

# SHOULD CONGRESS ENGAGE IN TORT REFORM?

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Should Congress engage in tort reform? I first appraise, and find rather unpersuasive, arguments that defense interests might offer in favor of Congressional action on personal injury law. Then I explore reasons why consumer and victim advocates might seek Congressional action with respect to personal injuries. Although some good arguments can be made on this side, their political prospects are currently slim. Turning to the tort reform proposals now pending in Washington, I criticize them as asking Congress to take on an inappropriate role. Finally, I raise some issues about what clearly is a proper Congressional role — determining the place of federal courts in personal injury cases.

## I. ARGUMENTS DEFENSE INTERESTS MIGHT OFFER IN FAVOR OF CONGRESSIONAL ACTION ON PERSONAL INJURY LAW

For more than two decades defense interests have captured the “tort reform” label. They have broadly argued that liberal judges have allowed or encouraged personal injury law to get out of control, and they have appealed to legislatures at both the state and federal level for relief. In this section, I address a variety of justifications that defense interests assert (or could assert) in support of tort reform by Congress. The issue in each case is whether a convincing argument has been made for national legislation with respect to personal injuries, a field which has long been dominated by state law, primarily common law. My conclusion is that none of the claims canvassed in this section is convincing.

### *A. Adopting a National Fault-Based Theory of Tort Law*

Defense interests have argued that the United States should embrace fault-based liability as our national legal theory of tort law. Reflected in conventional “negligence” doctrine, I associate this perspective with traditionally conservative values. Its core principle is that when someone acts badly and causes harm to another, the government should make its courts available as a forum for redress if the victim seeks to hold the wrongdoer accountable. In this model of tort law, individuals pursue justice and serve the collective good in the process. This happens because

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potential injurers, fearing liability if they misbehave, will have an incentive to exercise due care in the way they act. This outlook arguably dovetails with the ideology behind the Republican Party's "Contract With America" — in welfare, for example, the Contract also emphasizes the tenet of personal responsibility.

Of course, Congressional endorsement of a single ideological view of tort law is not the only way to achieve national consistency. For example, the National Conference of Commissioners on Uniform State Laws, an organization with representatives from every state, regularly tries to accomplish that same result by promulgating so-called "uniform laws" that states are urged to adopt. The aspiration is that the country will converge on a single vision legislature-by-legislature. This has been attained, perhaps most spectacularly, with the Uniform Commercial Code. The Restatement project of the American Law Institute is another, perhaps more subtle, approach to the same end. By lending the prestige of its members to what they conclude is the better reasoned doctrine in important, traditionally common law areas, the Institute hopes to convince state court judges to fall in line.

Nevertheless, Congressional action in significant legal fields previously left to the states is certainly not unheard of — even in the area of tort law. Consider, for example, the Sherman antitrust law and the federal securities laws. They created dominant national visions of how to deal with the financial problems they address, thereby importantly supplanting, if not actually preempting, state tort doctrine in the areas of conspiracy and fraud.

On this basis, I can understand the business community pressing, starting around 1970, for a sweeping federal products liability law grounded firmly in the fault principle. At that time, the new and competing ideology of "enterprise liability" was very much in the air — backed by a few venturesome judges and several prominent torts scholars and given at least some backing by the Restatement (Second) of Torts. Rather than being individual fault-based, enterprise liability reflects a liberal perspective on the role of tort law. It imposes strict liability on organizations whose products cause harm, whether or not it can be shown in specific cases that injury could have been avoided by the product manufacturer through the exercise of reasonable precaution. Many believed that enterprise liability would become the new tort law paradigm at least in the products area, and fear of that outcome provided defense interests a reason for seeking Congressional re-affirmation of the traditional fault principle. This was indeed the thrust of the Model Product Liability Act, developed in the mid 1970s by the Department of Commerce. Although drafted as though it would be adopted by individual

states, it was quickly understood that Congress itself might impose its provisions nationwide. Even though bills of this sort were introduced, they did not pass in the face of Democratic opposition.

With Republicans finally taking control of Congress in 1995 is it time to revive such bills? I do not think so. The reason is that as the past 25 years have unfolded, enterprise liability has failed to take hold as legal doctrine. On the whole, state courts just have not been won over to the idea of using tort law as an accident compensation scheme in the tradition of Workers' Compensation — apart from the arena of manufacturing defects where tort law simply adopted contract warranty notions, in place for decades, that present no real threat to the business world. Simply put, through vigorous litigation efforts and state-level political efforts, the threat of enterprise liability has been largely beaten back. Instead, conservative ideology and the fault principle have continued to carry the day. Even in New Jersey, a change of heart by the supreme court plus state legislative reform have pulled what was perhaps the doctrinally most liberal state squarely back into the fault camp. This is why I simply see no need today for Congress to embrace fault-based tort law for product injuries — a point that has been made painfully clear to defeated advocates of strict liability in preliminary drafts of a new Restatement of Torts covering product injuries that is now in the adoption process.

