THE THIRD WAVE OF FEDERAL TORT REFORM: PROTECTING THE PUBLIC OR PUSHING THE CONSTITUTIONAL ENVELOPE?

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I. INTRODUCTION

The United States has experienced several phases of federal tort reforms.[1] Congress' initial legislative reform efforts sought to alter state tort law applicable between common carriers and their employees by eliminating a number of common law defenses and substituting a comparative negligence standard.[2] In this regard, after the 1906 Employers' Liability Act[3] was struck down on Commerce Clause grounds,[4] Congress narrowed the law and enacted a similar law, the 1908 Employers' Liability Act.[5]

Commencing in the middle part of the century, Congress sought to encourage a variety of forms of conduct—such as the construction of nuclear power facilities[6] and swine flu immunization[7]—by granting potential defendants partial immunity from tort liability. In exchange for forfeiting common law rights against these private parties, claimants were granted offsetting legal benefits, such as the ability to seek damages against the United States under the Federal Torts Claims Act.[8]

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1 As used herein, the phrase "federal tort reform" is not intended to have a favorable or unfavorable connotation, but rather to generically describe a statutory law or proposal preempting state tort law.

2 1906 Employers' Liability Act, Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. §§ 51-60) (1906) (repealed 1907) and 1908 Employers' Liability Act, Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1994)).

3 Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. §§ 51-60) (1906) (repealed 1907).

4 *Infra* note 29 and accompanying text.

5 Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1994)).

6 Atomic Testing Liability Act, Pub. L. No. 101-510, 104 Stat. 1837, 42 U.S.C. § 2212 (1994).

7 National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113, 42 U.S.C. § 247b (1976) (repealed 1978).

8 28 U.S.C. §§ 2671-2680 (1994).

Beginning in the 1990's, Congress commenced what can be viewed as a third phase of, or wave of, tort reform. These laws and proposals limit or pare back a number of common law rights of action, often without providing any direct substitute or alternative legal remedy to claimants. The initiatives affect a range of activities—from volunteerism to various types of commercial conduct.[9]

A major unanswered question with respect to this "third wave" of tort reform is the extent to which these laws and proposals conform with constitutional requirements. We expect adversely impacted claimants to assert that the reforms: (1) exceed Congress' legislative authority under the Commerce Clause (and, to the extent applicable, section five of the Fourteenth Amendment); (2) violate Fifth Amendment due process and equal protection requirements; (3) violate Seventh Amendment jury trial rights; and (4) are inconsistent with Tenth Amendment federalism principles. To analyze and consider these claims, we review Supreme Court and lower court decisions considering the constitutionality of earlier federal tort reform laws.

We find that although all but one of the previous federal tort reform laws were ultimately upheld against a variety of constitutional challenges,[10] the current set of initiatives raise a number of novel legal questions that have yet to be directly and fully addressed by the Supreme Court. For example, several of the measures, such as the Bill Emerson Good Samaritan Food Donation Act[11] and the Volunteer Protection Act of 1997,[12] may have a significant impact on intrastate activity, and could therefore be found inconsistent with Congress' Commerce Clause authority, in light of the Supreme Court's recent decision in *Lopez v. United States*.[13]

In the event Congress' Commerce Clause authority is struck down with regard to a particular tort reform, defendants may assert that the law is based on Congress' authority to protect due process under section five of the Fourteenth Amendment, particularly to the extent the tort reform includes punitive damage limitations. While cases such as *BMW of*

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9 Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. §§ 14501- 14505 (West Supp. III 1997)); General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. § 40101 note (1994)); Y2K Act, Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. §§ 6601-17 (1999)); Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998).

10 *See infra* note 29.

11 Pub. L. No. 104-210, 110 Stat. 3011 (to be codified at 42 U.S.C.A. § 1791 (West Supp. 1998)).

12 Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. §§ 14501- 14505 (West Supp. III 1997)).

13 514 U.S. 549 (1995).

North America v. Gore[14] and *Honda Motor Co. v. Oberg*[15] invalidated particular state law punitive damage awards as violating due process, the Court has yet to evaluate legislative efforts by Congress to affirmatively codify limitations on punitive damages.

Supreme Court guidance may also be necessary to ascertain the extent the Seventh Amendment jury trial right operates as a constraint on Congress' ability to limit common law rights, such as capping the amount of non-economic damages payable in particular tort actions. On the few occasions this issue has been presented to the courts in the context of previous federal tort reforms, the Seventh Amendment issue has been side-stepped since the law in question provided for separate administrative remedies against the United States.[16]

A final potential constitutional issue presented by the recent set of tort reforms concerns federalism and state sovereignty. Tort reforms such as those relating to medical implant suppliers,[17] Y2K liability actions,[18] and the tobacco settlement[19] have and would impose detailed and rigorous procedural as well as substantive requirements upon state courts. If the Court is willing to extend the federalism concerns enunciated in *New York v. United States*[20] and *Printz v. United States*,[21] these initiatives could also be subject to credible challenges under the Tenth Amendment.

II. THE FIRST WAVE: EXPANDING EMPLOYERS' LIABILITY BY WAIVING COMMON LAW DEFENSES

Although an analysis of state tort reform laws is beyond the scope of this article, according to a recent study, in the last fourteen years twenty-four states have handed down seventy-five separate decisions overturning all or part of these laws. At the same time, courts have issued one hundred twenty decisions upholding various aspects of the state laws.[22] Con-

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14 517 U.S. 559 (1996).

15 512 U.S. 415 (1994).

16 *See infra* note 393.

17 The Biomaterials Access Assurance Act, H.R. 872, 105th Cong. (1997) (enacted).

18 The Y2K Act, Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. §§ 6601-17 (1999)).

19 Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997).

20 505 U.S. 144 (1992).

21 521 U.S. 98 (1997).

22 *See* Schwartz, Behrens & Taylor, Appendix A & B.

gress'[23] first effort to preempt state tort law[24] came in the form of the 1906 Employers' Liability Act[25] and the 1908 Employers' Liability Act.[26] Both laws represented efforts to eliminate certain common law employer defenses and substitute a comparative (as opposed to a contrib-

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23 In contrast to the relatively small number and modest scope of federal tort reforms, states have adopted numerous statutory changes to their own tort laws. In the early part of the 1900's, states enacted a series of workers' compensation laws ultimately upheld by the Supreme Court in cases such as *New York Central R. Co. v. White* and *Mountain Timber v. Washington,* 243 U.S. 188 (1917). *See Silver v. Silver*, 280 U.S. 117 (1929) (upholding Connecticut automobile guest statute); *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549 (1910) (upholding Iowa law abrogating fellow servant doctrine); Arizona Employers Liability Cases, 250 U.S. 400 (1919) (upholding Arizona law providing strict employer liability for inherently dangerous work).

More recently, states have enacted tort laws providing protections to defendants with every state adopting some form of tort reform in the last twenty some years. *See* Martha Middleton, *A Changing Landscape,* ABA JOURNAL, 56, 59 (1995). For useful summaries of the nature of the statutory changes made by the states, *see* VICTOR E. SCHWARTZ, MARK E. BEHRENS, & MARK D. TAYLOR, WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES? (Washington Legal Foundation) (1997); Mark Thompson, *Letting the Air out of Tort Reform*, ABA JOURNAL, 64 (1997); Henry Cohen, *Fifty-State Survey on Selected Product Liability Issues*, May 24, 1995 (Congressional Research Service Report 95-300A).

24 In addition to adopting laws preempting state common law of tort, Congress has enacted a number of liability laws pursuant to its maritime and international treaty authority. *See* Limitation of Vessel Owners Liability Act, 46 U.S.C. App. §§ 181-196 (1994) (enacted in 1893) (setting shipping liability rules in case of damage or harm occurring without privity or knowledge of ship owner), found to constitute valid exercise of Congress' maritime and commerce authority in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U.S. 578 (1883); Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) (enacted in 1927) (providing a workers' compensation scheme for injuries occurring in the navigable waters of the United States), upheld against due process challenge in *Crowell v. Benson*, 285 U.S. 22 (1932); Convention For the Unification of Certain Rules Relating to International Carriage By Air (Warsaw Convention), Oct. 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, as amended and supplemented by Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (Montreal Agreement), Agreement No. CAB 18,999, approved by Order No. E-28, 680, May 13, 1966 (CAB Docket 17,325), *reprinted in* 49 U.S.C. § 1502 (1994) (limits international air carriers' potential liability for property loss or damage or personal injury to $75,000 and creates a presumption of liability for accidents and limiting passengers' recovery for injuries during transportation covered by the Convention) upheld against constitutional challenge in Indemnity Ins. Co. of North America v. Pan American Airways, 58 F. Supp. 338 (S.D.N.Y. 1944); Pierre v. Eastern Airlines, Inc., 152 F. Supp. 486 (D.N.J. 1957). *See also* Death on the High Seas by Wrongful Act, 46 U.S.C. App. §§ 761 - 68 (setting liability rules for negligence and other misconduct on the high seas); 46 U.S.C. app. 688 (1994) (abrogating the fellow servant rule and granting seamen the same rights as railway workers under the Employers Liability Act of 1908); 46 U.S.C.A. § 183 (West Supp. 1998) (recognizing certain limitations on non-economic damages set forth in cruise ship contracts and tickets and permitting international owners to rely on state statutory damage limitations relating to employee medical malpractice claims).

25 Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. §§ 51-60) (1906) (repealed 1907).

26 Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1994)).

utory) negligence regime.[27] The principal constitutional issue raised in Supreme Court challenges was whether the laws were authorized under the Commerce Clause (although the Court also briefly considered issues in the nature of due process and federalism concerns).[28]

A. 1906 EMPLOYERS' LIABILITY ACT

The 1906 Employers' Liability Act (the "1906 Act")[29] required, inter alia, that common carriers compensate their employees for damages caused by defects in equipment or the negligence of their fellow employees, eliminated the common law doctrine of contributory negligence and substituted a form of comparative negligence, and eliminated any bars or defenses to liability set forth in employment contracts.[30] The 1906 Act applied to "every common carrier engaged in trade or commerce . . . between the several states . . . [with regard to] any of its employees . . . ."[31]

In *The Employers' Liability Cases*,[32] the Court considered the constitutionality of the 1906 Act. The Court first considered the question of whether Congress had the authority to enact laws dealing with the master-servant relationship, "a subject hitherto treated as being exclusively within the control of the states."[33] The Court rejected this contention, holding, "the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce. . . ."[34]

Next, the Court considered whether the 1906 Act constituted a valid exercise of Congress' authority to regulate interstate commerce under the Commerce Clause.[35] Although the statute was limited to carriers engaged in interstate commerce, the Court read the law as applying to instances where such carriers were transacting purely intrastate business.[36] Therefore, the court held the 1906 Act was being applied in an unconstitutional manner:

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27 Under the doctrine of contributory negligence a plaintiff is completely barred from recovery if he or she bears any amount of fault, while comparative negligence reduces a plaintiff's recovery by his or her percentage of negligence. *See* Restatement (Second) of Torts § 552A (1977).

28 *See* The Employers' Liability Cases, 207 U.S. 463 (1907) and The Second Employers' Liability Cases (Mondou v. New York), 223 U.S. 1 (1912).

29 Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. §§ 51-60) (1906) (repealed 1907).

30 *See id.*

31 *Id.* § 51.

32 207 U.S. 463 (1907).

33 207 U.S. at 491.

34 *Id.* at 495.

35 *See infra* note 296.

36 207 U.S. at 503.

Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant of the Constitution and non-enforceable . . . .[37]

Having found the 1906 Act's asserted regulation of intrastate commerce to be unconstitutional, the Court put off considering arguments that the law violated employers' Fifth Amendment due process rights[38] (*i.e.*, because it was claimed to have arbitrarily subjected common carriers to greater liability than other employers engaged in interstate commerce), and that it compromised employers' Seventh Amendment[39] right to a jury trial.[40]

Subsequently, in *El Paso & Northeastern Railway Co. v. Gutierrez*,[41] the Court found that the 1906 Act could be applied to United States territories "[i]n view of the plenary power of Congress under the Constitution over the Territories of the United States."[42] Since the Court concluded that the provisions of the Act declared unconstitutional in *The Employers' Liability Cases* were separable and that Congress would have enacted them independently, it upheld the law in these areas.[43]

B. 1908 EMPLOYERS' LIABILITY ACT

In 1908 Congress enacted a substantially similar version of the Employers' Liability Act (the "1908 Act"), limiting the statute to cases involving employees "suffering injury while . . . employed by [carriers engaged in interstate commerce] in such commerce . . . ."[44] Employers again complained that the law imposed substantially more liability on them than they were subject to under the common law, and hence challenged its constitutionality. In 1912, the Court upheld the constitutionality of the law in *The Second Employers' Liability Cases (Mondou v. New York)*.[45]

On this occasion, the Court found the law constituted a valid exercise of Congress' commerce authority.[46] Although the 1908 Act was limited to injuries involving persons employed in interstate commerce, it

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37 207 U.S. at 504.

38 *See infra* note 357 and accompanying text.

39 *See infra* note 386 and accompanying text.

40 207 U.S. at 503.

41 215 U.S. 87 (1909).

42 *Id.* at 93.

43 *Id.* at 96-97.

44 Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1994)).

45 223 U.S. 1 (1912).

46 *Id.*

had been asserted the law should be struck down because co-employees causing the injury may not have been so engaged. The Court disagreed, observing "this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power."[47]

The Court also considered and rejected several objections to the 1908 Act in the nature of due process concerns—that it unreasonably abrogated common law rules, that it interfered with "liberty of contract,"[48] and that it arbitrarily placed employers in a "disfavored class."[49] The Court disposed of the contention that the law unreasonably altered rules of common law, quoting from their 1876 decision in *Munn v. Illinois*[50] for the proposition that:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the greater office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.[51]

The Court also found that changes in common law liability rules would promote workplace safety and were well within Congress' discretion.[52] The fact that other states had enacted special rules concerning workplace liability was of little importance to the Court, which observed that such laws "were far from uniform" and it was left to Congress to determine whether national law "would better serve the needs of commerce."[53]

The Court readily disposed of the "liberty of contract argument" raised by the employers. Recent decisions had established that "if Congress possesses the power to impose . . . liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it."[54]

As for the question of whether the 1908 Act effectuated an impermissible classification discriminating against railways, the Court found

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47 *Id.* at 51 (citations omitted).

48 *Id.* at 49.

49 *Id.*

50 94 U.S. 113 (1876) (Illinois statute setting maximum grain storage rates upheld against Fourteenth Amendment due process challenge that it abrogates the common law rule that such charges are required to be "reasonable").

51 223 U.S. at 50, citing *Munn*, 94 U.S. 113, 134 (additional citations omitted).

52 223 U.S. at 51.

53 *Id.*

54 *Id.* at 52.

that even if it is assumed that the Fifth Amendment Due Process Clause incorporates the same standards as the Fourteenth Amendment's Equal Protection Clause, the law was not unconstitutional:

> [The Equal Protection Clause] does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis, and is therefore purely arbitrary. . . . Tested by these standards, this classification is not objectionable.[55]

The Court next considered a federalism-related question—whether Congress had the authority to preempt state laws concerning the same subject matter as the 1908 Act. Using a straightforward Supremacy Clause analysis to reject this concern, the Court quoted *McCulloch v. Maryland*[56] for the proposition that the "government of the United States . . . though limited in powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or the laws of any state, to the contrary notwithstanding.'"[57]

The Court also used the Supremacy Clause as the constitutional justification for allowing the 1908 Act to be enforced in state court. The Court reasoned, "[t]he fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize those laws as operative within the state as it is to recognize the state laws."[58]

C. BLACK LUNG BENEFITS ACT OF 1972

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972[59] ("Black Lung Benefits Act"), requires that employers provide benefits to coal miners suffering from "black lung disease" (pneumonoconiosis) and their survivor families.[60] Although enacted more than sixty years after the 1908 Employers' Liability Act, The Black Lung Benefits Act can be seen as consistent with the first wave of federal tort reforms through its restrictions on employer legal rights.[61]

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55 *Id.* at 53 (citations omitted).

56 17 U.S. 316 (1819).

57 223 U.S. at 53, *citing McCulloch* at 405.

58 223 U.S. at 58.

59 30 U.S.C. §§ 901-945 (1994).

60 Pub. L. No. 91-173, 83 Stat. 742 (1969).

61 Rather than preempting state common law directly, the Black Lung Benefits Act had the effect of preempting state workers' compensation laws.

Shortly after the Black Lung Benefits Act was enacted, a number of coal mine operators challenged its constitutionality, claiming it violated their Fifth Amendment due process rights because it applied "retrospectively" (by requiring the benefit payments be made to miners who had left employment before the law's effective date), and asserting that the presumptions and evidentiary rules were arbitrary and irrational.[62] In 1976, the Supreme Court upheld the constitutionality of these provisions in *Usery v. Turner Elkhorn Mining Co.*[63]

In reviewing the retrospective applicability of the Black Lung Benefits Act, the Court observed it was "by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality,"[64] and it had previously upheld laws effectuating "workmen's compensation principles analogous to those enacted here."[65] In this case, the Court found that the retrospective liability scheme in question was justified and rational, even though it applied to mine operators doing business prior to the law's enactment:

We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical is not a question of constitutional dimension.[66]

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62 The specific presumptions and evidentiary rules objected to included: (1) the definition of total disability under § 402(f) of the Black Lung Benefits Act requiring compensation for former miners who might be employable in other lines of work; (2) the irrebuttable presumption of total disability under § 411(c)(3) where there is clinical evidence of complicated pneumoconiosis; (3) the rebuttable presumptions under § 411(c)(1) and (2) that operators were responsible for pneumoconiosis for miners employed more than ten years; (4) the rebuttable presumption under § 411(c)(4) that miners employed for more than fifteen years who are able to marshal evidence demonstrating a totally disabling respiratory or pulmonary ailment have been disabled by pneumoconiosis; (5) the requirement under § 413(b) that claims for benefits not be denied solely on the basis of negative chest X-rays; and (6) the limitation on the use of rebuttal evidence in cases under § 411(c)(4). *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-37 (1976).

63 428 U.S. 1 (1976). The case proceeded directly to the Supreme Court after being considered by a three-judge district court panel pursuant to 28 U.S.C. §§ 2282, 2284 (1994). *See* Turner Elkhorn Mining Co. v. Brennan, 385 F. Supp. 424 (1974) (upholding the provisions of the Black Lung Benefits Act against constitutional challenge, with the exception of the limitation on the use of rebuttal evidence in cases under § 411(c)(4)).

64 428 U.S. at 15 (citations omitted).

65 *Id.*, (citing New York Central R. Co. v. White, 243 U.S. 188 (1917)) (New Yorker workers' compensation law); Philadelphia, Baltimore & Washington R. Co. v. Schubert, 224 U.S. 603 (1912) (1908 Employers Liability Act).

66 *Id.* at 18-19 (citations omitted).

The Court applied a similar analysis in considering the various challenges to the Black Lung Benefits Act's presumptions and evidentiary rules, finding each to have a rational basis.[67] In dicta, however, the Court refused to grant Congress totally unfettered discretion in setting liability rules, indicating it might face a far more difficult problem upholding legislation granting benefits retrospectively to families of miners who did not die of black lung disease and who were unaware and unaffected by the illness during their lives.[68]

III. THE SECOND WAVE: ENCOURAGING BENEFICIAL ACTIVITIES BY LIMITING PLAINTIFFS' COMMON LAW RIGHTS IN EXCHANGE FOR OFFSETTING LEGAL BENEFITS

The second wave of federal tort reform began in the middle of the 20th century when Congress enacted a number of laws granting liability protections for defendants while generally providing substitute remedies for harmed parties. The following is an analysis of these "second wave" laws which have been challenged on constitutional grounds.[69]

A. FEDERAL DRIVERS ACT

In 1961, Congress enacted the Federal Drivers Act,[70] making the Federal Torts Claims Act the exclusive remedy for injuries resulting from the operation of a motor vehicle by government employees acting within

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[67] *Id.* at 22-38.

[68] *Id.* at 26.

[69] Congress has enacted a number of federal tort reforms which have not been challenged on constitutional grounds in federal court. These include several instances in which Congress has elected to substitute the United States as a defendant for volunteers performing a variety of activity associated with the Federal Government. *See, e.g.,* (1) Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. § 233 (g) & (o) (1994) (health centers and their officers, employees, and contractors and health clinic professionals); (2) National Service Trust Act, 42 U.S.C. §§ 12651b(f) & 12651g (a)(B) (1994) (enacted in 1993) (board members and volunteers in the National and Community Service program); (3) Take Pride in America Act, 16 U.S.C. § 4604 (c)(2) (1994) (Take Pride in America Act volunteers) (enacted in 1990); (4) Support for East European Democracy Act of 1989, 22 U.S.C. § 5422 (c)(2)(A) (1994) (volunteers providing technical assistance to Poland or Hungary); (5) Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737 (f) (1994) (Bureau of Land Management volunteers); (6) Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5055(f)(3) (1994) (VISTA volunteers); (7) Volunteers in the National Forests Act of 1972, 16 U.S.C. § 558c(b) (1994) (Forest Service volunteers); (8) Volunteers in Parks Act of 1969, 16 U.S.C. § 18i(b) (1994) (National Parks volunteers); (9) Peace Corps Act, 22 U.S.C. § 2504(h)(1994) (enacted in 1961) (Peace Corps volunteers); (10) Fish and Wildlife Act of 1956, 16 U.S.C. § 742f(c)(4) (1994) (volunteers in Fish and Wildlife Service or National Oceanic and Atmospheric Administration programs); (11) Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 203 note (Supp. I 1995); and (12) 18 U.S.C.A. § 1955 note (West Supp. IV 1997).

