federal courts of appeals acknowledge that state courts have no obligation to do so. *See, e.g.*, Comment, *State Courts and the Federal Common Law*, 27 ALB. L. REV. 73 (1962).

168. *See* Victor E. Schwartz & Liberty Mahshigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 SAN DIEGO L. REV. 1, 4–6 (1986).

limited agenda by way of grants of certiorari. And one can be perplexed by the prospect of products liability cases competing for the Court's attention with Equal Protection, the First Amendment, and various Presidential crises.

If the crudities and ambiguities of any congressional products liability statute do warrant concern, an alternative model for the nationalization of products liability law can be identified. This would be the federal common law model, as recommended by Neely.[169] Congress could merely pass a statute announcing that products liability law is now federal; that statute could indicate that courts (both federal and state) should do their best as a matter of the common-law process in developing the substance of federal law. While Neely recommends that the statute contain certain criteria for courts to consider in fashioning rules, he acknowledges that these criteria would largely be sweeteners, designed mainly to make the statutory proposal more attractive to Congress.[170] As conflicts among courts in their elucidation of the federal law inevitably develop, the Supreme Court could provide the needed resolutions.[171]

While a federal common law approach to products liability would minimize the public choice problems involved in congressional lawmaking, this proposed approach does not really escape the problem that public choice identifies with congressional decision making. If Congress does consist mainly of self-interested legislators, why would those legislators deprive themselves of the ability to establish actual doctrine and instead limit themselves to merely authorizing a federal common-law process?[172]

Moreover, any brand-new federal common law of products liability would pose additional problems. While hardly a keen admirer of the current state court doctrinal effort, I certainly would not want to now wipe the slate of doctrine entirely clean and begin all over again from scratch with judicial lawmaking under a new congressional authorization.[173]

Moreover, a federal common law of products liability would maximize the problem of betting the store on whatever a particular United States Supreme Court ends up thinking. That problem can be further considered here. A state supreme court that decides a products liability case does so against the backdrop of all the other tort issues that belong to that court's ongoing agenda. Yet were there a federal common law of products liability and that alone, the Supreme Court would be required ultimately to decide products liability issues in isolation from any larger understanding of tort law; therefore there would be an increased prospect of unjustified disharmonies or discontinuities between products liability doctrine and tort doctrine more generally. As far as products liability itself is concerned, the situation of the Supreme Court can be contrasted with that of federal courts of appeal. Those latter courts, on account

169. NEELY, *supra* note 102, at 145–50, 170–75.

170. *Id.* at 171.

171. In recommending "*supervisory* jurisdiction...in federal courts," Neely evidently contemplates requiring state courts to follow the elucidation of the federal common law previously developed by relevant federal courts of appeal. *Id.* at 170. As noted above, such a proposal runs the risk of disparaging state courts in an inappropriate way. *See supra* note 59 and accompanying text.

172. Of relevance here is the scholarly discussion of congressional delegation to administrative agencies. *See, e.g.*, Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

173. Such a clean slate is evidently what Neely has in mind.

of their diversity jurisdiction, have been considering large numbers of products liability cases ever since the mid-1960s, and hence by now are generally familiar with products liability problems. Yet the Supreme Court routinely denies certiorari in mere diversity cases; until now, it has dealt with products liability only in a tiny number of cases with federal-law significance.[174] Accordingly, the Supreme Court is currently unfamiliar not only with the larger body of tort law in general but also with the narrower body of products liability law in particular. A third problem with Supreme Court products liability decision making would be its rigidity. A state high court's docket is much less crowded than that of the United States Supreme Court itself. Given, for example, the prominence of tort cases on the California Supreme Court's docket, that court has been able to consider design defect doctrines in a series of opinions in 1970, 1972, 1978, 1982, and 1994;[175] that Court has hence been able to do a reasonably good job in refining doctrine and learning from criticisms of its prior rulings. This learning process would be much less likely to occur were products liability assigned to the United States Supreme Court. Once that Court decides some particular products liability issue, as a practical matter that decision would probably remain unreviewable for perhaps a generation.

IV. PRODUCTS LIABILITY: ALTERNATIVES TO FEDERAL LAW

To recap, the tradition of state authority over medical malpractice (and many related tort topics) makes good sense, and should be allowed to continue. Yet from the perspective of the advantages of uniformity and the possible risk of bias in state lawmaking, the tradition of state authority over products liability is vulnerable to serious criticism. Unfortunately, the alternative of products liability under the control of Congress (and the Supreme Court) prompts little enthusiasm. The status quo of state-law products liability may be unsatisfactory, but the alternative of federal-law products liability is keenly disadvantageous as well.

