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The New Federalism Jurisprudence and National Tort Reform

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I. Introduction

Tort law in America has long been in the middle of a philosophical tug of war between exponents of federalization and protectors of unique state interests. On one hand, ever since the days of *Swift v. Tyson*,[1] proponents of

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1. 41 U.S. (16 Pet.) 1 (1842).

uniformity and protection of commercial interests have advocated the federalization of tort law. Today, numerous bills that recently have been passed to federalize important aspects of tort law reflect the arguments of these proponents.[2] Most recently, in the aftermath of the September 11 terrorist attacks, Congress swiftly passed the Air Transportation Safety and System Stabilization Act, which creates a federal strict liability cause of action for all property and personal injury claims that result from the September 11 terrorist attacks and limits airline liability to the extent of their liability insurance coverage.[3] In 2001, Congress began writing the first comprehensive federal standards for health insurance. The House and Senate passed separate versions of the Patients' Bill of Rights, which provided for an expansion of patients' right to sue their health plans in state courts while capping damages for pain and suffering

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2. *See, e.g.*, The Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb (2000) (requiring class actions of fifty or more people regarding certain federal securities lawsuits to be filed in federal court); The Year 2000 Information and Readiness Disclosure Act, 15 U.S.C. § 6601 (2000) (setting many new procedural, factual, and notice requirements for plaintiffs claiming damages from year 2000 failure); The Biomaterials Access Assurance Act of 1998, 21 U.S.C. § 1605 (2000) (exempting suppliers of raw materials and component parts for implantable medical devices from certain tort suits); The Small Business Job Protection Act of 1996, 26 U.S.C. § 104 (2000) (declaring that punitive damages and damages for emotional distress are taxable income); The Bill Emerson Good Samaritan Food Donation Act of 1996, 42 U.S.C. § 1791 (2000) (protecting food donors from most civil suits); The Coast Guard Authorization Act of 1996, 46 U.S.C. § 183 (2000) (limiting medical malpractice liability of cruise ship operators); The Volunteer Protection Act of 1997, 42 U.S.C. § 14503 (2000) (limiting immunity for volunteers for nonprofit organizations, creating national standard of punitive damages, and removing joint liability for noneconomic damages); The Aviation Disaster Family Assistance Act of 1996, 49 U.S.C. § 1136 (2000) (prohibiting lawyers and insurance representatives from contacting survivors or families of plane crash victims for thirty days from date of crash); Amtrak Record and Accountability Act of 1997, 49 U.S.C. § 28103 (2000) (capping Amtrak's tort liability at $200 million for each rail accident and creating standard for punitive damages awards); The General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (2000) (setting eighteen-year statute of repose for small aircraft and aircraft parts).

3. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42 (2001). Title IV of the Act creates a compensation program for any individual who was killed or physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001. *Id.* § 403. A claimant seeking compensation must file a claim with a Special Master appointed by the Attorney General. *Id.* § 405(a)(1). When evaluating the claim, the Special Master shall not consider negligence or any other theory and must make a determination on the claim within 120 days. *Id.* § 405(b)(3). No punitive damage awards are allowed. *Id.* § 405(b)(5). In submitting a claim, the claimant waives the right to file a civil action. *Id.* § 405(c)(3)(B)(i).

Other federal protections have been given to the World Trade Center, the Boeing Corporation, which manufactured the planes involved, the operators of Logan, Newark, and Dallas Airports, as well as New York City. Aviation Security Act, Pub. L. No. 107-71, §§ 201(a)(1),(3) (2001); *see Sept. 11 Laws Raise Fears of Tort Reform*, Nat'l L.J., Dec. 3, 2001, at A1 [hereinafter *Sept. 11 Laws*] (discussing whether September 11 laws may lead to slippery slope in tort reform).

and punitive damages.[4] In addition, the Common Sense Product Liability Legal Reform Act of 1996[5] avoided enactment only by a presidential veto.

At the same time, several commentators have proposed that state law should give way to national tort law to help federal courts cope with ever-increasing numbers of mass tort cases.[6] Others have called for consolidated federal proceedings[7] or federalized choice of law for mass tort litigation[8] to achieve the same effect.[9] Legislators have proposed several bills that would

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4. H.R. 2563, 107th Cong. (2001); S.1052, 107th Cong. (2001). Patient protections in the two bills are nearly identical, but the means of enforcing those rights are different. The Senate bill gives patients a much more extensive right to sue health plans for injuries caused by the denial of care. The only limits on suits in the Senate bill are those provided under current state law. S.1052, 107th Cong. § 402(a)(3) (2001). Both versions set limits on punitive damages, with the House version also limiting the amount recoverable for pain and suffering. H.R. 2563, 107th Cong. § 402(a)(4)(A) (2001).

5. H.R. 956, 104th Cong. (1996). This legislation would have capped punitive damage awards at the greater of $250,000 or twice the plaintiff's compensatory damages award, abolished joint liability for noneconomic damages, limited the liability of product sellers, established a complete defense to liability if the principal cause of the accident was the plaintiff's use of alcohol or illegal drugs, reduced liability if misuse or alteration of a product was the principal cause of the accident, and set a fifteen-year statute of repose in litigation involving workplace durable goods. *See* H.R. CONF. REP. No. 104-481 (1996) (presenting disagreements and compromises between House and Senate regarding product liability reform).

6. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS AND OTHER MULTIPARTY DEVICES 4, 21, 146 (1995) (suggesting need for federal tort law); Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE J. ON REG. 429, 451-56 (1996) (arguing for presumption against federalization of tort law, which would be overcome in products liability cases); Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. L. & POL. 261, 277-99 (2000) (advocating federalization of products liability law, including rules surrounding intoxicated users, fair treatment of sellers, statutes of repose, punitive damages, and joint and several liability); *see also* Charles T. Kimmett, *Rethinking Mass Tort Law* 105 YALE L.J. 1713, 1714 (1996) (book review) (discussing Judge Weinstein's call for national tort law); Georgine Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law*, 54 FORDHAM L. REV. 167, 223-24 (1985) (arguing for federal common law); Robert W. Kasten Jr. & Gene Kimmelman, *Is It Time for a Uniform Product Liability Law?*, A.B.A. J., May 1985, at 38 (discussing merits of uniform federal product liability law).

7. *See* FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, 254-55 (1995) (discussing advantages for consolidating proceedings from multiple districts); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44-45 (1990) (discussing economy and efficiency of consolidated federal proceedings in mass tort and product liability cases).

8. Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1638 (1992) (discussing why federal common law may be appropriate in mass tort situations).

9. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 56 (1991) ("The current set of proposals on aggregation use the federal courts as the central forum. Such centralization will increase federal power and, in the context of mass torts, will shift the task of developing tort law from state to federal courts.").

confer jurisdiction on the federal courts to hear many state law class actions on the basis of minimal diversity.[10] Some have suggested that federal law, not state law, should govern punitive damages.[11] Federalization of tort law is also occurring indirectly, as products increasingly are being regulated at the federal level, which leaves individual tort suits vulnerable to either a preemption defense or a defense of regulatory compliance.

Why has this movement occurred that allows federal courts to decide more tort cases under federal law? Several explanations usually are given. Many believe that federalizing tort law represents an appealing solution to the increasingly complex factual and legal issues presented in tort litigation based on uniformity, predictability, and efficiency arguments. Manufacturers argue that it will help avoid inconsistent rulings on the same product. Some believe that state judges and juries unfairly favor in-state plaintiffs against out-of-state defendants. Others argue that federalization benefits special interest groups because it is a more efficient way to accomplish their objectives.[12] Most recently, legislators used the federalization of tort law as a way to save a national industry as a component of the nation's war against terrorism.[13]

Regardless of the motivation, reform advocates seek to create a national system to displace state tort law. Moreover, it is clear that efforts to enact federal legislation to direct tort law will continue.[14]

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10. Class Action Fairness Act of 2000, S. 353, H.R. 1875, 106th Cong. (2000).

11. *See* Thomas E. Willging, Annotation, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 421-25 (1999) (discussing proposals for federal punitive damages law); Briggs L. Tobin, Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 480 (1989) (stating that "federal court[s] must be free to formulate a neutral, uniform standard of punitive damage liability to be applied to the entire plaintiff class").

12. William Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 723 (1995). Professor Jonathan R. Macey argues, for example, that the transaction costs of obtaining legislation on the federal level are simply lower than obtaining the passage of fifty state statutes. Jonathan R. Macey, *Federal Deference to Local Regulators and Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990). Moreover, federal law will always exist in the background even if state legislation addresses the issue and federal regulators must still be persuaded not to preempt the field later. *Id.* at 271-72. Further, federal law is sometimes viewed as a "higher quality product than state law," *id.* at 272, and special interest groups seek federalization to stress the importance of the issue involved. Marshall, *supra*, at 723 (citing Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1749-50 (1991)).

13. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42 (2001) (establishing compensation program for individuals killed or injured in terrorist-related aircraft crashes of September 11, 2001).

14. *See, e.g.*, The Class Action Fairness Act of 2001, H.R. 2341 § 2(b), 107th Cong. (2001) (seeking to limit power of state courts to adjudicate class actions); The Patients' Bill of Rights, H.R. 2563 § 402, 107th Cong. (2001) (setting federal civil remedies to provide for lia-

On the other hand, there is a rich history in this country, with its roots in the Tenth Amendment and epitomized in the last century by *Erie Railroad v. Tompkins*,[15] that seeks to protect the rights of states to govern in matters of local concern. The Supreme Court's recent attempts to reign in congressional efforts under the Commerce Clause to regulate in matters that the Court regards as truly local in nature evidences this history. For example, in *United States v. Lopez*,[16] the Court struck down a congressional enactment under the Commerce Clause for the first time since the New Deal and found that Congress did not have the power to prohibit the possession of guns near schools.[17] The Court continued this trend in more recent decisions, most notably by striking down the civil remedy provision of the Violence Against Women Act in *United States v. Morrison*.[18] Also, the Court's recent Tenth and Eleventh Amendment jurisprudence urges protection of the "dignity" of the states as sovereign units.[19] Such was the case, for example, in *Alden v. Maine*,[20] in which the Court held that Congress could not compel the states to defend federal claims in state courts,[21] and in *Board of Trustees v. Garrett*,[22] in which the Court ruled that state employees could not sue for damages for violations of the Americans With Disabilities Act.[23]

This Article examines the most recent chapter in this tug of war by evaluating the competing considerations that will govern the constitutionality of modern day tort reform proposals. To put this issue in historical perspective, Part II discusses the *Swift-Erie* debate that raised many of the same issues as today's debate over national tort reform. Part III provides a general overview of our system of federalism and notes the changes in the Court's renewed solicitude for state sovereignty. Part IV explores the values of maintaining a federal and state system. Part V examines these values in the context of tort law. Part VI discusses the foundations of tort law as an area tradition-

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bility of health organizations to plan member or member's estate). Some say that the September 11, 2001 terrorist attacks have allowed federal tort reform efforts to be revived. *See Added Rush on Revising Tort System*, N.Y. TIMES, Dec. 13, 2001, at C1 (describing protections given to insurance and biotechnology industries, as well as airports, plane manufacturers, World Trade Center, and New York City from lawsuits stemming from terrorist attacks); *Sept. 11 Laws*, *supra* note 3, at A1 (same).

15. 304 U.S. 64 (1938).

16. 514 U.S. 549 (1995).

17. *Id.* at 567-68.

18. 529 U.S. 598 (2000).

19. *See infra* notes 114-31 and accompanying text (discussing developments in state sovereignty and relationship between federal and state governments).

20. 527 U.S. 706 (1999).

21. *Id.* at 749-54.

22. 531 U.S. 356 (2001).

23. *Id.* at 366-68.

ally regulated by the states, along with the paradigms underlying the philosophic understandings of tort law. Finally, Part VII applies the paradigms to federal tort law, developing a sliding scale model for use in analyzing the constitutionally of federal tort reform legislation.

The Article concludes that the key to determining whether national tort reform would pass constitutional muster is to look first at the purpose and effect of the federal legislation and second at the purpose behind the tort law it attempts to replace. Under recent federalism jurisprudence, federal legislation passed pursuant to the Commerce Clause power must serve an economic interest. Even if the federal law meets this test, it still may not be sufficient to invoke federal power. As the purpose of the displaced tort law is more to achieve efficiency in the marketplace, the argument becomes stronger for a substantial, even dominant, role for the Congress in the tort system given its power to regulate interstate commerce. Furthermore, this increases the likelihood that federal legislation would be upheld under the recent federalism decisions. To the extent that the state law in issue enforces moral norms, however, Congress's power to federalize that law is subject to greater scrutiny under the recent federalism decisions.

II. An Historical Perspective

A. The Swift v. Tyson *Decision*

Officially, the issue addressed by the Court in *Swift v. Tyson*[24] was the meaning of the word "laws" in the Judiciary Act of 1789.[25] More specifically, did the term "laws" include the common law? This was the issue that the Supreme Court focused on almost a century later in *Erie Railroad v. Tompkins*.[26] As many authors have pointed out, the real issue in these decisions was much larger. *Swift* and *Erie* questioned the federal government's role in protecting the emerging national businesses from potentially burdensome state law.

There were two main lines of support for *Swift*, both of which mirror present-day national tort reform concerns. First, there was a desire for uniformity and predictability, which only a federal law (either statutory or common) could provide; this, of course, was logically independent of the substance of the uniform law. Second, there was a desire to promote commerce by means of a consistently pro-business system of laws.[27]

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24. 41 U.S. (16 Pet.) 1 (1842).

25. Judiciary Act of 1789 § 34, 28 U.S.C. § 1652 (2000) ("The laws of the several states, except where the Constitution or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.").

26. 304 U.S. 64 (1938).

27. *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 245-52 (1977) (asserting that courts employed judicial powers to promote commercial and

Even before *Swift*, businesses preferred to have cases heard in federal court for several reasons. Businesses generally felt that they would face local bias if forced to defend themselves in foreign state courts.[28] In addition, there was a perception that federal court interpretations of state common law would be more favorable to business interests than would be a state court's interpretation of relevant state laws. Also, the *Swift* decision came at a time when many common law issues simply had not yet been definitively addressed by state supreme courts and, therefore, English law provided the source for both federal and state systems. This gave businesses an incentive to have the more favorable federal courts decide these novel questions. Finally, federal courts tended to look for their guidance from other federal courts, which resulted in a rough uniformity of rulings. These factors, combined with very loose diversity standards, insured that the federal courts' dockets were heavy with suits involving commercial issues.[29]

By 1840, the great divergence between the laws of the states regarding certain commercial transactions became troublesome. One flashpoint was the commerce in bills of exchange.[30] A number of states, including New York, had departed from the common law principle of unquestioned negotiability. Mr. Swift, who had obtained a bill under dubious circumstances, unsuccessfully attempted to settle the case, then brought a diversity action in federal court. The case reached the Supreme Court[31] and the opinion by Justice Story resulted in the famous *Swift* doctrine. The Court held that the reliance on state law required by the Judiciary Act did not extend to cases of a "commercial nature";[32] the applicable law was "to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence."[33] These principles were universal and could be interpreted by anyone,

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industrial growth); EDWARD A. PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 53 (2000) ("The federal courts under *Swift* . . . [established] a nationally uniform common law that would facilitate interstate commerce in the burgeoning national market.").

28. This is the reason for which Congress provided diversity jurisdiction in the first place in order to guard against local partisanship. PURCELL, *supra* note 27, at 65.

29. *Id.* at 79 ("[Corporate defendants] were involved in 75 percent of all diversity cases and 87 percent of all removed diversity actions.") (citing Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A. J. 499 (1933)).

30. A bill of exchange is "[a] written order of one party upon another for absolute payment of money to a third or designated person . . . upon demand or at a specified or determinable future time." BALLENTINE'S LAW DICTIONARY 136 (3d ed. 1969). This term is synonymous with the U.C.C. term "draft." *Id.*

31. The case reached the Supreme Court twice. The first time before the Court it was remanded, apparently to develop the record. TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 13 (1981).

32. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

33. *Id.*

reflecting the *Swift*-era view of the law as the "brooding omnipresence."[34] The federal judicial system had just as much right as the states to interpret the rule of law because it was separate from that of the states.

The decision was not merely a neutral one of statutory interpretation. Justice Story plainly saw uniformity – on the commercial interests' terms – as critical: "It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper. . . . The [contrary] doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."[35]

As a result, *Swift* perpetuated a dual federal-state system based on independent interpretations of the same common law.[36] *Swift* was crucial in federalizing common law and the federal role became even more prominent in 1855 with *Watson v. Tarpley*.[37] In that case, the Supreme Court held that the "general principles" of commercial law required by *Swift* trumped even a state statute.[38] The confusing wording of the Judiciary Act could not justify *Watson*'s conclusion; a state statute was certainly "the law of the state."[39] Rather, to put it in anachronistic terms, *Watson* was a very broad assertion of the Dormant Commerce Clause. The law of commerce defined the contractual rights of nonresidents of a state; therefore, any state law infringing those rights was invalid. A "state would have no power to impose, and . . . the courts of the United States would be bound to disregard" any such law.[40] It should be noted that the Court did not hold that such a law was unconstitutional either as a violation of the Commerce Clause or as a law impairing the obligation of contracts; rather, it held that the federal courts could not enforce it.[41] State courts, in cases involving only state residents, were free to adhere

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34. So. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

35. *Swift*, 41 U.S. (16 Pet.) at 20. Justice Story was a leading authority on negotiable instruments, having published a treatise on the subject, and saw the case as an opportunity to "replace the indeterminacy in commercial law with a unified body of rules promulgated by federal courts that could be broadly applied." KERMIT L. HALL, THE MAGIC MIRROR 122, 123 (1989).

36. EDWARD A. PURCELL, LITIGATION AND INEQUALITY 59 (1992) ("[W]hen 'state' law properly controlled a case, as in tort and contract claims heard in diversity actions, federal judges often ignored the decisions of state courts and applied their independent federal rules which were in many cases inconsistent with the state rules."). Similarly, state courts refused to follow federal precedents.

37. 59 U.S. 517 (1855).

38. *Cf.* Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291 (1832) (stating that interpretation by state courts of state statute takes precedence over Supreme Court interpretation of state property law).