To be sure, some of those on the defense side argue that, despite the formal legal doctrine, enterprise liability is the law in action as applied by juries. Business executives can often relate a favorite anecdote about how their firm or another they know about was held liable for an injury that, in their view, could not plausibly have been avoided by actions taken at the time of manufacture. As they see it, either jurors are disregarding the judge's instructions or plaintiffs' lawyers are capitalizing on knowledge gained from the benefit of hindsight and fooling juries into believing that warnings should have been given or that products should have been made in different ways.

It is not easy, however, for conservatives to offer a principled remedy to this complaint. After all, the fault idea to which they claim such attachment depends upon having confidence that juries can do well exactly what some claim juries often do poorly — determine whether or not due care was taken. Indeed, opponents of the current regime often mistakenly attack what they call "strict products liability" law when juries find that a product should have been designed differently, apparently not realizing that this is exactly the sort of issue that conventional fault law requires juries to address.

Of course, it could be argued that judges should replace juries as the decision-makers in torts cases. Yet, juries themselves, as a matter of

political philosophy, are something of a conservative institution in the sense that they have been understood to stand in the way of the abuse of power by government. To be sure, one could favor maintaining juries in criminal cases but not in civil cases, as is largely the situation in England today. Yet, the traditionalism of the American civil jury is so ingrained as to make a conservative attack on its very existence sound radical — especially if the proposal put on the table is that *Congress* should tell states that they may no longer use juries in torts cases. Besides, in the end, it is by no means clear as a practical matter that defense interests would routinely fare better if there were no civil jury. After all, it is not infrequent that the defense, not the plaintiff, asks for a jury trial.

Perhaps certain procedural changes to the current system could be adopted that would make the fault principle more accurately implemented in the eyes of the defense. But, once more, it seems an exceedingly odd step to ask *Congress* to take so long as tort cases continue to be heard in state courts — a matter to which I will return below.

### *B. Protecting Vital International Interests of the United States*

An entirely different defense-oriented justification for Congressional tort law reform is that it is necessary to protect vital international interests of the United States. After all, national legislation on matters of international trade is commonplace, and the international competitiveness of American firms and products is surely a legitimate matter of Congressional concern.

Turning specifically to products liability law, the claim is often voiced that pro-plaintiff state law verdicts harm U.S. firms which are out there battling in today's global market. I find this argument unpersuasive.

The first point to notice is that, despite all the attention it gets, in the end tort law is not a very important financial drag on U.S. business — typically costing firms well under 2% (often under 1%) of gross sales. As a result, even if the “tort liability” tax in the U.S. is *relatively* much larger than, for example, in Europe and Asia, to the great majority of firms these differentials are nonetheless far less important than international wage, tax and regulatory differentials. German firms, for example, typically face much higher payroll taxes than do American firms; Korean firms typically face much lower wage costs — differences that dwarf tort cost differentials.

Moreover, foreign manufacturers who do business in the U.S., and thus compete here with American firms, are also subject to American law. Hence, when foreign made products injure U.S. consumers, their manufacturers or importers are typically burdened in the same way as American manufacturers selling in the U.S. market. For example, Toyota is on

the same footing as Ford (whether Toyota's cars are made here or abroad) for vehicles sold and used in Illinois. It is possible that, in some instances, there is a problem with thin capitalization of firms that make or import foreign products, but the absence of evidence demonstrating this suggests it is not a serious problem.

As for sales of U.S. products abroad, the "level playing field" result would be that injuries to non-Americans in their home nation would lead to claims filed there under foreign law. Increasingly, this appears to be the result. American courts today (both state and federal) seem routinely willing to dismiss such claims — typically on the grounds that the forum is inappropriate even if jurisdiction technically is available.

The upshot is that we just do not seem to be differentially hobbling our own firms to any significant extent in their fight for market share either at home or abroad.

### *C. Protecting Out-of-State Business Defendants*

A rather different claim is that Congressional action is needed to protect out-of-state defendants (e.g., national corporations headquartered elsewhere) from in-state judges and juries. The argument is that state law functions in a way that is systematically biased against outsiders. This claim formed the heart of a book published some years ago by Richard Neely, a former justice of the West Virginia Supreme Court, who portrayed West Virginia judges and juries as deliberately socking it to out-of-state defendants.

The first doubt I have about this assertion stems from an absence of systematic empirical evidence. Suppose that certain states would choose to adopt this strategy through legal doctrine. By adopting strong rules of liability, states with few in-state manufacturers could attempt to impose the burdens created by those rules mainly on out-of-staters. Yet, so far as I have been able to determine, there is no factual support for this supposition. That is, the law on the books does not seem especially pro-plaintiff in states with little in-state manufacturing. Indeed, some of the least industrial states often appear to be the most pro-defendant in terms of tort doctrine.

Second, I question whether the law in action, regardless of the law on the books, particularly disfavors out-of-state businesses. As I look across America it seems to me that complaints about tort law have not been coming especially from out-of-state defendants. Rather, we have been hearing just as loudly from doctors and municipal governments, two very local categories of defendants.