In any event, if there is appeal in the idea of a uniform products liability law, there may be alternatives to federal congressional action.[176] There is, for example, the *Restatement* process, which attempts to identify and give black-letter expression to appropriate substantive rules. Certainly, Uniform State Laws—drafted and endorsed by the National Conference of Commissioners for Uniform State Laws—are often seen as an alternative to preemptive federal

174. *E.g.*, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) (ruling economic loss not recoverable in products liability admiralty action); Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (recognizing government contractor defense as adjunct to federal government's tort immunity).

175. In chronological order: Pike v. Frank G. Hough Co., 467 P.2d 229 (Cal. 1970); Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972); Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978); Campbell v. General Motors Corp., 649 P.2d 224 (Cal. 1982); Soule v. General Motors Corp., 882 P.2d 298 (Cal. 1994).

176. My colleague, William Warren, served as the co-reporter for Article 4A of the revised Uniform Commercial Code (UCC), on wire transfers. At some point, Warren discussed with relevant interest groups why they were seeking a revision of the UCC rather than federal legislation. The groups gave the explanation that the congressional process is too ignorant, too political, and too covert. William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811, 815–16 (1993).

legislation.[177] Moreover, one recent study finds that state legislatures have done a reasonably good job in adopting proposed Uniform Laws when there is in fact a strong efficiency argument in favor of uniformity.[178] Given the way in which *Restatements* try to give black-letter expression to what are common law doctrines, the drafting of a *Restatement* can easily be seen as an alternative to codification by state legislatures.[179] But *Restatements* also tend to bring about a significant measure of uniformity in the law; to this extent, at least a limited number of *Restatements* can be viewed as attempting to improve the state law regime so as to ward off any federal law alternative. In considering *Restatements*, Professor Bernstein refers to the appeal to uniformity as "the last refuge of a restater."[180] Such a put-down may be relevant to any proposed *Restatement* of (say) landowner liability, where the need for uniformity is in fact slight. But the put-down is clearly unwarranted as applied to products liability, where the interest in uniformity is quite significant.

Admittedly, neither the *Restatement* nor the American Law Institute should be glamorized. Indeed, let me here debunk the *Restatement*, at least to some extent. Section 402A of the *Second Restatement*[181] has generally been seen as a fabulous success. Yet Section 402A has been hugely overrated. That section usefully sets forth a rule of strict liability for manufacturing defects. But it does so in a pretentious way that advances excessive rhetoric on behalf of a limited and easily defensible result. By the early 1960s, there was a significant volume of cases against manufacturers involving claims of inadequate product warnings.[182] However the warning dimension in products liability is dealt with in Section 402A mainly in an unilluminating comment.[183] By the early 1960s there was also a considerable volume of cases against manufacturers for negligently designing their products.[184] Here Section 402A is obtuse, dealing with design issues only indirectly and by implication.[185] Courts that have assigned a "biblical" quality to Section 402A have frankly deceived themselves about the guidance that Section 402A is genuinely able to offer.

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177. *See* Ripstein & Kobayashi, *supra* note 48, at 175–79. Karl Llewellyn began working on Article 2 of the UCC only after failing to interest Congress in a federal version of sales law. *See* Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 477–92 (1987). For a current discussion of the choice between revising the UCC and supporting federal commercial law, see Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?*, 26 LOY. L.A. L. REV. 551 (1993). In fact, the UCC is the product of a joint venture undertaken by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI).

178. Ripstein & Kobayashi, *supra* note 48.

179. See the discussion in Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1667 (1995).

180. *Id.* at 1682.

181. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

182. *See* Hardy C. Dillard & Harris Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

183. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965); *see also id.* at cmt. k.

184. *See* Dix W. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

185. Indeed, George Priest has concluded that § 402A was understood by the ALI as having no application in design cases. George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989). Priest overstates. If the *Restatement* had no intention of applying to design issues, there would have been no need for comment k, on "unavoidably unsafe products." Still, § 402A's failure to focus on design issues encourages overstatements of this sort.

The *Restatement* sections on products liability are now in the course of being supplanted, as the America Law Institute develops a new *Restatement of Products Liability*.[186] If the ALI was naive in 1965 about the range of products liability issues, that naiveté has been eliminated by the experience of the last thirty years, an experience that now makes possible the exercise of mature judgment. Even so, the ALI itself can be subjected to a public choice critique, as recently sketched out by Alan Schwartz and Robert Scott.[187] It would be foolish to believe that influential lawyers, deeply involved in their clients' affairs, shed their clients' interests and values when they attend ALI sessions.[188] Yet even if the basic outline of the Schwartz–Scott critique seems about right, it can still be observed that the ALI is likely to do a better job in formulating products liability doctrine than Congress, federal courts, or state courts. Indeed, some confirmation of this can be found in the recent congressional tort reform movement. A review of the bill finally passed by Congress—and also of the House and Senate bills that preceded it—shows that these bills chose *not* to address matters that currently are under consideration in the ALI Products Liability Restatement project. *Either* the proponents of tort reform regarded the ALI effort as satisfactory *or* the opponents of tort reform were successful in suggesting that defense interests—when legitimate—will be adequately weighted by the ALI.