[70] Pub. L. No. 87-258, §1, 75 Stat. 539 (codified as amended at 28 U.S.C. § 2679) (1994)).

the scope of their employment.[71] Unlike many private employers, the Federal Government did not obtain private liability insurance for its employees, and Congress considered the Act necessary to allow the government to attract competent drivers.[72] The Federal Drivers Act was upheld against a variety of constitutional challenges in *Carr v. United States*,[73] *Thomason v. Sanchez*,[74] and *Nistendirk v. McGee*.[75]

Carr involved an action in which a federal employee brought an automobile liability action against a co-employee, claiming the Federal Drivers Act violated due process by abrogating common law rights without providing a legislative quid pro quo.[76] The Fourth Circuit responded first that the premise of that argument had been rejected in *Silver v. Silver*[77] (upholding the constitutionality of a Connecticut guest statute preventing non-paying guests from bringing negligence suits against owners or operators of automobiles), when the Supreme Court held "the Constitution does not forbid the creation of new rights, or the abolition of old rights recognized by the common law."[78] Secondly, *Carr* observed "in any event Congress provided an adequate quid pro quo for the common law cause of action which it abolished."[79] The court believed this to be the case even if the plaintiff, as a federal employee, was not entitled to bring suit against the Federal Government.[80] This was because the Federal Drivers Act benefited all federal employees—including the plaintiff—by providing them with protection against liability from automobile accidents.[81]

Carr also rejected the contention that the Federal Drivers Act denied the plaintiff his equal protection rights by treating automobile liability actions in a manner different from other liability actions involving government co-workers.[82] The court found that "the statutory classification comes here clothed with a presumption of constitutionality and it will not be set aside if any state of facts reasonably may be conceived to justify it."[83] In this instance, the Fourth Circuit found the Federal Driv-

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71 *Id.* § 2679(b).

72 *See* S. Rep. No. 87-736 (1961), *reprinted in* 1962 U.S.C.C.A.N. 2784.

73 422 F.2d 1007 (4th Cir. 1970).

74 539 F.2d 955 (3d Cir. 1976).

75 225 F. Supp. 881 (W.D. Mo. 1963).

76 422 F.2d 1007.

77 280 U.S. 117 (1929).

78 *Id.* at 122.

79 422 F.2d at 1011.

80 *See id.* at 1101. A Torts Claims Act remedy may not be available to federal workers because of the exclusivity provisions of the Employees' Compensation Act, 5 U.S.C. § 8116(c).

81 422 F.2d at 1101.

82 *Id.*

83 *Id.* at 1012 (quoting McGowan v. Maryland, 366 U.S. 420, 426).

ers Act to be a justified response to the problem of an undue financial burden otherwise being placed on government drivers.[84]

Thomason represented another case where the Federal Drivers Act was upheld against a due process challenge.[85] The Third Circuit held that the right to sue a co-worker does not enjoy constitutional protection and that statutory classifications along these lines "need not be justified by a compelling governmental interest" and do not "create a suspect classification" or "involve a fundamental interest."[86] The court found the Federal Drivers Act to be a reasonable response to the financial burden imposed on government workers and that "the magnitude of the automobile insurance problem justified Congress' separate treatment of this specific problem."[87]

Finally, in *Nistendirk*, a federal district court considered and rejected the argument that the Federal Drivers Act violated the plaintiff's Seventh Amendment right to a jury trial.[88] The court found that where a common law action was eliminated entirely and an action against the government substituted in its place, "the guarantees of the Seventh Amendment do not apply."[89]

B. THE PRICE-ANDERSON ACT

As enacted in 1957,[90] and amended in 1966,[91] and 1975,[92] the Price-Anderson Act ("Price-Anderson")[93] provided for a maximum aggregate liability of $560 million in the event of a nuclear accident at a federally licensed nuclear power plant, such maximum amount to be distributed to claimants from a pool of funds derived from the owner's insurance, contributions from other nuclear plant owners, and the Federal Government.[94] In exchange for these benefits, the plant owner was required to waive all of its defenses to liability if sued as a result of a nuclear accident, and Congress was required to take whatever additional action was deemed necessary and appropriate to protect the public.[95]

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84 *Id.*

85 539 F.2d 955

86 539 F.2d 955, 959 (3d Cir. 1976) (citations omitted).

87 *Id.* at 959-60.

88 225 F. Supp. 881.

89 *Id.* at 881, 882.

90 Pub. L. No. 85-256, 71 Stat. 576 (1957).

91 Pub. L. No. 89-645, 80 Stat. 891 (1966).

92 Pub. L. No. 94-197, 89 Stat. 1111-1115 (1975).

93 Codified as amended in scattered sections of 42 U.S.C. (1994).

94 42 U.S.C. § 2210(c) (1994). The Price-Anderson Act required the nuclear industry to purchase the maximum level of liability insurance available on the market—$60 million—and provided that the Federal Government would indemnify the industry, if necessary, up to $500 million.

95 42 U.S.C. §§ 2210(n)(1), 2210(c) (1994).

In 1978, the Court upheld Price-Anderson in *Duke Power Co. v. Carolina Environmental Study Group,*[96] the most recent Supreme Court decision concerning the constitutionality of a federal tort reform. In *Duke Power*, after finding the plaintiffs—a group of individuals who lived near proposed new nuclear power plants along with an environmental group and a labor union—had standing to challenge the law[97] and that it was "ripe" for adjudication,[98] the Court held Price-Anderson did not violate their Fifth Amendment due process rights.[99] The Court found Price-Anderson to be a "classic example of an economic regulation,"[100] which should be upheld unless it can be established that Congress' judgment was "demonstrably arbitrary or irrational."[101] Based on this review standard, the Court found it was appropriate for Congress to encourage the construction of nuclear power facilities in the manner set forth in the Price-Anderson Act.[102]

The Court rejected the district court's assertion[103] that the $560 million damage limitation was arbitrary and not rationally related to the potential damages caused by a possible nuclear accident. Instead, the Court found the dollar limitation a reasonable starting point given that the risk of a nuclear accident was very small, and that in the event an accident did occur, it was likely Congress would take further action ameliorating the hardship (as Congress had done with respect to previous natural disasters).[104] The Court also disagreed with the district court's determination that liability limitations in the Price-Anderson Act would encourage irresponsibility, pointing to the rigorous regulatory review process and the still significant damages a power plant owner would face in the event of an accident.[105]

Finally, the Court disagreed with the lower court's conclusion that the Price-Anderson Act should not survive scrutiny under the Due Process Clause because it failed to provide injured parties with a satisfactory quid pro quo to compensate for the forfeiture of their common law rights.[106] First, the Court noted "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable sub-

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96 438 U.S. 59 (1978).

97 *Id.* at 72-81.

98 *Id.* at 81-82.

99 *Id.* at 82.

100 *Id.* at 83.

101 *Id.* at 84.

102 *Id.*

103 Carolina Environmental Study Group v. Duke Power Co., 431 F. Supp. 203, 222 (W.D.N.C. 1977), *rev'd*, 438 U.S. 59 (1978).

104 438 U.S. at 84-85.

105 *Id.* at 87.

106 *Id.* at 87-88 (citations omitted).

stitute remedy."[107] In so doing, the Court observed in a footnote that the *Second Employers' Liability Cases* stood for the proposition that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'"[108]

Ultimately, however, the Court failed to resolve whether or not a quid pro quo was required to satisfy the Due Process Clause, since it found the requisite substitute remedy had been effectuated by the Price-Anderson Act.[109] The Court noted the Price-Anderson Act provided a secure source of funds to victims harmed by a nuclear accident, mandated a waiver of the owner's common law defenses, and allowed claims to be satisfied without resulting in an inequitable "race to the courthouse."[110] In this respect, the Court observed that the Price-Anderson Act was somewhat comparable to the New York worker's compensation statute[111] upheld in *New York Central R. Co. v. White*,[112] and the Federal Longshoremen and Harbor Workers' Compensation Act[113] upheld in *Crowell v. Benson*[114] (both being upheld against due process challenges).[115] The Court also rejected the plaintiff's Fifth Amendment equal protection claim, finding that this argument "largely track[ed] and duplicate[d] those made in support of the due process claim."[116]

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107 *Id.* at 88.

108 *Id.* at 88, n.32, (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)). In the same footnote, the Court also quoted from its 1929 decision in Silver v. Silver, 280 U.S. 117 (1929), for the principle that "[t]he 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" *Id.*

109 *Id.* at 88.

110 *Id.* at 90.

111 1913 N.Y. Laws 816; 1914 N.Y. Laws 41, 316.

112 243 U.S. 188 (1917). In New York Central R. Co. v. White, the Court found the New York workers' compensation law to be "reasonable" and in conformance with "natural justice." *Id.* at 203. The Court specifically reserved the question of whether New York could have eliminated the parties' common law rights without setting up an alternative compensation scheme: "it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented." *Id.* at 201. The New York workers' compensation law was further amended and upheld against due process challenge in New York Central R. Co. v. Bianc, 250 U.S. 596 (1919).

113 33 U.S.C. §§ 901-950 (1994).

114 285 U.S. 22 (1932), *overruled on other grounds*, Director, Office of Workers' Compensation Programs v. Perini North River Assoc., 459 U.S. 297 (1983). In *Crowell*, the Court found the Federal Longshoreman and Harbor Workers' Compensation Act, requiring employers to pay reasonable statutory compensation to maritime employees who are disabled or die from work injuries while on United States navigable waters, to conform to due process requirements since it was reasonable and similar to other workers' compensation schemes. *Id.* at 41. The Court found the employers' Seventh Amendment claim to be "unavailing" since the compensation arrangement had previously been governed by maritime law and fell within Congress' admiralty jurisdiction. *Id.* at 45.

115 438 U.S. at 88.

116 *Id.* at 93.

The Court did not separately consider any federalism issues. The plaintiffs had sought to argue that Price-Anderson "encroaches on substantial state governmental interests"[117] and should therefore be subject to an augmented standard of review under the Due Process Clause, but the Court could find no basis in law for this contention.[118]

The Court also did not reach the plaintiffs' argument that the Price-Anderson Act effectuated an unconstitutional Fifth Amendment "taking".[119] The Court found that it was not necessary to consider this argument because in their view the Price-Anderson Act did not withdraw plaintiffs' ability to bring a claim for an unjust taking under the Tucker Act.[120] In the Court's view, the question as to whether a takings claim could be established under the Fifth Amendment "is a matter appropriately left for another day."[121]

C. SWINE FLU ACT

In 1976, Congress adopted the Swine Flu Act,[122] substituting the liability of the United States under the Federal Torts Claim Act for the liability of manufacturers, distributors, and volunteer medical personnel in connection with the administration of the swine flu vaccine.[123] Under the Swine Flu Act, although these program participants are not directly liable to harmed individuals for personal injury or death, the United States is permitted to seek indemnification from them on the basis of their negligence or breach of contract.[124]

The Swine Flu Act was upheld against constitutional challenge by district courts in Tennessee (*Wolfe v. Merrill National Laboratories*[125]), Oklahoma (*Sparks v. Wyeth Laboratories, Inc.*[126]), and Alabama (*Stephens v. Wyeth Laboratories, Inc.*[127]) in 1977, as well as by the Fifth

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117 *Id.* at 84 n.27.

118 *Id.*

119 *Id.* at 94. The Fifth Amendment "takings" clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

120 438 U.S. at 94. The Tucker Act, *inter alia*, waives United States sovereign immunity for claims founded on statutes, regulations, contracts or provisions of the Constitution that create substantive rights to money damages. 28 U.S.C. § 1491 (1994).

121 438 U.S. at 94 n.39.

122 Swine Flu Act, Pub. L. No. 94-380, 90 Stat. 1113, 42 U.S.C. § 247b (1976) (repealed 1978).

123 Under the Swine Flu Act, although the procedures of the Federal Tort Claims Act are made applicable to suits against the United States, the Act did not limit a plaintiff's theory of recovery to negligence alone. *See* 42 U.S.C. § 247b(k)(2)(A); 28 U.S.C. §§ 1346(b) and 2674 (1976). Instead, the United States is made liable upon any basis which would have been available against the program participant under applicable state law, "including negligence, strict liability in tort, and breach of warranty." 42 U.S.C. § 247b(k)(2)(A)(I) (1976).

124 42 U.S.C. § 247b(k)(7) (1976).

125 433 F. Supp. 231 (M.D. Tenn. 1977).

126 431 F. Supp. 411 (W.D. Okl. 1977).

127 No. 77-L-0274-S (W.D. Ala., June 3, 1977).

Circuit in *Ducharme v. Merrill-National Laboratories*[128] the following year. The courts found the Swine Flu Act to involve "the area of social and economic welfare" and applied a rational basis standard of review in rejecting plaintiffs' Fifth Amendment due process and equal protection arguments.[129] Applying this standard, the Fifth Circuit in *Ducharme* concluded that "the procedure established under the [Swine Flu] Act is rationally related to achieving the goal of assuring interstate distribution of the swine flu vaccine."[130] The court also rejected the plaintiff's takings assertion, finding the law did not apply retroactively to remove any "vested" property rights from claimants.[131]

The *Ducharme* and *Sparks* courts also rejected the contention that the Swine Flu Act violated plaintiffs' Seventh Amendment rights, holding the United States as the "sovereign" was not subject to the Seventh Amendment.[132] In *Sparks*, the Oklahoma district court observed, "it is axiomatic that if a cause of action against [the sovereign] can be abolished, the jury trial of that action is also abolished. The elemental fact is that suits against the sovereign were unknown at common law."[133] The court noted that similar arguments had been raised—and rejected—in the context of the Federal Drivers Act.[134]

In *Sparks*, the district court further rejected the plaintiff's argument that the Swine Flu Act violated the Tenth Amendment[135] by calling for the assistance of state and local governments. The court noted that in our modern economy it was appropriate for the federal and state governments to work together in responding to common problems, so long as the legislation does not impose a "coercion on the states,"[136] and in the case of the Swine Flu Act, the law specifically sanctioned voluntary cooperation by state governments concerning health matters.[137]

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128 574 F.2d 1307 (5th Cir. 1978).

129 *Id.* at 1310. In *Sparks*, the court stated, "the statutory classification comes here clothed with a presumption of constitutionality and it 'will not be set aside if any state of facts reasonably may be conceived to justify it.'" 431 F. Supp. at 418. In *Wolfe*, the court adopted the reasoning of *Sparks* to the extent necessary to reach the issues raised by the plaintiff, but went on to observe that it need not necessarily reach the constitutional issues since the plaintiff, a doctor, had voluntarily consented to the legal limitations of the Swine Flu Act. 433 F. Supp. at 236, 237-238.

130 574 F.2d at 1311.

131 *Id.* at 1310.

132 574 F.2d at 1311; 431 F. Supp. at 418.

133 431 F. Supp. at 418.

134 *Id.* at 416.

135 *See infra* note 427.

136 Sparks, 431 F. Supp. at 419.

137 *Id.* at 420.

D. ATOMIC TESTING LIABILITY ACT

The 1984 Atomic Testing Liability Act ("Atomic Testing Liability Act") made an action against the United States under the Federal Tort Claims Act the exclusive remedy for injury or death due to exposure to radiation from atomic weapons testing programs carried out by government contractors.[138] The law was found to be constitutional by the First Circuit in *Hammond v. United States*[139] in 1986 and by the Ninth Circuit in *In re Consolidated United States Atmospheric Testing Litigation*[140] in 1987.

As was the case with the Swine Flu Act, the courts readily disposed of plaintiffs' Fifth Amendment takings assertion, citing *New York Central R. Co. v. White* for the proposition that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."[141] In *Hammond*, the First Circuit concluded that a takings claim would not lie unless and until a harmed party has a "final, unreviewable judgment."[142]

As for the Fifth Amendment due process challenge, like other tort reforms, the courts use a rational basis review standard to conclude the Atomic Testing Liability Act was reasonably designed to encourage federal contractors to participate in the nuclear weapons program.[143] In reaching this conclusion, the courts in *Hammond* and *In re Consolidated United States Atmospheric Testing Litigation* stated that the Due Process Clause permitted Congress to choose from a range of alternative compensation schemes when it preempted state tort law:

> [A]lthough Congress could have relieved the independent contractors of their burden of defending suits for radiation and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis . . . . When the program began Congress could have mandated that all tort claims arising from it be litigated through the [Federal Tort Claims Act].[144]

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138 Pub. L. No. 101-510, 104 Stat. 1837, 42 U.S.C. § 2212 (1994). The statute provides "[t]he remedy against the United States provided by [the FTCA] as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States." *Id.* § 2212(b)(1).

139 786 F.2d 8 (1st Cir. 1986).

140 820 F.2d 982 (9th Cir. 1987).

141 *Hammond*, 786 F.2d at 12 & 820 F.2d at 989 (quoting New York Central R. Co. v. White, 243 U.S. 188, 198).

142 *Id.*

143 *Id.* at 12-14 (considering Fifth Amendment due process and equal protection challenges); In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d at 989-91 (rejecting both procedural and substantive due process challenges).

144 *Id.* at 991 (*citing Hammond*, 786 F.2d at 14).

The First Circuit in *Hammond* also disposed of a number of other constitutional challenges to the Atomic Testing Liability Act, including the assertion that the law violated the Seventh and Tenth Amendments.[145] Using the same reasoning developed in upholding the Swine Flu Act (and the Federal Drivers Act before that), the Court found the Seventh Amendment did not apply to federal laws involving the sovereign, concluding, "[w]hen the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has here, the seventh amendment does not require that it must also provide a jury trial."[146]

Finally, in *Hammond*, the plaintiff asserted the Atomic Testing Liability Act improperly invaded state prerogatives in light of the Court's 1976 decision in *National League of Cities v. Usery*.[147] In rejecting this argument, the court responded that not only was *National League of Cites* distinguishable because it involved a limitation on Congress' commerce authority (rather than the war powers authority implicated by the Atomic Testing Liability Act), but that *National League of Cities* had been overruled by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[148]

E. 1988 AMENDMENTS TO THE PRICE-ANDERSON ACT

In 1988, Price-Anderson was amended for a third time pursuant to the Price-Anderson Amendments Act of 1988 (the "1988 Amendments").[149] Under the 1988 Amendments, claims arising from "nuclear incidents" were considered to be exclusively federal causes of action.[150] Such actions, denoted as "public liability actions," are to be based on the applicable state law where the nuclear accident occurred except to the extent such law is inconsistent with federal law (*e.g.*, Price-Anderson).[151] The 1988 Amendments also provided for consolidation of all claims in the

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145 786 F.2d at 15. In addition to the Fifth, Seventh, and Tenth Amendment arguments discussed *supra*, the court rejected claims that the law was unconstitutional because it was an "unexpected law," violated the Ninth Amendment (preserving all unenumerated rights for the people), right of access to the courts, and prohibition against *ex post facto* laws. *Id.*

146 *Id.*

147 *Id.* at 15 (*citing National League of Cities*, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Congress lacks authority to impose wage and hour standards on state and local government employees).

148 *Hammond*, 786 F.2d at 15 (*citing Garcia*, 469 U.S. 528 (1985)).

149 Pub. L. No. 100-408, 102 Stat. 1066 (codified as amended at 42 U.S.C. § 2210 (1994)).

150 The 1966 amendments to the Price-Anderson Act provided for transfer to federal district court of all actions arising out of an "extraordinary nuclear occurrence." 42 U.S.C. § 2210(n)(2)(1994). The failure of such definition to apply to the Three Mile Island accident was seen as a significant impetus for Price-Anderson's 1988 expansion. *See* S. Rep. No. 100-218, at 13 (1987).

151 42 U.S.C. § 2014 (1994).

federal district court where the accident occurred, and were made to apply retroactively to any claim pending on the date of enactment.[152]

The constitutionality of the 1988 Amendments was upheld by the Seventh Circuit in *O'Conner v. Commonwealth Edison Co.*,[153] and by the Third Circuit in *In re TMI Litigation Cases Consol. II*[154] and *In re TMI*.[155] These cases principally considered two constitutional questions—whether the 1988 Amendments conferred jurisdiction in the federal courts in violation of Article III of the Constitution,[156] and whether the retroactive nature of the law violated Fifth Amendment due process. With regard to the Article III issue, *O'Conner* found that the 1988 Amendments did not "merely create federal jurisdiction for a state claim, rather [they] affirmatively 'embodie[d] substantive federal policies.'"[157] *O'Conner* further noted that rather than "adopt[ing] in wholesale fashion state law,"[158] the Price-Anderson Act created a "new and entirely federal cause of action."[159] *In re TMI Litigation Cases Consol. II* reached the same conclusion, finding that "the Act while relying for definition upon state law elements, contains the federal components necessary to survive the constitutional challenge."[160] The court went on to note there were numerous features of federal law for a court to consider in a Price-Anderson Act public liability action, such as whether the cause of action resulted from a nuclear incident, the waiver of state law defenses, the limited availability of punitive damages, and whether the action is otherwise inconsistent with federal law.[161]

As for the due process challenge, *O'Conner* rejected the contention that it was irrational to apply the 1988 Amendments to circumstances other than the Three Mile Island nuclear accident.[162] After noting the

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152 *Id.* § 2219(n)(2).