39. Judiciary Act of 1789 § 34, 28 U.S.C. § 1652 (2000).

40. Watson v. Tarpley, 59 U.S. 517, 521 (1855).

41. *Cf.* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205-07 (1863) (involving federal actions on defaulted municipal bonds). In *Gelpcke*, the Supreme Court declined to

to it. As a result, the nonresidents had the pleasant choice between state law or the "general" law, whereas residents had only the state law.[42]

The principles behind the *Swift* line of cases extended to tort cases by the 1870s.[43] Through many decisions, federal courts exercised the common law decision-making authority conferred on them by *Swift* and erected a number of barriers to tort recovery in the federal courts. One commentator summed up this period:

> [In the area of torts the] federal common law came in the late nineteenth century to impose relatively narrow standards of liability. Restricted standards of care, exacting requirements for establishing causation, and a capacious idea of the kinds of risks that people properly "assumed" all combined – particularly in cases of injured employees – to give frequent advantages to [corporate] defendants.[44]

These narrow standards of liability imposed on corporate defendants by federal courts arguably had the effect of "fostering business enterprise."[45]

Advantages to businesses took several forms, including limited employer liability.[46] For instance, the Supreme Court adopted a strict interpretation of

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follow a state court construction of the state constitution that would have invalidated the bonds, in light of the fact that the construction overruled decisions outstanding at the time the bonds were issued. *Id.* at 204-05.

One of my colleagues, Michael Berch, believes that the *Swift* doctrine flourished because prior to the adoption of the Fourteenth Amendment in 1867, federal courts were powerless to invalidate state legislation.

42. This, of course, assumes that the requirements of diversity, including the amount in controversy, were met.

In the end, it was probably this inequality, especially in the taxicab case, which put the anti-*Swift* movement over the top. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 530-31 (1928) (allowing taxicab company to reincorporate in Tennessee and invoke federal common law to avoid undesired outcome under Kentucky common law). In *Black & White Taxicab*, a Kentucky taxicab company was permitted to avoid unfavorable state common law prohibiting exclusive dealing contracts by reincorporating in Tennessee. *Id.* at 530. The taxicab company invoked the federal common law permitting such contracts when it brought suit in federal court to enforce the contract. *Id.* at 522-23. The federal court upheld the contract despite the fact that it would have been invalid had the company remained incorporated in Kentucky. *Id.*

43. PURCELL, *supra* note 36, at 72 ("By the 1870's the federal courts were regularly exercising their independent judgment in tort cases and by the nineteenth century the federal common law had expanded to include almost the entire law of industrial accidents.").

44. *Id.* at 73. However, there were exceptions. In some cases the federal courts adopted broad rules of corporate liability contrary to the law of the state where the injury occurred. For example, in *Washington & Georgetown R.R. Co. v. Gladmon*, 82 U.S. (15 Wall.) 401, 407-08 (1872), and *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 660 (1873), the Court held that infants were held to a different duty of care and caution than adults despite contradictory state law.

45. PURCELL, *supra* note 36, at 73.

46. There are few reported federal tort cases from this time period for two main reasons.

the fellow-servant rule,[47] which was then under attack in a number of state courts. In several cases, the Court adduced a modern Commerce Clause-type justification for federal jurisdiction: the liability of a railroad employer (or remedy of the employee) should not depend upon the fortuitous location of the train at the time of the accident.[48] However, it is clear from the leading federal tort case in the employer-employee context of the time, *Baltimore & Ohio Railroad Co. v. Baugh*,[49] that tort law, no less than contract law, was part of the "general law" of commerce and thus beyond the reach of state entities. The dissent in *Baugh* complained that the decision had the result – and the intention – of subverting the states' attempts to reform the common law of torts in the interests of "justice and humanity."[50]

While the fellow-servant rules provided employers with a broad range of immunity from suit, two other defenses, contributory negligence and assumption of the risk, also reduced employers' exposure to liability. In *Kohn v. McNulta*,[51] the Supreme Court held that a railyard employee could not state a claim against his employer for his injury because he assumed the risk associated with the work.[52] It was widely believed in the post-*Swift* era that

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First, United States district courts did not make a practice of publishing opinions during this time period. Second, after a defendant removed a tort case to federal court, factors such as delay and expense often forced the injured plaintiff to settle. *Id.* at 49-50.

47. The fellow-servant rule provided that an employer would not be liable for injuries to employees caused by the acts of fellow employees.

48. *See* PURCELL, *supra* note 36, at 24 (stating that nationally consistent common law was considered "essential to business planning and security").

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or others.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

49. 149 U.S. 368, 378 (1893). In *Baugh*, a fireman was injured when an engineer negligently drove a train along the wrong section of track and subsequently collided with another train. *Id.* at 368. The Court adopted a sweeping interpretation of the fellow-servant rule by holding that all in the employ of the same employer are fellow servants and that the employer will not be held liable for injuries caused to any fellow servant. *Id.* at 384.

50. *Id.* at 411 (Field, J., dissenting). Excerpts from the dissent were subsequently quoted by the majority in *Erie*.

51. 147 U.S. 238 (1893).

52. Kohn v. McNulta, 147 U.S. 238, 241 (1893); *see also* Chesapeake & Ohio R.R. Co. v. Hennessey, 96 F. 713, 713 (1899) (stating that it is assumed that employee assumes risk when he "has notice of the general risks and dangers of his employment, such as that many of the cars which he is required to handle as a switchman are defective, [therefore] the master is not guilty of negligence in failing to notify him of each particular defect").

the federal courts enforced these employer defenses much more stringently than did the state courts.[53]

In addition to the liberal employer defenses permitted in federal court, federal courts also adopted narrow and protective rules of liability. In *Patton v. Texas & Pacific Railway Co.*,[54] the Court held that an injured employee must prove that the defendant's negligence was a cause in fact of the injury.[55] The decision denied injured employees the benefit of relying on the doctrine of res ipsa loquitur as a means of inferring the employer's negligence.[56]

The expansion of the "general law" to torts was not limited to torts involving employee injuries. For example, federal courts adopted privity rules that limited opportunities for injured consumers to recover for product defects and increased the various means by which common carriers could contract to waive or limit their liability to customers.[57]

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53. PURCELL, *supra* note 36, at 75 (citing Lawrence M Friedman & Jack Landinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 59-62 (1967)).

54. 179 U.S. 658 (1901).

55. Patton v. Tex. & Pac. Ry. Co., 179 U.S. 658, 663 (1901).

56. *Id.* ("[I]t is not sufficient for the employee to show that the employer may have been guilty of negligence – the evidence must point to the fact that he was.").

57. PURCELL, *supra* note 36, at 82. In *Gallbraith v. Illinois Steel Co.*, the Seventh Circuit held that an injured consumer could not seek relief against a steel company that erected a structure for a sprinkler company with which the plaintiff contracted because there was no privity of contract. Gallbraith v. Ill. Steel Co., 133 F. 485, 489 (7th Cir. 1904), *cert. denied*, 201 U.S. 643 (1906). In requiring privity, the Seventh Circuit opinion indicated its intention to protect business interests:

> If the law should hold all the builders and makers and doers in the land to a[n] . . . absolute duty to use care that the thing shall be innocuous as it passes through the hands of all mankind . . . we fancy few persons would be willing to do business, in the face of the insufferable litigation that would ensue.

Id.

Although the general common law rule was that common carriers could not contract out of liability incurred by "passengers for hire" caused by negligent employees, the federal courts limited this doctrine in a way that proved very favorable to corporations. N.Y. Cont. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 384 (1873). In *Northern Pacific Railway Co. v. Adams*, for example, the Supreme Court held that all passengers traveling on a free pass, containing language limiting liability, are not "passengers for hire," and therefore will be held to have waived any cause of action against the common carrier. N. Pac. Ry. Co. v. Adams, 192 U.S. 440 (1904).

The federal courts also limited the liability of the railroads by limiting their responsibility for injuries occurring on their leased property. In *Curtis v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*, 140 F. 777, 778 (C.C.E.D. Ill. 1905), and *Yeates v. Illinois Central Railway Co.*, 137 F. 943, 944-45 (C.C.N.D. Ill. 1905), the courts addressed the liability rules for railroad leases. In both cases, the state law held the lessor of a railroad track liable for the negligence of the lessee. Curtis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 140 F. at 778; Yeates v. Ill. Cent. Ry. Co., 137 F. at 945. But, in *Curtis*, the federal court found that

B. *The Move Against* Swift

By the 1890s, opposition to the *Swift* concept of a general common law mounted.[58] For instance, the federal courts became severely overcrowded because cases were more frequently being removed by corporate defendants to the federal courts in order that they could reap the benefits of the federal common law of torts.[59] Second, as the federal courts began to narrowly construe or completely ignore relevant state laws, critics began to question the correctness of *Swift*.[60] The language of the Judiciary Act was not so vague as to justify ignoring state statutory and constitutional law. In addition, the federal courts began to face criticism of their perceived pro-business interpretation of the federal general law.[61] The criticism seemed to be not so much about abstract federalism as a belief that the diversity system, intended to protect out-of-state defendants against local plaintiffs, was tilting the playing field the other way. This was especially true in cases involving the fellow-servant rule and the *Baugh* decision because corporate non-resident defendants could avoid changes in state law that favored the injured employee by removing the case to federal court.[62]

These critics ultimately prevailed in *Erie Railroad v. Tompkins*.[63] In *Erie*, the Court examined a negligence action brought by a pedestrian who was struck by a rail car. The Erie Railroad contended that the duty it owed to Tompkins was that which it owed to a trespasser under Pennsylvania law, while Tompkins argued that the railroad's duty should be determined by federal courts as a matter of general law because there was no state statute on the subject. Justice Brandeis's *Erie* opinion overturned *Swift* ostensibly because it reinterpreted the concept of a "federal general common law"; in performance of their common law functions, *Erie* recognized that state courts do not look to a "general" law as recognized by *Swift*, but instead persist "in their own opinions on questions of common law."[64] As a result, federal courts

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"[t]he rule of law in question is not local, or the effect of a statute, or its constriction, but exists as a general rule of the common law, which the federal courts determine for themselves." 140 F. at 779.

58. PURCELL, *supra* note 27, at 66.

59. PURCELL, *supra* note 36, at 50.

60. *Id.* at 225.

61. *Id.* at 73.

62. *See id.* at 264 (stating that federal court rules imposing heavy evidentiary burdens on plaintiffs to show liability and strictly enforcing fellow-servant rule increasingly were perceived as unfair during this time because "a number of state courts developed innovative ways to ameliorate the harshness of their own common law rules and thereby widened the divergence between federal and state law").

63. 304 U.S. 68 (1938).

64. Erie R.R. v. Tompkins, 304 U.S. 68, 74 (1938).

following *Swift* had developed a body of common law that had no connection to state common law. Therefore,

> [p]ersistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.[65]

Furthermore, *Swift* created the opportunity for discrimination by non-citizens against citizens depending on whether a plaintiff brought suit in federal or state court and thus led to "injustice and confusion."[66]

The *Erie* opinion expressed the idea that a "federal general common law" cannot exist and declared that the *Swift* doctrine was "an unconstitutional assumption of powers" by federal courts.[67] Justice Brandeis's reasoning relied on the idea that no other law can exist in diversity cases except that of the states because no other federal law can exist except in the areas in which Congress is sovereign. "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[68] The Judiciary Act of 1789 adopted this new interpretation. In a larger sense, however, the growing reform movement which a conservative federal judiciary had long thwarted finally prevailed.

C. Congressional Federalization

Although *Erie* ended federal court usurpation of tort common law lawmaking, it did not silence the debate on whether the phrase "Congress has no power" means precisely that. Exactly what is the extent of Congress's authority to legislate in the tort area? Scholars interpret Congress's power in tort to derive principally from the Commerce Clause and the Necessary and Proper Clause, which give Congress substantial authority in the area.

Perhaps the best known example of the courts' long history of upholding federal tort laws is the Federal Employers' Liability Act (FELA).[69] This Act

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65. *Id.*

66. *Id.* at 77.

67. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

68. *Id.* at 78. On the same day as the *Erie* decision, the Court reversed a decision that an interstate compact concerning water rights was invalid because it concerned appropriate rights guaranteed by Colorado's constitution. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). Justice Brandeis, writing for the Court, said that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110 (citations omitted).

69. Employers' Liability Act, 45 U.S.C. §§ 51-60 (1994).

was a "tort substitute" for workers' compensation in the railroad field and defined the rights and obligations in personal injury and wrongful death actions brought against railroads engaged in interstate commerce.[70] When the railroads challenged the legislation, the Supreme Court upheld the Act as a constitutional exercise of congressional power under the Commerce Clause.[71] In *Mondou v. New York, New Haven & Hartford Railroad Co.*,[72] the Court held that "[a] person has no property, no vested interest, in any rule of the common law.... [T]he law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations."[73] The Court found that Congress had a legitimate interest in displacing tort law for railroad workers.[74]

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70. *See id.* (discussing liability for injuries to railroad employees).

71. *See* Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. 1, 48-52 (1912) (stating that Congress acted within limits of its power under U.S. Constitution when it enacted FELA). The Court had previously struck down a 1906 version of FELA in *Howard v. Ill. Cent. R.R.*, 207 U.S. 463 (1908). In *Howard*, the Court found that the 1906 Act exceeded Congress's Commerce Clause authority because it embraced "matters and things domestic in their character." *Id.* at 496-97.

72. 223 U.S. 1 (1912).

73. Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. at 50 (citations omitted).

74. *See id.* at 51 (noting that Congress may determine that national law would better serve needs of railroad commerce). Other examples exist of courts upholding legislation federalizing tort law against constitutional challenge. In 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901- 44 (1994)). Similar to FELA, the LHWCA awarded fixed amounts to employees or to their dependents in cases of employment-related personal injuries occurring upon the navigable waters of the United States. *See id.* § 903(a) (covering employee's disability or death occurring upon navigable waters of United States). Upon a challenge, the Supreme Court found that Congress acted legitimately under its authority to revise or alter maritime law. *See* Crowell v. Benson, 285 U.S. 22, 39-41 (1932) (upholding constitutionality of LHWCA). Of course, Congress acted pursuant to its authority in admiralty, so arguably no foundation state law existed for LHWCA to supplant.

Congress enacted the Drivers Act in 1961, which forbade individual tort suits against federal drivers for accidents caused by a driver's negligence but allowed suits against the United States. *See* Federal Drivers Act (Government Drivers Act), Pub. L. No. 87-258, 75 Stat. 539 (codified as amended at 28 U.S.C. § 2679(b)-(e) (1994)) (insulating federal employees from personal liability for negligent acts arising from use of motor vehicle in course of employment). A district court upheld the Act as a valid exercise of legislative power under the Necessary and Proper Clause of Article I. *See* Nistendirk v. McGee, 225 F. Supp. 881, 882 (W.D. Mo. 1963) (determining that Federal Drivers Act is valid exercise of legislative power). The other question that arose after the enactment of the Drivers Act was whether the Federal Employees' Compensation Act (FECA) limited the claims of federal employees who were injured by federal drivers to those against the United States or whether the employees could also bring a common law tort action against the negligent co-worker. *See* Federal Employees' Compensation Act, §§ 8101-8193 (1994) (providing compensation for work injuries of federal employees). Courts that addressed the issue uniformly held that the Drivers Act abrogated the common law rule. *See*

Since *Erie* and the New Deal, the federal system has changed substantially to overlap with or to displace the authority of the states as the dominant force regulating the private lives of most Americans. *Erie* intended to bind the federal courts to state law, but as centralization increased, the reach of the *Erie* doctrine became more limited. Now, a specialized federal common law derived from federal statutes and regulations is evolving. The difference, though, is that under *Swift*, state courts were basically free to develop their own jurisprudence as it applied to their residents. The new federal common law, however, binds the state tribunals because it extrapolates from federal statutory law and therefore is supreme.

More recent decisions have shown increasing reluctance to allow Congress to expand its powers on matters of local concern, of which tort law may be a significant part. This Article now provides an overview of these recent federalism decisions but does not attempt to support or oppose the validity of the current Court's theory of federalism – a task that many others have undertaken.[75] Rather, this Article seeks to identify the components of prevailing

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Noga v. United States, 411 F.2d 943, 944 (9th Cir. 1969) (finding that Federal Drivers Act and FECA limit plaintiff to remedy against U.S. and abrogate common law tort remedy against negligent fellow employee); Van Houten v. Ralls, 411 F.2d 940, 943 (9th Cir. 1969) (noting that "federal legislative objective in enacting the Federal Drivers Act while leaving the exclusivity provision of the FECA intact was apparently to protect federal drivers from personal liability by rendering the Government . . . liable only under the FECA in the case of federal employee plaintiffs"); Vantrease v. United States, 400 F.2d 853, 856 (6th Cir. 1968) (noting that injured federal employee was not entitled to common law action against alleged tortfeasor; rather, his sole remedy was under FECA); Beechwood v. United States, 264 F. Supp. 926, 926-27 (D. Mont. 1967) (dismissing case because federal employee plaintiff had no cause of action against federal employee defendant in defendant's personal capacity; rather, plaintiff is limited to recovery under FECA).

The next wave of litigation challenged Congress's authority to revoke common law rule by statute. The courts, in turn, rejected the argument that Congress exceeded its powers in passing the Drivers Act and in abrogating the traditional common law rule. *See* Thomason v. Sanchez, 539 F.2d 955, 959-60 (3d Cir. 1976) (stating that even though serviceman injured by another serviceman had no cause of action under "Feres doctrine," Drivers Act did not constitute denial of due process under Fifth Amendment); Carr v. United States, 422 F.2d 1007, 1010-12 (4th Cir. 1970) (finding no violation of Due Process or Equal Protection Clauses of Fifth Amendment, even though Drivers Act did not create new benefit or distinguish between federal employees injured in vehicular accidents and federal workers injured in other job-related activities). Several other federal tort law statutes have survived constitutional challenges. *See generally* Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269, 288-300 (1999) (discussing Black Lung Benefits Act of 1972, The Price Anderson Act, Swine Flu Act, Atomic Weapons Testing Liability Act, National Childhood Vaccine Injury Act of 1986, Price-Anderson Act Amendments of 1988, Federal Employees Liability Reform and Tort Compensation Act, and General Aviation Revitalization Act of 1994).

75. *See, e.g.*, Ann Althouse, Lecture, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 245-50 (2000) (explaining federalism of Burger and

principles of federalism and to predict how the Supreme Court might apply those elements to federal tort reform legislation.

III. The New Federalism Decisions

Despite the sovereignty of the states under the federal system, the federal power under the Constitution is vast.[76] Not only does the Constitution confer on Congress broad enumerated powers, particularly under the Commerce Clause, it enables Congress to enact "any laws . . . necessary and proper" to effectuate its power.[77]

Rehnquist Courts as balancing of state and federal interests); Edward Hartnett, *Why Is The Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 985-86 (1997) (explaining federalism's application to standing to seek review of state court's judgment in U.S. Supreme Court); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2228-29 (1998) (discussing judicial enforcement of federalism-based constraints on federal government).

76. *See* U.S. CONST. art. I, § 8 (enumerating congressional powers); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

77. U.S. CONST. art. I, § 8, cl. 3, 18. This Article focuses on the commerce power, on which Congress usually relies when displacing state tort actions. The national government possesses many other important powers, of course, such as the war power, U.S. CONST. art. I, § 8, cl. 11, and the treaty power, U.S. CONST. art. II, § 2, cl. 2.