Third, it appears to me that what research we have on this topic shows that if there is any bias in the law in action, it is against all

corporate defendants and not just out-of-state businesses. For example, work by the RAND Institute of Civil Justice suggests that an otherwise similar case yields a higher judgment if the defendant is a corporation instead of an individual (and even larger, it should be noted, if the defendant is an organ of government). Besides, if out-of-state defendants are mistreated by the law in action rather than the law on the books, it is by no means clear that they would fare any better under a Congressionally adopted national tort law (putting the issue of federal damages rules aside until later).

Finally, even if there were something to this concern about bias, it seems to me that it is already addressed by the principle of "diversity" jurisdiction, which gives out-of-state defendants the right to remove such cases to federal court. To be sure, since the *Erie* decision it is clear that federal courts will apply state law to tort claims brought to them on the basis of diversity jurisdiction. Still, there is reason to believe that federal courts will be rather less provincial than state courts, and hence less likely than outlier, local courts and juries to engage in or tolerate rank discrimination against out-of-state defendants.

I realize that there is arguably a defect in this reliance on the current rules for diversity jurisdiction in the sense that a plaintiff can typically defeat a manufacturer's effort to remove a case to federal court in a product injury case by suing a local retailer as well. On the other hand, since state tort law in product injury cases typically holds the retailer liable to the same extent as the manufacturer, in order to impose extravagant liability on the outsider, the jury will usually also have to do the same thing to the local retailer. If this is still considered insufficient protection, then perhaps Congress could think about changing the grounds on which cases may be removed to federal courts, an issue to which I will return at the end.

#### *D. Preventing Inappropriate Forum Shopping*

In a somewhat different vein, it is sometimes claimed that victims inappropriately forum shop their cases, seeking out places where the law is more favorable to them. A uniform national law would curtail this inappropriate behavior. But it is by no means clear what defense interests think plaintiffs gain from such behavior.

All states have "choice of law" rules, and while they are not exactly the same, ordinarily in tort cases the same law is applied whether the claim is litigated in California where the plaintiff bought the product and was injured, in Texas where the defendant manufactured it, or in New York where the defendant's national headquarters is located. Usually, that is, all states will conclude that California tort law should apply to this case.

This is not to say that nothing turns on the location of the suit. There are procedural differences from place to place that might be thought to favor one side or the other. But it is easy to over-emphasize such differences; besides, these differences are likely to remain even with a uniform national substantive tort law. Again, if the law in action as opposed to the law on the books, favors plaintiffs more in one state than in another, that is not easily altered with a new law on the books. To be sure, some plaintiffs may be able to have more favorable damages laws applied to their case as a result of forum shopping; I explore the idea of a national tort damages law below.

Finally, as I see it, most of the complaints about forum shopping actually are based on variation within a state — such as urban juries being far more generous than are suburban ones, or that juries in certain blue collar communities are especially anti-business. But this problem exists where there already is a uniform law applicable from forum to forum, and hence is unlikely to be solved with a different uniform substantive tort law.

#### *E. Eliminating Conflicting Legal Requirements*

A still different complaint by defense interests is that it is intolerable for national companies to be subject to so many different state tort laws. Again I fail to see what is really so serious about this variety.

First of all, it bears re-emphasizing that, in fact, state tort laws today are broadly the same in product injury cases. Basically, all states impose strict liability for injuries caused by products that were defectively manufactured, but require plaintiffs to plead and, as a practical matter, prove negligence when an entire product line is challenged for its design or warning features. Hence, most of the time, a firm will be liable or not for the same sort of injury wherever it occurs and whatever defendant is sued.

To be sure, around the edges there are genuine state-to-state differences both in terms of damages law and as to certain arguably important doctrinal details including the formal burden of proof. Yet, pointing to these details hardly suffices to demonstrate that there is a serious problem. After all, firms doing business in many states always have to contend with different state laws on all sorts of matters and they seem to manage without undue difficulty. Besides, assume that state A has more generous damages laws than does state B, or suppose state A has a more plaintiff-oriented contributory negligence law than does state B. It is difficult to see how this would really mean anything more than that the cost of doing business in state A is higher than in state B. This, of course, is something enterprises know going in and can deal with in

advance — just as they do when one state's tax or regulatory regime imposes higher costs of doing business in that state than another.

Ordinarily, this would simply mean charging slightly higher prices in state A. Since we are typically talking about cost differences that would amount to only a fraction of one percent of the sales price, imposing this differential certainly seems feasible (if it were even thought necessary). For such differences, manufacturers will not generally have to deal with complaints by their retailers that customers are going across state lines to make their purchases. Of course, this cost accounting will be somewhat upset because some accidents will be the result of products that were bought in state Y injuring people in state Z because the product has been brought into state Z when, say, its user moved there. But surely this phenomenon accounts for a fairly small share of accidents. Furthermore, perhaps just as often the product will have been purchased in a place where a higher cost would have been imposed in anticipation of a possible injury in that state, but then the product was taken to a place with more pro-defendant tort rules and lower prices. And finally, where there is a more regional market for goods and activities, there is reason to expect that surrounding state law is likely to be fairly homogeneous.