153 13 F.3d 1090 (7th Cir. 1994).

154 940 F.2d 832 (3d Cir. 1991).

155 89 F.3d 1106 (3d Cir. 1996), *cert. denied*, Aldrich v. General Pub. Utils. Corp., __ U.S. __; 117 S.Ct. 739; 136 L. Ed. 2d 678; 65 U.S.L.W. 3487 (U.S. 1997).

156 Article III of the Constitution provides that federal judicial power extends to cases "arising under the Constitution, the Laws of the United States, and Treaties made . . . under their authority." U.S. Const. art. III, § 2.

157 13 F.3d at 1099. In considering the Article III issue, *O'Conner* reviewed prior Supreme Court precedent such as Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824), and Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). The court read these cases as establishing that "more than a jurisdictional grant is required for a matter to 'arise under' the Constitution or laws of the United States," but that "where Congress has the authority to legislate in a given area and substantively does so, a grant of federal subject matter jurisdiction will survive an Article III challenge." 13 F.3d at 1098-99 (citations omitted).

158 13 F.3d at 1100.

159 *Id.*

160 940 F.2d at 857.

161 *Id.*

162 In *O'Conner*, plaintiff alleged he had been overexposed to radioactive materials in his position as a pipe fitter for Commonwealth Edison nuclear facility. *Id.* at 1093.

plaintiff must overcome a "strong presumption"[163] of constitutionality, the court found retroactive application of the removal and consolidation provisions of the 1988 Amendments could provide advantages and efficiencies to a broad class of nuclear incidents above and beyond the Three Mile Island accident.[164]

In *TMI*[165] the court applied a straightforward rational basis constitutional test, finding the 1988 Amendments furthered Congress' stated goals of " 'uniformity, equity, and efficiency in the disposition of public liability claims' arising from nuclear accidents."[166] The Third Circuit found that retroactive application applied the Price-Anderson Act to all parties and therefore eliminated the potential for inconsistent results between jurisdictions.[167] Furthermore, *TMI* asserted the 1988 Amendments promoted efficiency by allowing consolidation of all nuclear accident cases in a single forum, remedying what the court referred to as "procedural problems plaguing the TMI cases."[168]

F. WESTFALL ACT

In reaction to the Supreme Court's decision in *Westfall v. Erwin*[169] limiting federal employees' immunity from tort,[170] Congress enacted the Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act").[171] The Westfall Act broadened the Federal Drivers Act to provide for substitution of the United States as a defendant in actions arising from torts committed by federal employees acting within the scope of their employment, and applied retroactively to cases pending on the date of enactment.[172]

Rather than challenging the general limitations on liability set forth in the Westfall Act, plaintiffs focused on provisions applying to pending

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163 *Id.* at 1102.

164 *Id.*

165 In *TMI*, plaintiffs asserted that retroactive application of the 1988 Amendments violated their due process rights by requiring resort to Pennsylvania's two-year statute of limitations (rather than Mississippi's six-year statute) thereby resulting in a dismissal of their action. 89 F.3d at 1110-11.

166 *Id.* at 1113, (quoting H.R. Rep. No. 100-104, pt. 3, at 18 (1987)).

167 *Id.* at 1113.

168 *Id.* at 1114. *In re TMI Litigation Cases Consol. II* also rejected due process and equal protection claims as well as other "collateral" arguments relating to federalism and state sovereignty concerns. 940 F.2d at 860-61. *See also O'Conner*, 13 F.3d at 1102, n. 10. ("[t]he removal of cases arising under [the laws of the United States] from state into federal courts is . . . no invasion of state domain.").

169 484 U.S. 292 (1988) (conduct by federal officials must be discretionary in nature as well as within the scope of their employment to enjoy absolute state-law tort immunity).

170 Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990).

171 Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. § 2679 (1994)).

172 *Id.* The Westfall Act amended the Federal Torts Claims Act

actions. However, claims that the Act's retroactivity provisions violated Fifth Amendment due process rights were rejected by the Eleventh Circuit in *Sowell v. American Cyanimid*;[173] the Sixth Circuit in *Arbour v. Jenkins*;[174] and the Tenth Circuit in *Salmon v. Shwarz.*[175] In each case, the courts found that "a legal claim [for tortious injury] affords no definite or enforceable property right until reduced to a final judgment,"[176] and were therefore not subject to constitutional protection. In *Salmon* the court also argued that any disadvantages to plaintiffs were offset by the legal benefits available under the Westfall Act, noting "there are advantages afforded under the [Federal Torts Claims Act, such as] the administrative claim procedure for more expeditious resolutions, and the liability of the government in lieu of the risk that individual defendants may be judgment proof."[177]

IV. THE THIRD WAVE: PROTECTING THE PUBLIC OR PUSHING THE CONSTITUTIONAL ENVELOPE?

The third and most recent wave of federal tort reforms was initiated in the 1990's, when Congress enacted several narrowly tailored laws providing specific liability exemptions; such as a statute of repose for general aviation, exemptions from ordinary negligence for food donors and volunteers, caps on liability for rail passenger providers, and limitations on liability for medical implant suppliers who meet certain contractual and other product specifications, and limitations on liability in Y2K actions.[178] Due to the relatively narrow scope of these laws, they have not yet been applied in a manner giving rise to constitutional challenge.[179]

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173 888 F.2d 802 (11th Cir. 1989).

174 903 F.2d at 416.

175 948 F.2d 1131 (10th Cir. 1991).

176 *Salmon*, 924 F.2d at 1143.

177 *Id.*

178 *See infra* nn.174, 184, 216, 228 & 244. Other recent examples of federal tort reforms include (1) 49 U.S.C. § 28102 (1994) (enacted in 1990) (limiting passenger rail liability for Virginia commuter lines to $200 million per accident in the District of Columbia along with requiring such railways to maintain minimum liability coverage of $200 million); (2) Federal Credit Union Act, 12 U.S.C. § 1787(c)(3)(A) (1994) (enacted in 1987) (limiting damages for lost profits, lost opportunity, and pain and suffering stemming from the liquidation of federal credit unions) (enacted in 1987); (3) National Childhood Vaccine Injury Compensation Act of 1986, 42 U.S.C. §§ 300aa-1-34 (1994) (providing no-fault compensation scheme for injuries resulting from child vaccines and eliminating most forms of state law liability for vaccine manufacturers and administrators); and (4) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 42 U.S.C. §§ 9612(e) & 9658 (a) (1994) (providing that bringing Superfund claim does not constitute a waiver of rights under state law and substituting federal for state statute of limitations). *See also* Year 2000 Information and Readiness Disclosure Act, 15 U.S.C. 1 note (1998) (preempting state contract actions and evidentiary rules stemming from the dissemination of information concerning the Year 2000 computer problems).

179 *See infra* n.456.

Congress has also considered a number of far broader liability reforms involving areas such as products liability, medical malpractice and tobacco liability.[180] Collectively, this third wave of reforms raise a number of constitutional issues which have not been fully addressed in either the first or second wave of federal tort laws.

A. RECENTLY ENACTED FEDERAL TORT REFORMS

1. *General Aviation Revitalization Act of 1994*

The General Aviation Revitalization Act of 1994 (the "General Aviation Act")[181] provides for an 18-year federal statute of repose for manufacturers of "general aviation aircraft"[182] and their component parts. As such, the law operates to prevent plaintiffs from bringing civil actions for death or injury or damage to property stemming from an accident against a manufacturer of a general aviation aircraft or component part which is more than 18 years old. The statute operates on a "rolling basis," so that if an original part is replaced, the new part would have a new 18-year statute of repose commencing with its replacement.[183]

The General Aviation Act does not apply in cases in which: (1) the manufacturer has misrepresented safety information to the Federal Aviation Administration; (2) the claimant was a passenger for purposes of receiving emergency medical treatment; (3) the claimant was not aboard the aircraft; and (4) actions are brought pursuant to written warranties.[184] The General Aviation Act is "one-way preemptive," that is to say it only supersedes state laws where there are no statutes of repose or which provide for a longer statute of repose.[185]

The General Aviation Act stems from concerns that the United States' general aviation industry was declining in part due to excessive liability burdens and the costs of defending so-called frivolous lawsuits.

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180 *See infra* notes 241, 261 & 273. A number of other tort reform proposals may be on the congressional agenda which are not discussed in detail herein. *See e.g.*, Trade and Professional Association Free Flow of Information Act of 1997, H.R. 1542 & S. 1135, 105th Cong. (1997) (providing expanded liability protections for non-profit organizations); and Auto Choice Reform Act of 1997, H.R. 2021 & S. 625, 105th Cong. (1997) (preempting state automobile liability law to permit motorists to of the ability to seek non-economic damages); Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong. (1998) (preempting state law concerning liability for asbestos to provide an administrative procedure subject to a variety of caps and limitations on liability).

181 Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. § 40101 note (1994)).

182 General Aviation Act § 2(c). In the scope of this provision a "general aviation aircraft" is defined as aircraft of less than 20 seats not engaged in scheduled passenger carrying operations.

183 *Id.* §§ 2(a)(2) & 3.

184 *Id.* § 2(b). In excluding "written" warranties, the law would presumably apply to supersede any implied warranties which may have applied beyond the statute of repose period.

185 *Id.* § 2(d).

In their report on the legislation, the House Transportation Committee concluded that "[a]n important factor in the decline of general aviation manufacturing has been the industry's product liability costs, which have increased from $24 million in 1978 to more than $200 million a year in recent years."[186] An additional factor justifying Congress' interest was the fact that the general aviation industry was considered uniquely susceptible to federal tort relief because it was otherwise subject to " 'cradle to grave'federal regulatory oversight"—including FAA approval of aircraft designs, federal licensing of pilots, mechanics and maintenance facilities, federal regulation of air routes and fuel handling, and FAA and National Transportation Safety Board review of aircraft accidents.[187]

The liability law which was ultimately enacted was far less comprehensive than previous versions of the legislation. As originally introduced by Senator Kassebaum (R-KA) and approved by the Senate Commerce Committee in 1986, general aviation reform would have established a uniform federal standard of negligence for general aviation accidents; mandated comparative negligence; altered the rules of evidence in general aviation cases (*i.e.*, to explicitly provide that plaintiffs may not introduce evidence of subsequent remedial measures); set forth a federal standard for the award of punitive damages; created a two-year federal statute of limitations for bringing liability actions, and allowed automatic removal to federal courts as well as providing for a federal statute of repose (originally sought to be 12 years).[188]

Due to the controversy engendered by such a wide-ranging approach,[189] by 1993 the bill's sponsors settled on seeking a single reform—the imposition of a 15-year statute of repose. In order to obtain the consensus necessary to obtain clearance for consideration and approval in the Senate, the bill was further modified to extend the statute of repose period to 18-years, and exceptions were added to exempt cases involving misrepresentations to the FAA and written warranties, as well as persons injured on the ground and pursuant to medical evacuation.[190]

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186 *See* H.R. Rep. No. 103-525, pt. 1, at 2 (1994). Proponents had noted that production of general aviation aircrafts by domestic manufacturers had declined from 17,000 units in 1979 to 954 units in 1993. This in turn was asserted to have led to a direct loss of 20,000 aviation jobs and an indirect loss of another 80,000 jobs in related industries. *Id.*

187 *Id.* at 5-6.

188 *See* S. 2794, 99th Cong. (1986).

189 *See, e.g.*, S. Rep. No. 101-303, at 2 (1990) (Senate Judiciary Committee issued an adverse report on general aviation legislation, concluding, *inter alia*, that "[t]he General Aviation Accident Liability Standards Act [S. 640] should not be passed by the Senate and enacted into law. The bill has not been proven to be necessary and would represent an unwise policy decision on the part of the Senate, if adopted. Further, a number of the specific substantive provisions of the bill are so problematic that the entire bill is fatally flawed.").

190 The House version of the legislation further clarified that it would only apply to limit suits brought against general aviation manufacturers in their capacity as manufacturers. *See* General Aviation Act, § 2(a).

2. *Bill Emerson Good Samaritan Food Donation Act*

The Bill Emerson Good Samaritan Food Donation Act (the "Food Donation Act"),[191] enacted in 1996, exempts persons who donate[192] food and grocery products to nonprofits[193] for distribution to the needy, as well as the non-profits themselves, from civil or criminal liability in connection with food which is "apparently wholesome" and grocery products which are "apparently fit" (*i.e.*, meeting applicable quality and labeling standards).[194]

The Food Donation Act allows persons to donate food and grocery products which do not meet applicable quality and labeling standards without fear of liability so long as the nonprofit organization is so informed, agrees to remedy the defect, and has the knowledge to do so.[195] The law also protects persons who permit food to be "gleaned" (harvested from their land free of charge) from civil or criminal liability arising from the gleaner, except in cases of gross negligence or intentional misconduct.[196] The Food Donation Act does not include a specific clause stating that it is one-way preemptive, however, it is written in such a manner that it provides only relief from liability in specified situations, and therefore does not appear to create any liability where gross negligence or intentional misconduct occur except as otherwise provided under state law.[197]

Proponents of the Food Donation Act asserted it was needed to provide a minimum federal floor of liability protection in order to encourage the various forms of food donation activity.[198] While it was acknowledged that all states had adopted some form of liability protection to food donors, supporters believed these laws were inconsistent and created confusion, particularly for large national food donors.[199]

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191 Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C.A. § 1791 (West Supp. 1998)).

192 The Food Donation Act applies to persons who donate as well as "glean" food, with "gleaner" defined to mean "a person who harvests for free distribution to the needy . . . an agricultural crop that has been donated by the owner." *Id.* §§ 1791(b)(5) & (c)(1).

193 The Food Donation Act defines "nonprofit organization" as an entity that (A) is operated for religious, charitable, or educational purposes; and (B) does not provide net earnings or operate in a manner that benefits any of its officers, employees, or shareholders. *Id.* § 1791(b)(9).

194 *Id.* §§ 1791(b)(1), (b)(2),(c)(1) & (c)(2).

195 *Id.* § 1791(d).

196 *Id.* § 1791(d).

197 The operative provisions of the law provide that persons, gleaners, and nonprofit organizations "shall not be subject to civil or criminal liability" arising from a specified set of circumstances. *Id.* §§ 1791(c)(1) & (c)(2).

198 *See, e.g.*, H.R. Rep. No. 104-661, at 3 (1996).

199 *See, e.g., The Good Samaritan Food Donation Act, Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Education, Training and Life-Long Learning of the House Comm. on Economic and Educational Opportunities*, 104th Cong., 5 (1996) (statement of Rep.

The Food Donation Act was based on a model good samaritan statute which Congress adopted in 1990.[200] In March of 1996, a conference committee declined to extend the law into a federal mandate as part of the Agriculture bill because of stated federalism and jurisdictional concerns.[201] However, in the wake of the death of the proposal's principal supporter, Rep. Bill Emerson (R-MO), the legislation received renewed attention and was able to easily pass the House and Senate in substantially the same form as the introduced version.[202]

3. *Volunteer Protection Act of 1997*

The Volunteer Protection Act of 1997 (the "Volunteer Protection Act"),[203] provides a variety of protections from liability to individuals who volunteer for nonprofit organizations[204] or government agencies.[205] The principal form of protection provided by the Act insulates volunteers[206] from actions for harm caused by ordinary negligence (*i.e.*, not caused by willful or criminal conduct, gross negligence, reckless misconduct or a conscious, or flagrant indifference to the rights or safety of others).[207] This protection from civil liability does not apply to volunteers acting outside the scope of their responsibility, volunteers acting without a required license, certification, or authorization, or harm caused by a motor vehicle.[208]

Danner) ("[w]hile each of the 50 states have Good Samaritan legislation in place, the level of protection differs and the liability concerns of the national and regional donors are not uniformly addressed. Adoption of this bill would eliminate this disparity and facilitate greater support of private sector feeding programs. . . .").

200 National and Community Service Act of 1990, 42 U.S.C. §§ 12571, 12671-12673 (1994).

201 *See* H.R. Rep. No. 104-494, at 405 (1996).

202 The Senate adopted amendments which clarified that "gross negligence" included a failure to act and that the law did not supersede state or local health regulations covering nonprofit organizations. *See* 142 Cong. Rec. S9532 -33 (daily ed. Aug. 2, 1996).

203 Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. §§ 14501- 14505 (West Supp. III 1997)).

204 "Nonprofit organization" is defined to include any organization exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code as well as any not-for-profit organized and conducted for the public benefit and operated primarily for charitable, civic, educational, religious, welfare or health purposes, so long as the group does not practice any action constituting a federal hate crime. *Id.* § 14505(4).

205 The Volunteer Protection Act does not provide any direct liability protections to the nonprofit organizations or government agencies. *Id.* § 14503(c).

206 "Volunteer" is defined to mean an individual (including a director or officer) performing services for a "nonprofit organization" or a governmental entity who does not receive compensation (other than reasonable expenses) in excess of $500 per year. *Id.* § 14505 (6).

207 *Id.* § 14503(a)(3).

208 *Id.* §§ 14503(a)(1), (2) & (3). The Act also excludes from liability protection any specific misconduct constituting a crime of violence or international terrorism, hate crime, sexual offense, civil rights violation, or which is caused by the influence of alcohol or drugs in violation of state law as well as volunteers performing services for groups responsible for federal hate crimes (*e.g.*, crimes that manifest evidence of prejudice based on race, religion,

In addition, the Volunteer Protection Act provides special protections to volunteers for actions involving punitive damages and actions involving joint and several liability with respect to volunteers acting within the scope of their employment.[209] Punitive damages may only be allowed if the plaintiff establishes by clear and convincing evidence that the harm was caused by willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of others.[210] Joint and several liability by volunteers is eliminated for "non-economic" damages (*e.g.*, pain and suffering). Instead, under the Volunteer Protection Act volunteers are only responsible for paying non-economic damages to the extent of their "percentage of responsibility" (as determined by the trier of fact).[211]

The Volunteer Protection Act is one-way preemptive, superseding state laws "except to the extent that such laws are inconsistent with [the] Act, except that [the] Act shall not preempt any state law that provides additional protections from liability relating to volunteers . . . ."[212] However, the Volunteer Protection Act permits the operation of certain state laws requiring that nonprofit organizations operate in a safe and sound manner, namely, laws requiring nonprofit organizations to adopt risk management procedures (*e.g.*, training volunteers), be subject to respondeat superior (*i.e.*, vicarious employer liability for employee negligence), and have a secure source of funds for victim recovery available.[213]

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sexual orientation, or ethnicity). *Id.* §§ 14503(f) & 14505(4). (Federal hate crimes are defined at 28 U.S.C. § 534 note).

209 Unlike the liability protections against acts of ordinary negligence, the Volunteer Protection Act's limitations on liability for punitive damages and joint and several liability for non-economic damages are not limited to actions where the volunteer was acting with any required license or was not caused by a motor vehicle. An additional variation in coverage concerns the scope of the joint and several liability damage limitations set forth in the Volunteer Protection Act. By its terms the provisions prohibiting actions against volunteers for ordinary negligence and limiting punitive damage actions do not apply to affect civil actions brought by a nonprofit or governmental entity against their volunteers. There is no such limitation contained in the provisions limiting non-economic damages in joint and several liability cases. *See* 42 U.S.C. §§ 14503 (a), (c), (e) & 14504.

210 *Id.* § 14503(e)(1).

211 *Id.* § 14504(b)(1).

212 *Id.* § 14502(a). Under some scenarios, determinations regarding the interaction between state law and the Act could be problematic with regard to tort reforms. Consider a state such as Idaho where punitive damages may be established by a "preponderance of the evidence," but such awards are limited to "wanton, malicious or outrageous misconduct." Idaho Code § 6-1604 (1996). In the event of a voluntary liability case in Idaho involving a punitive damage claim, it would be unclear whether a defendant would be permitted to use the stricter evidentiary requirement of the Volunteer Protection Act requiring "clear and convincing evidence" to establish punitive damages, while at the same time benefiting from the stricter state law requirement limiting punitive damages to "outrageous misconduct" (as compared to the Volunteer Protection Act's seemingly more lenient standard of "flagrant indifference to the rights or safety of others").

213 *Id.* §§ 14503(d)(1), (2) & (4).