Congress may exercise its power under Section 5 of the Fourteenth Amendment by enacting legislation that provides tort remedies to protect the constitutional rights of private citizens. U.S. CONST. amend. XIV, § 5. For example, 42 U.S.C. § 1983 (1994) provides a remedy for interference with one's civil rights under color of state law. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961) (justifying § 1983 under Fourteenth Amendment), *overruled by* Monnell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). Because no analogous statute provides a remedy for interference with one's civil rights under color of federal law, the Supreme Court created such a remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Despite this power, Congress has resisted attempts to make the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976) (finding no Fourteenth Amendment deprivation when police distributed flyers describing plaintiff as "active shoplifter"). *See* Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 674 (1999) (stating that expanding Fourteenth Amendment property interests to encompass right to be free from unfair competition "would violate our frequent admonition that the Due Process Clause is not merely a 'font of tort law'" (quoting *Paul*, 424 U.S. at 701)); Daniels v. Williams, 474 U.S. 327, 335-36 (1986) (holding that defendant had no due process claim when state employee's negligence caused his fall even though defendant could claim immunity under state law); Parratt v. Taylor, 451 U.S. 527, 543-44 (1981) (finding that states' own tort remedy provided sufficient due process to prisoner whose property was lost due to state's negligence), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

The Court has also interpreted the Constitution as placing limits on state tort actions. These limits may create space for federal legislation. For example, the Court has limited

A badly splintered Court is leading a revolution of sorts regarding these federal powers. A major issue in the federalism debate is whether pockets of exclusive state power exist upon which the federal government cannot encroach that stem from a constitutional vision that sees a division of power between federal and state governments as better protection for individual rights. The Court's decisions that touched on federalism in the last several terms do not resolve the issue but indicate a stronger solicitude for state sovereignty. Both the Court's focus on a Congress of limited powers and its continued protection of the states from federal lawsuits and from federal policy "commandeering" reflect this solicitude. Although national legislation federalizing tort law most likely will derive its power from the Commerce Clause, recent decisions re-examining the federalism doctrine under the Tenth and Eleventh Amendments would also determine whether federal tort reform would pass constitutional muster.[78] This Article examines these decisions briefly below.

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remedies under state-created defamation actions on First Amendment grounds. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 3, 21 (1990) (finding that statements of "opinion" are neither privileged under First Amendment nor exempt from state libel laws); Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-48 (1974) (finding that First Amendment does not require that states impose standard articulated in *New York Times Co. v. Sullivan* when plaintiff is neither public official nor public figure); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that, under First Amendment, state cannot award libel damages in actions by public official unless official proves actual malice – that speaker knew statement was false or spoke with reckless disregard of whether it was true or false). The Court has also used due process to limit punitive damages awarded under state tort law. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (concluding that two million dollar punitive damages award was grossly excessive and so violated Due Process Clause of Fourteenth Amendment); Honda Motor Co., v. Oberg, 512 U.S. 415, 434-45 (1994) (remarking that jury's decision to award punitive damages is exercise of state power that must comply with Due Process Clause); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460-61, 466 (1993) (finding ten million dollar punitive damages award was reasonably related to potential harm from defendant's conduct, and so was not grossly excessive and did not violate Due Process Clause). The Court stated in *City of Boerne v. Flores* that Congress must receive much deference in its determinations of "what legislation is needed to secure the guarantees of the Fourteenth Amendment." City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). Thus, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

78. One author argues, for example, that national tort reform would face a constitutional challenge as possibly "commandeering" the state judges and state courts to promulgate and enforce federal tort reform. *See* Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: Warning Not Heeded*, 64 TENN. L. REV. 665, 680 (1997) (arguing that "compelling state courts to litigate under a complex set of rules dictated by Congress will prove as antithetical to prevailing theories of state sovereignty as compelling state legislatures to legislate").

A. Enumerated Powers

In the last decade, the Supreme Court actively has developed federalism doctrine under the enumerated powers. In particular, the Court has focused on congressional power under the Commerce Clause. From the beginning, courts generally have construed this power broadly. In *Gibbons v. Ogden*,[79] Chief Justice John Marshall defined the commerce power as "comprehend[ing] every species of commercial intercourse," comprising both interstate and foreign commerce.[80] As the Chief Justice stated, "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[81] Although courts have examined this initial broad construction with different tests throughout history, they generally have maintained a broad construction until recently.

Between 1890 and 1937, the Supreme Court used various formal categories to strike down progressive legislation and New Deal legislation that Congress passed under the Commerce Clause. It drew distinctions between "commerce" and "police" powers,[82] between "direct" and "indirect" effects on commerce,[83] and between "flow " and "rest" in the "stream of commerce."[84] The Court justified its reliance on these categories as an effort to avoid undermining the police power of the states.[85] In 1937, the Court famously reversed direction and adopted a "substantial effect" test that expanded congressional power under the Commerce Clause[86] so far that many believed that

79. 22 U.S. (9 Wheat.) 1 (1824).

80. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824).

81. *Id.* at 196.

82. *See* Champion v. Ames, 188 U.S. 321, 361 (1903) (noting that Congress had given states power to regulate in-state commerce of alcohol under states' own police powers).

83. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (noting well-established distinction between direct and indirect effects on interstate commerce).

84. *See id.* at 543 (distinguishing instances when goods come to rest permanently in state and those when goods are destined for later transportation to other states).

85. *See id.* at 546 (stating that "[i]f the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government").

86. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (stating that Congress has power to exercise control over activities that "have such a close and substantial relation to interstate commerce that [Congress's] control is essential or appropriate to protect that commerce from burdens and obstructions"); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (noting existence of overwhelming evidence of disruptive effect of racial discrimination on commercial intercourse); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding that racial discrimination in local restaurants directly and adversely affected

the power was without judicial limitation.[87]

In 1995, however, the Supreme Court struck down a congressional enactment under the Commerce Clause for the first time since the New Deal.[88] In *United States v. Lopez*,[89] the Court held that Congress did not have the power to prohibit the possession of guns near schools.[90] The Court laid out three categories of activity within the scope of the commerce power, the broadest category addressing activities that "substantially affect" – not just "affect" – interstate commerce.[91] These categories do not focus on state authority to act;

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interstate commerce); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (stating that Congress may regulate activity that "exerts a substantial economic effect on interstate commerce").

87. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 307-08 (1981) (Rehnquist, J., concurring in judgment) (remarking that "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 633 (1993) (opining that for most of last half-century, no constitutional law of federalism had existed in United States).

88. The Supreme Court held that Congress's power under the Commerce Clause was limited when Congress sought to regulate the states directly, by affecting traditional state functions. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). A divided Court in *Nat'l League of Cities* invalidated the amendments to the Fair Labor Standards Act that extended the statute's minimum wage and maximum hours provisions to most state employees, holding that regulation of traditional governmental functions involving matters "essential to [the] separate and independent existence" of the states was beyond Congress's power under the Commerce Clause and the Tenth Amendment. *See id.* at 845 (quoting Coyle v. Oklahoma, 551 U.S. 559, 580 (1911)). The Court distinguished federal regulation of private activity from regulation "directed . . . to the States as States." *Id.*

The Court overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985). In *Garcia*, the Court recognized that the political process should protect states from direct congressional regulation, not the courts, and rejected a traditional state function test. *Id.* at 546-47, 556. Although the *Usery* rationale had become too difficult to apply, the Court recognized

> that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action – the built-in restraints that our system provides through state participation in federal government action.

Id. at 556.

89. 514 U.S. 549 (1995).

90. United States v. Lopez, 514 U.S. 549, 567-68 (1995).

91. *Id.* at 558-59.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority in-

they focus instead on whether the activity Congress regulates constitutes "commerce."[92] The test received criticism for its lack of guidance or bounds because it does not analyze when Congress may regulate pursuant to its commerce power.[93]

In 2000, the Court indicated that *Lopez* was not an aberration and that Congress simply cannot regulate some activities under its commerce power.[94] In *United States v. Morrison*,[95] the Court struck down the civil remedy provision of the Violence Against Women Act.[96] The majority, in a five-to-four

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> cludes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. (citations omitted).

Even Justice Breyer in dissent proposed "significant" rather than "substantial," thereby also rejecting mere "effects." *Id.* at 616 (Breyer, J., dissenting).

92. The Court held that intrastate activities can be regulated if the underlying activity is commercial or economic. *Id.* at 559-61.

93. *See* Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court?,"* 46 CASE W. RES. L. REV. 663, 668 (1996) (stating that Justice Thomas's concurrence attempts to put "real limits on congressional power" but his approach "plainly does not represent the views of a majority of the Supreme Court"). Even though *Lopez* holds that congressional power to regulate private activity has limits, several commentators predicted that the decision did not appear likely "to curtail [federal power] in any significant way." Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487 n.4 (1994).

Although *City of Boerne v. Flores*, 521 U.S. 507 (1997) is a separation-of-powers case, it is noteworthy here because of the federalism concerns raised by the case. Under examination was the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1994). That statute favored restoration of the compelling state interest test recently rejected by the Supreme Court. RFRA was held unconstitutional in its "attempt [to make] a substantive change in constitutional protections." *Id.* at 532. According to the Court, the statute swept too broadly and "ensures its intrusion at every level of [local] government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* Federalism concerns account in large part for the result of the case. The subsequent decisions in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), rely heavily on the *City of Boerne* decision.

94. In *Jones v. United States*, the Court stressed its solicitude for state sovereignty in the criminal law context. The Court unanimously held that Congress did not intend a federal arson law, which requires that a building be "used" in an activity affecting commerce, to apply to the arson of a private residence, in order to avoid any constitutional issues. *See* Jones v. United States, 529 U.S. 848, 849 (2000) (interpreting 18 U.S.C. § 844(i) (2000), which makes arson against property used in interstate commerce federal crime). As the Court stated: "To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change [on the federal-state balance], for arson is a paradigmatic common-law state crime." *Id.* at 858.

95. 529 U.S. 598 (2000).

96. United States v. Morrison, 529 U.S. 598, 617 (2000); *see* Violence Against Women Act of 1994, § 40302, 42 U.S.C. § 13981 (2000) (granting civil remedies to women who are victims of crime).

decision, rejected both of the sources of constitutional authority that Congress asserted as the basis for the legislation and concluded that the civil remedy provision was neither a valid regulation of interstate commerce nor a proper means of enforcing the equal protection guarantee of the Fourteenth Amendment.[97]

In *Morrison*, the Court made clear that it is not enough for Congress simply to recite that the activity it seeks to regulate has some impact on interstate commerce or even to amass evidence of such effects. The Court stated that *Lopez* demonstrated that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."[98] In contrast, gender-motivated violent crimes, according to the Court, "are not, in any sense of the phrase, economic activity."[99]

In addition to examining whether the statute regulates economic activity, the Court also was concerned about whether the activity being regulated was one traditionally overseen by the states.[100] The Court held that an indirect impact on the national economy does not suffice to invoke congressional power;[101] it worried that use of a "but-for" causal analysis would allow Congress to invoke Commerce Clause power to regulate murder, family law, and other areas of traditional state concern.[102]

Chief Justice Rehnquist reinforced the notion of separate areas of state regulation. "The Constitution," he emphasized, "requires a distinction between what is truly national and what is truly local."[103] He continued:

> In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and

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97. *Morrison*, 529 U.S. at 619, 627.

98. *Id.* at 611.

99. *Id.* at 613.

100. A similar concern has been raised by the Court in other contexts. In determining whether a private right of action may be implied from a federal statute, the Court considers, among other factors, whether "the subject matter involves an area basically of concern to the States." Cannon v. Univ. of Chicago, 441 U.S. 677, 708 (1979).

101. *See Morrison*, 529 U.S. at 608 (noting that "scope of the interstate commerce power must be considered in light of our dual system of government and may not be extended so as to . . . obliterate the distinction between what is national and what is local" (citations omitted)).

102. *See id.* at 615-16 (stating that "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence . . . as well [as] family law and other areas of traditional state regulation"). The Court noted that Congress expressly precluded the Act from being used in the family law context, presumably trying to avoid this effect. *Id.* at 616.

103. United States v. Morrison, 529 U.S. 598, 617-18 (2000) (citing United States v. Lopez, 514 U.S. 549, 568 (1995)).

> punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[104]

Some have argued that the commercial/noncommercial distinction, along with the rest of the decisions in the Court's "federalist revival,"[105] resurrects the notion of "dual federalism."[106] The idea of distinct spheres that give either

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104. *Id.* at 618 (citations omitted).

105. The term was coined by Professor Jackson. *See* Jackson, *supra* note 75, at 2213 ("The Court's new activism compounds assertions that federalism is dead and . . . requires continued attention to the foundations for federalism's revival.").

106. *See, e.g.*, Mathew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz *and* Yeskey, 1998 S. CT. REV. 71, 72 ("The doctrines . . . create a regime of dichotomous boundaries. Like the federalism jurisprudence set forth, a generation ago, in *National League of Cities v. Usery*, the new jurisprudence of commandeering purports to define an area of total state (and local) immunity from federal intervention."); Andrew I. Gavil, *Introduction: Seminole Tribe and the Creeping Reemergence of Dual Federalism*, 23 OHIO N.U. L. REV. 1393, 1400 (1997) ("[O]n a broader plane, the combined impact of the current Court's federalism jurisprudence, as in cases like *Lopez*, *New York v. United States* and especially *Seminole Tribe*, leads one to believe that we are moving back towards the 'dual federalism' model believed to have expired by the time of the New Deal."); Jackson, *supra* note 75, at 2257-58 (stating that *Printz*'s rule forbidding federal directives to state employees is not adequately supported by historical or functional considerations; advocating milder federalism based on limits on national legislation); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 868 (1999) ("Just one year after clearing its throat in *Ashcroft*, the Court in *New York v. United States* firmly announced its return to the business of protecting states from national encroachment. In establishing its new role, both in *New York* and then again in *Printz*, the Court professed to distinguish *Garcia* but in fact cut the legs out from under that case's political process approach while embracing the 'dual federalism' or state-sovereignty model it had abandoned twice before."). *See also* Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 595 (1994) ("[B]y its terms, the Constitution effectively prohibits the total consumption of state authority by the assertion of federal power. Modern Supreme Court doctrine, however, has all but achieved that end, in practical terms if not in name. Rather than invent otherwise non-existent constitutional protections of state governments, the Court would be better advised to devote serious attention to redefining the modern constitutional limits on the reach of federal power."); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 215 (2000) ("I would call this the 'dual federalism interpretation' of *Lopez*, because it would attribute to the case not so much a sensitivity to contextual facts as a categorical intention to evict federal legislators from some exclusive domain of state policy making.").

In *Morrison*, Justice Souter accused the majority of following the same sort of "formalistically contrived confines of commerce power" that "provoked the judicial crisis of 1937." United States v. Morrison, 529 U.S. 598, 642 (2000) (Souter, J., dissenting).

the states or federal government exclusive regulatory authority, known as "dual federalism," died around 1937 and finally was put to rest in a famous article by Edward Corwin in 1950.[107] Other commentators have distinguished between the Court's current approach to federalism and the fixed enclaves of dual federalism.[108] Although the model I propose does not need to reach the question, I do not interpret *Morrison* as attempting to identify particular subject areas of state regulatory authority and placing them off-limits to federal encroachment. Rather, *Morrison* seems to reinforce the notion of concurrent power, although some areas of state jurisdiction, like family law, require greater solicitude against federal encroachment than others.[109]

In addition to distinguishing between federal and state areas of sovereignty, *Morrison* does not defer to congressional judgment. Although the law's sponsors had compiled a volume of evidence to show why a national approach to violence against women was needed, Chief Justice Rehnquist emphasized: "We . . . reject the argument that Congress may regulate non-economic, violent criminal conduct based solely in that conduct's aggregate effect on interstate commerce."[110] *Morrison* reached its result despite the support of thirty-eight states urging the law's passage.[111]

Thus, *Morrison* rejects the philosophy underlying *Garcia v. San Antonio Metropolitan Transit Authority*,[112] which favored a political-process approach to federalism that presumes Congress is capable of adjusting power between the federal and state governments. Instead, a deep-seated respect for states as sovereigns motivated the Court's decision. Congressional action

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107. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 2-24 (1950) (tracing demise of early dual federal jurisprudence).

108. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1499 (1994) (stating that "[c]ourts have moved from prophylactic categories to case-by-case standards in a variety of areas, and in theory at least, nothing prevents them from doing so in the area of federalism"); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 140 (2001) (stating that recent federalism cases do not attempt to identify particular subject matter areas of state regulatory authority, making them off limits to federal action).

109. For example, although the Court's language strongly suggests singling out criminal law as a sphere reserved for state regulation, the Court made clear in a decision a week later that some forms of arson – "a paradigmatic common-law state crime" – fall within the reach of the Commerce power. Jones v. United States, 529 U.S. 848, 858 (2000) (construing federal arson statute as limited to buildings used for commercial purposes); *see also* Troxel v. Granville, 530 U.S. 57, 73 (2000) (protecting parental rights against Washington state grandparent statutes but hesitating to rule broadly on constitutional standard); Young, *supra* note 108, at 158-59.

110. United States v. Morrison, 529 U.S. 598, 617-18 (2000).

111. *See id.* at 653 (stating that thirty-eight states' attorney generals called for Congress to pass Violence Against Women Act (Souter, J., dissenting)).

112. 469 U.S. 528 (1985); *see supra* note 88 (discussing *Garcia*).

must not blur "the distinction between what is truly national and what is truly local."[113]

The Court's recent decisions under the Tenth and Eleventh Amendments reflect this desire to respect sovereign interests. In its recent Eleventh Amendment jurisprudence, the Court has made clear that state immunity from private suits is critical to the dignity of states as sovereigns.[114] In *Alden v. Maine*,[115] the Court addressed the question whether Congress could compel states to defend federal claims in state courts and a five-to-four majority upheld the dismissal of such an action on the grounds of sovereign immunity.[116] To avoid a suggestion that states may disregard federal law, Justice Kennedy, in his majority decision, mentioned the need for supremacy, but relied on the states' good faith rather than private suit compulsion, consent, or the possibility that the federal government may bring nonconsensual suits against them.[117] Throughout *Alden*, Justice Kennedy expressed

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113. *Morrison*, 529 U.S. at 617-18; *see* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (concluding that Corps' rule extending definition of "navigable waters" under Clean Water Act to include intrastate waters exceeded authority granted Corps under Act and warning against federal encroachment of traditional state power).

114. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1998) ("[F]ederal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution . . .'" (citation omitted)). In 1996, *Seminole Tribe* examined the question whether Congress, through its Article I powers, could subject the states to private federal suits. In rejecting that claim, the majority opinion reasoned that Congress may only abrogate state sovereign immunity when enforcing provisions of the Fourteenth Amendment, which "expand[s] federal power at the expense of state autonomy . . . ." *Id.* at 59.