It is sometimes argued in response that considerably more is involved than mere differences in the cost of doing business from one place to another. Suppose California courts condemn certain auto designs that New York courts do not. For example, suppose gasoline tanks mounted outside the vehicle's frame are found to be defective in the former jurisdiction, but not in the latter. What, then, is General Motors supposed to do? Making a special California version might be possible, as we have seen with the creation of special California cars with tighter emission controls. But while California is a huge market, making a special Oregon version, for example, is perhaps far less feasible. And it probably becomes increasingly less feasible as either the state-to-state variety increases beyond two and/or the product is less expensive than an automobile. While this does put General Motors (and other product makers) in something of a difficult position, let us consider the alternatives more carefully.

In the first place, if we asked General Motors whether it would prefer to face a uniform national law which was the same as California's in this example of the gas tank location, or else legal variety among the states with most adopting the hypothetical New York position, I would be very surprised if General Motors did not opt for the diverse law result. In short, defendants are far more attracted to the idea of uniformity when it is uniformly pro defendant.



One ground for my prediction about General Motors's preferences is my instinct that a significant share of cases where states treat product designs or warnings differently occur after an older design has been attacked, and go only to whether or not money will have to be paid to the plaintiff. By the time of litigation, that is, the product's current national design standard is already very different.

Finally, suppose that, in my example, the more restrictive California tort law makes General Motors feel that it has to make all of its models contain the design solution that the California courts decided was safer — even though, let us assume, General Motors engineers are convinced that the cost of the design change simply is not worth the (alleged) safety benefit thereby attained. In that event, it seems to me, it ought to be the consumers in other states who should be complaining because, I trust, they will now have to pay for the new design in the vehicles they buy. But I note that we certainly don't hear such complaints. Indeed, I bet that national consumer groups are far more likely to complain if General Motors were to take the position that it would simply pay the damages claims when people are injured by the design in California and stick to its preferred design everywhere.

## II. ARGUMENTS CONSUMER AND VICTIM ADVOCATES MIGHT OFFER IN FAVOR OF CONGRESSIONAL ACTION WITH RESPECT TO PERSONAL INJURIES

Although the general tort reform bills that have been introduced into Congress in the course of the past two decades have come almost entirely from the defense side (and largely from Republicans), this need not have been, nor need it continue to be, the case. Consumer and victim advocates might also try to make an argument for federal legislation. Indeed, I believe there are better arguments for Congress undertaking these reforms than those urged by the defense side. As a political matter, however, I concede at the start that such changes are quite unlikely right now.

### *A. Adopting a Uniform National Enterprise Liability-Based Tort Law*

One approach is exactly the opposite of that with which I began — instead of opponents trying to block enterprise liability, its advocates might have gone to Congress seeking to have it adopted for the nation. Indeed, the unwillingness of the states to break with the fault principle may make federal enactment of enterprise liability now all the more urgent in the eyes of its supporters. One justification for a federal statute would be that a perverse incentive problem prevents action by individual

states and requires, instead, what is in effect concerted action among them through the mechanism of Congress. According to this argument economic threats by business make it especially difficult for any single state to get out in front of others by imposing extra burdens on enterprises, even if a majority of citizens in most, or even every, state actually favored that result.

The simple version of this argument is not terribly persuasive, however. Under current law the direct threat an individual firm could make against a state trying to adopt enterprise liability would only be not to sell its goods in the state and that sort of threat would probably be viewed as rather empty. What states might more seriously fear is a threat not to locate business operations in the state, since this means jobs. As we have seen, however, place of manufacture is now usually unimportant in determining whether a state's strict liability rules will apply to any specific product injury.

Therefore, the more effective pressure from the business community is less likely to be in the form of an individual enterprise threatening to retaliate against tort reform specifically and more likely to come from the business community as a whole. Groups like the Chamber of Commerce argue that adoption of enterprise liability would reflect hostility by the state to business generally, thereby discouraging firms from locating there. This pressure is more likely to be effective against state legislatures than against state courts, because business is a well organized interest group in the direct political arena. Nonetheless, business organizations also file amicus briefs in key tort law litigation.

In light of this analysis, it seems to me that had prestigious national bodies strongly supported enterprise liability as a desirable reform for the country, it might have prompted a serious political fight in Congress over the idea. But despite early support from some scholars and courts, in the end groups like the American Bar Association and the American Law Institute that have explored tort reform since the 1970s have not generally endorsed this approach. Hence, no real case has been made that leaving tort reform to the states yields a "race to the bottom" so far as victim and consumer interests are concerned.

### *B. Enacting a Nationwide Accident Compensation Plan*

A quite different comprehensive solution to the problem of accident victim compensation could come through congressional enactment of a new social insurance scheme (or an expansion of existing national programs).

This approach could be modelled after the accident compensation plan adopted by New Zealand in 1974. Although certain features of the

New Zealand system have been modified in the 1990s with the election of a conservative, more market-oriented government, it remains basically true that if you suffer injury by accident in that nation, you qualify for wage replacement and health care benefits that are provided by the central government and funded nationally. Proposals later offered (but not enacted) in Australia and Great Britain were even more sweeping in their reach, designed to provide benefits through the same program to the full range of disabled people, whether the disability was caused by accident, illness, congenital disability, etc.