States are also permitted to exempt lawsuits brought against volunteers by police officers and other state and local officials.[214] In addition, the Volunteer Protection Act allows states to enact stand alone legislation opting out of the new volunteer protection provisions entirely.[215]

The legislation's supporters asserted that an increase in the number of lawsuits being brought against volunteers was having a negative impact on volunteerism.[216] Proponents also asserted that inconsistencies between the various state laws were having an adverse impact on national volunteer organizations. During House floor debate, Judiciary Chairman Hyde (R-IL) argued that "[t]he Red Cross, for example, would like to be able to train people . . . for disaster relief . . . and it is important that they not have to concern themselves with the checkerboard of liability laws. In addition, there is a very small insurance market to cover volunteers. The cost of that insurance becomes prohibitive if it has to be complicated by a plethora of liability standards from state to state."[217]

The Volunteer Protection Act traces its roots to legislation introduced by Rep. Porter (R-IL) in 1987 as H.R. 911 and reintroduced as that bill number in each succeeding Congress.[218] Rather than mandating immunity for specified volunteer activity, the approach taken by these bills was to encourage the states to adopt volunteer liability protection provisions by offering the incentive of a one percent increase in their Social Security block grants.[219] During the 105th Congress, however, proponents of volunteer liability legislation took a more aggressive approach, mandating the liability limitations, rather than encouraging them through

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214 *Id.* § 14503(d)(3).

215 Such opt-out authority would only apply to volunteer liability cases where all of the parties to the proceeding are residents of the state in question. *Id.* § 14502(b).

216 *See, e.g.*, H.R. Rep. No. 105-101, pt. 1, at 5-8 (1997). In particular, supporters pointed to a 1996 report prepared by the Nonprofit Risk Management Center (an organization designed to meet the insurance and risk management needs of the nonprofit community) in cooperation with the ABA Section on Business Law which found that there had been a significant increase in the number of lawsuits brought against volunteers since the mid-1980's, and a study by the Independent Sector (an organization of foundations, charities, and businesses that tracks nonprofit activities) indicating that the rate of volunteerism had dropped from 54% in 1989 to 48% in 1993. *Id.* at 5-6 (1997); 143 Cong. Rec. S3861-62 (daily ed. May 1, 1997) (statement of Sen. Coverdell).

217 143 Cong. Rec. H3101 (daily ed. May 21, 1997) (statement of Rep. Hyde).

218 *See* H.R. 911, 100th Cong. (1987).

219 In 1993, Rep. Porter offered his bill as an amendment to the National Service Trust Act, and it was approved by the full House after a perfecting amendment offered by Rep. John Bryant was adopted (providing that as a condition of the volunteer immunity, the states require—rather than just permit—laws insuring that covered nonprofit organizations operate in a safe and sound manner). The Bryant amendment was approved by a vote of 239-194, and the Porter Amendment, as perfected by the Bryant Amendment, was agreed to by a vote of 362-61. *See* 139 Cong. Rec. H5376-82, H5422-23 (daily ed. July 28, 1993). The Porter amendment was subsequently dropped in conference with the Senate.

block grants.[220] In order to obtain the consensus needed to pass the bill in the Senate, the legislation was revised to exclude the nonprofit organizations themselves from coverage and exempt motor vehicle liability cases.[221]

4. *Section 161 of the Amtrak Reform and Accountability Act of 1997*

Section 161 of the Amtrak Reform and Accountability Act of 1997 (the "Amtrak Act")[222] provides liability protections relating to the standards for awarding punitive damages and overall damage awards stemming from accidents in connection with the provision of rail passenger transportation.[223]

With regard to punitive damages, the Amtrak Act provides that such damages may only be awarded if a passenger establishes by clear and convincing evidence that the harm resulted from conduct carried out with a conscious, flagrant indifference to the rights or safety of others.[224] The Amtrak Act also limits the aggregate overall damages that may be awarded to all passengers for all claims (including punitive damages) from a particular rail accident to $200 million.[225]

The final law also specifies that Amtrak and other providers of rail transportation may enter into indemnification agreements allocating financial responsibility for passenger accidents.[226] This is apparently intended to preserve Amtrak's authority to enter into agreements with track owners and operators whom Amtrak assumes liability for in the event of a passenger accident, without resolving the issue of whether such agreements are ultimately enforceable in court.[227] In exchange for these vari-

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220 *See* S. 543, 105th Cong. (1997); H.R. 1167, 105th Cong, 1st Sess. (1997).

221 Further modest revisions were made to the bill when the House Judiciary Committee approved amendments providing that the bill would only apply to causes of action from events occurring after the bill's effective date and excluding from the bill's coverage volunteers performing services for groups responsible for federal hate crimes. *See* H.R. Rep. No. 105-101, pt. 1 at 9, 16 (1997).

222 Pub. L. No. 105-134, § 111 Stat. 2570 (codified at 49 U.S.C.A. § 28103 (West Supp. 1998)).

223 The Amtrak Act is analyzed as a federal tort reform herein because it operates to supersede state law, since Amtrak is not considered an agency or instrumentality for purposes of the Federal Torts Claims Act. *See* Senter v. Amtrak, 540 F. Supp. 557 (D.N.J. 1982) (Amtrak, unlike federal agencies and instrumentalities, found to be subject to punitive damage liability).

224 49 U.S.C. § 28103(a)(1).

225 *Id.* § 28103(a)(2). It is unclear how the damage cap is to be apportioned in the event claims are established which exceed $200 million.

226 *Id.* § 28103(b).

227 The introduced version of the legislation would have provided that such obligations "shall be enforceable, notwithstanding any other statutory or common law or public policy . . . ." This was an effort to overturn a district court decision in National Railroad Passenger Corp v. Consolidated Rail Corp., 698 F. Supp. 951 (D.C. 1988), *vacated,* 892 F.2d 1066 (D.C.

ous protections, the Amtrak Act mandates that Amtrak maintains a total minimum liability coverage through insurance and self-insurance of at least $200 million per accident or incident.[228] Proponents of passenger rail liability reforms sought to justify them on the basis that they would save the taxpayers' money, since Amtrak is a publicly-funded corporation.[229] Supporters also observed that there was precedent at the federal and state level for limiting liability associated with public transportation.[230]

The version of passenger rail liability limitations passed into law was far narrower than the originally proposed reforms. In addition to adopting a minimum federal standard for awarding punitive damages, proponents had initially sought: a non-economic damages cap at an amount equal to economic damages plus $250,000; a punitive damages cap at the greater of $250,000 or three times economic damages; and a mandate of the enforceability of indemnification agreements.[231] The original version of the bill would have also applied to all potential plaintiffs—passengers as well as non-passengers and property owners harmed by passenger rail accidents.[232] These latter provisions were opposed by many Democrats,[233] and after failing to pass the Senate, were deleted from the final bill.

5. *Biomaterials Access Assurance Act of 1998*

The Biomaterials Access Assurance Act of 1998 ("Biomaterials Access Assurance Act"),[234] allows suppliers of raw materials and medical implant component parts to be dismissed from product liability actions if

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Cir. 1990) (voiding an indemnification agreement between "mtrak and Conrail implicated by a 1987 Chase, Maryland collision as being against public policy). *See* H.R. 2247, 105th Cong. § 401 (1997); H.R. Rep. No. 105-251, at 7, 22 (1997).

228 49 U.S.C. § 28103(c).

229 *See, e.g.*, H.R. Rep. No. 105-251, at 21 (1997).

230 *Id.* The report of the House Committee on Transportation and Infrastructure also rejected safety concerns raised by the liability limitations, due to the claimed extensive federal regulatory role: "Railroad safety is subject to regulation by the Federal Railroad Administration. Under current law, any single violation of a federal safety law or regulation can subject an individual or a company to a fine from $500 to $10,000—with the maximum increased to $20,000 for willful violations." *Id.* at 22.

231 H.R. 2247, 105th Cong. § 401 (1997).

232 *Id.*

233 *See, e.g.*, H.R. Rep. No. 105-251, at 93-94 (1997) (minority views contending that reforms initially approved by the Committee were "neither fair nor sensible." In particular, the views complained that punitive damages should not be linked to the amount of economic loss, non-economic damages should not be dependent on economic damages, and mandating the upholding of indemnification agreements would encourage recklessness by the freight railways).

234 Biomaterials Access Assurance Act of 1988, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (codified at 21 U.S.C. § 1601-1606) (1998)).

they meet certain contractual and other product specifications.[235] The concept behind the Biomaterials Access Assurance Act dates from the product liability bill vetoed by President Clinton during the 104th Congress. That bill included a title exempting medical implant suppliers from product liability actions so long as they have met certain contractual and other product specifications.[236] Proponents of the Act argued that frivolous suits against implant suppliers, as well as the fear of such lawsuits, have an adverse impact on the availability of life-saving medical implants.[237]

During the 105th Congress, however, proponents agreed to a number of legislative refinements which narrowed the overall impact of the Act. Most importantly, rather than permanently barring a liability action against suppliers who meet these conditions (as the 104th Congress' version would have), under the Biomaterials Access Assurance Act, an implant supplier may subsequently be impleaded back into the action if a claimant or manufacturer can show by clear and convincing evidence that the supplier's negligence was the actual and proximate cause of the

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235 The Biomaterials Access Assurance Act of 1998 limits the liability under state product liability law of biomaterials suppliers that directly or indirectly supply component parts or raw materials for use in the manufacture of an implant, to only those who fail to meet contractual and other specifications and such conduct was an actual and proximate cause of the harm to the claimant. *Id.* § 5(a).

A biomaterials supplier does not receive liability protection under the "failure to meet contractual specifications" exception if the raw materials or component parts delivered: (1) did not constitute the product described in the contract; (2) failed to meet any specifications that were provided to the supplier and not expressly repudiated; (3) failed to meet any specifications published by the biomaterials supplier; (4) failed to meet any specifications provided to the manufacturer by the biomaterials supplier; (5) failed to meet any specifications contained in a master file submitted by the supplier to the Secretary of Health and Human Services and that is currently maintained by the supplier for the purposes of premarket approval of medical devices; or (6) failed to meet any specifications included in the submissions for purposes of premarket approval or review by the FDA provided by the manufacturer to the supplier and not repudiated by the supplier. *Id.* § 5(d).

The Biomaterials Access Assurance Act of 1998 also requires the manufacturer of an implant to be named a party unless the manufacturer is subject to service of process solely in a jurisdiction in which the biomaterials supplier is not domiciled or subject to a service of process, or if an action against the manufacturer is barred by applicable law. *Id.* § 6(b).

236 Common Sense Product Liability and Legal Reform Act, H.R. Conf. Rep. No. 104-481 (1996). Provisions to protect biomaterials suppliers were also included in the Senate Product Liability Proposal during the 105th Congress.

237 *Biomaterials Access Assurance Act of 1997: Hearing on H.R. 872 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 96 (1997) (statement of Jorge E. Ramirez, Sales and Marketing Manager, Hoechst Corp.). Proponents of the Act also argued that the patchwork of fifty separate product liability laws leads to venue-shopping and confusion and that the system can be improved by limiting the liability of materials suppliers. *Id.*

harm.[238] The Biomaterials Access Assurance Act excludes actions involving silicon breast implants completely.[239]

The dismissal and impleader provisions in the Biomaterials Access Assurance Act are enforceable through an elaborate set of procedural mandates. For example, in order to obtain a pre-trial dismissal, the Act specifies that a defendant may file a motion alleging that it has met the various legal requirements for dismissal, including the contractual and other product specifications.[240] While the motion is pending, the Biomaterials Access Assurance Act limits discovery and requires that state courts rule on the motion based on the pleadings and affidavits before it.[241] It also sets forth rules for the issuance of summary judgments and stays.[242] Post-trial motions to implead are also subject to limited discov-

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238 *See supra* note 235 at § 7. In order to implead a supplier back into the action, a manufacturer or a claimant must file a motion within 90 days after entry of a final judgment.

239 *Id.* § 3(2)(D)(iii). The Biomaterials Access Assurance Act also excludes actions involving: (1) health care providers where the sale or use of an implant is incidental to the transaction and where the essence of the transaction is the furnishing of judgment, skill, or services; and (2) a person acting in the capacity of a manufacturer, seller, or biomaterials supplier. *Id.* §§ 3(2)(D)(i) & (ii).

240 *Id.* § 6(a). Grounds for the motion to dismiss include that the defendant is: (1) a biomaterials supplier; and (2) is not a manufacturer, or a seller of the implant or it has not been established that it supplied raw materials or component parts in violation of the contractual requirements or specifications.

241 *Id.* § 6(c). The Act specifies a number of rules pertaining to the motion to dismiss. For example, in a proceeding on a motion to dismiss, the defendant may submit an affidavit demonstrating that it has not included the implant on a list filed with the Secretary of Health and Human Services. *Id.* § 6(c)(2)(A). The claimant may then submit an affidavit demonstrating that the Secretary of Health and Human services has issued a declaration with respect to the defendant and the implant or demonstrating that the defendant is liable as a seller of the implant. *Id.* § 6(c)(2)(B). If a defendant files a motion to dismiss, no discovery will be permitted in connection to the action that is the subject of the motion, other than discovery necessary to determine a motion to dismiss for lack of jurisdiction until the court rules on the motion to dismiss based on the affidavits submitted by the parties. *Id.* § 6(c)(1)(A). If a defendant files a motion to dismiss on the grounds that the biomaterials supplier did not supply raw material or component parts in violation of contractual requirements or specifications, the court may permit discovery that is limited to issues relevant to the pending motion to dismiss or the jurisdiction of the court. *Id.* § 6(c)(1)(B). Unless the defendant is demonstrated to be a manufacturer or seller of the implant, the court will consider the defendant to be a biomaterials supplier who is not subject to an action for harm to a claimant caused by an implant, other than an action relating to liability for a violation of contractual requirements or specifications. *Id.* § 6(c)(3)(A). The court is required to grant a motion to dismiss any action that asserts liability of the defendant on the grounds that the defendant is not a manufacturer or seller unless the claimant submits a valid affidavit demonstrating that the defendant is liable as a manufacturer or a seller. *Id.* § 6(c)(3)(B). The court is required to rule on a motion to dismiss solely on the basis of the pleadings and affidavits submitted by the parties. *Id.* § 6(c)(3). If the court determines that the pleadings and affidavits raise genuine issues of material facts with respect to a motion concerning contractual requirements and specifications, the court may deem the motion to dismiss to be a motion for summary judgment. *Id.* § 6(c)(4).

242 *Id.* §§ 6(d) & 5(b)(3)(D). Under the Act, a biomaterials supplier is entitled to summary judgment only if the court finds no genuine issue of material fact as to the legal requirements for dismissal. Discovery prior to a ruling on a summary judgment motion is limited to

ery and the Act provides further opportunity for the supplier to supplement the record before any trial on the merits may proceed.[243]

6. *Y2K Act*

The most recent as well as wide ranging tort reform enacted by Congress is the Y2K Act signed into law by President Clinton on July 20, 1999.[244] The law provides liability relief for defendants in legal actions stemming from Year 2000 computer failures (e.g., where computer software or hardware fails to process a two digit code of 00 as being the year 2000) by enacting a number of substantive and procedural provisions which preempt state liability law. The law limits the liability exposure of Y2K defendants, and is intended to clarify the legal rules applicable to such actions, thereby, in the proponents' words, "reduc[ing] the potential for frivolous lawsuits"[245] and "increas[ing] the likelihood that the entity who bears responsibility for the Y2K compliance will work quickly to fix the problem and reduce damages."[246]

The law limits punitive damage claims in Y2K actions by specifying that they must be proved by "clear and convincing evidence,"[247] and capping the amount of such claims that may be brought against "small business" defendants (defined as individuals having a net worth of less than $500,000 and businesses with fewer than 50 employees)[248] at the lesser of 3 times compensatory damages or $250,000. The cap does not apply where the defendant acted with specific intent to injure.[249] The legislation also provides generally that defendants are only liable for their proportionate share of liability (in lieu of the common law rule of joint and several liability). This preemptive rule does not apply (i) in

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establishing whether a genuine issue of material fact exists as to the legal requirements of dismissal. In response to a claimant's petition for a declaration, the court is required to stay all proceedings with respect to a defendant until the Secretary makes a final decision as to whether the defendant is a manufacturer and may incur liability.

243 *Id.* §§ 7(c) & 7(b)(1).

244 Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. §§ 6601-17 (1999)).

245 H.R. Rep. No. 106-131, pt. 1, at 14 (1999).

246 *Id.*

247 *Id.* § 5(a).

248 *Id.* § 5(b)(2). Section 5(c) of the Y2K Act contains an absolute prohibition on the award of punitive damages in a Y2K action against a "government entity." Because of concern that this would protect public, but not private, universities, the Consolidated Appropriations Act for Fiscal Year 2000 amended Section 5 of the Y2K Act to prohibit the award of punitive damages against all institutions of higher education. Consolidated Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-113, § 311, 113 Stat. 151 (1999). (The provision will not apply to an institution of higher education if the Y2K failure in the Y2K action occurred in a computer-based student financial aid system of that institution of higher education, and the institution: (1) has not passed Y2K data exchange testing with the Department of Education or (2) is not or was not in the process of performing data exchange testing with the Department of Education at the time the Department terminates such testing.).

249 *Id.* § 5(b).

cases brought by consumers who sue individually, rather than as part of a larger class; or (ii) where the defendant acted with specific intent to injure the plaintiff or knowingly committed fraud.[250]

The legislation also alters a number of statutory and common law rules in contract and tort actions involving Y2K claims. It mandates strict enforcement of all contractual terms, unless such enforcement is inconsistent with state statutory law, or the state common law doctrine of unconscionability, including adhesion, in effect on January 1, 1999.[251] The Act also specifically provides that damage limitations provided for in contracts relating to Y2K legal claims are strictly enforceable.[252] The Y2K Act further specifically codifies mitigation of damage requirements by providing that damage awards must exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was or reasonably should have been aware.[253] The law also codifies the so-called "economic loss" rule, which prohibits tort plaintiffs from seeking economic or consequential damages (*e.g.*, lost profits stemming from a Y2K failure) unless such damages are permitted by contract or they result from damage to personal or real property.[254]

In an effort to prevent states from enacting laws making it easier to sue perceived "deep pocket" corporate defendants in Y2K cases than in ordinary liability cases, the Act "freezes" certain aspects of state law into effect. Thus, for example, if a Y2K action for breach or repudiation of contract is brought, the bill specifies that state law doctrine on the doctrines of "impossibility" and "commercial impracticability" shall be determined by state law as it exists on January 1, 1999.[255]

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250 *Id.* § 6. In addition, if portions of the plaintiff's damage claim ultimately prove to be uncollectible, and the plaintiff is an individual with a net worth of less than $200,000 (a so-called "widow or orphan") and damages are greater than 10% of a plaintiff's net worth, a solvent defendant is responsible for paying an additional 100% share of their liability, or an additional 150% of this amount if they acted with "reckless disregard for the likelihood that its acts would cause injury."

251 *Id.* § 4(d).

252 *Id.* § 11. The legislation does not specify whether it would be appropriate to enforce a damage limitation that was found to be unconscionable or a provision of adhesion, as is generally the case under section 4(d) of the Act.

253 *Id.* § 9. This limitation on damages does not apply where the defendant has engaged in fraud.

254 *Id.* § 12. Some Democrats and the Administration sought to limit the applicability of the new rule so that it would not apply where there was fraud in the inducement. Ultimately, the legislation only excluded claims for intentional tort which arise independent of a contract.

255 *Id.* § 10. It is unclear if this would prevent courts from looking to common law interpretations on these doctrines which develop after January 1, 1999. It is also unclear whether this provision would apply to protect plaintiffs in the event a state changed their law to further expand these doctrines, given that section 16 says the law is not to be construed to affect state law affording greater protections to defendants in Y2K actions.

The bill also makes a number of changes in order to prevent lawsuits from being brought against non-negligent defendants or those not in direct privity with the harmed party. As a result, the Act freezes state law concerning the standard of evidence needed to establish a defendant's state of mind in a tort action as of January 1, 1999,[256] and eliminates the doctrine of so-called "bystander liability" by providing that Y2K service providers are not liable to third parties who are not in privity with them unless the defendant actually knew, or recklessly disregarded a known and substantial risk, that a Y2K failure would occur.[257] This latter change makes it more difficult, for example, for a customer of a business that was certified to be Y2K compliant to sue the certifying consultant. Finally, in this regard, the law provides that the fact that a Y2K failure occurred in an environment within the control of the defendant shall not be permitted to constitute a sole basis for the recovery of damages.[258]

The Act further makes a number of procedural changes concerning legal actions involving Y2K claims. These include a notice and "cooling off" period preventing Y2K actions from proceeding to trial until the defendant has first had a 90-day opportunity to fix the Y2K failure after receiving written notice of the particular problem.[259] The law also provides for heightened pleading requirements by requiring that plaintiffs must provide specificity in the notice of damages sought in Y2K actions; the factual basis for the damages claim; a statement of specific information regarding the manifestations of the material defect and the facts supporting such material defect; and a statement of facts showing a strong inference that the defendant acted with a required state of mind.[260]

The law also overhauls the procedural rules applicable to Y2K class actions. Subject to certain limited exceptions, the Act requires that Y2K class actions be considered in federal, rather than state court.[261] (This provision is similar to broader legislation that would apply to all cases, rather than just Y2K cases.[262]) In addition, the bill only permits Y2K

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256 *Id.* § 13(a).

257 *Id.* § 13(b).

258 *Id.* § 13(c).

259 *Id.* § 7.

260 *Id.* § 8.