115. 527 U.S. 706 (1999).

116. *See* Alden v. Maine, 527 U.S. 706, 758-60 (1999) ("To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty . . . ."). The standard the Court developed for determining whether Article I legislation subjects states to private suits in their own courts is whether "there is 'compelling evidence' that the states were required to surrender this power to Congress pursuant to the constitutional design." *Id.* at 731 (citations omitted).

117. *See id.* at 757 (stating that "federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law"). An individual may sue a state for money damages only if (1) Congress explicitly authorizes such a suit in exercising its power to enforce the Fourteenth Amendment; or (2) the state waives its sovereign immunity. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (stating circumstances in which citizen may sue State). In *College Savings Bank* and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, two cases decided during the same term as *Alden*, the Court grappled with alleged state invasion of private property cases, the former case involving trademarks and the latter case involving patents. *Id.*; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999). These cases reflect the same five-to-four split on the issues of the scope of the states' Eleventh Amendment immunity and Congress's ability to subject states to federal law.

concern about the potential affront to the "dignity" of the states if individuals are permitted to sue them:

> The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status . . . . Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of the "concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people – who were, in Hamilton's words, 'the only objects of government.'"[118]

As Justice Kennedy wrote, "[States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not full authority, of sovereignty."[119]

Similarly, when it considered whether states can be sued by their employees under the federal law against age discrimination, the Court held, in another five-to-four ruling, that Congress exceeded its Fourteenth Amendment remedial powers when it abrogated the states' immunity from suits brought under the Age Discrimination in Employment Act (ADEA).[120] Even though Congress was unequivocally clear in expressing its intent to abolish the states' Eleventh Amendment immunity from suit, that abrogation was both disproportionate to any unconstitutional conduct the states could conceivably commit and unsupported by adequate congressional findings of age discrimination by the states that it exceeded Congress's authority under Section 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the Equal Protection Clause.[121]

Most recently, the Court held, in yet another five-to-four decision, that Congress again exceeded its Fourteenth Amendment powers to abrogate state sovereign immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA).[122] The Court found that Congress failed to establish an

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118. *Alden*, 527 U.S. at 714 (citations omitted).

119. *Id.* at 715.

120. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (stating that ADEA's purported abrogation of States' sovereign immunity was invalid under Fourteenth Amendment).

121. *See id.* (finding that because ADEA was not valid exercise of congressional power under Fourteenth Amendment, ADEA's attempt to abrogate state's sovereignty was invalid); U.S. CONST. amend. XIV § 5 (giving Congress "power to enforce, by appropriate legislation," the provisions of Fourteenth Amendment).

122. Title I, Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (stating that "in order [for Congress] to authorize private individuals to recover money damages against the States, there must

appropriate exercise of its authority in the language of the ADA. Moreover, the majority found the record compiled by Congress troublesome: it determined that the ADA's legislative record was insufficient to show a history and pattern of irrational employment discrimination by the states against the disabled.[123] Even if Congress had established a sufficient record, proportionality concerned the Court. The Court found that the rights and remedies created by the ADA against the states were not "congruent and proportional to the targeted violation."[124]

These recent decisions thus indicate the Court's belief that sovereign immunity is critical to protecting the states' dignity as sovereigns.[125] The real concern, according to Professor Ann Althouse, is states' survival, which cannot depend on the will of Congress.[126] "The real, practical concern . . . is to protect the states as independently functioning government institutions by sparing them the impact of accumulated liability for their past violations of law."[127]

The Court's recent decisions under the Tenth Amendment that invoke the anti-commandeering principle reflect this same interest in protecting state sovereignty. Historically, Congress has used its spending power to regulate indirectly several areas traditionally of state concern.[128] Indirect regulation of the states has limitations when congressional pressure turns into unconstitutional compulsion for the states to regulate.[129] In *New York v. United States*,[130] for example, the Court held that Congress had unconstitutionally comman-

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be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation," and that Congress had not met burden when applying ADA to States).

123. *See Garrett*, 531 U.S. at 368 (stating that "the legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled").

124. *Id.* at 374. The dissent argued that Congress had compiled sufficient evidence of discriminatory treatment by local governments and that the Constitution requires only that "Congress reasonably could have concluded that the remedy" was "appropriate." *Id.* at 377 (Breyer, J., dissenting).

125. *See* Althouse, *supra* note 75, at 250-51 (criticizing Court's recent protection of state's "dignity," and arguing for normative federalism model); Georgene Vairo, *Judicial Congress v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1612 (2000) (arguing that Interstate Class Action Jurisdiction Act of 1999 may violate Tenth and Eleventh Amendments under new federalism decisions).

126. *See* Althouse, *supra* note 75, at 266.

127. *Id.*

128. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding legislation under which federal highway funds would be withheld from any state that failed to enact legislation prohibiting purchase or possession of alcohol by persons under twenty-one years).

129. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 363 (1997).

130. 505 U.S. 144 (1992).

deered the state legislative process by requiring a state legislature to enact a law providing for the disposal of radioactive waste generated within the state's borders.[131] Similarly, in *Printz v. United States*,[132] the Court struck down the part of the Brady Handgun Violence Protection Act[133] that required state officers to assist in the implementation of federal regulation by performing criminal background checks on firearms purchasers.[134] The Court identified two ways by which Congress "may urge a State to adopt a legislative program consistent with federal interests."[135] First, Congress can use its spending power to attach certain conditions on the receipt of federal funds as a way to influence state policy.[136] Second, Congress can establish a "program of cooperative federalism," thereby allowing states to choose to follow federal standards or to have state law preempted by federal regulation.[137] Anything beyond those parameters, however, would unconstitutionally "commandeer" the states.[138] In both *New York* and *Printz*, the Court viewed the preservation of political accountability as a major reason for prohibiting commandeering. It found that state governments could remain responsive to the local electorate's policy preferences through indirect regulation; however, if Congress were able to compel states to regulate, political accountability would diminish.[139]

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131. New York v. United States, 505 U.S. 114, 174-75 (1992) (stating that Congress had commandeered state legislative process by compelling states to enact and enforce nuclear waste regulatory program).

132. 521 U.S. 898 (1997).

133. 18 U.S.C. §§ 921-930 (2000).

134. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding part of Brady Act unconstitutional).

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

136. *See id.* at 167 (stating that Congress may encourage States to regulate by attaching conditions to receipt of federal funds).

137. *See id.* (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981)).

138. *Cf.* F.E.R.C. v. Mississippi, 456 U.S. 742, 771 (1982), in which the Court upheld provisions of the Public Utility Regulatory Policies Act of 1978 that imposed certain procedural requirements on state commissions regulating energy. The Court emphasized that the area of public utility regulation was one in which Congress could preempt the states completely and that the states could avoid the federal obligation by deciding not to regulate. *Id.* at 764-65.

139. *See* Printz v. United States, 521 U.S. 898, 930 (1997) (stating that Congress could avoid political accountability by forcing states to undertake federal program); New York v. United States, 505 U.S. 144, 168 (1992) (stating that "where the Federal Government compels States to regulate, the accountability of both State and Federal officials is diminished"). In its latest pronouncement, however, the Supreme Court refrained from expanding the scope of its "anti-commandeering" principle, suggesting that the Court is not simply guarding "states rights." In *Reno v. Condon*, 528 U.S. 141 (2000), the Court reviewed the constitutionality of a federal law that barred states from selling personal data on drivers' licenses. *Id.* A unanimous Court held that the Driver's Privacy Protection Act (DPPA) did not violate the Tenth Amendment,

Given the Court's new aggressive protection of state sovereignty and dignity, it is likely that federal tort reform legislation will invite constitutional challenges. *Lopez* and *Morrison* require that the activity Congress seeks to regulate must constitute "commerce." As discussed later in this Article, aside from products liability, which has its basis in interstate commerce, and perhaps motor vehicle accidents, which involve interstate movement and industry, torts generally do not involve an economic exchange. The externalities associated with torts – *e.g.*, insurance – may involve commercial transactions with interstate repercussions[140] but the torts themselves do not. Instead, torts typically involve individual conduct that is local in nature. For example, in *Morrison*, the Court struck down the civil remedy provision of the Violence Against Women Act precisely because it did not advance an economic interest.[141] Some tort cases may simply be too attenuated from interstate commerce to rely on the Commerce Clause as a basis for regulation.

Regardless of whether legislation federalizing tort law would be declared invalid as exceeding congressional authority, as a practical matter, the exer-

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instead concluding that it permissibly "'regulate[s] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" *Id.* at 150 (quoting South Carolina v. Baker, 485 U.S. 505, 514-15 (1988)). Contrasting the earlier anti-commandeering cases, the Court found that the DPPA was a straightforward federal regulation of state activity, which neither requires the states to pass legislation nor commands state executive officers to enforce a federal program. *Id.* at 151. As to congressional authority, the Court held that the law fit comfortably within the power of Congress to regulate interstate commerce because the information was an "article of commerce" in the context of the statute and "its sale or release into the interstate stream of business is sufficient to support Congressional regulation." *Id.* at 148.

Further, the Court stated "that a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *See id.* at 150-51 (quoting *Baker*, 485 U.S. at 514-15).

In contrast to the *Printz* and *New York* opinions, the *Condon* case does not address the issue of political accountability. Nor did it reach the ruling by the lower court that the federal government could regulate the states only by means of "generally applicable" laws, ones that do not single out states for regulation.

140. Insurance may provide the link to interstate commerce to allow Congress plenary power to federalize tort law under the Commerce Clause. *See* Ackerman, *supra* note 6, at 441 (stating that "[i]nsurance links the overwhelming majority of tort claims, whatever their origin, to interstate commerce"). Congress could include an interstate jurisdictional element in its statute, say, a civil action in federal court against persons who cross state lines to commit a tort.

Other commentators have interpreted the anti-commandeering Eleventh Amendment holdings to suggest that Congress may lack the power to direct state judges to enforce federal tort reform legislation. *See* Lebow, *supra* note 78, at 690 (concluding that "[l]egislators should not attempt to conscript the state courts as agents of reform in contravention of fundamental notions of federalism").

141. *See supra* notes 95-113 and accompanying text (discussing *Morrison* holding).

cise of congressional power to regulate and preempt also remains a threat to the states. The assumption behind the exercise of the preemption power, of course, is that Congress has the power to regulate. However, the Court's recent preemption cases that generally displace state laws seem inconsistent with its recent Commerce Clause and Eleventh Amendment decisions that generally protect state laws and powers. This Article examines those cases next.

B. The Power to Preempt

The goal of safety is sought through two different approaches: tort liability and direct regulation at the state and federal level. Tort liability applies ex post to hold tortfeasors liable for accident costs. Decisions about product safety, for example, are made on a case-by-case basis. On the other hand, federal agencies heavily regulate products by creating mandatory requirements that manufacturers must meet in order to sell their products on the market. This type of ex ante regulation is specific and uniformly applies across the country. Such heavy regulation of products has led to extensive litigation under the preemption power. Examination of these cases sheds light on the Court's view of tort law as a core state interest.

Congress has the power to displace state lawmaking power in any area in which Congress has regulatory authority. The power of preemption stems from the Supremacy Clause, which proscribes any state law that is "to the [c]ontrary" of federal law.[142] In *M'Culloch v. Maryland*[143] and *Gibbons v. Ogden*,[144] Chief Justice Marshall interpreted the Supremacy Clause to prohibit mere "interference" with federal law.[145] Preemption may be complete or partial, express or implied.[146] Thus, the preemption power allows Congress

142. U.S. CONST. art. VI, § 1, cl. 2.

143. 17 U.S. (4 Wheat.) 316 (1819).

144. 22 U.S. (9 Wheat.) 1 (1824).

145. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824) ("The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a state."); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 330 (1819) (stating that "a constitutional act [of Congress] . . . cannot be either defeated or impeded by acts of state legislation").

146. Thus, Congress may decide to occupy an entire field of regulation or preempt state law only within certain bounds. For example, the Employee Retirement Income Security Act of 1974 (ERISA) completely preempts the field of employee welfare benefit plans. ERISA, 29 U.S.C. § 1144(a) (1994). *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (stating that ERISA's preemption clause indicates congressional intent to "establish the regulation of employee welfare benefit plans 'as exclusively a federal concern'" (citation omitted)). An example of partial preemption is the Comprehensive Smokeless Tobacco Health Education Act of 1986, 5 U.S.C. §§ 4401-4408 (1994).

to displace state law whether or not Congress has even exercised its regulatory authority. In theory, this broad proscription would allow courts to strike down vast numbers of state laws.

Preemption comes from the Constitution or derives from statute. Labor law is the classic example of the latter. Under the common law of many states, labor organizing and picketing were torts or crimes. Congress made the decision to legalize unions.[147] Put plainly, the congressional decision would be ineffective if the states, employing their community norms, could punish people for exercising their rights under the federal statutes. Thus, there is broad federal preemption of labor activity.[148] It is important, however, to note that the Supreme Court has repeatedly recognized a state role in regulating labor activity that does not call into question the federally-created legitimacy of the activity as such.[149] In other areas of the law, such as obscenity, the Court has relied on the states to help define the federal interest.[150]

See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (delineating the partial preemption of state law remedies by the Comprehensive Smokeless Tobacco Health Education Act of 1986). Furthermore, courts can infer preemption from a scheme of national regulation, even if Congress has not expressed an intent to preempt the field. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

Generally, the Supreme Court applies a three-part test to determine whether state law has been trumped by federal law. First, the Court looks to see whether Congress explicitly has expressed an intent to preempt state law. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) (explaining that "Congress can define explicitly the extent to which its enactments preempt state law"). Second, if there is no express preemption, the Court looks to whether there is a direct conflict between the exercise of state and federal regulation. *See id.* at 79 (stating that "state law is preempted to the extent that it actually conflicts with federal law"). Third, even in the absence of express preemption or direct conflict, the Court will ascertain whether state regulatory authority is preempted because Congress has "occupied the field." *See id.* (stating that "state law is preempted where it regulates a field that Congress intended the Federal Government to occupy exclusively").

147. *See* Labor Management Relations Act, 29 U.S.C. §§ 151, 157 (1998) (creating workers' right to form unions).

148. *See* San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 244-45 (1959) (citing reasons for federal preemption of labor activity).

149. *See, e.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 198 (1978) (deciding that state action was not preempted because Sears was challenging location of picketing and not whether federal labor law protected picketing); United Mine Workers v. Gibbs, 383 U.S. 715, 721 (1966) (stating that state jurisdiction has prevailed in situations involving traditional tort remedies for consequences of violence and imminent threats because state's interest in maintenance of domestic peace is not overridden in absence of expressed congressional direction).

150. Miller v. California, 413 U.S. 15, 24 (1973) (stating that test for obscenity is based on "contemporary community standards" (citations omitted)).

To avoid unnecessary displacement of state police power,[151] the Court has construed congressional intent narrowly.[152] At bottom, federalism is the root of the presumption against preemption, and

> [t]he signal virtues of this presumption are its placement of the power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power.[153]

Nonetheless, the preemption power remains quite broad and some commentators argue that it intrudes upon state lawmaking abilities and is an invasion from the Court's own making.[154]

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151. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). The Court also has stressed the need to avoid leaving a regulatory vacuum. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 207-08 (1983) ("It is almost inconceivable that Congress would have left a regulatory vacuum . . . .").

152. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (applying presumption against preemption in construing congressional intent to displace state police powers); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."); *cf.* Jones v. United States, 529 U.S. 848, 858 (2000) (construing federal arson criminal statute as inapplicable to arson of owner-occupied residence). In Justice Stevens's concurrence to *Jones*, he compared the presumption against preemption to the Court's narrow interpretation of federal criminal laws that overlap with state authority:

> The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years . . . illustrates how a criminal law like this may effectively displace a policy choice made by the State. Even when Congress has undoubted power to pre-empt local law, we have wisely decided that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."

Id. at 859-60 (Stevens, J., concurring) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

153. Geier v. Am. Honda Motor Co., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting). As Justice Stevens stated:

> In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement . . . . In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purpose . . . .

Id.

154. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 803-04 (1994) (arguing that preemption principles were introduced in 1912 Court decision); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 532-35 (1997) (arguing that preemption doctrine was product of *Lochner* Court).

In a recent series of decisions starting with cases that involve federal regulation of cigarette warnings, the Court has embarked on a complicated and contentious analysis of preemption of common law tort claims. These decisions found that congressional or regulatory action preempts tort claims with slightly different reasoning in each case.[155] A large part of the debate concerns the strength of the presumption against preemption when the subject matter involves preemption of common law remedies for compensating tort victims – an area traditionally regarded as within the states' domain.

In 1992, the Supreme Court held that federal law preempted certain, but not all, state failure-to-warn claims arising out of the sale of cigarettes.[156] Four years later, the Supreme Court confronted the question of federal preemption of state common law damages actions arising out of the use of federally regulated medical devices. In *Medtronic, Inc. v. Lohr*,[157] a majority of the Justices agreed that the term "requirement" contained within the preemption clause of the relevant statute encompassed not just state positive enactments, but also legal requirements arising from the application of state common law.[158] Ultimately, however, the Court held that the federal statute preempted none of the plaintiff's claims on a variety of other grounds.[159] In a plurality opinion authored by Justice Stevens, four justices described the role of the states as "independent sovereigns in our federal system."[160] Citing a presumption against preemption of state police powers used by the *Cipollone* Court to narrowly construe federal regulation of cigarette advertising, the *Medtronic* Court found that this "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety."[161] Thus, the plurality found it "implausible" that "Congress

155. *See Geier*, 529 U.S. at 886 (upholding preemption of lawsuit claiming that car without airbag was defective); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 675 (1993) (concluding that federal regulation governing maximum train speed preempted tort claim that train's speed was excessive); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 506 (1992) (upholding preemption of certain common law tort claims against cigarette manufacturers); *cf.* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986) (refusing to find federal question jurisdiction where plaintiffs incorporated federal standard in state-law private action for damages from ingestion of Bendectin during pregnancy); *Medtronic*, 518 U.S. at 503 (Breyer, J., concurring) (stating that Medical Device Act will sometimes preempt state law tort suit).

156. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992).

157. 518 U.S. 470 (1996).

158. Medtronic, Inc. v. Lohr, 518 U.S. 470, 504-05 (1996) (Breyer, J., concurring in part); *Id.* at 509-11 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part).

159. *See id.* at 492-502 (holding that plaintiff's claims based on state's common law theory of defective design and common law manufacturing and labeling requirements were not preempted).

160. *Id.* at 465.