I have previously broached what I consider to be an even more wide ranging idea, in which a single scheme would be aimed at all needs for income support, health care and rehabilitation. Such a program might actually pay somewhat different benefits to, say, the retired, the unemployed, and the disabled. But tradeoffs among these groups and judgments about relative need and dessert would be made within a single program with a single administration.

Thus, those who favor the "compensation plan" approach for the U.S. have several models from which to choose. If Congress were to start from our existing social insurance base, any of these proposals would probably involve an expansion of the Social Security and Medicare programs. For example, Social Security could be enlarged to provide income security for those workers who are only partially disabled as well as for those people who become disabled but were not in the work force at the time. This is hardly unprecedented. Social Security has already managed the transition from a scheme of benefits for retired workers to a broader program that includes benefits for totally and permanently disabled former workers and the survivors of former workers.

Although this is not the place to explore these ideas in any detail, a few matters bear mention. I acknowledge that the precise nature of the income and health care benefits any such plan would provide, as well as the mechanism(s) employed to finance and administer such benefits, would be difficult to work out and controversial in many respects. For example, to what extent should funding be tied to activities that generate claims on the plan? Nevertheless, with reasonable technical solutions to these matters in the design, victim and consumer groups could strongly favor such legislation, at least if there were any hope of its adoption as a political matter. I concede that almost no one these days seems to be advocating such a program apart from me. But they might do so, and perhaps will do so in the future. I also admit that it is imaginable that states on their own could move in this direction, although coordination with existing Social Security benefits for the disabled could be awkward. Nonetheless, a state's workers' compensation plan, for example, could be

expanded to cover both non-work injuries and a worker's dependents. But the feasibility of certain state level solutions does not invalidate the legitimacy of a nationwide program any more than does the existence of private pension plans make Social Security illegitimate. If our society concludes that all Americans should have income security and health care protection against disabilities caused by accidents (or arising from other causes), I consider this to be a sound basis for congressional action.

Returning then to the possibility of a national accident compensation scheme (or even a broader plan), two more points need emphasizing. First, such a reform should be seen as part of tort reform, whether or not tort law itself is in any way altered, simply because this reform would directly address a central function of tort law. That is, it would pay compensation to qualified plaintiffs who suffer wage loss and medical expenses, even though, of course, the class of those provided benefits would be much wider than that comprised of those who today could be successful tort plaintiffs.

Second, were a social insurance scheme of this sort adopted by Congress, it would in any event become essential then at least to decide what the implications, if any, should be for tort law itself. Several approaches are possible. Congress could simply provide the new social insurance benefit and leave it to states to determine how to blend their own tort law with the new program. States could, for example, allow double recovery or, more likely, could reduce the benefits that victims could obtain by the amount to which they are entitled under the new federal plan.

Congress might also take a more active stance. For example, it might order states to abandon the common law rule on collateral sources and preclude tort plaintiffs from collecting damages already covered by the federal plan. Or, on the contrary, Congress might provide that the new federal plan stands in the shoes of plaintiffs and is entitled to reimbursement from tortfeasors as a matter of law, precluding states from abandoning the collateral sources rule. This approach would presumably minimize direct federal costs and would arguably internalize costs of certain accidents into the activities that cause them. This is basically what Germany does today. It is a country with a strong first party social insurance scheme in which the social insurance providers retain a right of reimbursement from tort defendants and their liability insurers.

Of course, in order to engage in what some consider to be good social cost accounting, this approach would generate considerable transaction costs by shifting funds from the pocket of one insurer to another, and on that ground I have grave doubts about the wisdom of such a solution.

In any event, in contrast to the German approach, I want to put on the table an even bolder proposal on the other side. Along with the new national social insurance scheme, Congress might decide to abolish state tort actions for ordinary accident victims — perhaps retaining the right to sue for punitive damages for those who are victims of intentional misconduct.

This result would be justified first from a pragmatic perspective. With a comprehensive national plan in place of the sort I have discussed, there is simply no need to provide victims with tort damages. To be sure, this solution would deny victims recovery for pain and suffering damages as well. But that too might be justified. On the one hand it can be argued that these damages today go primarily to pay for legal fees and expenses which would be largely eliminated under the new plan. Moreover, it might also be argued that: (a) awards for pain and suffering are inappropriately given today by tort law to those victims with modest injuries who don't really have lasting pain and suffering; (b) the availability of such awards too often promotes fraudulent and exaggerated claims; and (c) because of practical realities, such awards are rarely provided to seriously injured people (since most tortfeasors who cause grave harm with their cars or weapons are either completely judgment proof or effectively so above modest automobile insurance liability policy limits of, for example, \$50,000). Moreover, the new national social insurance scheme itself might provide some extra compensation to those who are seriously impaired or disfigured, as New Zealand has done.