261 *Id.* § 15(c). The only exceptions to the mandated federal court jurisdiction for Y2K class actions are where (1) a substantial majority of members of the plaintiff class are citizens of a single state, the primary defendants are citizens of that state, and the claims asserted will be governed primarily by the laws of that state; (2) the primary defendants are states or state officials; (3) the plaintiff class does not seek an award of punitive damages and the amount in controversy is less than $10 million; or (4) there are less than 100 members of the class. The burden is on the plaintiff to establish that any of these four exceptions apply.

262 *See, e.g.*, Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999); Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999). [ck nexis]

actions which involve "material" product defects to proceed as class actions and requires class members to receive direct notice of the class action (rather than mere notice by publication).[263]

There are several important overall limitations in scope in the Y2K Act. First, the Act only applies to Y2K failures which occur on or before January 1, 2003.[264] This three-year time limitation was an important factor noted by President Clinton when he agreed to sign the legislation.[265] In addition, the legislation does not apply to any claims for personal injury or wrongful death,[266] and does not apply to securities actions.[267] The law is also written to be "one-way preemptive,"' so that its provisions do not supercede any state law having stricter liability restrictions.[268]

To a certain extent, the legislation signed into law reflected a compromise between tort reform supporters and high technology concerns, on the one hand, and tort reform opponents, on the other hand. This explains why Democrats opted to offer their own substitute Y2K liability legislation in the House and Senate, with some of these provisions being incorporated into the final legislative product.[269] This is also why many of the more far reaching provisions of the original House and Senate bills such as the "reasonable efforts" defense, "loser pays" provision, and limitations on the overall liability of officers and directors were dropped during the legislative process or in conference,[270] and why the Administration insisted on the inclusion of numerous provisions that exempted

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263 *Id.* § 15(a) & (b). The class notice is also required to include information concerning the attorney's fee arrangements.

The Y2K Act includes several other minor procedural and technical provisions, including regulatory relief from penalties for Y2K related reporting or monitoring violations (§ 4 (g)); consumer protection to ensures that homeowners cannot be foreclosed on due to a Y2K failure (§ 4(h)); authorizing federal courts to appoint special masters to consider Y2K matters (§ 14); applying Rule 704 of the Federal Rules of Civil Procedure (concerning the use of expert testimony) to state courts (§ 17); and civil penalty waivers for first-time violations by a small business of federally enforceable rules or requirements that are caused by a Y2K failure (§ 18);

264 *Id.* § 4(a).

265 Statement on Signing Y2K Act, 35 Weekly Comp. Pres. Doc. 143 (July 20, 1999).

266 *Id.* § 4(c).

267 *Id.* § 4(i).

268 *Id.* § 16.

269 *See* House Democratic substitute offered by Rep. Conyers (D-MI), 145 Cong. Rec. H3039-51(daily ed. May 12, 1999); Senate Democratic substitute offered by Sen. Kerry (D-MA), 145 Cong. Rec. S657B76 (daily ed. June 12, 1999).

270 The House passed version of H.R. 775 included: (i) a "reasonable efforts" defense providing that the fact that a defendant took reasonable measures to prevent the Y2K-related failure was a complete defense to liability; (ii) a "loser pays" (or "English Rule") provision requiring a litigant to be liable to pay the other side's attorneys' fees if they rejected a pre-trial settlement offer and ultimately secured a less favorable verdict; and (iii) a provision capping the personal liability of corporate directors and officers at the greater of $100,000 or their past 12-months' compensation. *See* H.R. 775, 106th Cong, §§ 303, 507, & 305.

so-called "bad actors" (*i.e.*, intentional tortfeasors) from the bill's protections.[271]

B. RECENTLY CONSIDERED TORT REFORM PROPOSALS

1. *Senate Product Liability Proposal*

Congress has been considering product liability legislation as early as 1979 when Rep. John Dingell (D-MI) introduced legislation which would have federalized a number of areas of state liability law.[272] Proponents of such reforms argue, inter alia, that state laws have led to excessive product liability damage awards, and the unpredictable and "patchwork" nature of the state product liability system harms the competitiveness of domestic manufacturing firms.[273] After being unable to bring a product liability reform bill to either the House or Senate floor for a number of years, during the 104th Congress the House and Senate agreed to product liability legislation. That legislation would have, inter alia, capped punitive damages for large and small businesses and narrowed the standards for awarding such damages; eliminated joint and several liability for non-economic damages; created a fifteen-year statute of repose and a two-year statute of limitations; limited seller liability; and limited liability for medical implant suppliers. President Clinton subsequently vetoed the legislation.[274]

In the wake of President Clinton's veto, the White House entered into negotiations with Senators Rockefeller (D-WVA) and Gorton (R-

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271 *See* Y2K Act §§ 5(b), 6, 9, & 12 (limiting protections relating to punitive damages, proportionate liability, duty to mitigate, and "economic loss" rule).

272 Among other things, the legislation would have created federal liability standards along with a statute of limitations and repose and restricted the availability of punitive damage awards. For a detailed legislative history of federal product liability reform efforts, *see* S. Rep. No. 105-32, at 15-19 (1997); Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 Tenn. L. Rev. 595, 599 - 601 (1997); Sherman Joyce, *Product Liability Law in the Federal Arena*, 19 Seattle U. L. Rev. 421 (1996); Beth Rogers, Note, *Legal Reform —at the Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act*, 21 U. Dayton L. Rev. 513, 517 - 519 (1996).

273 *Product Liability Reform: Hearing Before the Committee on the Judiciary*, 105th Cong. 9 (1997) (statement of Peter H. Hickok, Owner, Hickok Manufacturing Co., Inc.); *Product Liability and Legal Reform: Hearing on H.R. 10 Before the Committee on the Judiciary*, 104th Cong. 1 (1995) (statement of Rep. Hyde). *See also* Michael Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 Rutgers L. Rev. 673 (1996).

274 Message on Returning Without Approval to the House of Representatives the Common Sense Product Liability Legal Reform Act of 1996, 32 Weekly Comp. Pres. Doc. 780 (May 2, 1996). The President's Veto Statement opposed, *inter alia*, provisions eliminating joint and several liability for non-economic damages and the limitations on punitive damages. It also noted that the legislation inappropriately intruded on state authority. The House failed to obtain the two-thirds vote necessary to override the President's veto on May 9, 1996 by a vote of 258 to 163. *See* 142 Cong. Rec. H4764 (daily ed. May 9, 1996).

WA), culminating in a somewhat narrower form of product liability legislation (the "Senate Product Liability Proposal").[275] The Senate Product Liability Proposal was brought directly to the Senate floor but its proponents were unable to obtain cloture to cut off debate.[276]

The Senate Product Liability Proposal would cap the maximum amount of punitive damages which may be awarded against "small businesses"[277] and individuals with a net worth of less than one-half million dollars at the lesser of two times "compensatory" damages or $250,000.[278] In addition, the proposal would narrow the grounds for the award of punitive damages to those cases where there is a "conscious, flagrant, indifference to the rights or safety of others" which can be established by "clear and convincing evidence."[279] The foregoing restrictions do not apply in cases where death results.[280]

The Senate Product Liability Proposal also provides for a national statute of limitations and statute of repose.[281] The statute of limitations would be two years from the date a product liability harm is discovered or should have been discovered "in the exercise of reasonable care."[282] The statute of repose is 18-years, but is limited to "durable goods," defined as goods used in the workplace which are subject to a claim for harm under the applicable workers compensation laws.[283] The proposal

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275 The Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998). The Senate Proposal applies to a broad range of "product liability actions," defined as a civil action brought on any theory for harm caused by a product. *Id.* § 101(16). It omits any provision concerning joint and several liability, and narrows the scope of a number of other provisions included in last Congress' product liability bill.

276 *See* 144 Cong. Rec. S7255 (daily ed. June 26, 1998).

277 A small business is defined as those with fewer than 25 full time employees and annual revenues of $5 million or less. *Id.* § 110(b)(2)(A)(ii). The annual revenues and numbers of employees of a corporation include the annual revenues and employees of any parent corporation, subsidiary, branch, division, or unit of that corporation. *Id.* § 110(b)(2)(B)(i) & (ii).

278 *Id.* § 110(b)(1)(A) & (B). Compensatory damages include both economic and non-economic damages. *Id.* § 101(6).

279 *Id.* § 110(a)(1). The Senate Proposal also provides for a bifurcated determination of punitive damage awards. Under the proposal, any party may request that the court consider in a separate proceeding, subsequent to the determination of compensatory damages, whether punitive damages should be awarded. *Id.* § 110(a)(2)(A).

280 *Id.* § 111.

281 *Id.* § 106(a), *Id.* § 107(a).

282 *Id.* § 106(a). The proposal provides an exception to the statute of limitations so that persons with a legal disability may file a product liability action up to two years after the date in which the person ceases to have the disability. *Id.* § 106(b)(1). It also provides that if a civil action is stayed or enjoined, the statute of limitations will be tolled until the end of the stay or injunction. *Id.* § 106(b)(2). Finally, if a statute of limitations or statute of repose provision shortens the period during which a product liability action could be otherwise brought, the claimant may bring the product liability action within one year after the date of enactment of the legislation. *Id.* § 108.

283 *Id.* § 107(a). The proposal provides exceptions to the statute of repose for (1) motor vehicles, vessels, aircraft or trains used primarily to transport passengers for hire, (2) actions

also preempts state tort law in cases where the claimant has used alcohol or drugs, or where the product has been misused or altered. It is a complete defense to liability where claimant's drug or alcohol use was more than 50% responsible for the harm.[284] With regard to product misuse or alteration, the Senate Proposal provides that claimant's damages shall be reduced by the portion of harm attributable to misuse (whether by the claimant or otherwise).[285] This applies where the defendant can prove that a percentage of the claimant's harm was proximately caused by use or alteration of a product in violation of or contrary to an express warning or involved a risk of harm which was known or should have been known by a reasonable person who uses the product.[286] Damages to a claimant as a result of workplace injuries would be exempt from this comparative negligence standard.[287]

The Senate Proposal also offers relief to product sellers, lessors, and renters by specifying that they may only be subject to a product liability suit where they: (1) failed to exercise reasonable care; (2) violated an express warranty; or (3) engaged in intentional wrongdoing.[288] This has the effect of eliminating seller liability under theories of strict liability, failure to warn, or breach of an implied warranty.

The Senate Proposal includes provisions designed to encourage alternative dispute resolution ("ADR") and settlement negotiations. It grants the parties the option of using any applicable voluntary, non-binding ADR within specified time periods after a product liability suit is brought.[289]

The proposal exempts several categories of product liability actions from its provisions entirely.[290] These include actions involving "commercial loss" by other businesses; negligent gun sales; tobacco products; breast implants, defective tissues, organs and blood; and electricity, water and natural gas.[291] The proposal also includes a workers' compensation subrogation provision which would alter state law to provide if the

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based on an express warranty in writing for longer than eighteen years, and (3) the limitation period established by the General Aviation Revitalization Act of 1994. *Id.* § 107(c).

284 *Id.* § 104(a).

285 *Id.* § 105(a).

286 *Id.* § 105(a)(1)(A) & (B).

287 *Id.* § 105(b).

288 *Id.* § 103(a)(1). Under the proposal, a product seller will not be considered to have failed to exercise reasonable care if there was no reasonable opportunity to inspect the product, or if the inspection would not have revealed the aspect of the product that allegedly caused the claimant's harm. *Id.* § 103(a)(2).

289 *Id.* § 109(a) & (b). Under the proposal, the claimant or defendant may offer to an adverse party to proceed under ADR within 60 days of the service of the initial complaint or the expiration of the period for a responsive pleading, and an offeree must file a written notice of acceptance or rejection within 20 days of receipt of the offer.

290 *Id.* §§ 101(15)(B) & 102(a)(2).

291 *Id.*

trier of fact finds by clear and convincing evidence that fault of the employer was a substantial factor in causing a workplace injury, the employer would have to bear the costs of the worker.[292]

2. *House Medical Malpractice Proposal*

Over the last two Congresses, the House has passed medical malpractice reform legislation four separate times,[293] with the Senate failing to concur on each occasion. Supporters of these reforms claim that excessive and frivolous medical malpractice claims unduly increase the costs of health care, both directly (through increased insurance premiums) and indirectly (through the costs of so-called "defensive medicine").[294]

The most recent proposal (the "House Medical Malpractice Proposal")[295] considered in the 105th Congress would have preempted state law concerning "health care liability actions"[296] in a number of regards. It would limit "non-economic" damages[297] by capping their award at

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292 Title II of the Senate Product Liability Proposal also included relief for suppliers of raw materials and component parts for medical implants, a form of which was subsequently signed into law. *See supra* section IV.A.5.

The Senate Proposal includes a general preemption provision, indicating that except as otherwise provided, the legislation is to preempt certain state law on a "two-way" basis. As such, the bill could operate to preempt some laws that are more favorable to defendants than the draft provides. For example, under the Senate Proposal, actions brought in states which do not have a statute of limitations running from the time harm is discovered would be subject to a lengthier statute of limitations period than under their currently applicable law. *See supra* note 283 (for example, Virginia bars claims filed a specified number of years after a person has been injured, regardless of whether the person actually knew of the injury. *See* VA Code Ann. §§ 8.01- 243 (Michie 1997)). The preemption provisions are not drafted to provide causes of action where they do not otherwise exist. For example, the punitive damages caps would only apply in states which otherwise allow for punitive damages, rather than allowing for punitive damage actions in all states. *Id.* § 110(a)(1).

293 *See* Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997); Health Care Coverage Availability and Affordability Act, H.R. 3160, 104th Cong. (1996); Balanced Budget Act of 1995, H.R. 2491, 104th Cong. (1995); Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong. (1995).

294 *See, e.g.*, Rep. Bill Thomas, *Rest of Country Deserves Medical Liability Reforms State of California Passed for itself Two Decades Ago*, Roll Call, Nov. 13, 1995 (Health Care Policy Briefing), at 9.

295 *See supra* note 294.

296 A health care liability action is defined as a civil action brought in a state or federal court against a health care provider, an entity which is obligated to provide or pay for health benefits under any health plan (including any person or entity acting under a contract or arrangement to provide or administer a health benefit), or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product in which the claimant alleges a health care liability claim. *Id.* § 4802(10).

297 *Id.* § 4812(a)(1). Non-economic damages are defined as damages paid to an individual for pain and suffering, inconvenience, emotional distress, mental anguish, loss of society and companionship, injury to reputation, humiliation, and other subjective, nonpecuniary losses. *Id.* § 4802(14).

$250,000[298] as well as eliminating claimants' rights to hold defendants jointly and severally liable for such non-economic damages.[299] The proposal also prohibits bringing any health care liability action more than two years after an injury and the cause of the injury is discovered, or, in the exercise of reasonable care, should have been discovered.[300]

The House Medical Malpractice proposal would also limit punitive damage awards by creating a maximum cap of the greater of $250,000 or three times "economic damages,"[301] and narrow the grounds for awarding punitive damages to cases where it can be established by clear and convincing evidence that the injury was suffered by conduct manifesting a "conscious, flagrant indifference to the rights and safety of others."[302]

Other proposed changes would allow for the periodic payment of damages and modifications to the collateral source rule.[303] Under the House Medical Malpractice Proposal, a defendant is permitted to pay any health care liability damage award greater than $50,000 in periodic installments as determined by the court.[304] The proposal would alter the traditional collateral source rule[305] by allowing defendants to introduce

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298 *Id.* Although there is no provision dealing with preemption issues, these provisions are written so they would not preempt any state law with higher liability caps.

299 *Id.* § 4812(a)(2).

300 *Id.* § 4811(a). The proposal provides an exception so that persons with a legal disability may file an action up to two years after the date on which they cease to have the legal disability. *Id.* § 4811(b). It also provides a transitional provision so that if a provision under the statute of limitations shortens the period during which a health care liability action would be brought, the claimant may bring an action up to two years after the date of enactment of this Act. *Id.* § 4811(c).

301 *Id.* § 4812(b)(2). Economic loss is defined in the proposal as any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities), to the extent recovery for such loss is allowed under applicable state or federal law. *Id.* § 4802(8).

302 *Id.* § 4812(b)(1). The proposal also allows for bifurcated proceedings for the consideration of punitive damage claims and ban punitive damage awards in the case of drugs or other devices that have been approved by the FDA or any other drug generally recognized as safe and effective pursuant to FDA-established conditions. *Id.* §§ 4812(c)(2), (d)(1). The ban on punitive damages would not apply in cases where the defendant intentionally and wrongfully withheld from or misrepresented information to the Food and Drug Administration that is material and relevant to the harm suffered by the claimant. *Id.* § 4812(d)(1)(B).

303 In addition, the House Medical Malpractice Proposal requires that any ADR system used to resolve health care liability actions or claims must include provisions specified in the bill regarding statute of limitations, non-economic damages, joint and several liability, punitive damages, the collateral source rule, and periodic payments of damage awards. *Id.* § 4813.

304 *Id.* § 4812(E). The judgment of the court awarding periodic payments may not be reopened to contest, amend, or modify the schedule or amount of the payments, absent any fraud.

305 Under the collateral source rule, a victim is able to obtain compensation for the full amount of damages incurred, and his or her health insurance provider is able to seek subrogation in respect of its own payments to the victim. *See* Restatement (Second) Torts § 920(A) (1979).

evidence of any collateral payments received by claimants and eliminating rights to subrogation by third parties.[306]

3. *Tobacco Settlement*

Over the course of the 105th Congress the House and Senate also considered enacting a variation of the global tobacco settlement (the "Tobacco Settlement")[307] which includes a number of provisions limiting claimants' ability to bring tobacco related lawsuits under state tort law. Proponents asserted that absent these litigation reforms there would be no incentive for the tobacco companies to agree to make the payments and accept the other restrictions set forth in the settlement.[308]

In many respects, the litigation restrictions contained in the Tobacco Settlement go well beyond the pending product liability and medical malpractice reform proposals. For example, instead of capping or narrowing the standards for the award of punitive damages, the Tobacco Settlement provides total immunity from punitive damages for any past misconduct by tobacco companies.[309] Moreover, in addition to completely eliminating liability by sellers or agents of the tobacco industry,[310] the agreement legislatively preempts any pending or future Attorney General actions and any "addiction/dependence" claims.[311]

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306 *Id.* § 4812(F). If the defendant introduces evidence of collateral source payments, the claimant may introduce evidence of the insurance amount that is paid or likely to be paid to secure the collateral source payment. *Id.* § 4812(F)(1). The provider of the collateral source payment cannot recover any amount against the claimant or receive a lien or credit against the claimant's recovery, or be subrogated the right of the claimant, whether the action is settled or tried. *Id.* § 4812(F)(2).

307 Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997). Legislation was introduced in the 105th Congress which would convert the provisions of the *Proposed Resolution* into legislative language. *See* Universal Tobacco Settlement Act, S. 1414, 105th Cong. (1997) . Eventually, the Senate considered a version of the legislation which excluded many of the litigation descriptions described herein, but the Senate failed to invoke cloture to cut off debate on the legislation. *See* Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997); 144 Cong. Rec. S6743 (daily ed. June 17, 1998).

308 *The Civil Liability Portions of the Proposed Tobacco Settlement: Hearing Before the House Comm. On the Judiciary,* 105th Cong. (1998) (written statement of Meyer Koplow at 3-4).

309 *Id.* at 3.221, Title VIII.B.1. The settlement deems a one-time $60 billion payment made by the tobacco industry to public health funds to constitute resolution of past punitive damage claims. Proponents also argue that given the poor record of private tobacco plaintiffs to date, these litigation "concessions" will have little practical impact. *See* 12.3 TPLR at 3.203-3.205 ("none of [the past civil actions] has to date resulted in the collection of any monies to compensate smokers or third-party payors").

310 The Tobacco Settlement also eliminates claims against sellers entirely (Title VIII.B.5), whereas the Senate Product Liability Proposal would limit seller liability to claims involving failure to exercise reasonable care, violation of an express warranty, and intentional wrongdoing. *See supra* note 289 and accompanying text.

311 12.3 TPLR at 3.221, Title VIII.A.

The Tobacco Settlement provides for an annual cap on tobacco liability equal to 33% of the annual "Industry Base Payment" (an agreed upon amount equal to $6 billion in the first year, increasing to $15 billion in the ninth year and thereafter),[312] resulting in a maximum liability of $5 billion per year.[313] This amount is to be paid each year, regardless of whether the annual amount of judgments and settlements aggregate to the maximum figure (any shortfall is subject to allocation by a Presidential Commission).[314] In addition, because the Tobacco Settlement solely provides for the industry to receive an 80% credit against this maximum amount for any liability judgments or settlements entered into (a so-called 20% "litigation co-payment penalty"), the industry is also subject to a secondary liability of up to an additional $1 billion per year.[315] To the extent judgments and settlements exceed the maximum statutory amount in any given year, the liability carries over to the following year.[316] In addition, individual claimants may only recover $1 million in a given year, even if awarded more, unless there are funds left over from the Industry Base Payment.[317] In order to help ameliorate any perceived unfairness between the liability obligations of the participating companies and other tobacco companies, the Tobacco Settlement requires non-participating companies to place into an escrow fund 150% of what would otherwise have been their share of the annual payment pending their payment of any liability claims. Under the settlement "[t]hese escrowed funds would be earmarked for potential liability payments, and the manufacturer would reclaim them with interest 35 years later to the extent they had not been paid out in liability."[318] The Tobacco Settlement provides that tobacco manufacturers will pay their own legal de-

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312 *Id.* at 3.218, Title VI.B.3. The Industry Base Payment is to be increased to account for inflation at a rate of the greater of 3% or the consumer price index, and is to be decreased to account for any cumulative decline in unit cigarette volume (from the 1996 base). Each participating company's share of the Industry Base Payment is to be based on their respective current market shares.