161. *Id.* at 485.

effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device."[162] Instead the Court emphasized that it would be "to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct,' and it would take language much plainer than the text of § 360k to convince us that Congress intended that result."[163]

Recently, in *Geier v. American Honda Motor Co.*,[164] the Court held that a plaintiff's lawsuit alleging that her car was defective because it lacked a driver's side air bag was preempted.[165] Finding no express preemption because of a savings clause in the National Traffic and Motor Vehicle Safety Act of 1966,[166] the Court nonetheless found that the claim was preempted because it conflicted with the objectives of a federal regulation.[167] The dissent emphasized that the case raised important federalism concerns – concerns that create a presumption that state laws "particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police power are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so."[168]

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162. *Id.* at 487.

163. *Id.* (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)). Yet, this is what the Court has effectively achieved in *Alden*. *See supra* notes 115-19 and accompanying text (stating that Congress cannot compel states to defend federal claims in state courts).

164. 529 U.S. 861 (2000).

165. Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000).

166. 15 U.S.C. § 1381 (1988) (repealed 1994).

167. It held that the presence of a savings clause "does not bar the ordinary working of conflict preemption principles," rejecting the dissent's argument that a "special burden" should apply when a savings clause has been included in the legislation. *Geier*, 529 U.S. at 869. The dissent argued that the savings clause at issue showed congressional intent to preserve the state tort law and therefore the party favoring preemption had a special burden to show that valid federal purposes would be frustrated if that state law were not preempted. *Id.* at 898-99 (Stevens, J., dissenting).

168. *Id.* at 894 (Stevens, J., dissenting). But Justice Breyer's majority opinion did note that *Geier* "leav[es] . . . state tort law to operate . . . where federal law creates only a floor, *i.e.*, a minimum safety standard." *Id.* at 868; *see* Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 387 (2000) (Breyer, J., concurring) ("'[C]ommon sense and sound policy' suggest that federal minimum safety standards should not pre-empt a state tort action claiming that in the particular circumstance a railroad's warning device remains inadequate."). Lower courts have begun to interpret *Geier* as strongly suggesting that a minimum federal safety standard will rarely, if ever, impliedly preempt more rigorous common law safety obligations. *See* Harris v. Great Dane Trailers, Inc., 234 F.3d. 398, 402 (8th Cir. 2000) (finding that National Traffic and Motor Safety Act did not preempt state products liability claim on lack of reflective tape on vehicle); Leipart v. Guardian Indus., Inc., 234 F.3d. 1063, 1068 (9th Cir. 2000) (concluding that Consumer Product Safety Act did not preempt products liability claim based on glass shower door).

Continuing its solicitude of federal regulation in the face of state tort suits, the Court held this past term that claims alleging that the manufacturer of orthopedic bone screws had made fraudulent representations to the Food and Drug Administration in the course of obtaining approval to market the screws were preempted impliedly.[169] No presumption against preemption applied in the case because policing fraud against federal agencies is not a field traditionally occupied by the states.[170] The Court distinguished *Silkwood v. Kerr-McGee Corp.*,[171] a case that refused to find preemption of tort claims brought by an employee against a nuclear power plant, because it addressed traditional state tort law principles of the duty of care and not on a fraud-on-the-federal-agency theory.[172] The Court found that the plaintiffs' allegations conflicted with federal law in two ways.[173] First, they undermined the FDA's control over its regulatory responsibilities by "dramatically increasing the burdens" of regulated entities that would be forced to comply with the FDA's detailed regulatory regime in the shadow of fifty States' tort regimes."[174] Second, they deprived the FDA of the "flexibility" to respond to alleged misconduct as it deemed appropriate, which the Court found to be a "critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives."[175] The Court worried that state tort claims would impede competition and delay doctors' ability to prescribe off-label uses of drugs and medical devices.[176]

Justice Stevens concurred in the judgment without joining the opinion because he found that causation could not be established. Justice Stevens argued, however, that if the FDA determined before the litigation began that fraud had occurred during the approval process and had removed the offending product from the market, state damages would supplement, rather than conflict with, federal enforcement. In those cases, the majority's position would leave parties injured by fraudulent representations without a remedy.[177]

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169. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 353 (2001).

170. *Id.* at 347.

171. 464 U.S. 238 (1984)

172. Further, it found that in *Silkwood*, the Court had specific statutory evidence that Congress did not intend to preclude tort remedies, whereas Congress clearly intended that the Medical Device Act be enforced exclusively by the federal government. *Buckman*, 531 U.S. at 352.

173. *Id.* at 349-50.

174. *Id.* at 350. The Court was also concerned about imposing "additional burdens" on the FDA, because regulated entities would "have an incentive to submit a deluge of information that the Administration neither wants nor needs." *Id.* at 351.

175. *Id.* at 349.

176. *Id.*

177. *Id.* at 354-55 (Stevens, J., concurring). In an unusual alliance, Justice Thomas joined Justice Stevens in his concurrence.

Inherent in the spate of decisions involving preemption of tort claims is a fundamental tension between federalism and uniformity. On the one hand, providing a remedy to persons injured by defective products is viewed as a local, not federal, concern that should be reserved to the states under their police powers. On the other hand, as many product manufacturers' markets expand from a local to a national and even global scale, Congress has become increasingly concerned about the need for uniform national standards.[178] The tension between these competing considerations surfaced in 1999 when both houses introduced legislation that sought to limit Congress's and federal agencies' ability to preempt state and local tort laws.[179] An unusual alliance between conservative advocates of states rights and liberals interested in enhancing environmental protection through more stringent state laws sponsored the legislation. Business groups opposed the legislation, alleging that it would subject businesses to a patchwork of different state standards for their goods and services.[180] The business view ultimately prevailed and the legislation was dropped – at least for the time being.

Thus, despite the failure of most federal laws and regulations to provide a private compensation remedy, the Supreme Court's recent trend suggests that it is open to greater federal preemption of state tort suits.[181] It also suggests that the Court may not view tort law in the same category as other areas like criminal law in terms of representing a core state sovereign interest. Statutory language, federal regulation, and agency intent vary from product to product; thus, although courts' examination of the preemption question will continue to vary, preemption has become as strong a threat to common law torts as direct federalization of law through federal legislation.[182] Both areas

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178. *See, e.g.*, Virus-Serum-Toxin Act, 21 U.S.C. § 151-159 (1999) (stating that legislative history of 1985 amendments to Act shows Congress's intent to establish "uniform national standards" for all animal vaccines marketed in United States).

179. S. REP. NO. 106-59, at 1 (1999).

180. Cindy Skrzycki, *The Chamber Reached a Sticking Point*, WASH. POST, Sept. 17, 1999, at E1.

181. Prior to this recent trend, the Court switched back and forth between preempting and preserving state tort claims. *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Claims*, 77 B.U. L. REV. 559, 560 (1997). This reflected a switch in emphasis from uniformity to ensuring private damage remedies. *Id.* at 559-65.

182. Related to a preemption defense, a regulatory compliance defense would allow defendants to avoid liability in tort litigation by presenting evidence that its products or actions complied with relevant regulatory requirements. Although scholars and advocates of tort reform have pressed for a regulatory compliance defense for several years, *see generally* Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147 (2000) (arguing in favor of defense of regulatory compliance in tort actions), no jurisdiction has yet adopted a general regulatory compliance defense. *See* Doyle v. Volkswagenwerk Aktiengesellschaft, 481 S.E. 2d 518, 521 (Ga. 1997) (ruling that compliance with federal safety belt standards did not preclude liability for design defect as matter of law); Gonzales v. Surgidev Corp., 899 P.2d 576, 591 (N.M. 1991) (ruling that compliance with FDA regulation was not

raise serious questions regarding the proper balance between federal and state powers over tort law. They also demand an examination of the values of federalism.

IV. The Values of Federalism

Although this Article focuses on the constitutionality of congressional replacement of a particular state tort law, it is hard to divorce that question from the consideration of whether the exercise of that power is sound as a matter of policy. Thus, in addition to asking whether Congress has the power to act in a given area under the Constitution, it is important to ask whether

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complete defense to liability); RESTATEMENT (SECOND) OF TORTS § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 (1998) ("[C]ompliance with an applicable product safety statute or administrative regulation . . . does not preclude as a matter of law a finding of product defect.").

This is in contrast to the way noncompliance with regulatory standards is treated. Generally, jurisdictions treat unexcused violations of statutes as negligence per se. Although courts generally have refused to view regulatory compliance as a complete defense to liability, *see* Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1069 (Wash. 1993) (refusing to allow evidence of compliance with FDA regulations to provide relief from liability for failure to adequately warn because Court found that the FDA standards are only minimum requirements), some courts allow regulatory compliance to serve as some evidence of due care, *see* United Blood Servs. v. Quintana, 827 P.2d 509, 525 (Colo. 1992) (holding that compliance with FDA's regulations for blood banking was some evidence of due care, but not absolute proof); Jackson v. Spagnola, 503 A.2d 944, 948 (Pa. Super. Ct. 1986) (holding that compliance with automobile safety standards is properly introduced into evidence, but cannot create immunity to strict liability), others give it substantial weight, *see* Lorenzo v. Celotex Corp., 896 F.2d 148, 150-51 (5th Cir. 1990) (holding that compliance with safety regulation is strong and substantial evidence of lack of product defect), and in a few cases, courts have allowed regulatory compliance to serve as an absolute defense to liability. *See* Sims v. Washex Mach. Corp., 932 S.W.2d 559, 565 (Tex. Ct. App. 1995) ("Compliance with government regulations is strong evidence, although not conclusive, that a machine is defectively designed."); Ramirez v. Plough, Inc., 863 P.2d 167, 176 (Cal. 1994) ("[T]he prudent course is to adopt for tort purposes the existing legislative and administrative standard of care on this issue."); Dentson v. Eddins & Lee Bus Sales, Inc., 491 So. 2d 942, 944 (Ala. 1986) (noting that legislative standard not requiring seatbelts on school buses is conclusive on non-defectiveness). In addition, several states have adopted limited forms of a regulatory compliance defense. *See* ARK. CODE ANN. § 16-116-105 (Michie 1999) (interpreting section as not providing complete defense to liability and stating that regulatory compliance is evidence of non-defectiveness); COLO. REV. STAT. § 13-21-403 (2001) (stating that compliance creates rebuttable presumption); N.J. STAT. ANN. § 2A:58C-4 (West 2000) (providing rebuttable presumption of adequacy where product warning complies with Food, Drug, and Cosmetic Act or Public Health Service Act); OHIO REV. CODE ANN. § 2307.801(c)(1)(a) (2000) (barring recovery of punitive damages where product complies with Food, Drug, and Cosmetic Act or Public Health Service Act); OR. REV. STAT. § 30.927 (1999) (same); UTAH CODE ANN. § 78-18-2 (2000) (same); Buchanna v. Diehl Mach., Inc., 98 F.3d 366, 370 (8th Cir. 1996) (stating that evidence of compliance with applicable industry standards at time of manufacture gives jury competing evidence from which to choose). Manufacturers and many commentators continue to argue that regulatory compliance should be a complete defense to tort liability.

Congress should be allowed to act. Also, who should decide whether Congress or the states have overstepped their bounds, *i.e.*, should the courts decide this or will the political process provide a sufficient check on their powers?

Traditionally, the Supreme Court cites three values of federalism: it provides a check on the tyranny of federal power, it fosters governments that are more responsive than Congress to the needs of local citizens, and it uses the states as laboratories to develop new approaches to social problems.[183] "[The] state/federal division of authority protects liberty – both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home."[184]

The Framers of the Constitution thought that by separating powers among the branches of federal government and between the states and federal government, the structure of the government itself would become the best protection against a tyrannical federal government.[185] The Framers assumed that most governance would take place at the state and local levels. Thus, granting the federal government limited powers as well as creating two separate governing systems would necessarily restrict the power of the central government. Alexander Hamilton explained that the "necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power."[186]

A second value of federalism the Court often cites is that the state governments are closer to – and therefore are more likely to be responsive to – the local needs and desires of the public. As Professor David Shapiro explains, "one of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized."[187] The smaller the governing unit, the more likely it is to be responsive to the needs of the citizenry.[188] Thus, if a majority of citizens in Arizona favor punitive damages for medical malpractice suits but a majority in New Hamp-

183. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 524 (1995).

184. United States v. Morrison, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting).

185. Chemerinsky, *supra* note 183, at 525.

186. THE FEDERALIST NO. 32, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Professor Chemerinsky rejects this rationale as anachronistic, however, especially in light of the modern national economy and the development of extensive federal regulations. Chemerinsky, *supra* note 183, at 526.

187. DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-92 (1995).

188. As Professor Michael McConnell explained: "So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987) (reviewing RAOUL BERGER, FEDERALISM: EVALUATING THE FOUNDERS' DESIGN (1987)).

shire do not, it is easier to accommodate the divergent interests at the state rather than the federal level.[189]

The third argument made in support of federalism has its genesis in Justice Brandeis's famous observation about the states as laboratories for experimentation:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[190]

Other, more recent Supreme Court decisions have invoked similar arguments in support of federalism. For example, Justice O'Connor praised the experimentation of states by noting in her dissent that the "[C]ourt's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the fifty States have served as laboratories for the development of new social, economic, and political ideas."[191]

Some modern theorists argue that placement of power at the state level is important because it allows those who disagree with certain policies, but are politically powerless to change them to leave the jurisdiction or choose not to locate there in the first place.[192] Some commentators view this possibility of

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189. Professor Tom Stacy points out that this rationale works best when majoritarian preferences differ from state to state. But in such a case, he argues, national authority is also desirable because these state majorities can be prevented from too easily dominating minority interests by enlarging the polity and thereby making them lose their majority status. Thus he questions whether curbing the power of factions on the state level is more important or whether diversity is the stronger interest. Tom Stacy, *Whose Interests Does Federalism Protect?*, 45 U. KAN. L. REV. 1185, 1193 (1997).

Professor Chemerinsky suggests, however, that special interest groups may dominate government at the local level, thus defeating the purpose of avoiding tyrannical rule by maximizing electoral responsiveness. Chemerinsky, *supra* note 183, at 527 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989), and expressing concern about dangers of special interest capture at local level). Relying on the work of Professor Shapiro, Professor Chemerinsky also questions whether local governments are inherently more responsive than a greater level of government. *Id.* at 528.

190. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

191. FERC v. Mississippi, 456 U.S. 742, 787-88 (1982) (O'Connor, J., dissenting in part); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that federalist structure allows for innovation and experimentation in government); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568 n.13 (1985) (Powell, J., dissenting) ("The Court does not explain how leaving the States virtually at the mercy of the Federal government, without recourse to judicial review, will enhance their opportunities to experiment and serve as 'laboratories.'"); Stacy, *supra* note 189, at 1192.

192. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 25 (1995) (noting that interstate mobility allows citizens to escape tyrannical government); RICHARD A.

exit as a liberty-promoting advantage[193] while others view it as encouraging an undesirable race to the bottom.[194]

In supporting the value of federalism all theories make one basic assumption: that states have diverging, distinct views on the issue at hand. Thus, states may take differing views on welfare reform or the legalization of gambling. Whether this assumption holds true in the area of torts is debatable. Some say that "[t]he voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch."[195] Others assume there is a national consensus on tort law in various areas.[196] As such, I examine below whether state interests are distinct in the torts sphere.

V. Diversity of Views in State Tort Law

Historically, the states have taken distinct views on various tort issues.[197] One of the best known examples involves liability for water brought upon one's land. In *Rylands v. Fletcher*,[198] the English court held that an individual would be held strictly liable for damage from any water that escaped from the property owner's land.[199] When the issue was examined in the United States, the English holding met with varying degrees of enthusiasm. The western states, in particular, largely rejected the strict liability theory, finding negligence better suited to their needs:

> In Texas we have conditions very different from those which obtain in England. A large portion of Texas is an arid or semi-arid region.... The country is almost without streams; and without the storage of water from rainfall in basins constructed for the purpose, or to hold waters pumped from the earth, the great livestock industry of West Texas must perish. No

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EPSTEIN, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (1992) (stating that exit rights under federalism offer important and indispensable safeguard against government abuse).

193. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 76-77 (1991) (stating that Richard Epstein "makes no bones about the fact that his support for federalism is directly linked with his rejection of government regulation").

194. SHAPIRO, *supra* note 187, at 42-43; *see* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1011-13 (1995) (noting that decentralization may lead to state government deregulation in attempt to promote economic development).

195. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1301 (7th Cir. 1995).

196. *See In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 713 (E.D.N.Y. 1984) (noting likelihood that state court would look to national consensus to guide tort action).

197. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1969) (stating that rights and liabilities of parties in tort are governed generally by law of state which has most significant relationship to occurrence and parties).

198. 3 L.R.E. & I. App. 330 (H.L. 1868).

199. Rylands v. Fletcher, 3 L.R.E. & I. App. 330 (H.L. 1868).

> such condition obtains in England. With us the storage of water is a natural or necessary and common use of the land, necessarily within the contemplation of the state and its grantees when grants were made, and obviously the rule announced in *Rylands v. Fletcher*, predicated upon different conditions, can have no application here.[200]

Thus, the rule was tailored to meet the economic conditions of the region. Another significant historical example is the distinctive approaches states take to comparative negligence.[201] For example, states' positions vary on the relative degree of negligence allowed to the plaintiff before the plaintiff's fault bars recovery.[202]

State courts historically have "sung at different pitches" in another important sense: as initiators of "new torts."[203] There are various examples of this exercise; several significant ones include intentional infliction of emotional distress,[204] medical monitoring claims,[205] and invasion of privacy.[206] Courts have also adapted traditional torts to new situations.[207] Furthermore,

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200. Turner v. Big Lake Oil Co., 96 S.W.2d 221, 226 (Tex. 1936).

201. *See generally* David C. Sobelsohn, *Pure vs. Modified Comparative Fault: Notes on the Debate*, 34 EMORY L.J. 65 (1985) (surveying various states' comparative fault regimes).

202. *Id.* at 67.

203. Some will argue that new torts are merely old wine in a new bottle, but whether these are described as new torts or wrinkles on old ones is not significant in recognizing that common law courts are engaged in the development of causes of actions. Professor Bernstein defines new torts as those that are "both novel and free-standing" and "accepted . . . into the fold of American torts." Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413, 414 (1999).

204. *See* State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 284-85 (Cal. 1952) (recognizing tort of intentional infliction of emotional distress); RESTATEMENT (SECOND) OF TORTS § 46 (1978) (same). The tort of intentional infliction of emotional distress, for example, was not even recognized until 1948. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, § 12, at 64 (5th ed.).

205. *See, e.g.*, Bower v. Westinghouse Elec. Corp., 522 S.E.2d. 424, 430 (W. Va. 1999) (recognizing claim for medical monitoring as "proper subject of compensatory damages").