Clearly, those who believe that tort law today effectively serves other important social functions besides victim compensation would be alarmed by this proposal. I have primarily in mind those who view tort law as predominantly serving either to deter careless conduct or to provide precise individual justice. To placate those with these outlooks, perhaps tort law has to remain in place as in Germany, even after the new national compensation plan is adopted. Indeed, some deterrence devotees might object to the compensation plan altogether. First, they might fear that some victims who, in their view, should sue to help keep up the deterrence pressure would choose not to do so. Second, they might worry that some victims would be more careless in their own conduct or slower to recover from an injury because of the availability of the plan's benefits.

Yet, maintaining the tort law remedy is not the only way to respond to these concerns. On the one hand, new behavior control mechanisms might be enacted along with the new social insurance plan. I have, for example, proposed a scheme of paying bounties to whistle-blowers who identify dangerous products before manufacturers themselves come

forward and disclose those dangers. Others might favor promoting safer products through the compensation plan's funding mechanism, in the tradition of workers' compensation, as was long ago advocated by Professors Marc Franklin and Richard Pierce.

On the other hand, there are also routes to achieving victim satisfaction apart from maintaining tort remedies. These deserve consideration especially given the relatively low level of satisfaction that victims in fact seem to attach to today's tort liability regime. Ours is a system, after all, in which few plaintiffs ever actually win at trial. Instead, most obtain a compromised settlement award in a process typically marked by a lack of regular communication between the plaintiff's lawyer and the plaintiff and by minimal participation by the claimant in the settlement process. Moreover, individual wrongdoers are rarely directly punished by tort awards, as they are almost always paid, if at all, by insurance companies, enterprises, or governmental agencies. By contrast, in Japan, for example, where victims sue much less often, it has been worked out culturally that injurers (or top executives of firms that have caused injuries) come around and make what appear to be sincere apologies.

The main thing to see is that a new national accident compensation plan, perhaps coordinated with other national legislation, may well be viewed as simply incompatible with the maintenance of individual lawsuits for personal injuries.

Or, perhaps more pragmatically, Congress might decide that it was only fair to give defendants, especially business defendants, relief from state tort law in return for imposing on them the new costs of the expanded social insurance regime (assuming that at least some of the funding would come from expanded payroll taxes, for example). In other words, it might be concluded that a compensation plan minus tort is a better package on balance than tort with no compensation plan, putting aside the option of having both of systems.

By this same way of thinking Congress might restrict state medical malpractice laws (or even state tort law generally) as part of the adoption of a national health insurance scheme. This is an issue that Congress would have had to resolve if President Clinton's health care reform proposals had been adopted.

A still different approach was embraced in the National Childhood Vaccine Injury Act of 1986 — the only significant federal statute adopted in the past twenty-five years concerning personal injury law. There, for public health reasons, Congress stepped into a very narrow and special area of state tort law in order to assure a continued supply of children's vaccines after lawsuits at the state level drove some manufacturers from the field and the one or two that remained threatened to quit. A national

compensation plan was created for children who, shortly following vaccination, can be shown to have certain listed health problems. It is not required to show an actual causal connection between the two. If found eligible for the program, the liberal benefits include medical care, future wage loss reimbursement if appropriate, and even up to \$250,000 for pain and suffering. If a claimant doesn't like the fund's compensation offer, however, it may be rejected and the victim is then free to sue in tort in court. However, Congress insisted that in such cases, manufacturer fault has to be demonstrated (or that a defective batch of the vaccine was the source of the injury). In short, the state tort option is maintained, albeit somewhat modified in certain states by Congressional direction, but the victim must select between the two remedies. It is readily imaginable that this solution could be expanded by Congress to cover, for example, all cases of serious adverse reactions to pharmaceutical products, perhaps to medical treatment generally, or even to all accidental injuries.

### *C. Permitting or Encouraging State Level Experimentation*

This analysis so far has assumed that if Congress is to act it would do so either by adopting some substantive tort law regime or by creating a compensation plan substitute for tort. But Congressional action need not necessarily come in the form of uniform national schemes. Instead Congress could aggressively encourage state-level experimentation, or at least pave the way for state experimentation by getting other existing federal rules out of the way. A few examples will illustrate the point.

I have been trying to get states to experiment with an employee benefit scheme that I call "short term paid leave." It would, among other things, replace tort law recovery for short term disabilities with a kind of mandated individual savings account. Employees would "earn" from their employer one paid leave day for, say, every five days worked. This paid leave bank could be drawn on to provide income during periods of temporary disability arising from accident or illness. The account would also be used to fund vacation pay, paid public holidays, short term unemployment, etc. and would eliminate the payment of short term wage replacement benefits in workers' compensation. For our general purposes here, however, the most important thing about the proposal is that, if also combined with a state-wide health insurance scheme, it could provide the basis for eliminating a very large proportion of existing tort claims. But in order to enact the short term paid leave plan states would need waivers from federal unemployment compensation rules. And in order to adopt employer-based state health insurance programs, states would need Congress to waive the requirements of ERISA, the federal pension law, that preclude such legislation. In short, what I see as consumer-oriented

state level changes, which would probably include tort law reform in the package, are being thwarted by existing federal controls.