313 Under the settlement proposal, obligations for annual payments apply only to entities selling into the domestic market. *Id.* Title VI.B.6

314 *Id.* at 3.222, Title VIII.B.10. Under the settlement, "[t]he Commission will be entitled to consider, among public health, governmental entities, and other uses of the funds, applications for compensation from persons, including non-subrogation claims of third party payors, not otherwise entitled to compensation under the Act."

315 *Id.* at 3.221, Title VIII.B.9. The litigation co-payment provision was apparently included to provide an incentive for the tobacco industry to fully defend themselves in liability actions.

316 *Id.* Title VIII.B.9.

317 *Id.* Any excess rolls forward without interest to be paid at a rate of $1 million per year, until the first year that the annual aggregate cap is not exceeded, at which time the remainder is to be paid in full. The settlement treats any eligible third party payer actions not based on subrogation (*i.e.*, those filed before June 9, 1997) as having been brought by a single plaintiff and subject to the $1 million rollover requirement.

318 *Id.* at 3.215, Title III.

fense fees, but is silent on the issue of the payment of plaintiff's fees for legal services performed on behalf of the State Attorneys General.[319]

The Tobacco Settlement eliminates joint liability between participating and non-participating tobacco companies,[320] requiring instead that tobacco companies agree to share responsibility with respect to suits brought against each other.[321] The Tobacco Settlement also bans third party payers from bringing suits (other than non-aggregated subrogation suits[322]) claiming they have paid a portion of damages which should have been paid by the tobacco companies.[323]

The Tobacco Settlement additionally imposes a number of procedural and evidentiary requirements with respect to tobacco liability actions. Significantly, it bars current and future class actions in federal and state courts as well as all other devices for the consolidation and aggregation of claims without the tobacco companies' consent.[324] The proposal also provides for a panel of three federal judges to review all claims of privilege or trade secrets asserted at the state or federal level with respect to tobacco industry documents.[325] The Tobacco Settlement further specifies that the existence of "reduced risk tobacco products"[326] are neither admissible nor discoverable in civil liability actions.[327]

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319 *Id.* Title VIII.B.11. Although not set forth in the settlement, several of the parties have separately agreed that the tobacco industry will pay up to $500 million per year to attorneys representing the states with the specific amounts to be determined by a panel of three arbitrators. *See* Suein Z. Hwang & Milo Geyelin, *Tobacco Concerns Set Pact on Legal Fees*, Wall St. J., Dec. 2, 1997, at A2.

320 12.3 TPLR at 3.221, Title VIII.B.4.

321 *Id.*

322 A subrogation suit would include a health insurer seeking to recoup any medical benefit payments it made to a claimant.

323 12.3 TPLR at 3.221, Title VIII.B.5.b. This means, for example, that asbestos defendants and union health and welfare funds which have paid workers for cancer and other disease claims would be unable to bring suit seeking reimbursement from tobacco companies for their portion of smoking related diseases.

324 *Id.* Title VIII.B.2. The settlement provides for "individual trials only," specifically barring "class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases other than on the basis of individual trials, without defendant's consent." This provision is subject to enforcement by removal to federal court by the defendant "upon receipt or application to, or order of, state court providing for trial or other procedure in violation of the [individual trial] provision." *Id.*

325 *Id.* at 3.232, Appendix VIII.3. The three judge panel is to be appointed by the Judicial Conference and is to decide the disputes in accordance with the ABI/ALI Model Rules and principles of federal law concerning privilege and the Uniform Trade Secrets Act concerning trade secrecy. The panel's costs are to be borne by the tobacco industry, which is also required to pay their opponents' costs and attorneys' fees if the tobacco company did not have a good faith factual and legal basis for the assertion of the privilege.

326 *Id.* at 3.221, Title VIII(B)(7). An example of a reduced risk tobacco product would be a less carcinogenic cigarette.

327 *Id.*

C. CONSTITUTIONAL ANALYSIS OF RECENT FEDERAL TORT REFORMS[328]

This Part analyzes the range of potential constitutional challenges which may be brought against federal tort reforms. As a threshold matter, there is a question whether these proposals constitute a valid exercise of Congress' commerce authority, and if not, whether they may be justified under Section Five of the Fourteenth Amendment. In addition, there are separate questions whether the reforms violate (1) Fifth Amendment due process and equal protection principles; (2) Seventh Amendment jury trial requirements; and (3) Tenth Amendment federalism principles.

1. *Constitutional Authority*

a. Commerce Clause[329]

Although *The Employers' Liability Cases*[330] placed limitations on Congress' ability to alter state tort law with respect to intrastate conduct,[331] the Court had subsequently deferred to Congress concerning commerce authority[332] matters for nearly sixty years (from 1937 to 1995).[333] In the wake of *Lopez v. United States*[334] striking down the Gun-Free School Zones Act of 1990,[335] however, there is concern that under appropriate circumstances federal tort reforms may again be inval-

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328 For a general discussion of the constitutionality of various tort reform laws and proposals, *see* Henry Cohen, *The Constitutionality of Federal Tort Reform Legislation*, CRS Report for Congress (Oct. 24, 1997); Kathryn L. Vezina, Note, *Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayer or is it the Dragon?*, 42 ME. L. REV. 218 (1990); Susan C. Schmidt & Andrew B. Derman, *The Constitutionality of Federal Products Liability/Toxic Tort Legislation*, 6 J. PROD. LIAB. 171 (1983); Martin H. Redish, *Legislative Responses to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX L. REV759 (1977).

329 For a general analysis of Commerce Clause issues in the context of federal tort reforms, *see* Jerry J. Phillips, *Hoisted by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN L. REV 647 (1997).

330 207 U.S. 463 (1907).

331 *See supra* note 37 and accompanying text.

332 Article I, Section 8 of the Constitution provides, *inter alia*, "Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States . . . ." U.S. Const. art I, § 8, cl. 3.

333 The Court went from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), to Lopez v. United States, 514 U.S. 549 (1995), without striking down a single federal law on Commerce Clause grounds.

334 514 U.S. 549 (1995).

335 18 U.S.C. § 922(q)(2)(A) (1994) (The Gun-Free School Zones Act of 1990 made it a federal criminal offense to knowingly possess a firearm in a school zone).

idated on these grounds.[336] Both the Volunteer Protection Act and the Food Donation Act may present such cases.[337]

In *Lopez*, the Court identified three categories of activity Congress may regulate under its commerce power: the "use of the channels of interstate commerce," the "instrumentalities of interstate commerce," and activity "that substantially affects interstate commerce."[338] The Court found that the school gun ban at issue clearly did not implicate either of the first two categories, and, after reviewing a series of factors, found its affect on interstate commerce was too removed to comply with the third category.[339]

If challenged on Commerce Clause grounds, defenders of the Volunteer Protection Act and the Food Donation Act will no doubt attempt to distinguish *Lopez* by asserting that although volunteerism and food donation have significant local and non-commercial aspects, in the aggregate such activities can substantially affect interstate commerce because: they serve valuable community functions, are linked with federal expenditures and involve the use of federal tax exemptions, are subject to replacement by private commercial services, and implicate the interstate insurance market. Further, defenders of the Volunteer Protection Act

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336 *See, e.g.*, T.R. Goldman, *Lopez Gives Tort Reform a New Weapon*, Legal Times, May 8, 1995, at 2 (quoting Harvard Law School Professor Lawrence Tribe for the proposition that "*Lopez* is a reminder that the commerce clause is not a blank check. As such, it will operate to at least raise significant questions about some of the elements of proposed tort reforms pending in Congress").

337 Commerce Clause concerns may also be raised in the context of other tort reforms. For conflicting views on the likely constitutionality of federal product liability and medical malpractice legislation, *see* Schwartz & Behrens, *supra* note 273 at 606-7 ("[i]n contrast to [the Gun- Free School Zones Act struck down in *Lopez*], product liability is without question a matter of interstate commerce"); Phillips, *supra* note 330 at 663 ("[t]he four factors of *Lopez*—legislative findings, jurisdictional fact, localness, and nature of the activity—all point to varying degrees to the conclusion that [product liability legislation] may well be unconstitutional if enacted under the authority of the Commerce Clause"); Rogers, *supra* note 273 at 540 ("Because Congress' claim to Commerce Clause authority is based on arbitrary conclusions [product liability legislation] is constitutionally questionable"); Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL'Y REV. 429, 441 (1996) ("the increasingly commercial nature of medical practice would almost certainly qualify [it] for federal regulation under the commerce power"); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 922 ("the federal interest in malpractice is doubtful: malpractice seems strikingly lacking in either [interstate] spill-over effects or a clear uniformity need").

338 514 U.S. at 558-559.

339 *Id.* at 559-568. If challenged, the laws' defenders should be able to assert that the mere fact that the regulated activity involves "non-profit" as opposed to "for-profit" activity is not necessarily dispositive of the Commerce Clause issue. For example, last term in Camps Newfound/Owatonna v. Town of Harrison, __U.S.__; 117 S.Ct. 1590, 1602 (1997), the Supreme Court found that the so-called "dormant Commerce Clause" was implicated by a Maine law concerning non-profits, observing "there is no reason why an enterprise's nonprofit character should exclude it from the coverage of either the affirmative or the negative aspect of the [Commerce] Clause . . . ."

will be able to argue that unlike the School-Gun ban struck down in *Lopez*, the Volunteer Protection Act contains detailed legislative findings to this effect[340] and is supported by abundant legislative history[341] reiterating its Commerce Clause rationale. Indeed, in his dissent in *Lopez*, Justice Souter suggested that if Congress had included explicit legislative finding that guns in schools have a substantial affect on interstate commerce, "the result in this case might well have been different."[342]

Defenders of these liability laws may also point to the fact that *Lopez* is a highly fact specific decision, and the Court has subsequently upheld other laws having a seemingly precarious nexus to interstate commerce. Recently, for example, the Supreme Court failed to grant *certiorari* in two companion cases, *United States v. Ramey*[343] and *United States v. Moore*,[344] where the Fourth Circuit found the federal arson statute[345] to constitute an appropriate exercise of Congress' commerce power. In those cases, the principal linkage to interstate commerce was a burned trailer's usage of electricity derived from an interstate power grid.[346]

At the same time, challengers of the Volunteer Protection Act and Food Donation Act's constitutionality will be able to argue that many of the factors used to strike down *Lopez* are also present in these laws. For example, the majority opinion placed great emphasis on the gun ban not

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340 42 U.S.C.A. § 14501(a)(7) (West Supp. III 1997).

341 *See, e.g.*, H.R. Rep. No. 105-101, pt. 1, at 6-7 (1997) ("Volunteerism is a national activity and the decline in volunteerism is a national concern. And in many cases, volunteer activities cross state lines . . . . The patchwork quality of state volunteer liability laws also has a negative effect on the cost of insurance. Because of the small size of the market for volunteer liability insurance, insurers do not differentiate among the states."); 143 Cong. Rec. S3879 (daily ed. May 1, 1997) (statement of Sen. McConnell) ("If the Kentucky Red Cross volunteer wants to cross over into Tennessee or Ohio or Illinois or Indiana or West Virginia or Virginia and help his neighbor recover from a flood, then he should not have to call his lawyer to check on his liability potential in a surrounding state. We must have a uniform minimum standard.").

342 514 U.S. at 612.

343 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995).

344 25 F.3d 1042 (4th Cir. 1994), *cert. denied*, 514 U.S. 1102 (1995). *See also* Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), *cert. denied*, Cargill, Inc. v. United States, 516 U.S. 955 (1995) (existence of migratory birds on property created sufficient nexus with interstate commerce to permit regulation of lands by Army Corps of Engineers under the Clean Water Act).

345 18 U.S.C. § 844(I) (1994).

346 *See Ramey*, 24 F.3d at 607; United States v. Moore, No. 93-5273, 1994 U.S. App. LEXIS 14314, at *10-11 (4th Cir. Apr. 13, 1994). *See also* Ackerman, *supra* note 338 at 439 (arguing *Lopez* is undercut by numerous circuit court decisions upholding the Freedom of Access to Clinic Entrances Act on Commerce Clause grounds).

But see Brzonkala v. Virginia Polytechnic Institute & State Univ., 169 F.3d 820 (4th Cir. 1999)(en banc), *cert. granted, sub. nom.*, U.S. v. Morrison, 120 S.Ct. 11 (U.S. Sept. 28, 1999) (No. 99-5, 99-29) (striking down the civil rights remedy of the Violence Against Women Act of 1994 as an unconstitutional exercise of Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment).

constituting an "essential part of larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activities were regulated."[347] The linkage between non-commercial volunteer and food donation activities and interstate commerce is also arguably somewhat attenuated. As the Court observed in *Lopez*, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states [and] . . . there never will be a distinction between what is truly national and what is truly local."[348]

Another factor mitigating against the constitutionality of both the Volunteer Protection Act and the Food Donation Act is their lack of an interstate commerce jurisdictional requirement. According to the Court in *Lopez*, one of the problems with the school gun ban was that it contained "no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce."[349] Notably, the *Ramey* and *Moore* decisions[350] involved a statute which contained such an express jurisdictional element.[351] Further, when Congress acted in 1996 to remedy the constitutional infirmity in the school gun ban invalidated by *Lopez*, it limited the law to firearms that have "moved in or that otherwise [affect] interstate or foreign commerce."[352] This is also the lesson of *The Employers' Liability Cases*[353] and *The Second Employers' Liability Cases*[354]—only after the employers' liability law was changed to clearly limit its application to injuries involving persons employed in interstate commerce was the statute found to pass constitutional scrutiny.[355]

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347 514 U.S. at 561 (emphasis added).

348 *Id.* at 567-68.

349 *Id.* at 562.

350 *Supra* notes 345 & 346.

351 18 U.S.C. § 844(I) (1994) (applying federal criminal law to crimes against property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce").

352 18 U.S.C.A. § 922(q)(2)(A) (1994) (amended 1996) (West Supp. 1998).

353 207 U.S. 463 (1907).

354 223 U.S. 1 (1912).

355 This was one of the principal constitutional concerns with the Volunteer Protection Act highlighted by the Justice Department Office of Legal Counsel in their comments on the legislation. They wrote that even with an express congressional finding creating a nexus between volunteer liability and the Federal Government, "we are concerned that the bill might invite challenge as to Congress' source of authority because it is not directly tied to Congress' spending power . . . and not limited to volunteer organizations that engage in interstate commerce or liability that arises by reason of volunteer services affecting interstate commerce." (Office of Legal Counsel Comments on S. 543, Volunteer Protection Act of 1997 (on file with authors) (citations omitted)).

Finally, the Court in *Lopez* observed there were certain traditional areas of state law, such as criminal law and education, which should be off limits to federal intervention.[356] The concurrence by Justices Kennedy and O'Connor also reasoned that the Federal Government should avoid involving itself in areas which fall within the "traditional concern of the states," noting that over 40 states had adopted laws outlawing the possession of firearms on or near school grounds.[357] These same concerns could also lie with the Volunteer Protection Act and Food Donation Act, particularly given that all 50 states have adopted some form of special liability protection for volunteers in general and good samaritan food donation activities in particular.[358] Accordingly, if *Lopez* represents a substantial turning point in the Court's Commerce Clause jurisdiction, rather than a mere symbolic warning, it is likely to prove difficult to uphold laws which involve activity which is both intrastate and non-commercial in nature.[359]

b. Section Five of the Fourteenth Amendment

While the Commerce Clause is the most obvious source of authority to justify federal tort legislation, Section Five of the Fourteenth Amendment also grants Congress the power to legislatively enforce the constitutional requirement of due process.[360] Several recent tort reform proposals have made reference to this authority. For example, the product liability legislation reported by the Senate Commerce Committee in 1997 includes a finding that "it is the constitutional role of the national government to . . . protect due process rights."[361] Similarly, the Volunteer Protection Act of 1997 contains an express finding that "liability reform is an appropriate use of the powers contained in . . . the fourteenth amendment to the United States Constitution."[362]

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356 514 U.S. at 641.

357 *Id.* at 651-52.

358 *See* Nonprofit Risk Management Center, *State Liability Laws for Charitable Organizations and Volunteers* (1996); La Vonne Grabiak, *State Laws Limiting Liability of Food Donors*, CRS Memorandum for Congress (March 16, 1987). *But see The Second Employers' Liability Cases, supra* note 53 (disregarding that state workplace liability laws "were far from uniform" in upholding the constitutionality of the 1908 Act).

359 514 U.S. 549.

360 Section Five of the Fourteenth Amendment grants Congress "the power to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]." U.S. Const. amend XIV, § 5.

361 S. 648, § 2 (a)(9) (1997). The Commerce Committee Report also concludes that "Federal legislation to reform punitive damages falls squarely within the 'broad power' of Congress to 'carry out' both the letter and spirit of the Fourteenth Amendment." S. Rep. No. 105-32, at 45 (1997).

362 42 U.S.C.A. § 14501(a)(7)(D)(ii) (West Supp. III 1997). The House Judiciary Committee Report included a "Constitutional Authority Statement" stating that the legislation was authorized under both the Commerce Clause and the Fourteenth Amendment. H.R. Rep. No. 105-101, pt. 1, at 13 (1997).

The Supreme Court has never considered whether Section Five of the Fourteenth Amendment provides the necessary authority to support federal tort reforms, although it has validated the use of this authority in other contexts, most notably voting rights laws.[363] Significantly, in *City of Boerne v. Flores,*[364] in invalidating the Religious Freedom Restoration Act of 1993 (RFRA),[365] the Court restated its understanding of the scope of legislative authority generally available under Section Five of the Fourteenth Amendment. The *Boerne* Court held that Congress' power under Section Five extends only to " 'enforc[ing]' the provisions of the Fourteenth Amendment . . rather than decree[ing] the substance of the Fourteenth Amendment's restrictions on the states."[366]

Boerne emphasized the importance of developing a legislative record of constitutional infirmities supporting the need for legislation under Section Five of the Fourteenth Amendment. The Court emphasized:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends achieved. The appropriateness of the remedial measures must be considered in light of the evil presented. . . . In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.[367]

Given these parameters, it would seem that the most plausible case for the use of congressional authority under Section Five of the Fourteenth Amendment pertains to limitations on punitive damages. Advocates of using this authority will be able to point to two recent Supreme Court precedents striking down specific punitive damage awards based on due process grounds. In 1996, in *BMW of North America v. Gore,*[368] the Court found that a judgment of $2 million in punitive damages awarded to a consumer fraud plaintiff sustaining actual damages of only $4,000 was so "grossly excessive"[369] as to violate due process. Two

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363 *See, e.g., South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966) (provisions in the Voting Rights Act of 1965); *Katzenbach v. Morgan,* 384 U.S. 641 (1966) (ban on literacy tests that had prevented certain persons schooled in Puerto Rico from voting); *Oregon v. Mitchell,* 400 U.S. 112 (1970) (5-year nationwide ban on literacy tests); *City of Rome v United States,* 446 U.S. 156 (1980) (extension of Voting Rights Act's requirement that certain jurisdictions pre-clear changes in voting procedures). These laws implicated Congress' due process power under the Fourteenth Amendment and voting rights powers under the Fifteenth Amendment.

364 521 U.S. __; 117 S.Ct. 2157; 138 L.Ed. 624; 65 U.S.L.W. 4612 (U.S. June 25, 1997).

365 42 U.S.C. §§ 2000bb-2000bb-4 (1994) (prohibiting federal, state, and local governments from substantially burdening the exercise of religion).

366 65 U.S.L.W at 4615, *quoting* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

367 65 U.S.L.W. at 4618 (citations omitted).

368 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809, 64 U.S.L.W. 4335 (1996).

369 64 U.S.L.W. at 4339.

years earlier, in *Honda Motor Co. v. Oberg*,[370] the Court invalidated a punitive damage award of $5 million, finding that an Oregon law limiting the scope of judicial review of punitive damage awards[371] violated procedural due process.

In *Gore* the Court identified three "guideposts" for determining whether a punitive damage award is "grossly excessive": degree of reprehensibility, ratio between punitive award and plaintiff's actual harm, and legislative sanctions provided for possible misconduct.[372] The second of these guideposts, ratio between punitive damages award and actual harm, is arguably directly evocative of provisions in the Senate Product Liability Proposal which cap the maximum punitive damage award payable by "small businesses" at the lesser of $250,000 or two times compensatory damages.[373] In *Gore*, the Court made much of the fact that "[t]he $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of actual harm determined by the jury."[374] Furthermore, although the Supreme Court has previously found other challenged punitive damage awards not to violate due process in *Pacific Mutual Life Insurance Co. v. Haslip*[375] and *TXO Production Corp. v. Alliance Resources Corp.*,[376] the *Gore* Court read these decisions as "endors[ing] the proposition that a comparison between the compensatory award and punitive award is significant" in assessing whether the award violated due process.[377]

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370 512 U.S. 415 (1994).