206. *See* Haynes v. Alfred A. Knoff, Inc., 8 F.3d 1222, 1229 (7th Cir. 1993) (describing many aspects of tort comprising common law "right of privacy"). The tort of invasion of privacy is usually traced to a law review article written by Louis D. Brandeis and his law partner, Samuel D. Warren, entitled *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-89 (1960) (describing development of right to privacy in common law courts).

207. *See* Ford v. Revlon, 734 P.2d 580, 585-86 (Ariz. 1987) (adopting intentional infliction of emotional distress tort to sexual harassment in workplace); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 629 (Tex. 1967) (finding battery when employee of hotel snatched plate from plaintiff, declaring that hotel did not serve "Negroes"); Fibreboard Corp. v. Pool, 813 S.W.2d 658, 675 (Tex. App. 1991) (allowing jury instruction on fear of cancer as mental anguish in determining damages).

lawyers and academics constantly attempt to persuade courts to adopt new tort causes of action.[208]

Examples of these differences in approach to civil standards of behavior abound today.[209] Perhaps most indicative evidence of the strength of this

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208. *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179-81 (1982) (regarding racial hate speech); Rory Lancman, *Protecting Speech from Private Abridgement: Introducing the Tort of Suppression*, 25 SW. U. L. REV. 223, 238-44 (1996) (regarding suppression of speech).

The assumption here is that state courts or legislatures make new law and the distribution of power between state courts and Congress creates the tension that this Article addresses. This is not to ignore, however, that the civil jury, another entity within its own right, has an impact on the creation of new torts. This distinguishes our common law tort system from the tort law of other nations. Some critics find this unique feature to create instability or even lawlessness. Bernstein, *supra* note 203, at 419 & n.35.

209. A classic example is found in the development of products liability law. States require varying tests to prove a design defect. Some states allow proof through a consumers expectation test while others do not. Some states allow the use of a risk/utility balancing test, without proof of a reasonable alternative design, while others do not require such proof. Indeed, this was one of the major controversies of the Restatement of Torts (Third). RESTATEMENT (THIRD) TORTS: PROD. LIAB. § 2 cmt. 6 (1998); James A. Henderson, Jr. & Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7, 11 (2000). Furthermore, states differ on whether to use comparative fault in the strict liability setting of products liability. *See generally* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917 (1996) (discussing diversity of approaches in products liability law).

Similarly, the area of negligent infliction of emotional distress has developed in a non-uniform fashion among the states. Some states extend recovery to bystanders only if they are in the "zone of danger," while others use a "foreseeability" approach and reject the zone of danger test. *Compare* Portee v. Jaffee, 417 A.2d 521, 526 (N.J. 1980) (stating multi-factored foreseeability test), *and* Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968) (same), *with* Bovsun v. Sanperi, 461 N.E.2d 843, 848 (N.Y. 1984) (announcing zone of danger rule). Along the same lines, states take different approaches to whether unmarried couples can recover for emotional distress from witnessing harm suffered by another. *Compare* Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (dismissing claims for emotional distress), *with* Dunphy v. Gregor, 642 A.2d 372, 379 (N.J. 1994) (allowing fiancee to bring claim). In protecting non-physical direct injuries against negligent interference, courts range from using a zone of danger test, *see* K.A.C. v. Benson, 527 N.W.2d 553, 559 (Minn. 1995) (requiring showing of fear of physical injury), to suggesting a broader foreseeability based limitation, *see* Gammon v. Osteopathic Hosp., 534 A.2d 1282, 1285 (Me. 1987) (foreseeability based on ordinary sensitive person).

Another example lies in the area of obligations of landowners. Two distinct approaches have emerged: the traditional approach varies the duty of the landowner depending on whether it is owed to a trespasser, licensee, or invitee. *See, e.g.*, Carter v. Kinney, 896 S.W.2d 926, 928 (Mo. 1995) (using category approach). The minority view has adopted a foreseeability-based approach. *See* Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968) (using foreseeability inquiry). And some states have created an exception to the minority view exempting trespassers from the foreseeability inquiry. *See* Heins v. Webster County, 552 N.W.2d 51, 54 (Neb. 1996) (listing states that have refused to abandon trespasser category).

diversity is the problem faced by plaintiffs seeking class action certification for mass tort actions brought in federal court. Plaintiffs repeatedly have argued that class certification should be granted, despite the fact that plaintiffs from different states in these diversity actions normally would have the negligence and damages law of their own state apply to their claims because tort law among the states has become nondistinctive. Courts generally reject this argument.[210] As Judge Posner explained:

> If one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States applicable to a novel claim, implying that the claim despite its controversiality would be decided iden-

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Market share liability, which expanded the notion of cause in fact, has developed among the states in a variety of ways. After California initiated the approach in *Sindell v. Abbott Laboratories*, 607 P.2d 924, 937 (Cal. 1980), courts in other jurisdictions reacted to it in numerous ways, ranging from rejecting the approach, adopting it, or modifying it. Some courts declined to find any judicial remedy. *See* Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 246 (Mo. 1984) ("[T]he law does not guarantee relief to every deserving plaintiff . . . [the] plaintiff must show with reasonable certainty that . . . the defendant is liable . . . ."); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 75-76 (Iowa 1986) (declining to apply market share-liability theory against manufacturers of DES when plaintiff could not prove which manufacturer sold DES in question). Other courts extended the concept by using risk shares rather than market shares. *See* Collins v. Eli Lilly & Co., 342 N.W.2d 37, 53 (Wis. 1984) (employing "market share alternative liability"); Martin v. Abbott Labs., 689 P.2d 368, 382 (Wash. 1984). In addition, other courts disallowed exculpatory evidence when the defendant is part of the relevant market. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989). Some courts (like those in New York and California) have defined the relevant market as national whereas other courts (like those in Wisconsin and Washington) have defined the market on a case-by-case basis. Many states rejected application of this concept outside of the DES setting, although a lower court in New York recently extended the market share concept to lawsuits brought against gun manufacturers. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 843 (E.D.N.Y. 1999), *rev'd*, 244 F.3d 26 (2d Cir. 2001).

Another example of diverse approaches lies in the area of damages. For example, courts struggle with whether to award damages for both pain and suffering and loss of enjoyment of life. *Compare* McDougald v. Garber, 536 N.E.2d 372, 376-77 (N.Y. 1989) (refusing to allow separate damages), *with* Fantozzi v. Sandusky Cement Prods. Co., 597 N.E. 474, 486 (Ohio 1992) (allowing separate charge to the jury). They also differ in whether damages lie for loss of consortium beyond claims brought by spouses. *Compare* Borer v. Am. Airlines, Inc., 563 P.2d 858, 865 (Cal. 1977) (refusing to extend loss of consortium claim to young children of injured mother), *with* Berger v. Weber, 303 N.W.2d 424, 425 (Mich. 1981) (allowing claim to go forward).

One author has studied the regional differences of tort law for New York. *See* William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-80*, 47 BUFF. L. REV. 117 (1999).

210. *See, e.g.*, Castano v. The Am. Tobacco Co., 84 F.3d 734, 741-42 (5th Cir. 1996) (denying class certification); *In re* Rhone-Poulenc Rorer, 51 F.3d 1293, 1302 (7th Cir. 1995) (same); *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987) (noting possibility of differences in products liability law).

> tically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court.[211]

Indeed, as a result of this problem, many class action lawsuits are certified only on a statewide basis.[212]

These differences in judicially crafted tort law have been complemented by state legislative changes, particularly in the area of tort reform. Over the last decade, legislatures have enacted wide-ranging laws in the name of reform, ranging from the elimination or capping of punitive damages for various types of lawsuits, to changes to or the elimination of joint and several liability, to modifying the collateral source rule and removing certain claims for intangible damages.[213]

Although the range of the diversity in states' approaches to tort liability is obvious, it is less obvious whether protecting this diversity promotes a federalism interest. It is unclear whether differences reflect regional social, economic, and cultural differences or if they simply reflect the views of the individual justices of the state supreme court who voted in a particular case. Furthermore, a state legislature's adoption of a cap on punitive damages in malpractice cases may be more indicative of the views of state legislators who have been influenced by special interest groups than of the views of a majority of the populace. For example, most citizens of New York probably did not have a view on whether exculpatory evidence should be allowed in a market share liability DES case.[214]

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211. *Rhone-Poulenc Rorer*, 51 F.3d at 1300.

212. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39, 42 (Fla. Dist. Ct. App. 1996) (denying class certification).

213. *See, e.g.*, ALA. CODE § 6-5-544, 6-5-547 (1993) (limiting noneconomic losses to $400,000 and total judgment to $1 million in medical malpractice cases); ALASKA STAT. § 09.17.010(b) (Michie 2000) ($500,000 limit on noneconomic damages); ARIZ. REV. STAT. § 12-2506 (2001) (abolishing joint and several liability); CAL. CIV. CODE § 3333.2 (West 1997) (placing $250,000 cap on noneconomic injuries in medical malpractice cases); COLO. REV. STAT. ANN. § 13-21-102.5(3) (West 2000) (limiting noneconomic damages to $250,000 unless court finds justification through clear and convincing evidence, thereby increasing limit to $500,000); IDAHO CODE § 6-1603(1) (Michie 1998) (capping noneconomic damages at $400,000, adjusted annually for wage inflation); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (2000) (limiting non-punitive, noneconomic damages to $500,000); OR. REV. STAT. § 18.560(1) (1999) (limiting noneconomic damages to $500,000); VA. CODE ANN. § 8.01-581.15 (Michie 2000) (capping recovery in medical malpractice actions to a total of $1.5 million, increased annually); WIS. STAT. ANN. § 893-55 (West 1996) (limiting total noneconomic damages to $350,000, adjusted annually).

214. *See* Hymowitz v. Eli Lilly & Co., 539 N.E. 2d 1029, 1078 (N.Y. 1989), *cert. denied*,

Yet a representative democracy does not require that citizens have specific views on these issues and, as Professor Rabin explains, the legislative adoption of caps on damages or a statute forbidding the use of the hindsight rule in products liability warning cases represents democracy at work.[215] Although it may not be a perfect example of representational government, it reflects local interests voiced through legislation.

If this is true of state legislation, it is even more true of a state's common law of torts. Of course, the citizen representation value is less apparent in judicial law-making. The tradition of common law development of torts, however, weighs heavily. Voters can play a role by overturning a common law ruling by voting to pass a law. Even more importantly, the common law has been woven over hundreds of years in response to perceived states' interests and works as an integrated whole.[216] Indeed, the Restatement of Conflicts supports this conclusion by recognizing that some tort principles are so important to the forum state's public policy that conflicting state law will not apply even if another jurisdiction has more substantial contacts with the tort.[217] Because diversity in state tort law exists, and the differences in viewpoints represent democracy at work, the question becomes whether that interest is sufficiently strong to withstand being superseded by federal legislation in the area.

VI. Foundations of Tort Law

Although the new federalism decisions, when defining congressional power under the Commerce Clause, do not declare certain areas traditionally regulated by the states as inviolate, the decisions clearly consider whether the federal statute regulates an area traditionally regulated by the states. As discussed above, examples cited by the Court of areas traditionally regulated by the states include family law, criminal law, and property. Are these categories merely determined by tradition and fiat, or is some broader principle at work?

Investigation into the historical and philosophic roots of tort law is critical for determining whether tort law belongs in this group. This Section sketches the early roots of tort law in criminal law and the two paradigms underlying the philosophic understandings of tort law: the "corrective" justice

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493 U.S. 944 (1989) (finding no exculpation for defendant who, although member of market producing DES, appeared not to have caused particular plaintiff's injury).

215. *See generally* Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 11 (1997) (noting legislature's choice from alternatives is more democratic than simply adopting federal standard).

216. *Id.*

217. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmts. c-d (1971).

function of rectifying torts and the attempt to explain the development of torts in economic terms.

Tort law, like its criminal law counterpart, began as local law reflecting the customary practices of the community.[218] "Its Anglo-Saxon inheritance gave it a customary quality; that is, it rested on long-established practices of the community."[219] As is well established, in early English law there was no distinction between tort law and criminal law.[220] One legal proceeding served both the tort function of compensating and placating the family or clan of the victim and the criminal function of compensating the king for disturbing his peace.[221] These payments, called *bot* and *wite*, were not contingent on proving fault, but rather were exacted to appease the clan of the injured person and limit feuding.[222] Over time, the civil and criminal functions began to separate. Although a duty to pay the full *bot* remained, one who was not blameworthy sometimes was excused from paying the *wite*.[223] Thus, the early history of tort law reflects the traditional purposes of tort law: punishment, compensation, and regulation.

It was not until the 1617 case of *Weaver v. Ward*[224] that a court suggested that one charged with trespass might be exonerated if he were "judged utterly without . . . fault."[225] The punitive effect of the action was increasingly limited by later courts to apply to those who were blameworthy in some respect. The increasing amount of travel on the roads in the 1800s and the corresponding rise in accident cases led the English courts to move toward a reasonable care standard of duty.[226] In an early case signaling a move in this direction, the court advised that people must "put up with such mischief as reasonable care on the part of others cannot avoid."[227]

Although tort law thus moved away from the criminal law, it remains rooted in seeking to punish those who violate societal norms. The punishment element is less important in tort law than it is in criminal law, which may

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218. Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 TORT & INS. L.J. 1, 1 (2000) (citing KERMIT L. HALL, THE MAGIC MIRROR 11 (1989)).

219. HALL, *supra* note 218, at 11.

220. *See generally* Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 2 (1970) ("[A]ny distinction between crime and tort was unknown.").

221. *Id.* at 2.

222. *Id.* at 3.

223. *Id.* at 6.

224. 80 Eng. Rep. 284 (K.B. 1617) (quoted in Malone, *supra* note 220, at 16).

225. Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1617).

226. Malone, *supra* note 220, at 32.

227. Holmes v. Mather, L.R. 10 Ex. 261 (1875).

reflect a different balance of private and public interests. However, it remains a strong element in tort law, which suggests that tort law should be viewed akin to criminal law as a regulatory area that should be protected from congressional invasion.

The traditional state role in both criminal and tort law reflects the sense that a smaller community is better able to define and impose its own social norms. Of course, a larger community can have social norms as well. As such, we have federal laws on gun control and federal criminal law. Assuming, for the sake of argument, that the federal law accurately and legitimately represents the norms of the national community, in our system the individual is expected to conform his behavior to the norms of both levels of society.[228] Separate responsibility to each sovereign is so deeply ingrained in our system that it even overrides the Fifth Amendment principle of only one punishment for a crime; the ban on double jeopardy almost never applies to successive federal and state prosecutions.[229]

As the federal system developed, the handling of tort law as well as criminal law fell to local government. Because local governments would bear the burden of caring for the injured, it made sense to allow the local people to determine who would bear the costs.[230] Similarly, because local people would pay the claim, it again was logical to allow the states to decide who should pay for the losses.[231] Thus, "[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens."[232]

Holmes recognized that states play this role of defining and imposing social norms in tort law as well as in criminal law. The standard for civil liability, he insisted, is "whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril."[233] Drawing from his example and from criminal law we can recog-

228. He is expected to conform even more, considering city ordinances, county health codes, and so on.

229. *See* Bartkus v. Illinois, 359 U.S. 121, 131 (1959) ("Every citizen of the United States is also a citizen of a State . . . . [H]e . . . owe[s] allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either." (citing Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852))); Arizona v. Poland, 645 P.2d 784, 791 (Ariz. 1982) (following *Bartkus* and holding that even when prior federal conviction rested on same facts as state conviction, state conviction is not barred); *see also* United States v. Wheeler, 435 U.S. 313, 317 (1978) (allowing second prosecution by United States after defendant had been convicted of lesser included offense by Navajo Nation because same act may be offense against two sovereigns, each with right to punish offender).

230. Eades, *supra* note 218, at 3-4.

231. *Id.*

232. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).

233. OLIVER WENDELL HOLMES, JR., *Lecture IV: Fraud, Malice, and Intent – The Theory of Torts* 162 (1881).

nize that normative rulemaking is the prerogative of every community to which the tortfeasor belongs, barring constitutional limitations or preemption.[234]

Extensive literature addresses the theoretical basis for these social norms of proper behavior in tort law.[235] Two basic paradigms have emerged, with many variations in each model. One approach asks when it is appropriate to have one party compensate another, basing this treatment on corrective justice or the idea that it is inherently "right" to pay for the injury one causes. The second approach adopts a utilitarian approach to the choice of a standard of liability, viewing it in economic terms as a manifestation of wealth maximization principles. Both approaches recognize, albeit for different reasons, the states' interest in providing compensation for harm to its citizens.

A number of scholars have argued that courts ought to focus on the moral or ethical duty to the community as a quasi-criminal function of the community. For example, in his classic essay, *Fairness and Utility in Tort Theory*,[236] Professor George Fletcher set the modern terms of the doctrinal debate by analyzing tort law under two competing paradigms: the "paradigm of reciprocity," whereby the "victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant," and the "paradigm of reasonableness" which roughly corresponds to the negligence standard and inquires into the justifiability of the risk created by the defendant's activities.[237] Fletcher's idea of duty rests on the rule of reciprocity, which would require compensation from a tortfeasor who imposes a nonreciprocal risk on his victim; he would not

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234. Community norms do not necessarily include the concept of "fault." Early tort regimes were strict liability, distinguishing them from criminal law, where fault early on became an essential element. Fault really entered the tort picture in the early nineteenth century cases like *Brown v. Kendall*. As Professor Malone noted, strict liability is the response of society to specific perils posing a serious threat to its welfare. More flexible tests, including the requirement of a degree of moral culpability or "fault," do not develop until diverse economic and social needs are sufficiently clustered into "meaningful activity groups" with conflicting needs. Malone, *supra* note 220, at 26-27. To put it in Holmesian terms, strict liability has a normative element, despite the absence of any culpable mental state – it imposes a duty to avoid, or a "negative fault."

235. Deep exploration of this debate is beyond the scope of this Article. Moreover, the two paradigms – fairness and efficiency – are presented to capture the main lines of the arguments, but certainly many authors have developed nuances or variations of the basic paradigms. For an overview of the major literature, see FOUNDATIONS OF TORT LAW (Saul Levmore ed., 1994); PERSPECTIVES ON TORT LAW (Robert Rabin ed., 4th ed. 1995).

236. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

237. *Id.* at 540, 542.

require actors who impose reciprocal risks of harm on each other to provide compensation for harm.[238]

Alternatively, Professor Jules Coleman's concept of duty rests more squarely on the principle of corrective justice. In his 1992 book, *Risks and Wrongs*, Coleman presents corrective justice as the principle that those who are responsible for the wrongful losses of others have a duty to repair them.[239] Coleman's principle of corrective justice finds its basis in a community's common sense of morality and shared moral and legal practices.[240]

The alternative to the moral conduct paradigm is the pure economic analysis epitomized by the Learned Hand formula and Judges Posner's and Calabresi's writings and decisions. The economic analysis of tort law focuses on efficiency as the primary goal of the law.[241] In the area of negligence, this means that the law seeks to minimize the combined costs of accidents and accident avoidance. Just as there may be too many accidents and too little spent on accident prevention, there may be too much spent on accident prevention and, perhaps contrary to intuition, too few accidents. To efficiently allocate societal resources of safety and care, the burden of preventing accidents should be placed on those who can avoid the accident at the lowest cost. Thus, the judgment of liability depends on a weighing of costs and benefits and it is less important whether compensation, punishment, or regulation is the dominant purpose of tort law.

In response to the argument that courts should and generally have focused on fairness in matters of tort law,[242] Judge Posner argues that, at least in this area, fairness equals efficiency.[243] A legal system that operates efficiently increases the size of the economic pie.[244] The shifting of the total

238. *See id.* at 542 (discussing regime of liability based on non-reciprocal nature of rights imposed).

239. *See* JULES L. COLEMAN, RISKS AND WRONGS 361-85 (1992) (developing theory of corrective justice based on moral duty to account for wrongs).

240. *See* Jules Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 29 (1995) (discussing effect of legal and political practices on content of duty required by corrective justice). Professor Weinrib also uses corrective justice as a fundamental principle of tort doctrine. *See* Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 297 (1994) (arguing that corrective justice is "key to understanding [tort law]").

241. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (discussing implications of efficiency in tort law); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998) (same).

242. *See* William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York*, 47 BUFF. LAW REV. 117, 118-19 (1999) (contrasting views of various normative scholars with those of law and economics scholars).

243. *See* LANDES & POSNER, *supra* note 241, at 8-9, 14-19 (arguing that economic efficiency is consistent with notions of fairness).

244. *See id.* at 16 (commenting that legal system that increases the economic pie is good from economic perspective).

expected damages and cost of care toward the optimal minimum point conserves the scarce resources of time and money for other uses. This effect may have a direct result in reduced insurance rates.[245] As Judge Posner notes, the improvement is wealth-maximizing but not necessarily Pareto-superior because the defendant who is the least cost avoider will be uncompensated.[246] According to Judge Posner, however, the economic pie will be bigger because those who directly benefit from the increased efficiency could compensate the losers.[247] Any concerns of unequal distribution are more properly directed to other branches of government.[248]

This debate suggests that different values, such as efficiency, reciprocity, and moral norms, may inform tort law in the United States. Further, states may rely on one or more of these values in operating their tort system. These differences are significant in the application of federalism principles to national tort reform. Indeed, the dichotomy already has influenced the Court's decision-making in the area. For example, these two polar positions are reflected in the two partial concurrences in *Cipollone v. Liggett Group, Inc.*[249] Justice Scalia took the extreme economic position: not only is any claim derived from the label itself preempted, but any alternative method of informing the public is also preempted.[250] This is not because the statute so states, but because allowing the states to impose a less economically efficient and thus more onerous burden on manufacturers would upset the commercial decision made by Congress.[251]

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245. *See id.* at 17 (suggesting efficient regime would lead to reduced insurance rates).

246. *See id.* (arguing that "winners" could theoretically compensate "losers").

247. *Id.* at 16-17 (suggesting Kaldor-Hicks wealth maximization rationale produces greater societal gains but may injure uncompensated individuals). But if wealth maximization is truly the goal of tort law, in part by redistribution from the generally poorer injured to the generally richer injurers, it would mean that the highest goals of tort law could be achieved by abolishing tort law altogether – thereby allowing defendants to externalize even more costs.

248. *See id.* at 17-18 (suggesting that balancing of efficiency and redistributive considerations is not appropriate inquiry for judiciary). But without the normative element, scholars argue, this analysis risks degenerating into a system of after-the-fact eminent domain; the person who can use the property or right in the most economically efficient manner can simply take it. The victim cannot choose whether he wants to be injured; and if he recovers anything at all, he gets only the market value of the damaged property or right. At worst, the tortfeasor is no worse off than if he had not committed the tort, while that recovery is the best possible outcome for the victim – a topsy-turvy scheme from a moral standpoint. Arguably, some element of punishment, deterrence or sanction is necessary to avoid this result. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 231-33 (1991) (suggesting that private law only prices conduct, whereas criminal law prohibits).

249. 505 U.S. 504 (1991).

250. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 544 (1991) (Scalia, J., concurring) (finding all claims preempted by federal statutes).

251. *See id.* at 554-55 (Scalia, J., concurring) (discussing economic concerns considered

On the other hand, Justice Blackmun argued that although Congress may have a role to play in the area it cannot oust the states from setting negligence standards.[252] Thus, he emphasized the distinction between direct regulation and tort liability.[253] Even when the states are preempted from the former, the courts consistently recognize a responsibility to adhere to the societal norms reflected in the latter.[254] The paradigmatic case, cited approvingly by Justice Blackmun, is *Ferebee v. Chevron Chemical Co.*,[255] which concerned a federal labeling requirement.[256] It states:

> Even if Chevron could not alter the [EPA-written] label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label . . . . That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.[257]

The critical question is whether the redistribution envisioned by the *Ferebee* court is economic or based on some notion of ethical duty to the community or both. Put another way, the inquiry is whether Maryland's normative position that manufacturers should pay for the injuries they cause interferes with Congress's economic interest in promoting the interstate sale of paraquat.

The *Buckman* preemption case presents a similar dichotomy.[258] Writing for the Court, Chief Justice Rehnquist reasoned that allowing state law fraud-

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by Congress). As a matter of historical fact, Scalia's interpretation of the statute may well be the correct one. Some have argued that the statute was a response to pressure from the tobacco lobby, which secured broad immunity from tort liability – lasting thirty years until just recently – in exchange for a perfunctory warning.

252. *See id.* at 537 (Blackmun, J., concurring) (noting that Court has declined to find state tort law preempted on numerous occasions).

253. *See id.* at 536-37 (Blackmun, J., concurring) (discussing effects of direct regulation versus common-law tort remedies).

254. *See id.* at 537 (Blackmun J., concurring) (noting that tort law has entirely separate function from direct regulation – compensation of victims).

255. 736 F.2d 1529 (D.C. Cir. 1984).

256. *See* Cippollone v. Liggett Group, Inc., 505 U.S. 504, 537 (1991) (Blackmun J., concurring) (citing Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1540 (D.C. Cir. 1984)).

257. *See* Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1532 (D.C. Cir. 1984) (suing on theory of strict liability for failure to label chemical, paraquet, properly).

258. *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 352-53 (2001) (discussing competing federal and state claims to regulate medical devices); *supra* notes 164-68 and accompanying text (discussing balancing interests of protecting community and implementing congressional policy).

on-the-FDA claims would negatively affect the FDA's flexibility in placing new devices on the market, would superimpose fifty state tort regimes on the FDA's own scheme, and would deter manufacturers from seeking approval of devices with beneficial off-label uses.[259] This would hurt the economically efficient scheme contemplated by Congress: "[T]he comparatively speedy § 510(k) process could encounter delays, which would, in turn, impede competition among predicate devices and delay health care professionals' ability to prescribe appropriate off-label uses."[260]

Justice Stevens, concurring in the judgment but not in the Court's reasoning, stressed the importance of allowing states to provide a private tort remedy.[261] He argued that allowing state damages remedies in an appropriate case would "supplement and facilitate" the federal enforcement scheme instead of encroaching upon it; this would not interpret the statutory scheme to preclude any damages remedy in that situation.[262] Otherwise, this would leave the parties injured by fraudulent representations to federal agencies without a private compensation remedy and upset a normative position that tort victims should receive compensation for injuries they receive.[263]

These cases highlight the Court's struggle over whether to let Congress's interest in promoting national economic efficiency or the states's interest in providing compensation for harm to its citizens dominate the preemption and Commerce Clause analysis. This Article turns to an application of these paradigms.

VII. Applications of the Paradigms and Conclusions

We are at a crossroads in federalism jurisprudence. For the past several years, the Supreme Court has defined more sharply the analysis behind its federalism decisions. In particular, it has made clear that Congress's power under the Commerce Clause is not indefinite, imposing limits for the first time in decades and indicating other situations where those limits may apply. This jurisprudence will meet new challenges as courts review legislation drafted in response to the September 11 terrorists attacks. The country immediately turned to the federal government to marshal a response to the attacks through legislation. New laws broadening federal power will challenge the federalism precedents that the Rehnquist Court has carefully nurtured over the last half

259. *See Buckman*, 351 U.S. at 350 (suggesting state tort claims would deter applicants from seeking approval of devices for fear of civil liability).

260. *Id.* at 351.

261. *See id.* at 354-55 (Stevens, J., concurring) (noting significance of common law tort remedies).

262. *See id.* at 354 (Stevens, J., concurring) (noting value of state tort remedies).

263. *See id.* at 355 (Stevens, J., concurring) (noting potential lack of remedy).

decade. Testing them will help define what the Court means by "truly national" and "truly local" interests.

Aside from the legislation enacted in response to the terrorist attacks, reformers increasingly have attempted to implement modern day tort reform at the federal level through Congress's Commerce Clause power. Thus far, no modern federal tort reform effort has been struck down as unconstitutional, but no major challenge has been mounted yet under the Court's new federalism jurisprudence. Given the new decisions and the strong history of preserving the rights of states to govern matters of local concerns, it is questionable whether some of the modern federal tort reform efforts will survive application of the new federalism jurisprudence.

This Section attempts to reconcile the competing developments and proposes a sliding scale model for the examination of federal tort legislation under the recent federalism decisions. Before doing so, it briefly examines the traditional justifications for federal tort reform and questions whether they are based on accurate assumptions.

Reformers usually couch the argument in favor of a national uniform tort law in terms of fairness.[264] The argument is that basic fairness demands that the legal system should treat similar cases in a similar fashion. For example, medical malpractice injuries should be judged similarly regardless of where they occur.[265] A classic example involves injuries that occur as a result of defective products.[266] Manufacturers of products market their products nationally, not locally, which creates uncertainty as to the liability rules that will apply once the product is marketed.[267] Commentators argue that this uncertainty would be greatly diminished if a uniform system of tort rules were applied.[268]

These fairness considerations rooted in economic efficiency thus seek to avoid the inefficiency of applying fifty different product liability schemes. Predictability allows manufacturers to better understand their obligations and to theoretically reduce transaction costs.[269] As such, one method to moderate

264. *See* Roger Transgrud, *Federalism and Mass Tort Litigation*, 148 U. PA. L. REV. 2263, 2270-71 (2000) (indicating that common federal tort reform argument is unfairness of differences in state regimes).

265. Schwartz, *supra* note 209, at 922.

266. *Id.* at 924; Pamela M. Mades, Note, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 SETON HALL L. REV. 540, 566 (1997).

267. *Id.*

268. *See* Schwartz, *supra* note 209, at 925-30; Ackerman, *supra* note 6, at 451-56.

269. It is unclear whether the wide variation in outcomes in similar tort cases is attributable to doctrinal differences. Tort law historically has vested a great deal of authority in juries to determine liability and damages for tortious behavior. The variability of outcomes in tort suits

differences in outcome would be to apply similar liability rules, hence the movement for uniform, federal tort legislation.[270] Based on this argument, recent tort reform efforts have focused on product liability.[271]

Although the economic efficiency argument has its appeal, current as well as historical federal tort reform efforts have been piecemeal and focus on specific industries or problems, and thus have not involved a vast, interstitial replacement of the entire body of common law torts.[272] Instead, Congress generally has deferred to the states in the area of tort remedies even as it expanded its role in government regulation.[273] This piecemeal approach has

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has often been attributed to differences in jury behavior. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. PA. L. REV. 1147, 1243-44 (1992) ("[A]ny increase in settlements could easily be the result of misperceptions about jury behavior. If lawyers and adjusters mistakenly believe that jury awards are soaring, they will negotiate settlements more favorable to plaintiffs than they need to or used to."). Indeed, the perception of differences in jury awards has spurred the tort reform movement in the form of legislative caps on the amounts of jury awards in certain tort cases.

Even more important, these differences in outcome suggest that perhaps the most effective way to curtail differences in jury determinations and achieve the goal of uniformity is to constrain discretion by curtailing jury discretion and investing stronger gatekeeping functions in the trial judge. *See* Rabin, *supra* note 215, at 15 (discussing response of legislative caps on jury awards); Schwartz, *supra* note 209, at 928 (commenting on different states' views on jury role in products liability cases). Indeed, current efforts to federalize tort law have focused mostly on curtailing remedies rather than affecting doctrine on liability. States have been very active in this area, but without any degree of uniformity. The degree to which we should constrain jury discretion is an old debate, *see* Pokora v. Wabash Ry., 292 U.S. 98, 101 (1934) (finding jury issue unless facts dictate rule of law), with a resurgence in the recent movement to polyfurcate complicated mass tort cases and the creation of evidentiary rules spawned by *Daubert*, Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 70 (1927) (leaving issues of due care to jury, but reserving standards of conduct as legal issues). *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-95 (1993) (creating new evidentiary rules for "expert" witnesses). Most efforts to impose uniformity through federal legislation come in the form of caps on recovery of noneconomic loss, elimination of joint and several liability, or making uniform the responsibility of collateral sources for economic loss. These efforts would allow uniformity to occur. By definition, a $400,000 cap on noneconomic loss awards would remove jury discretion to award a greater amount.

270. *See* Rabin, *supra* note 215, at 15 (discussing appeal of "legislative limitations on remedies/damages" in product liability realm).

271. *Cf.* Robert Pear, *States Dismayed by Federal Bills on Patients' Rights*, N.Y. TIMES, Aug. 13, 2001, at A1 (commenting that health plans and multistate employers want uniform standards supplied by the proposed Patients' Bill of Rights to provide uniformity in regulation).

272. *See* Terry Carter, *Piecemeal Tort Reform*, A.B.A. J., Dec. 2001, at 51, 51-53, 69 (suggesting incremental tort reform more successful than comprehensive approach).

273. *See* Food and Drug Administration Act, § 903(b)(2), 21 U.S.C. § 393(b)(2) (1994) (describing FDA's power to regulate prescription drugs); Federal Aviation Administrative Authorization Act, 49 U.S.C. § 106 (1994) (creating federal regulation of airline industry); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 503 (1996) (noting "presumption against the

compromised the goal of economic efficiency that a uniform federal tort system would supply.

Presumably, manufacturers could also avoid uncertainty and unpredictability by hewing to the rules of the single most stringent state. This, however, would give the strictest state control over the nation's safety tort rules. If the rules are to become de facto national in this way, it would make better sense for them to be truly national and created in a national forum. But there does not seem to be judicial or academic analyses of the question of how manufacturers handle the problem of facing different state standards, which is what the economic efficiency argument really warrants.[274]

Harkening back to the *Swift* era, proponents of moving product liability cases from state to federal courts also believe that juries disfavor foreign manufacturers in state courts.[275] Even if such discrimination does exist, it is unlikely to be avoided by forcing plaintiffs to bring suit in federal court. After all, in federal and state courts the jurors are drawn from the local community. Moreover, recent data suggests that federal judges have been more favorable to products liability plaintiffs than state juries have been.[276]

Others have pointed out that many of the assumptions underlying the push for tort reform, either on a state or federal level, stem from assumptions drawn from a few widely reported aberrant cases.[277] Despite widespread publicity, lobbying, and some scholarly and judicial rhetoric to the contrary, the data are fairly clear that the tort system, at least since the industrial age and up to the present, strongly favors defendants.[278]

[federal] pre-emption of state police power regulations and permitting state tort action for defective medical devices" (citation omitted)); Martin v. Eastern Airlines, Inc., 630 So. 2d 1206, 1209 (Fla. Dist. Ct. App. 1994) ("[T]he Federal Aviation Act was not intended to preempt state common law negligence claims." (citations omitted)).

274. For example, how often do manufacturers face choices in which it is necessary or useful for their general counsel to sit down with their engineers to design products? Or do manufacturers handle the variance in state laws simply as a litigation strategy problem by asking: "What should we argue in this state?"

275. *See* The Class Action Fairness Act of 2001, H.R. 2341, 107th Cong. § 2(b) (2001) (seeking to limit power of state courts to adjudicate mass tort actions).

276. *See* William Glaberson, *A Study's Verdict: Jury Awards Are Not Out of Control*, N.Y. TIMES, Aug. 6, 2001, at A9 (discussing study by Professors Theodore Heisenberg and Martin Wells to be published in *Cornell Law Review*).

277. Robert A. Prentice & Mark E. Roszkowski, *"Tort Reform" and The Liability "Revolution": Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 255-59 (1991) (arguing that perception of tort litigation explosion is incorrect); Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1000-04 (1998) (discussing factors that encourage reporting of exceptional damage awards).

278. *See* Saks, *supra* note 269, at 1281-86 (finding defendants in aggregate impose many times cost on society and on victims than they are required to compensate).

Many tort reform efforts focus on limiting damages. Such caps, however, are arbitrary. It is hard to explain the difference between a cap on medical malpractice damages of $200,000 and a cap of $300,000 other than as a response to political pressures. Further, caps are intrinsically unfair. A cap on intangible loss means that the very seriously injured individual does not receive compensation for the full extent of his or her intangible injuries.

Imposition of uniformity through nationwide caps on damages only exacerbates this problem. Furthermore, caps create uniformity from a defense perspective but not from a victim's perspective. If Congress imposed a cap on damages related to products liability cases but not as to other accident cases, a victim of a car accident caused by driver's negligence would be able to recover the full extent of his or her injuries while a victim of a car accident caused by a product defect would not. From the victim's perspective, similar injuries are not treated consistently.

Thus, the assumptions underlying congressional tort reform may be flawed empirically, or at least wrong in the context of particular states. The national economic interest may not be served to the extent claimed by the national tort reform movement – a strong consideration when these efforts face judgment under the recent federalism decisions.

Even assuming national tort reform efforts are based on accurate assumptions, it still is not clear that they would survive judicial scrutiny because of the state interests involved. The recent federalism decisions leave open many questions. In particular, they do not sufficiently define what is meant by a truly local interest. Drawing from the recent federalism jurisprudence, this Article proposes a two part, sliding scale analysis to deal with these questions that (1) examines the purpose behind the federal law to see whether it truly promotes a federal economic interest, and (2) determines whether the federal tort legislation unconstitutionally infringes upon common law torts, an area traditionally regulated by the states.[279]

A. Examining the Purpose Behind and Impact of the Federal Legislation

In its recent Commerce Clause jurisprudence, the Court focuses first on the federal interest Congress attempts to promote in its legislation. *Lopez* and *Morrison* demand that the activity Congress seeks to regulate must constitute "commerce."[280] Writing for the majority in *Morrison*, Chief Justice Rehnquist

279. As a result of the recent federalism decisions, Section Five of the Fourteenth Amendment may be the power Congress intends to invoke to support tort reform at the federal level, a federal power not addressed here.