A rather different example involves my idea for substituting what I call "pay at the pump no-fault auto insurance" for our traditional tort and liability insurance scheme. In this proposal auto accident victims would no longer make tort claims. Instead they would file first party (no-fault) claims with their own insurer. Funding of the insurance premium would come primarily from charges imposed at the time fuel is purchased (like gasoline taxes). Experimentation with this plan would be much more likely to occur were Congress to make certain modifications in the existing federal gasoline tax laws.

If state level programs like these were to gain widespread support among both business and consumer interests, then perhaps Congressional action enabling and promoting those experiments would indeed be forthcoming.

### III. TORT REFORM PROPOSALS CURRENTLY BEFORE CONGRESS

The Republican "Contract with America" calls for tort reform at the national level, and as of this writing the House of Representatives has actually passed tort reform legislation. These proposed changes seem to me to be relatively marginal adjustments around the fringes of traditional tort law. The House bill would restrict tort damages in certain respects. Punitive damages would be limited in amount in all cases to the greater of \$250,000 or three times economic loss, and pain and suffering awards would be limited to \$250,000 in medical malpractice cases (but not in product liability cases). If one side rejected a settlement offer from the other side and later went on to do worse in court, that side would have to pay the legal fees and costs of the other side that had accrued since the offer was rejected. To protect "deep pocket" defendants, joint and several liability would be abolished for pain and suffering damages, although states could maintain it for economic loss if they wished. Finally, in quite a different vein, a 15 year statute of repose would apply to most product liability cases, thereby cutting off claims against old products.

Whatever else it is, this package of reforms is neither a comprehensive national product liability law nor a comprehensive national law of tort damages. Several bills now before the Senate are decidedly in this same spirit, although they differ in details. I do not mean to argue that the specific proposals are misguided; on the contrary I believe that at least some of them are on the right track, even though I would prefer a rather different package.

What is troubling, however, is that Congress is now acting like a state legislature in an area that has conventionally been left to actual state



legislatures. In short, what is the point of this ad hoc central government activism, given that the overall ideology of the Contract with America appears to be much more oriented toward reviving state's rights?

Some explanations lie in basic politics, I suppose. Defense interests have been trying to get some sort of product liability reform through Congress for 20 years. They tend to be supporters of the Republicans. So, with their party now in power, the Republicans may feel a certain obligation to respond to the pressure of these constituents and set aside ideological consistency about federalism. In short, this legislative activity may be understood simply as repayment to important financial contributors to the new Republican controlled Congress. More broadly, like other provisions in the Contract With America, the most important thing may be the Republicans' ability to say to the voters "we said we would make change and we have," regardless of the actual content of the individual provisions. Under this analysis, the crucial thing is to explain why tort law reform got on the Contract in the first place, and the probable answer is that it was something that polls say Republicans generally like.

There is also a more cynical way to look at this Congressional activity. With the Republicans having a weaker position in the Senate and facing the threat of a Presidential veto, perhaps the congressional supporters of tort reform never really expected to pass reform legislation. Instead, these bills serve to allow Republicans to raise even more campaign contributions from a business community that hopes eventually to get its way. In the same vein, these bills may provide a good issue for Republican candidates to run on in the 1996 elections. This is reminiscent of President Reagan's continued talk in favor of "family values" along with the failure of his administration to do much to achieve federal policy changes in support of that talk.

It could be argued that these bills should be seen as a threat primarily designed to force states to act. This is perhaps a good way to understand the tort reform activities of the Reagan Administration which supported far more sweeping changes than those now before Congress. And whether or not the Reagan officials can fairly take credit for it, the fact is that most states did indeed soon thereafter adopt their own tort reform provisions. (Something similar occurred in the 1970s in the field of workers' compensation when threatened federal action was followed by considerable state level reform.)

But the very fact that most states have already engaged in tort reform in recent years makes it much less convincing to think about current Congressional activity as designed to push states to take tort reform seriously and do something about it. Indeed, a large number states have already restricted recovery for pain and suffering, tightened the rules

covering punitive damages, cut back on joint and several liability, altered their rules on the payment of legal fees, and so on — the very subjects of the proposed federal legislation.

To be sure, not every state has curtailed plaintiff rights, certainly not in all these areas. Maybe federal tort reform should be seen as achieving a mop up of what the states have started, spreading the “right” solutions everywhere. But this analysis is also highly problematic because the specific solutions contained in the House and Senate bills certainly do not reflect anything like a consensus among those who favor tort reform as to what exactly should be done in the areas covered. There is a great variety of opinion as to precisely how punitive damages and pain and suffering damages should be reduced, and there are widely differing views about just what protection to give to “deep pocket” defendants now subject to joint and several liability. These differences show up vividly in the tort reform provisions that states have already adopted. Hence, were Congress to adopt some version of the House and Senate bills it would be second guessing many states that have already acted from the same general outlook but have called the issue somewhat differently, perhaps disturbing the careful political alliance in individual states that allowed tort reform to be adopted on the terms it was.