Schwartz and Scott refer to the ALI as a "private legislature."[189] But this term is evidently an oxymoron: a "private" body is not in the position to "legislate." Whatever proposals are formulated by private organizations such as the ALI can acquire the force of law only if they are accepted by public lawmakers. The need to satisfy those ultimate lawmakers is a constraint that sharply curtails the range of choices that organizations such as the ALI can make.[190] *Restatements* become law if they are accepted by state court judges; Uniform Laws (drafted by the NCCUSL) come into effect only if adopted by state legislatures. Since an impressive job in policy and technical analysis carries considerably more weight with the state judiciary than it does with state legislatures, a well-worked-out *Restatement* is more likely to be implemented than a well-done Uniform Law proposal.[191] But an obvious offsetting point is that the very format of a *Restatement* is constraining: a *Restatement*, unlike a Uniform Law, is required to be timid in the choices it makes, and even in the options it is able to consider.

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186. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 86.

187. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislators*, 143 U. PA. L. REV. 595 (1995). Schwartz and Scott also apply their critique to the NCCUSL. *See also* Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991).

188. Two law review symposia have focused on the new Products Liability Restatement. One symposium received some financial support from plaintiffs' trial lawyers. *Symposium, ALI's Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043 (1994). The other evidently was sponsored by a products liability defense group. *Special Issue: Review of the System of Products Liability Law*, 36 S. TEX. L. REV. 227 (1995).

189. Schwartz & Scott, *supra* note 187.

190. Schwartz and Scott seem to assume that "private legislatures" in fact ignore this constraint, and hence doom many of their projects to futility. *Id.* at 609.

191. For data on the adoption of Uniform Laws, see Ripstein & Kobayashi, *supra* note 48. As noted, this article reaches an optimistic conclusion: Uniform Laws are more frequently enacted by states when the efficiency argument in favor of uniformity is strong.

Yet as limited as its range of choices might be, a *Restatement* can still serve an interesting role in encouraging uniformity. In fact, it will be fascinating to watch the influence of the new *Restatement of Products Liability*, now heading towards final approval by the ALI. Already, the *Restatement*'s support for "reasonable alternative design" as the criterion for liability in design defect cases[192] has won the approval of the Georgia Supreme Court[193] and the Ninth Circuit sitting in admiralty.[194] In all, the *Restatement*'s position can be expected to reduce the extent of disagreement that currently prevails on the issue of the standard of design liability.[195] Similarly, the new *Restatement*'s support for comparative negligence as a partial products liability defense[196] will in all likelihood reduce the number of states that currently are unwilling to attach any liability significance to the fact of victim carelessness.[197]

Nevertheless, all the controversy—both academic and political—surrounding products liability has resulted in the new *Restatement* being subjected to almost immediate critical attacks, including in law reviews.[198] Evidently influenced by these attacks, at least one state court judge has already expressed his dissatisfaction with at least one section in the new *Restatement*.[199] For that matter, the Ninth Circuit's admiralty opinion accepts the new *Restatement* only in part: while it endorses a reasonable alternative design standard for liability, it declines the *Restatement*'s recommendation that the consumer expectations test be discarded; instead, the court endorses that test as an alternative liability standard.[200] The very turbulence, then, that makes a *Restatement* project seemingly desirable may inhibit the ability of that project to achieve its goal of inter-state harmonization. Yet what results from this project may be a relatively satisfactory equilibrium: state courts may accede to the *Restatement*'s implicit call for uniformity except in particular cases in which those courts' preference for their own states' prior position is especially strong.

V. CONCLUSION

For most sectors of tort law—including auto accidents, medical malpractice, and landowner liability—the parties to particular cases and the incidents giving rise to those cases are typically concentrated within a single state. For these sectors, a system of state law functions quite satisfactorily. Even if state courts adopt non-uniform approaches, this non-uniformity is not dysfunctional. Quite to the contrary, it is the kind of non-uniformity that a proper system of federalism is designed to encourage.

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192. PRODUCTS LIABILITY RESTATEMENT, *supra* note 86, § 2(b).

193. Banks v. ICI Americas, Inc., 450 S.E.2d 671, 673 (Ga. 1994).

194. Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432, 1441 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3675 (U.S. Apr. 29, 1996) (No. 95–1764).