280. *See* United States v. Morrison, 529 U.S. 598, 617 (2000) (stating that Congress may

stated: "We . . . reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[281] Thus, even assuming that the concerns raised above that question the underlying assumptions behind federal tort legislation can be met, one would need to examine further the federal tort legislation to see whether it serves a true national economic interest or whether it attempts to regulate a noneconomic endeavor through indirect aggregate effects on interstate commerce. This in turn requires an examination of the purpose and, critically, the effect of the congressional legislation.

Clearly, each bill and its sections would have to be examined individually. The Air Transportation Safety and System Stabilization Act creates a federal civil cause of action, removes the need to prove negligence, and authorizes payment to claimants for physical injuries or death related to the September 11 terrorist attacks.[282] Congress made clear in passing this legislation that it was concerned about the financial status of the air carrier industry and thus took several measures, including the creation of a federal civil cause of action and the limitation of the industry's liability to insurance coverage, to ensure that the industry would survive.[283] Thus, submitting a claim waives the right to file a civil action in tort for damages, eliminates any claim for punitive damages, removes the right to appeal an award to a court, and caps the total liability for the claims against the industry at the limits of the airlines carriers' liability coverage.[284]

In contrast to the gun regulation at issue in *Lopez*, this is not an attempt to regulate noneconomic conduct based on indirect aggregate effects on commerce.[285] Air transportation is a classic example of interstate, economic commercial activity. On its face, creating a claims procedure is directly

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not regulate noneconomic criminal conduct); United States v. Lopez, 514 U.S. 549, 561 (1995) (requiring that conduct regulated affect interstate commerce).

281. *Morrison*, 529 U.S. at 617.

282. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230 (2001) (to be codified at 49 U.S.C. § 40101) (limiting victims' right to recover tort damages from air carriers).

283. *See id.* § 408 (creating federal cause of action and capping liability to extent of insurance coverage). Similarly, liability has been limited to insurance coverage for suits related to the terrorist attacks for aircraft manufacturers, airports, and owners of the World Trade Center. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201, 115 Stat. 597, 645-647 (2001) (to be codified at 49 U.S.C. § 40101) (limiting liability for terrorist attacks).

284. *See id.* §§ 405 & 408 (eliminating right to sue in tort, punitive damages, right to appeal, and capping total liability).

285. *Cf. Lopez*, 514 U.S. at 561 (discussing noneconomic "criminal" nature of Gun-Free Schools Act).

related to protection of that commercial activity – it is not hard to fathom that without such protection the airline industry would be in serious trouble.[286] In its haste to pass the legislation, however, Congress did not compile a strong record of the interstate economic impact of tort claims on the industry, which the *Garrett* decision seems to require.[287] As applied, the federal economic interest promoted by the claims facility could be undermined depending on the number of claimants who opt to pursue their claims individually in state court. Despite these shortcomings, the Aviation and Transportation Security Act seems to meet the first part of the Commerce Clause analysis.

Similarly, what if federal legislation seeks solely to limit compensatory damages against one industry in order to encourage development of the industry? In limiting damages against nuclear power plant operators, the potential for an unanticipatible scale of actual damages that could prevent the development of nuclear energy concerned Congress.[288] As a result, it imposed a limit which it acknowledged would almost certainly be too low to compensate the victims fully.[289] Nineteenth century courts systematically undercompensated tort victims for an analogous reason: because the capital owner (the injurer) could put the money to better economic use than the worker (the victim), as much money as possible should be left in the hands of the defendants.[290] In this instance, determining the appropriate level of redistribution from tortfeasors to victims for purposes beyond deterrence and compensation seems closer to serving a national economic interest – *i.e.*, one that would pass muster under the new federalism jurisprudence and is less connected to the moral conduct at which state tort systems are aimed.

The stated purpose of the Common Sense Product Liability Legal Reform Act – likely to be a model for future federal tort reform legislation – was to

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286. Of course, individuals still have the option to pursue their claims in state or federal court, so the industry may not have escaped the problem.

287. *See supra* notes 122-24 and accompanying text (discussing *Garrett*'s requirement that Congress establish appropriate exercise of authority through record).

288. *See* Atomic Energy Damages Act, 42 U.S.C. § 2210 (1994) (limiting liability of nuclear power plants); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83-86 (1978) (upholding Congress's enactment of legislation that enforced $560 million cap on damages and required waiver of defenses by indemnitors in event of nuclear catastrophe).

289. *See Duke Power*, 438 U.S. at 84-85 (discussing Congress's realization that statutory cap would not assure full compensation). Similar legislation has been passed to protect manufacturers of vaccines. *See* National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-13 (1994) (detailing procedure for securing compensation under vaccination programs).

290. *See* HALL, supra note 218, at 125 (indicating that placement of burden on victims freed "capital for further business investment . . . [providing] indirect subsidy for early industrial expansion"). *But see* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1743 (1980) (discussing development of res ipsa loquitor doctrine and liability imposed on railroads).

impose standards on manufacturers of products that cause harm.[291] The congressional findings concluded: "The rules of law governing product liability actions, damage awards, and allocations of liability have evolved inconsistently within and among the states, resulting in a complex, contradictory, and uncertain regime that is inequitable to both plaintiffs and defendants and unduly burdens interstate commerce."[292] Congress, obviously with an eye toward meeting the *Lopez* test, also concluded that the "national scope of the problems created by the defects in the civil justice system" made it impossible "for the States to enact laws that fully and effectively respond to those problems" and that there existed a "need to restore rationality, certainty, and fairness to the civil justice system in order to protect against excessive, arbitrary, and uncertain damage awards and to reduce the volume, costs, and delay of litigation."[293] Although, as discussed above, it is questionable that the assumptions underlying these reforms are accurate, there is no doubt that Congress tried to define a national economic problem and propose a national solution to the "product liability crisis." Because the equity argument Congress cited really is an efficiency argument, it seems to serve a national economic purpose, assuming this litany would be sufficient without more specific congressional findings on the relationship between product liability litigation and interstate commerce.[294]

Other areas are grayer. For example, assume that Congress enacted a federal tort statute solely for the goal of limiting punitive damages.[295] The Common Sense Product Liability Act included a cap on punitive damages equal to the greater of two times the sum of the amount awarded to the claimant for economic loss and noneconomic loss or $250,000.[296] The proposed cap sparked a strong reaction from its supporters and detractors. As one commentator observed, "The plaintiffs' bar (and their congressional supporters), ardently defended a public policy device intended to deter and punish wrongdoing,

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291. *See* Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 52(b) (1996) (seeking to impose "uniform legal principles of product liability").

292. 142 Cong. Rec. S. 2587 (daily ed. Mar. 21, 1996) (statement of Sen. Hollings).

293. Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 2(a)(8), (10) (1996).

294. *But see* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-74 (2001) (finding congressional record compiled to show history and pattern of employment discrimination by states inadequate to justify abrogating state sovereign immunity).

295. Although the final version of the Common Sense Product Liability Legal Reform Act of 1996 would have curbed punitive damages in products liability cases, earlier versions included a provision to curb punitive damages in all civil cases brought in any federal or state court on any theory. *See* H.R. 956, 104th Cong. §§ 201-202.

296. *See* Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 108 (imposing cap on tort damages).

while champions of the cap vigorously argued in favor of curbing excessive, arbitrary, and unpredictable punitive damage awards."[297] This observation succinctly summarizes the state and federal issues at stake here – the promotion of deterrence and punishment that reflects the local interest in regulating individual behavior, and the curbing of unpredictable punitive damages that reflects a national interest in ensuring an efficient national economy.

It is not entirely clear whether a cap on punitive damages actually achieves the result it seeks.[298] Assuming it does, the critical question is whether it promotes a national economic interest and regulates economic activity. Is the purpose of a federal cap on punitive damages to set an optimal level of deterrence or does it seek to protect an industry or profession regardless of the appropriate level of deterrence? A comparison to criminal law is apt. Setting the appropriate level of punishment for adequate deterrence has a strong norm-setting element aimed at noneconomic activity, which traditionally is within the province of state criminal law and outside the realm of federal legislation. Similarly, if the purpose and effect of federal tort legislation is to set an appropriate level of punishment for deterrence, it targets noneconomic activity and thus justifies a major role for the states in setting punitive damages, with Congress's role in the scheme directed at ensuring proportionality under the due process clause. On the other hand, if the purpose and effect of the cap is to protect a particular industry or certain defendants from liability to ensure the free-flow of interstate commerce, regardless of deterrence – as in the case of the Air Transportation Safety and System Stabilization Act, which eliminates punitive damages altogether with regard to certain claims – then it is more likely aimed at the economic activity contemplated in the recent federalism decisions.

Another provision of the Product Liability Legal Reform Act raises an example. It limits a defendant's responsibility in products liability actions for noneconomic loss to that which is in direct proportion to the defendant's percentage of responsibility for the harm caused to the plaintiff, *i.e.*, it makes each defendant's share several and not joint.[299] The vast majority of states have adopted some form of comparative fault and have abolished joint and

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297. Lebow, *supra* note 78, at 674.

298. *See* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1623 (1997) (arguing that capping punitive damages at arbitrary amount would hamper efficiency of tort system); Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 650 (commenting that arbitrary caps undervalue noneconomic damages).

299. *See* Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 110 (1996) (providing several liability for tortfeasors).

several liability, which reflects a change in philosophy regarding compensation of the victim at almost any cost as opposed to achieving a "fairer" result to the defendant; however, the states' approaches are not uniform.[300] Congress would need to demonstrate that imposing uniformity on the law regarding several liability promotes a national economic interest to pass judicial muster.[301]

Thus, to determine whether federal tort legislation serves a direct national economic interest, federalism jurisprudence requires a critical examination of the purpose and effect of the federal legislation which ensures that the activity in question is an economic endeavor. Such examination should reveal that the immediate subject of regulation has a direct, substantial impact on interstate commerce, along with congressional findings of fact to substantiate that claim. Federal tort legislation that regulates a commercial area with direct economic impact – such as the airline industry – will fare better than legislation directed at individual activity – such as medical malpractice.

B. Areas Traditionally Dedicated to State Regulation

Even assuming that the federal legislation passes the threshold of constitutionality because it substantially affects interstate commerce, the Court's inquiry does not end there. In its recent federalism jurisprudence, particularly in the cases arising under the Tenth Amendment, the Court indicated that states have a constitutional interest in regulating certain "local" matters. Regardless of whether these areas of state powers come from either the letter or the spirit of the Constitution, the Court has emphasized that a finding of traditional state regulations merits special inquiry under Commerce Clause analysis, although it has not fully explained how to conduct that inquiry.[302]

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300. *See* Lebow, *supra* note 78, at 676 (listing examples of differences among states with regard to joint and several liability).

301. Similarly, the Air Transportation Safety and System Stabilization Act and the Aviation and Transportation Security Act both limit the liability of certain industries to insurance coverage for incidents related to the September 11 terrorist attacks. Presumably, capping damages in this fashion is designed to protect specific industries from excessive liability that would hurt the national economy and in that way is aimed at promoting national economic activity.

Limitation of attorneys fees is another area often suggested for tort reform. Again, the question is whether such a limitation would serve a national economic interest. Here, the connection to interstate commerce appears more indirect and may be struck down under *Lopez* and its progeny.

302. This Article is agnostic as to whether there exists areas of exclusive state powers, an issue that has been debated at length. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 798 (1996) ("Challeng[ing] . . . fundamental premise by claiming that the existence of areas of exclusive state power is *not* a necessary condition of constitutional federalism."); *see also* Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528,

Under the model proposed below, the level of scrutiny applied to the asserted federal action is much greater if the area Congress seeks to regulate is one traditionally governed by the states. Thus, as the strength of the state interest infringed upon increases, the strength of the federal interest asserted correspondingly must be greater to constitutionally displace the state interest.

Determining whether creation of tort remedies is an area traditionally dedicated to state regulation such that it would inhibit federal legislation under the Commerce Clause is a complicated inquiry that depends on the analysis of various subsidiary issues. First, the Court has indicated that certain areas traditionally dedicated to state regulation involve core local interests that are specially protected against federal encroachment. Criminal legislation is one of the areas of state sovereignty that has been given special protection.[303] Although Congress certainly is empowered to create federal crimes, the Court does not usually find that federal law preempts states from creating their own crimes covering the same criminal activity.[304] Property law and family law are two other areas of regulation traditionally cited as local in nature.[305] Thus, it is critical to examine whether tort law should be viewed in the same way.

In examining whether tort law is comparable to the other areas of state sovereignty worthy of special protection, the critical analysis lies in how one views the main purpose of tort law. As discussed above, two primary approaches have emerged – the moral conduct view and the pure economic analysis approach.

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552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). Nor is this discussion an attempt to return to the days of dual federalism. *See supra* notes 105-08 and accompanying text (discussing possible revival of dual federalism). If these state powers are considered exclusive, then a finding of exclusivity would always trump federal encroachment; if state powers are considered important but less than exclusive, the sliding scale model presented here would be triggered.

303. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (stating that "criminal law enforcement" is area in which "States historically have been sovereign"). In *Printz*, the Court struck the provision of the Brady Bill requiring local law-enforcement officials to assist in the administration of a federal firearms statute as "commandeering." Printz v. United States, 521 U.S. 898, 933-35 (1997). And last Term in *Jones v. United States*, the Court held that a person accused of violating the statute that made arson a federal crime could not be convicted, even though he had thrown a Molotov cocktail into a home, because the act concerned a building not being used in interstate commerce in any active sense. The Court observed that arson is "traditionally local criminal conduct," indeed "a paradigmatic common-law state crime." Jones v. United States, 529 U.S. 848, 858 (2000).

304. In fact, research did not reveal any example of preemption of state crimes.

305. *See supra* notes 100-02 and accompanying text (discussing Court's concern that Congress should not preempt state exercise of traditional police powers).

If tort law is predominantly based on economics, then regulating tort law at the federal level aligns closely with the federal interest in regulating economic activity (assuming the activity has an effect on interstate commerce). The stronger the economic element in tort law, the stronger the argument for a substantial, even dominant role for Congress in the tort system, given its power to regulate national economic interests.

However, the recognition of an irreducible moral or ethical imperative in tort law reaches the heart of the exercise of state sovereign power, giving the states an irreducible role to play as co-equal norm setters in our federal system. Insofar as state tort law serves this normative function, it is closer to the other areas granted special protection, particularly to criminal law. In that case, Congress's power to federalize tort law is subject to greater scrutiny under the recent federalism decisions.

Most federal tort reform proposals are piecemeal; they either limit the amount or type of damages available to the victim of certain tortious behavior. However, sometimes they replace the common law tort system altogether with regard to claims against one industry or for a single mass accident, as in the Air Transportation Safety and System Stabilization Act.[306] If a claimant opts to use the federal compensation system, the federal system becomes "the exclusive remedy for damages arising out of the hijacking and subsequent crashes" of the airplanes, thus replaces a common law action in tort for compensatory and punitive damages.[307] Significantly, Congress left open the option of filing a tort action individually, thereby allowing claimants to go outside the federal claims system.[308]

That Congress left the victims with the option of pursuing a state remedy is significant because it leaves state powers intact. Creating a parallel civil remedy system is similar to the way Congress has approached the area of criminal law which preserves much of the states' role as primary norm setter. More troublesome are the situations where congressional legislation removes the common law tort remedy completely without providing any federal remedy to replace it.[309] In that situation, the states' interest runs high and the federal law would be subject to greater scrutiny.

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306. *See generally* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (to be codified at 49 U.S.C. 40101) (preempting common law tort system for September 11 disaster).

307. *Id.* § 408(b)(1).

308. *Id.*

309. This concern has provoked a running debate in preemption cases where preemption would deny the state altogether the ability to redress tortious behavior. In that situation, the state's interest runs high and the federal law would be subject to greater scrutiny. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 487 (1996) (quoting refrain from *Silkwood* that it was "diffi-

More difficult is the situation in which the federal legislation removes the common law tort action but creates a federal cause of action. Here, the state interest in setting standards of behavior for and providing compensation to its citizens may not be as compelling. Both morally or economically based principles may inform the state tort law in providing a remedy. Even if providing a tort remedy is driven by efficiency values, those values may not align with the national economic efficiency values promoted by the federal legislation. From the state common law point of view, putting an industry out of business through tort judgments may be an efficient solution which may not be considered an efficient result from the federal point of view. In that case, the sliding scale probably would err in favor of congressional action, countenancing encroachment on state tort regulation. If Congress demonstrates that the interstate economic interest in preserving an industry has strong national economic impact, it would outweigh the states' interest in ensuring that its citizens receive adequate compensation for harms suffered by tortfeasors and that tortfeasors are adequately deterred.

Federal legislation that caps punitive damages is a common proposal. As noted above, the Common Sense Product Liability Act would have capped punitive damages[310] and both versions of the proposed Patients' Bill of Rights would set limits for punitive damages.[311] Again, the critical inquiry is whether the tort law the federal legislation replaces is morally or economically based. Punitive damages are intended to deter and punish wrongdoing and can be

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cult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 542 (1992) (Blackmun, J., concurring) (failing to accept that "Congress, without any mention of state common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct."); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) (discussing absence of language in legislative history of Atomic Energy Act even considering precluding state law remedies for accidents in nuclear plants, for "[t]his silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 253 (1959) (Harlan, J., concurring) (noting that "the Court's opinion . . . cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be . . . federally prohibited").

More recently, with regard to the proposed Patients' Bill of Rights, state officials have begun to express concern that the congressional legislation may override protections already in place under state law for consumers. *See* Pear, *supra* note 271, at A1 (reporting concerns of state officials).

310. *See supra* note 5 (listing effects of proposed legislation).

311. *See supra* note 4 (noting limits on punitive damages imposed by both versions).

traced directly back to tort law's roots in criminal law. In allowing punitive damages, it seems that the state acts closer to its traditional function as a local norm-setter of morally acceptable behavior, akin to its common law role in criminal law. Thus, the strong state interest would demand an even stronger federal interest to overcome the special protection warranted by the state role being replaced. Congress would bear a higher burden to show exactly how critical it is to the national economy to impose uniform standards of punitive damages with regard to health plans or products manufacturing.

VIII. Conclusion

In the end, if proposals such as the Common Sense Products Liability Act survive scrutiny under the recent federalism decisions, we may see the federal courts return to the days of *Swift* when the law courts applied in tort and other cases was federal rather than state generated. The advantages to this swing may include greater uniformity and predictability of application of tort law. These advantages, however, may come at the expense of principles of federalism. Federal rules may be less responsive to local interests. Accordingly, the states as laboratories may have less opportunity to experiment and explore new doctrine.

ESSAY