In other words, it seems to me insulting for Congress, for example, to tell a state that: punitive damages must be proved by “clear and convincing” evidence; pain and suffering awards must be limited to \$250,000 but only for medical malpractice cases; and there may be no joint and several liability at all when that state already has, for example, restricted punitive damages to “despicable” conduct, limited pain and suffering awards across the board to \$500,000, and eliminated joint and several liability for any defendant that was less than 25% at fault. To re-emphasize the point, it would be one thing for a new state legislature to modify the old set of reforms to embrace those in the House bill, but there does not seem to be a principled justification for Congress to do this. So, although I am not saying that it would violate the Constitution for Congress to so act, it does seem inappropriate to do so.

Additional undesirable consequences would result if Congress engages in tort reform of the sort now being considered. Legislative action by Congress would emphatically undermine tort as a common law subject, thereby blunting certain opportunities for common law change. This is a situation, it seems to me, in which the symbolism of federal intrusion is great even if the actual statutory impact is not.

The evolution of tort law over the years has enjoyed a certain elegance that stems from the fact that change has not been so clearly a matter of raw political power, but rather the more subtle transformation

of doctrinal rules to reflect changing social mores. Hence, I consider it no trivial loss to have that tradition cast aside cavalierly. Indeed, this sort of federal pre-emption seems especially off the mark because, at this very moment, recently appointed state court judges are using common law techniques to move tort law in a more pro-defendant direction. Furthermore, this is hardly a case in which Congress must act in order to provide relief for an interest group that is structurally blocked from the political process at the state level. In recent years, defense interests have enjoyed widespread success convincing state legislators to engage in tort reform, regardless of what sometimes appears to be the political might of the plaintiffs' bar.

Finally, it remains unclear what theory of tort law underlies the provisions of these bills. To be sure, restricting tort damages law by formula can have a pro-defendant impact. But the sharp reduction this brings in jury discretion seems fundamentally at odds with the administration of the fault theory of tort law favored by defense interests which relies upon the wisdom of the jury to come to the fair result on a case by case basis.

#### IV. CHANGING THE ROLE OF THE FEDERAL COURTS

As I explained earlier, "diversity" jurisdiction in federal courts exists in part to permit out-of-state defendants to escape local courts when they are sued by a local citizen. The right of removal to federal court is frequently used by defendants for the purpose of obtaining what they consider to be a somewhat less parochial forum, even if the substantive law applied to the case remains the same. However, as I noted already, because of today's "complete diversity" requirement, plaintiffs can often prevent removal to federal court by joining a second defendant in the case, such as a retailer, who is a citizen of the same state as is the plaintiff. Perhaps, then, out-of-state product-maker defendants might wish to redirect their efforts at reform by urging Congress to alter the rules governing diversity jurisdiction in order to provide them more assured access to the federal courthouse.

This line of thinking suggests that defense interests might want a broader role for federal courts than exists today. Yet, many defendants may have the opposite view. I have in mind now the apparently increasing involvement of federal courts in product liability cases brought as class actions. Although in some of these cases the defense forces the case into the federal forum, in others the plaintiffs initially file in federal court. The aspiration of the attorneys for the class is to bring about a nationwide solution to the problem — typically by engaging in sufficient pre-trial litigation to convince the defense that some sort of mass settlement is the

best way to resolve the conflict. Then, payment arrangements for claimants are devised under the guidance of an active federal judge. This has occurred in several celebrated mass tort cases, such as the Agent Orange litigation, and seems to be what the plaintiffs' class action lawyers are counting on in the large scale breast implant and cigarette litigation currently pending.

To be sure, in some of these situations both sides may see mutual advantages in federal court litigation and a nationwide resolution. Yet, sometimes the defense might well have wanted to force plaintiffs to litigate piecemeal in state courts, perhaps hoping to discourage claims they consider to be without merit. In such cases, the development of the entrepreneurial federal judge who aggressively manages the matter is not really what the defense prefers.

Some federal judges must feel a great sense of satisfaction in presiding over settlements of immense and enormously complicated litigation that might otherwise have dragged on for years. Yet, these cases can also drain the very limited resources of the federal judiciary, taking up so much time and attention of a judge who would otherwise be moving forward with the local caseload. Furthermore, while these activist federal judges may be seen to be making the best of a terrible mess, the fact remains that a portion of the federal judiciary is being turned into a social welfare benefits distribution agency, a function for which other federal bodies, such as the Social Security Administration, seem better suited.

There is finally a certain irony about these mass tort cases that is worth noting. The managing judges seem to be applying what turns out to be a uniform national legal standard. That is, when they certify a national class and arrive at a nationwide settlement agreement, no attention appears to be paid to the vagaries of local law; claimants get the same settlement offer regardless of where they reside. The courts appear to justify this uniformity by giving unsatisfied claimants the opportunity to opt out of the settlement and sue locally. (Defendants, however, are not permitted to single out claimants for exclusion from the class based on their state of residence.) As a result, defendants in some of these mass injury cases are not altogether happy facing something of a uniform national tort law after all, and might favor Congressional action to decrease the role of federal judges in tort litigation.

For now I merely raise these matters without trying to resolve them. My point here is simply that, instead of seeking federal tort reform directly, defense interests might be better advised to press Congress to rethink the jurisdiction of federal courts — a plainly proper subject for national legislation.