371 An amendment to the Oregon Constitution prohibits judicial review of punitive damage amounts "unless the court can affirmatively say there is no evidence to support the verdict." *See* 512 U.S. at 418.

372 64 U.S.L.W. at 4339.

373 *Supra* note 279. A number of tort reform proposals seek to limit punitive damage awards. *See* Common Sense Product Liability and Legal Reform Act, H.R. Conf. Rep. No. 104-481 (1996) (capping punitive damages generally at greater of two times compensatory damages or $250,000, subject to judicial authority to increase up to jury award based on specified extenuating circumstances, with cap on small businesses and certain individuals set at lesser of these two amounts); House Medical Malpractice Proposal, *supra* note 302 (capping punitive damages at the greater of $250,000 or three times economic damages); the Tobacco Settlement, *supra* note 310, would eliminate punitive damage liability completely for past misconduct by the tobacco industry.

374 64 U.S.L.W. at 4342.

375 499 U.S. 1 (1991) (punitive damage award of more than $1 million where insurance company found responsible for fraud of employee found not to violate Fourteenth Amendment due process). In *Haslip*, the Court also considered in *dicta* the constitutionality of state imposition of a higher standard of proof to establish punitive damages, writing, "[t]here is much to be said in favor of a State's requiring . . . a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'. . . . We are not persuaded, however, that the Due Process Clause requires that much." *Id.* at 23 n.11.

376 509 U.S. 443 (1993) (punitive damage award of $10 million stemming from slander of title case found not to violate Fourteenth Amendment due process).

377 64 U.S.L.W. at 4341.

Defenders of Congress' use of authority under Section Five of the Fourteenth Amendment to limit punitive damages also find support in the Court's decision in *Honda.*[378] The Court, in considering whether Oregon's existing procedures for awarding punitive damages were fair, observed in *dicta*, "the clear and convincing standard of proof [required under Oregon law] is an important check against the unwarranted imposition of punitive damages."[379] This would seem to favorably relate to the provisions in the various product liability reforms seeking to import this evidentiary requirement into federal law.[380]

At the same time, while cases such as *Gore* and *Honda* have opened the door for Congress to use the Constitution's Fourteenth Amendment authority to limit punitive damages, a strong argument can be made that the proposed caps on punitive damages in the pending tort reform proposals do not fall within the "guideposts" laid down by the Court.[381] Although the Court has considered the punitive to compensatory damage ratios in its recent decisions, it has consistently rejected the notion of a straightforward arithmetic cut-off or cap. In *Gore*, the Majority declared:

[W]e have consistently rejected the notion that the constitutional line [of due process] is marked by a simple mathematical formula, even one that compares actual and punitive damages to the punitive award. Indeed low awards of compensatory damages may properly support a higher ratio than high compensatory damage awards, if for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of the non-economic harm might have been difficult to determine.[382]

Similarly, the Courts in *Haslip* and *TXO* have rejected the formulaic use of punitive damage ratios in assessing due process.[383] Persons challenging congressional authority under Section Five of the Fourteenth Amendment in this regard will be able to note the ratio of punitive to compensatory damages permitted in those cases—4 to 1 in *Haslip*, and more than 500 to one in *TXO* are both well in excess of the ratio permit-

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378 512 U.S. 415.

379 512 U.S. at 433 (although this aspect of Oregon law was determined in and of itself not sufficient to protect against arbitrary awards).

380 *See* Bill Emerson Good Samaritan Food Donation Act, *supra* note 191; Volunteer Protection Act, *supra* note 204; Amtrak Act, *supra* note 223; Senate Product Liability Proposal, *supra* note 276; House Medical Malpractice Proposal, *supra* note 294.

381 In his dissent to *Gore*, Justice Scalia wrote that the Majority's "' guideposts' mark a road to nowhere; they provide no real guidance at all." 64 U.S.L.W. at 4348.

382 *Id.* at 4342.

383 In *Haslip*, the Court wrote "[w]e need not, and indeed we cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 499 U.S. at 18. This language was affirmatively quoted in *TXO*. 509 U.S. at 458.

ted under the Senate Product Liability Proposal.[384] Moreover, since the Senate Product Liability Proposal provides for a punitive damages cap at the *lesser* of $250,000 or two times compensatory damages, it will not always be tied into the amount of compensatory damages.[385] To the extent that various punitive damage limitations go beyond the Court's pronouncements concerning due process, they may violate the admonition in *Boerne* that "Congress does not enforce a constitutional right by changing what the right is."[386]

It is also uncertain whether the incidence of punitive damage awards in product liability cases provides the extensive legislative record needed to comply with *Boerne's* mandate that the statutory remedy "be considered in light of the evil presented."[387] Although supporters of tort reforms can point to a number of instances of harmful punitive damage awards,[388] opponents can also cite studies detailing the limited incidence of punitive damage awards.[389] Further, in considering whether the standard for reviewing the constitutionality of punitive damage awards would require the federal courts to entangle themselves in innumerable disputes, *Gore* found such concerns to be "premature at best"[390] because of the "small number of punitive damages questions that we have reviewed in recent years, together with the fact that this is the first case in decades in which we have found that a punitive damages award exceeds the constitutional limit . . . ."[391]

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384 *See supra* note 278 & 279. The Senate Product Liability Proposal caps the amount of punitive damages that may be awarded against "small businesses" and certain individuals.

385 *Id.*

386 65 U.S.L.W at 4615.

387 *Id.* at 4618.

388 *See* S. Rep. No. 105-32, at 46-47 (1997) (noting that excessive punitive damage awards were overturned involving the drug Benedictin and Sabin polio vaccine; and that recent studies by Texas Policy Foundation and Institute for Civil Justice had found marked increases in the frequency and size of punitive damage awards in Dallas and Houston and the size of punitive damage awards in Chicago). *See also Haslip*, 499 U.S. at 18 ("[w]e note once again our concern about punitive damages that 'run wild.'"); Browning-Ferris Industries of Vermont v. Kelco Disposal, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting) ("[a]wards of punitive damages are skyrocketing [and] the threat of such enormous awards has a detrimental effect on the research and development of new products.").

389 *See* S. Rep. No. 105-32, at 74-75 (1997) (dissenting views noting a study by Dr. Stephen Daniels showed that between 1981-1985, punitive damages were only awarded in 4.9% of the cases reviewed and from 1988-1990 were only awarded in 4.8% of cases reviewed; study by Professors Michael Rustad and Thomas Koenig reviewing all product liability awards from 1965-1990 in federal and state courts and finding only 355 cases of punitive damage awards in 25 years).

390 64 U.S.L.W. at 4343 n.41.

391 *Id.*

2. *Fifth Amendment*[392]

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law,"[393] a proscription which has been held to include an equal protection component.[394] In the past, claimants have unsuccessfully sought to challenge federal tort reforms on both due process (*e.g.*, claiming the law was unfair as a substantive or a procedural matter)[395] and equal protection (*e.g.*, the law provides differential treatment for classes of tort claimants) grounds.[396] Assuming the courts continue to apply the lenient "rational basis test,"[397] plaintiffs challenging federal tort reforms under the Fifth Amendment will be placed in the difficult posture of overcoming the asserted legislative justifications. This is a standard claimants have been unable to meet in Supreme Court cases such as *Usery*[398] and *Duke Power.*[399]

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392 For an analysis of Fifth Amendment issues in the context of tort reform, *see* Steven J. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985 (1995) (federal products liability statute of repose likely to violate equal protection because it cannot be supported under a rationale basis test); Marco de Sae Silva, *Constitutional Challenges to Washington's Limit on Non-economic Damages in Cases of Personal Injury or Death*, 63 WASH. L. REV. 653 (1988) (caps on non-economic damages appear not to violate due process and equal protection because only minimal level of judicial scrutiny will be applied); Mary Ann Willis, Comment, *Limitation on Recovery of Damages: Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CINN. L. REV. 1329 (1986) (concluding that state limits on medical malpractice awards likely violate equal protection).

393 U.S. Const. amend. V.

394 *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (Fifth Amendment due process found to incorporate equal protection guarantees in case involving public school desegregation by the Federal Government in the District of Columbia).

395 Courts have varied on whether to differentiate between "substantive" and "procedural" due process when scrutinizing federal tort reforms. *See, e.g.*, Second Employers' Liability Cases, 223 U.S. 1 (applying a generic due process analysis); In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d at 989-91 (separately analyzing and rejecting substantive and procedural due process claims).

396 A separate due process issue which has arisen in those tort reform laws which have been reviewed by the courts is whether the law operates as an unconstitutional taking. In the case of the initiatives described in this article, it seems doubtful a credible taking argument could be advanced, given *Hammond's* holding that a taking claim would not lie under the Atomic Testing Liability Act unless the claimant had been forced to forfeit a "final, unreviewable judgment." *See* 786 F.2d at 12.

397 *See Usery,* 428 U.S. at 15; *Carr,* 539 F.2d at 959; *Thomason,* 438 U.S. at 84; *Sparks,* 574 F.2d at 1310; *In re Consolidated United States Atmospheric Testing Litigation,* 786 F.2d at 991; and *O'Conner & TMI,* 940 F.2d at 1102. *But see* Jones v. State Board of Medicine, 555 P.2d 399 (1976); Carson v. Maurer, 424 A.2d 825 (1980) (State courts applying the so-called "intermediate scrutiny" test where the tort reform is seen as depriving parties of their "fundamental" right to a jury trial).

398 In *Usery,* 428 U.S. at 33, the Court granted strong deference to Congress in its assessment concerning the efficacy of competing expert opinions: "[T]he reliability of negative X-ray evidence was debated forcefully on both sides before the Congress, and the Operators here suggest nothing new to add to the debate; they are simply dissatisfied with Congress' conclusion." *Id.*

399 438 U.S. 59 (1978).

In addition to the issue of whether a particular tort reform is seen as "rational," plaintiffs may also argue that the law does not provide a legislative *quid pro quo*. The latter issue raises two separate questions: whether the reform provides any requisite benefit or advantage to offset the forfeiture of common law rights; and whether any such *quid pro quo* is required as a constitutional matter. With regard to the first question, a strong argument can be made that several recently enacted reforms such as the General Aviation Act, Volunteer Protection Act, Food Donation, Biomaterials Access Assurance Act and Y2K Act[400] do not provide any offsetting legal benefits, at least to the parties directly harmed by the loss of their common law rights. Unlike the Price-Anderson Act upheld in *Duke Power*,[401] these laws provide no recourse to a secure source of funds or waiver of any of the defendant's legal rights, and in contrast to the Swine Flu Act, Atomic Testing Liability Act, Westfall Act and various other federal laws immunizing volunteers associated with federal activities[402] the laws provide no substitution of the United States as a defendant for any harm caused by volunteer negligence. A related argument was articulated in *Carr*, when the Fourth Circuit observed that the Federal Drivers Act benefited all government employees - even potential

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400 It could be argued that several recently enacted and pending tort reform proposals, such as the Biomaterials Access Assurance Act and the Tobacco Settlement provide plaintiffs with no direct offsetting benefits. However, some may contend that individuals bringing tobacco lawsuits may benefit from provisions intended to provide for the development of a more orderly tobacco liability payout system and the potential of receiving any unused liability funds allocated by the presidential commission. *See supra* notes 313-315 and accompanying text.

401 *See* 438 U.S. at 90. Although the Volunteer Protection Act permits states to adopt laws insuring that non-profits make a secure source of funds available in the event of injury, unlike Price-Anderson, the Act does not insure that such security is made available.

402 *See e.g.*, (1) Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. § 233 (g) & (o) (1994) (health centers and their officers, employees, and contractors and health clinic professionals); (2) National Service Trust Act, 42 U.S.C. §§ 12651b(f) & 12651g (a)(B) (1994) (enacted in 1993) (board members and volunteers in the National and Community Service program); (3) Take Pride in America Act, 16 U.S.C. § 4604 (c)(2) (1994) (Take Pride in America Act volunteers) (enacted in 1990); (4) Support for East European Democracy Act of 1989, 22 U.S.C. § 5422 (c)(2)(A) (1994) (volunteers providing technical assistance to Poland or Hungary); (5) Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737 (f) (1994) (Bureau of Land Management volunteers); (6) Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5055(f)(3) (1994) (VISTA volunteers); (7) Volunteers in the National Forests Act of 1972, 16 U.S.C. § 558c (b) (1994) (Forest Service volunteers); (8) Volunteers in Parks Act of 1969, 16 U.S.C. § 18i (b) (1994) (National Parks volunteers); (9) Peace Corps Act, 22 U.S.C. § 2504(h)(1994) (enacted in 1961) (Peace Corps volunteers); (10) Fish and Wildlife Act of 1956, 16 U.S.C. § 742f(c)(4) (1994) (volunteers in Fish and Wildlife Service or National Oceanic and Atmospheric Administration programs); (11) Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 203 note (Supp. I 1995); and (12) 18 U.S.C.A. § 1955 note (West Supp. IV 1997); 42 U.S.C. § 247b (1976) (repealed 1978); 42 U.S.C. § 2212 (1994); 28 U.S.C. § 2679 (1994).

plaintiffs - by providing them with protection against liability from automobile accidents.[403]

If these tort reforms are to be upheld in the face of a *quid pro quo* requirement, their defenders will likely resort to the argument that any necessary benefits may extend to society or persons who benefit from volunteerism generally, rather than impaired claimants directly. This is the contention accepted by the California Supreme Court in *Fein v. Permanente Medical Group*,[404] in upholding that state's medical malpractice reforms[405] against constitutional challenge. In *Fein*, the California court stated "even if due process principles required some *'quid pro quo'* to support the statute, it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs."[406]

In contrast, other tort reforms such as the Amtrak Act and the Senate Product Liability Proposal[407] could be construed as providing a directly offsetting benefit to affected claimants. The constitutional difficulty with respect to these proposals may come from establishing that the quantum of offsetting statutory benefits approaches that found in *Duke Power*. For example, while both the Amtrak Act and the Price-Anderson Act require potential defendants to provide insurance in the event of an accident,[408] the Amtrak Act contains no waiver of any common law defenses and does not obligate the Federal Government to provide any indemnification or commit itself to take any actions to protect the public in the event of an accident.[409] In *Duke Power*, the Court found such assurances to be a "fair and reasonable substitute for the un-

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403 *See* 5 U.S.C. § 8116 (c).

404 695 P.2d 665, *appeal dismissed for want of a substantial federal question*, 474 U.S. 892. *See also* Roa v. Lodi Medical Group, Inc., 695 P.2d 164 (capping attorneys' fees in medical malpractice actions), *appeal dismissed*, 474 U.S. 990 (1985).

405 The reforms upheld in *Fein* capped non-economic damages at $250,000 and modified the collateral source rule in medical malpractice cases. 695 P.2d at 665.

406 *Id.* at 160 n.18. Justice White dissented from plaintiff's appeal of *Fein*, finding there was a clear split concerning the constitutionality of damage limitations in medical malpractice cases, noting, "[o]ne of the reasons for the division among the state courts is [the *quid pro quo*] question left unresolved by this Court in *Duke Power*. . . ." *See* Fein v. Permanente Medical Group, 474 U.S. 892, 894 (1985).

407 Another issue presented by the Senate Product Liability Proposal is whether caps on punitive damages, as opposed to compensatory damages, are the type of restrictions subject to constitutional challenge. Some commentators have concluded that there is no constitutional right to seek punitive damages. See Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405 (1995); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

408 *See* 42 U.S.C. § 2210 (c) (1994); 49 U.S.C. § 28103 (c).

409 These provisions are included in the Price-Anderson Act. *See* 42 U.S.C. §§ 2210 (n)(1), 2210 (c) (1994).

certain recovery of damages from a utility or component manufacturer."[410]

Some of the potential legal benefits available to plaintiffs under the Senate Product Liability Proposal include the provision of a two-way preemptive federal statute of limitations running from the time the harm was actually discovered (or should have been discovered) rather than the date of the actual harm, and standards for the award of punitive damages and statutes of repose which can also operate to preempt some current laws which are less favorable to plaintiffs.[411] A potential constitutional infirmity with this proposal is the class of claimants which would benefit from these provisions is not necessarily the same as those whose rights will be impaired by other proposed liability limitations. This stands in contrast to *Duke Power*, where the persons subject to forfeiture of their common law rights in the event of a nuclear accident appear to constitute the same class of individuals benefiting from the liability waivers contained in the Price-Anderson Act.[412]

While defenders of these tort reforms may have some difficulty establishing that the reforms adequately provide for an offsetting legal benefit of the type found in *Duke Power*, they may be more readily able to claim a *quid pro quo* is not a constitutional requirement in the first instance. Although as a formal matter in *New York Central*[413] and *Duke Power*[414] the Supreme Court reserved the question of whether a *quid pro quo* is necessary for compliance with due process and equal protection, there is a significant degree of *dicta* skeptical of such a requirement. In *Duke Power*, for example, before finding that the Price-Anderson Act provided an adequate *quid pro quo*, the Court noted, "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonably just substitute for the common-law or state tort law remedies it replaces."[415] In upholding the Swine Flu Act against a constitutional due process challenge, the Fifth Circuit in *Ducharme* observed "[l]egislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away."[416] There also is senti-

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410 348 U.S. at 91.

411 *See supra* notes 280-284 & 294 and accompanying text.

412 The Senate Product Liability Proposal can also be contrasted with the Warsaw Convention, 49 Stat. 3000 (1934), which limits recoverable damages in exchange for providing all plaintiffs with a guaranteed recovery through its strict liability provisions.

413 *See* 243 U.S. 188.

414 *See* 438 U.S. 59.

415 *Id.* at 88.

416 *Ducharme*, 574 F.2d at 1310. *See also Carr*, 280 U.S. at 122. *But see Sparks*, 341 F. Supp. at 416 ("a replacement or substitution of remedies, while perhaps not technically necessary for due process, is nonetheless even more indicative of the satisfaction of due process requirements."); Honda Motor Co. v. Oberg, 512 U.S. 415 at 430 ("Oregon's abrogation of

ment in a number of cases upholding state laws altering common law rights such as *Munn v. Illinois*[417] and *Silver v. Silver*[418] for the propositions that: "[a] person has no property, no vested interest in any rule of the common law"[419] and "[t]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[420]

3. *Seventh Amendment*[421]

The Seventh Amendment provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[422] The cases in which federal tort reforms have been directly subject to constitutional challenge to date do not provide a great deal of guidance concerning the scope and operation of the Seventh Amendment. *The Employees' Liability Cases* did not reach the issue of the Seventh Amendment's application to the 1906 Employers' Liability Act because the law was invalidated on other grounds, while the issue was not raised in *The Second Employees' Liability Cases,*[423] *Usery,*[424] or *Duke Power.*[425] While the Seventh Amendment issue was raised in challenges to the Federal Drivers Act, Swine Flu Act, and the Atomic Testing Liability Act, it was rejected in those instances because the Seventh Amendment was held not to apply to laws substituting an administrative remedy against the United States.[426]

Notwithstanding the lack of direct legal precedent in tort reform cases, defenders of proposals such as the House Medical Malpractice

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well-established common law protections against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.").

417 94 U.S. 113 (1876).

418 280 U.S. 117 (1929).

419 *Munn*, 94 U.S. at 134.

420 *Silver*, 280 U.S. at 122.

421 For an analysis of Seventh Amendment issues in the context of tort reforms, *see* Colleen P. Murphy, *Determining the Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345 (1995) (raising questions concerning Congress' ability to cap, but not eliminate right to seek compensatory damages); James F. Tiu, *Challenging Medical Malpractice Damage Awards on Seventh Amendment Grounds: Attack in Search of a Rationale*, 59 U. CIN. L. REV. 213 (1990) (Federal courts have not found that statutory limits on damages in medical malpractice actions violate the Seventh Amendment); Paul B. Weiss, Comment, *Reforming Tort Reform: Is there Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737 (1989) (disagreeing with courts recognizing legislative power to impose damage caps).

422 U.S. Const. amend. VII.

423 223 U.S. 1.

424 428 U.S. 1.

425 438 U.S. 59.

426 *See* 225 F. Supp at 882; 574 F.2d at 1311; 786 F.2d at 15.

Proposal's cap on non-economic damages[427] (which appears to implicate jury trial rights most directly)[428] should be able to make several supporting legal arguments. They could first assert that to the extent the Seventh Amendment may apply to a particular federal tort reform, it would only limit Congress' ability to cap damages in diversity cases brought in federal court, rather than its ability to alter underlying state court jury rights. This concept is based on the Supreme Court's 1916 decision in *Minneapolis & St. Louis RR v. Bombolis,*[429] which upheld application of the 1908 Employers' Liability Act in state courts even though Minnesota law permitted civil claims to be adjudicated by less than a unanimous jury (in derogation of the common law).[430] In rejecting the constitutional argument, the *Bombolis* Court noted that the Seventh Amendment was expressly limited to "proceedings in the courts of the United States."[431]

Second, defenders of damage caps may assert that based on the Court's 1987 decision in *Tull v. United States*[432] statutory caps should be deemed to constitute "legal' rather than "factual" determinations which are not subject to the Seventh Amendment. In *Tull*, although the Court found that actions brought under the Clean Water Act[433] were generally subject to the Seventh Amendment,[434] it ultimately concluded the Sev-

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427 The House Medical Malpractice Proposal would cap economic damages at $250,000. *See supra* note 299.