195. *See supra* notes 67–86 and accompanying text.

196. PRODUCTS LIABILITY RESTATEMENT, *supra* note 86, § 12.

197. *See supra* note 86.

198. *See, e.g.*, *Symposium*, *supra* note 188; John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

199. *See* Tansy v. Dacomad Corp., 890 P.2d 881, 892–94 (Okla. 1994) (Opala, J., concurring).

200. Saratoga Fishing Co. v. Marco Seattle, Inc., 69 F.3d 1432, 1441 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3675 (U.S. Apr. 29, 1996) (No. 95–1764).

Products liability, however, poses a real problem. Each state decides on its own products liability rules, specifying what standards manufacturers need to meet in order to avoid liability; and the inter-state variations in these rules are clearly substantial. Yet manufacturers lack the ability to respond to the liability position that a particular state might adopt. Economies of scale in mass production and mass distribution effectively require the manufacturer to sell the same product on a nationwide basis. For choice of law and other reasons, the manufacturer is not even unable to adjust the price of its products sold in a particular state in order to take into account the liability exposure entailed by that state's legal doctrines. In any event, price differentials, even if practical, would be an inferior solution—since the primary goal of products liability doctrines is to encourage the distribution of products that comply with those doctrines' standards.

To paraphrase the line about railroads, this is a hell of a way in which to run a products liability system.[201] Moreover, it is a way that is unique to the United States. In every other major country, tort doctrine (including products liability doctrine) is finally developed at the national level. Indeed, partly because of a perceived need for uniformity, the European Community has adopted a Products Liability Directive that largely governs the content of each member-nation's products liability doctrine; products liability is hence dealt with at a supra-national level. The value associated with federalism in allowing experimentation at the state level seems undercut by the practical inability of manufacturers distributing products at the national level to respond to whatever experiments state courts might undertake. Note, moreover, that a large percentage of the child-resistance cases cited above come from federal courts, which in diversity cases make *Erie* estimates as to the content of state law. Products liability differs from most other fields of tort law in the frequency of diversity cases—and hence the awkward obligation it imposes on federal court judges to marshall their resources not in declaring law in a reasonably authoritative manner, but rather in merely making educated guesses about what results state courts would themselves support.

These various considerations, all relating to the absence of uniformity, provide the strongest argument for replacing state products liability law with national law. An additional argument relates to structural bias in state products liability lawmaking. State lawmakers might be inclined to expand liability, knowing that the cost of this will be exported to consumers or shareholders throughout the country. This argument is intriguing, and hardly irrational. Still, in light of offsetting factors, the argument's real-world application seems no more than modest.

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201. Cigarette lighters have been used above to illustrate the problem of non-uniformity. *See supra* notes 74–79 and accompanying text. A Consumer Product Safety Commission rule, which went into effect in mid-1994, requires certain child-resistance features in lighters. 16 C.F.R. § 1210 (1995). This new national rule will obviously take at least some of the pressure off of litigation for lighters sold after the rule's effective date. It is unclear to what extent CPSC rules are preemptive of state-law tort claims. *See* Moe v. MTD Prod., Inc., 73 F.3d 179 (8th Cir. 1995) (resolving ambiguity in favor of preemption). If one welcomes the Commission's rule as at least a partial solution to the litigation problem, one reason might be that one appreciates agency insight as an alternative to jury ad hocery. But another reason is that the rule, given its national source, is able to achieve something like a uniform solution to the problem. This second reason highlights the vulnerability of the current state products liability system.

Even if the need for uniformity does provide a prima facie justification for a national products liability regime, that prima facie claim can be rebutted by appreciating all the problems associated with congressional decision making and with integrating a limited federal measure into the larger body of state tort law. An alternative to a national statute would be a regime of federal court common-law authority over products liability. For that matter, even a congressional products liability statute would leave many issues for federal courts to decide, given the inevitable ambiguities and uncertainties in such a statute. Either way, nationalizing products liability would render the United States Supreme Court the final arbiter on products liability issues. This is an intriguing but disconcerting prospect.

Since a national solution to the problem of non-uniformity is far less than ideal, one can consider alternative ways in which uniformity could be fostered. One way is the *Restatement* process; and a new *Restatement* on Products Liability is now in the final stages of preparation. Yet the *Restatement* solution is very far from ideal. One problem is that internal politicking by interest groups certainly now plays some significant role in the drafting and approval of *Restatements*. Another problem is that *Restatements*, given their very format, are required to be modest in terms of the range of options they are able seriously to consider. A further problem is that *Restatements* serve as no more than persuasive sources as state courts undertake to make up their own minds; it is too soon to tell how "persuasive" (in this sense) the new Products Liability *Restatement* will turn out to be.