428 A number of federal tort reforms can be claimed to abrogate Seventh Amendment jury trial protections by legislatively resolving matters previously considered by a jury at common law. For example, the Emerson Food Donation Act and the Volunteer Protection Act both eliminate liability for ordinary negligence; the General Aviation Act and the Senate Product Liability Proposal eliminate tort liability where a statute of repose applies; and the Senate Product Liability Proposal, House Medical Malpractice Proposal and the Tobacco Settlement would cap or eliminate punitive damages. *But see* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723 (1993) (Seventh Amendment does not require juries to assess punitive damages because determination is unguided by meaningful standards).

429 241 U.S. 211 (1916). *See also* Simler v. Connor, 372 U.S. 221 (1963) (in federal district court diversity of citizenship action, federal rather than state law governs in determining whether the plaintiff is entitled to a jury trial).

430 Minnesota law permits five members of a six person jury to reach a verdict in a civil action if the jury has deliberated for twelve hours without reaching a unanimous verdict. *See* 241 U.S. 211.

431 241 U.S. at 217. The Court also wrote that its decision was premised on the grounds that "the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with federal action." *Id.*

432 481 U.S. 412 (1987).

433 33 U.S.C. § 1319 (1994).

434 Although Clean Water Act actions were statutory in nature, the Court found the Seventh Amendment also applied to actions "that are analogous to 'suits at common law.'" 481 U.S. at 417. In the case of the Clean Water Act, the Court observed that although legal actions brought under it were similar to actions traditionally brought at law (such as debt actions) and equity (such as nuisance actions), the "'more important'" determination for Seventh Amendment purposes was the nature of the relief being sought. *Id.* at 421 (citations omitted). Since a civil penalty was traditionally sought in a court of law, the Court concluded that the core

enth Amendment did not apply to the civil penalty determinations at issue under the Act. The Court found that since the assessment of civil penalties involved neither the " 'substance of a common-law right to a trial by jury' nor a 'fundamental element of a jury trial' "[435] it was not a required jury function under the Seventh Amendment.[436] In a footnote to its opinion, the Court suggested even more broadly, "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial."[437] Relying in part on this footnote, the Fourth Circuit in *Boyd v. Bulala*[438] held caps on damages did not violate the right to a jury trial, observing "it is not the role of the jury to determine the legal consequences of its factual findings . . . . That is a matter for the legislature.'[439] Similarly in *Franklin v. Mazda Motor Corp.*,[440] a Maryland district court wrote that "[j]uries always find facts on a matrix of laws given to them by the legislature and by precedent and it can hardly be argued that limitations imposed by law are a usurpation of the jury function."[441]

Third, defenders of damage caps may argue that since legislatures have open-ended authority under the Seventh Amendment to eliminate a right of action completely, they should also have the authority to eliminate certain jury prerogatives. This is premised on the Court's 1917 decision in *Mountain Timber Co. v. Washington*,[442] upholding against Seventh Amendment challenge the constitutionality of a Washington law eliminating causes of actions by employees against employers (and re-

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underlying question of legal responsibility should be heard by a jury under the Seventh Amendment. *Id.* at 425.

435 *Id.*

436 Since the text of the Seventh Amendment is silent on the question of whether a jury determination is required with respect to the remedy phase of a trial, the Court reasoned the "answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.' "*Id.* at 426 (citations omitted). The Court went on to argue since Congress had the clear authority to fix the amount of the civil penalty, it could also delegate that authority to the court, particularly in actions such as those under the Clean Water Act which involved "highly discretionary calculations." *Id.* at 427.

437 481 U.S. at 426 n.9 (citations omitted). The Court also observed, "[w]e have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." *Id.*

438 877 F.2d 1191 (4th Cir. 1989).

439 *Id.* at 1196 (citations omitted).

440 704 F. Supp. 1325 (D. Md. 1989). Both *Boyd* and *Franklin* raised Seventh Amendment issues because they involved diversity actions brought in federal court.

441 *Id.* at 1331. *See also* Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (Seventh Amendment does not apply to the Virgin Island's cap on non-economic damages in medical malpractice actions because the second clause of the Seventh Amendment —preventing facts tried by the jury from being reexamined—apply to courts, not legislatures).

442 243 U.S. at 219.

placing them with a workers' compensation regime).[443] More recently, federal courts in *Boyd* and *Franklin* utilized supplemental arguments extending this line of reasoning to validate state laws limiting damage awards. In *Boyd* the Fourth Circuit upheld the constitutionality of Virginia's cap on damages, reasoning "[i]f a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well."[444] Similarly, in *Franklin* the district court wrote, "[t]he power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action."[445]

Those challenging damage caps on Seventh Amendment grounds may attempt to respond to these lines of argument through a variety of contentions. First, rather than giving Congress free rein to deny jury rights in state courts, a closer reading of *Bombolis* may indicate it should more properly be seen as an effort to limit congressional preemption of state court procedures. For example, language in *Bombolis* stating the Seventh Amendment should not be permitted to operate to void state court procedures lest "both federal and state courts . . . by fluctuating hybridization be bereft of all real, independent existence"[446] indicate more of a respect for federalism than antipathy to state jury trial rights.

With regard to the argument that damage caps involve legal rather than factual determinations, persons challenging the constitutionality of caps may point to several cases undercutting *Tull* and its progeny. In the 1935 case *Dimick v. Schiedt*[447] the Court held the federal practice of additur, by which a federal judge believing a jury award to be unduly low allowed defendants to choose between an increase in a damage award or a new trial, unconstitutional. Finding no evidence that English common law courts had the authority to increase the amount of jury verdicts,[448] the Court held that increasing the amount of a jury award was a question

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443 The Court found that the Seventh Amendment did not apply where a cause of action was completely eliminated, writing "[a]s between employee and employer the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury." *Id.* at 235.

444 877 F.2d at 1196 (citations omitted).

445 704 F. Supp. at 1331.

446 241 U.S. at 221.

447 293 U.S. 474 (1935).

448 The Court observed "[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Id.* at 476. The Court went on to note that other than isolated exceptions it had found no historical evidence of English common law courts being able to increase the amount of a jury verdict, on either an absolute or conditional basis. *Id.* at 476-77.

of fact[449] protected by the Seventh Amendment.[450] Moreover, district court decisions invalidating state damage caps in *Boyd v. Bulala*[451] and *Reuwer v. Hunter*[452] may have some residual intellectual import despite their being overruled by the Fourth Circuit. In *Boyd* the district court reasoned that "[s]ince the assessment of damages is a fact issue . . . a limitation on [their] performance . . . is a limitation on the role of the jury."[453] *Reuwer* distinguished *Tull* on the grounds it concerned "the assessment of a civil penalty"[454] rather than "the determination of damages"[455] and went on to find that "[i]n terms of the jury's role, history justifies no distinction between the liability and the remedy phases of a trial of a common-law action."[456]

Third, those challenging damage caps may seek to distinguish *Mountain Timber* by asserting that rather than allowing for a legislature to completely eliminate common law rights, the Seventh Amendment merely permits the legislature to do so where it provides a comparable substitute regime, such as the workers compensation laws described in that case. As for the corollary claim that the greater legislative power (*e.g.*, abrogating causes of action completely) includes the lesser (*e.g.*, capping damages), this arguably proves too much. If Congress had such broad ranging authority, it could circumscribe any aspect of a common law or other legal action, thereby reducing the Seventh Amendment to a nullity.

Ultimately it appears damage caps are likely to present another constitutional case of first impression for the Supreme Court. The trends in the relevant cases, however, would appear to favor those defending caps. The Court has previously countenanced the erosion of jury trial rights in the form of directed verdicts, six-person juries, and liberal use of collateral estoppel, among other procedural devices.[457] Moreover, the Supreme Court precedent most favorable to defenders of caps *Tull* (1987) is far more recent than the *Dimick* decision (1935). While lower federal court decisions concerning state damage caps reach varying con-

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449 "The controlling distinction between the power of the court and that of the jury is that the former has the power to determine the law and the latter to determine the facts." *Id.* at 486.

450 According to the Court, "where the verdict is too small, an increase by the court is an addition of something which in no sense can be said to be included in the verdict." *Id.*

451 647 F. Supp. 781 (W.D. Va. 1986), *reaff'd*, 672 F. Supp. 915 (W.D. Va. 1987), *aff'd in part, rev'd in part, questions certified*, 877 F.2d 1191 (4th Cir. 1989).

452 684 F. Supp. 1340 (1988).

453 647 F. Supp. at 789.

454 684 F. Supp. at 1344.

455 *Id.*

456 *Id.*

457 *See* Galloway v. United States, 319 U.S. 372 (1943) (directed verdict); Colgrove v. Battin, 413 U.S. 149 (1973) (six-person juries); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (collateral estoppel).

clusions, the circuit court precedent on this matter —the Fourth Circuit decision in *Boyd v. Bulala*[458]—favors the defenders of caps as well.

4. *Tenth Amendment*[459]

Courts have previously not been accommodating of Tenth Amendment federalism concerns[460] in the context of federal tort reform laws. *The Second Employers' Liability Cases* rejected the federalism contention raised in that case, finding that the Supremacy Clause made it clear that laws made "in pursuance of the Constitution" prevailed over any conflicting state laws.[461] Tenth Amendment concerns were also dismissed in lower court decisions reviewing the constitutionality of the Swine Flu Act[462] and Atomic Testing Liability Act.[463]

However, in recent years the general nature of federalism concerns has expanded. In 1992 in *New York v. United States,*[464] the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the "Radioactive Waste Policy Amendments Act')[465] requiring states to assume ownership of radioactive waste or accept legal liability for damages caused by the waste. Under *New York v. United States*, even if a particular law is found to constitute a valid exercise of Congress' Commerce Clause authority, it may still be struck down if it "commandeer[s] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."[466] These concerns were reiterated more recently in *Printz v. United States,*[467] where the Court invalidated portions of the Brady Handgun

458 877 F.2d 1191 (4th Cir. 1989).

459 For an analysis of Tenth Amendment and related issues in the context of proposed product liability reforms, *see* Jeffrey White, *Does the Products Bill Collide with Tenth Amendment?*, Trial, Nov. 1997, at 30; Cynthia C. Lebow, *Federalism and Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665 (1997); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures,* 44 Vill. L. Rev. 1 (1999).

460 The Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

461 223 U.S. at 53. *The Employers' Liability Cases* also found that Congress had the authority to enact a law dealing with master-servant relationships so long as it involved interstate commerce. *See* Restatement (Second) of Torts § 552A (1977); The Employers' Liability Cases, 207 U.S. 463 (1907) and The Second Employers' Liability Cases (Mondou v. New York), 223 U.S. 1 (1912); Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. §§ 51-60) (1906) (repealed 1907); 207 U.S. 463 (1907).

462 *See* 431 F. Supp. at 419.

463 *See* 786 F.2d at 15.

464 505 U.S. at 144.

465 42 U.S.C. § 2021b-2021j (1994).

466 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

467 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (5-4 decision).

Violence Protection Act[468] requiring local law enforcement officials to conduct background checks on prospective gun purchasers.

Whether any tort reforms are found to be unconstitutional on Tenth Amendment grounds is likely to depend in part on whether the Court is willing to extend and build upon the federalism concerns expressed in *New York v. United States* and *Printz*. As the case law currently stands, defenders of tort reform measures are likely to assert that a distinction can readily be drawn between the holding in *New York v. United States*—prohibiting federal commandeering of the state legislative process by compelling the enactment of a regulatory program—and federal tort reforms which merely require state courts to honor federal law. The Court itself observed as much when it distinguished a series of federal laws which were enforceable in state courts from the Radioactive Waste Policy Amendments Act:

These cases involve no more than an application of the Supremacy Clause's provisions that federal law "shall be the supreme Law of the Land," enforceable in every state. More to the point, all involve congressional regulation of individuals, not congressional requirements that states regulate. Federal statutes enforceable in state courts do, in a sense, direct state judgments to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to regulate.[469]

Moreover, in *Printz* the Supreme Court continued to distinguish between legislation directly commandeering the legislature and the mere use by Congress of the state courts. In examining the laws enacted in the first several Congresses in order to clarify the legislative history of the Constitution and Bill of Rights, the Court identified a series of federal laws which made use of the state courts, writing, "[t]hese early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions . . . . It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time."[470]

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468 18 U.S.C. § 922(s) (1994).

469 505 U.S. at 178-79. Lebow, *supra* note 460 at 689 concludes that last year's product liability bill would have violated Tenth Amendment federalism principles, and distinguishes this line of cases, in part because it "directs the state courts to actually alter state tort law and related procedures as mandated by Congress."

470 65 U.S.L.W. at 4733-34. It may be significant, however, that the laws cited by the Court in *Printz* involved using state courts to effectuate uniquely federal policies, such as those relating to immigration, rather than matters which typically fell within state prerogatives, such as tort law.

On the other hand, parties seeking to challenge these tort reforms may assert that rather than provide for an alternative liability scheme (as the 1908 Act did) or substitute the United States as a defendant pursuant to the Federal Torts Claims Act (as the Federal Drivers Act, Swine Flu Act, and Atomic Testing Liability Act did), the reforms impermissibly set forth a limited number of federal limitations on liability, while reserving the remainder of the legal issues to state law.[471] One of the problems with the Radioactive Waste Policy Amendments Act identified by the Court in *New York v. United States* was that "where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[472]

A related contention is that unlike the laws early federal laws enforceable in state courts distinguished in *Printz*, recent tort reforms can be said to be more intrusive in that they affirmatively limit the application of state law. In a recent article in *TRIAL Magazine*, Jeffrey White, the Associate General Counsel of the Association of Trial Lawyers of America, argues that the early laws represent "instances in which Congress established a federal cause of action or federal administrative regulatory scheme affecting private conduct and preempted conflicting state law. In none of these statutes did Congress purport to leave state law in place while attempting to modify its content."[473]

Potentially more problematic may be the fact that specific proposals such as the Biomaterials Access Assurance Act, the Tobacco Settlement and the Y2K Act impose an elaborate set of procedural mandates directly on state courts with respect to state causes of action. This, it can be asserted, goes beyond requiring the supremacy of federal legal standards

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471 The Court in New York v. United States also noted a constitutional line between congressional and state legislative responsibilities: "The allocation of power contained in the Commerce Clause, for example, authorizes congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U.S. at 166.

472 505 U.S. at 169. *Cf.* Erie Railroad Co. v. Tomkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare state substantive rules of common law applicable in a state . . . be they commercial law or a part of the law of torts. Moreover, no clause in the Constitution purports to confer such a power upon the federal courts."); Guaranty Trust Co. v. New York, 326 U.S. 99 (1945) (Federal courts bound by state statutes of limitations since they are substantive, not procedural).

473 White, *supra* note 460, at 32. One could argue that *The Second Employers' Liability Cases,* 223 U.S. 1 (1912), constituted a tort reform which altered state law in eliminating certain common law employer liability defenses. However, the Majority in *Printz* read this precedent somewhat narrowly when it said "[t]he *Second Employers' Liability Cases* stand for the proposition that a state court must entertain a claim arising under federal law only 'when its ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.' "65 U.S.L.W. at 4733, *citing Second Employers' Liability Cases,* 223 U.S. at 56-57.

by proscribing detailed and potentially costly procedures on the state courts. For example, the Biomaterials Access Assurance Act specifies detailed rules concerning motions to dismiss, limits discovery pending ruling on such motions, requires that rulings be made solely on the basis of pleadings and affidavits, and specifies rules for consideration of summary judgment and stay motions.[474] The Tobacco Settlement prevents states from allowing any form of consolidation of tobacco claims, even if this is the least costly and most efficient means of resolving such lawsuits.[475] The Tobacco Settlement also prevents state courts from resolving attorney client privilege and trade secret disputes regarding tobacco documents and alters state court evidentiary rules by prohibiting the admission or discovery of any evidence concerning "reduced-risk" tobacco products.[476] The Y2K Act also mandates a variety of procedural rules upon state courts, such as notice, "cool-down" and heightened pleading requirements and prohibits state courts from considering most forms of Y2K class actions.[477]

Although we are aware of no direct Supreme Court precedent regarding whether Congress may mandate procedural rules on state courts concerning state causes of action, plaintiffs will be able to point to *dicta* in several recent decisions concerning the preemptive effect of civil rights claims brought under 42 U.S.C. § 1983 indicating that such requirements may well cross the constitutional line. In *Felder v. Casey*,[478] the Court observed that it is an "unassailable proposition . . . . that states may establish the rules of procedure governing litigation in their own courts." In *Johnson v. Fankell*,[479] the Court reiterated what it termed "the general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure . . . that federal law takes state courts as it finds them.'"[480] The *Johnson* Court also observed that judicial respect for the principal of federalism "is at its apex when we confront a claim that federal law requires a state to undertake something as funda-

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474 *See Biomaterials Access Assurance Act of 1997: Hearing on H.R. 872 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 96 (1997).

475 *See* 12.3 TPLR at 3.221, Title VIII.B.2.

476 *See* 12.3 TPLR at 3.232, Appendix VIII.3; 3.221, Title VIII (B)(7).

477 *See* Y2K Act §§ 7, 8 & 15.

478 487 U.S. 131, 138 (1988) (Wisconsin notice of claim statute found to be inconsistent with and preempted by 42 U.S.C. § 1983).

479 117 S. Ct. 1800 (1997) (42 U.S.C. § 1983 held not to preempt Idaho procedural rules concerning appealability of orders).

480 *Id.* at 1805 (citing Howlett v. Rose, 496 U.S. 356, 372 (1990)) quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

mental as restructuring the operation of its courts"[481] and "it is a matter for each state to decide how to structure its judicial system."[482]

Because of such concerns, during hearings concerning the Tobacco Settlement Professor Tribe testified "[f]or Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism."[483] Although the Tobacco Settlement provides for removal to federal court of tobacco liability suits for which class action certification is sought[484]—presumably in an effort to ameliorate the Tenth Amendment concerns—this mechanism may still be subject to further constitutional problems. Such problems as whether it constitutes an impermissible attempt to extend federal jurisdiction where it is otherwise lacking in violation of Article III of the Constitution. This is similar to the issue the Third and Seventh Circuit dealt with in the context of the 1988 Amendments to the Price-Anderson Act, which converted nuclear accident claims into federal causes of action.[485]

V. CONCLUSION

Over the last several years, Congress has enacted a series of federal tort reform laws. These statutes have partially preempted state tort law in the

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481 *Id.* at 1807.

482 *Id.* n.13. For their part, defendants may attempt to assert that procedural requirements such as those set forth in the Biomaterials Access Assurance Act and the Tobacco Settlement are no more burdensome on state courts than the comparative negligence determinations required under the 1908 Employers' Liability Act and that given the Court's recent decision in Amchem Products v. George Windsor, 117 S. Ct. 2231, 138 L.Ed. 2d 689, 65 U.S.L.W. 4635 (1997) (narrowing ability to obtain class certifications in mass product liability cases under the Federal Rules of Civil Procedure), it is unlikely the class action rules would prove to be of significant benefit in tobacco litigation in any event.

483 *The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., (1997) (Statement of Lawrence H. Tribe, Tyler Professor of Law, Harvard Law School).

484 *See* 12.3 TPLR at 3.221, Title VIII.B.2. The Universal Tobacco Settlement Act, S. 1414, 105th Cong. (1997) contains a general prohibition on class actions, along with a mechanism for removal by a defendant of "an action that involves a violation of [the class action prohibition] . . . to an appropriate federal court."

485 *See* 13 F.3d at 1099, 940 F.2d at 857. For an analysis of the possible Article III issue in the context of the Tobacco Settlement, *see The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., (1997) (statement of Lawrence H. Tribe, Tyler Professor of Law, Harvard Law School) ("Although Congress may as a general proposition regulate the the jurisdiction of the federal courts, it may not by statute enlarge their Article III jurisdiction . . . . Accordingly, I do not think that the proposed statute could be applied to permit the removal of an action where federal jurisdiction were otherwise lacking"); *Hearing on the Civil Liability Portions of the Proposed Tobacco Settlement Before the House Comm. On the Judiciary*, 105th Cong., 2d Sess. (1998) (statement of James F. Pfander, University of Illinois College of Law) ("The existence of a federal question, even by way of defense, should solve any Article III problem with the removal scheme").

areas of general aviation aircraft liability (the General Aviation Revitalization Act of 1994); donation of food for distribution to the needy (the Bill Emerson Good Samaritan Food Donation Act); volunteer activity generally (the Volunteer Protection Act of 1997); public railway transportation (Section 161 of the Amtrak Reform and Accountability Act of 1997); medical implant supplies (the Biomaterials Access Assurance Act) and year 2000 computer failures (the Y2K Act).[486] At the same time, Congress has considered a number of more far-reaching proposals, including legislation preempting state laws concerning product liability, medical malpractice, and tobacco litigation.[487]

In general, these enacted and pending reforms represent a third wave of federal tort reform. They seek to isolate a particular area of tort law (such as product liability or medical malpractice) or a sub-area (such as the general aviation or biomaterials supplies aspects of product liability), and carve out a set of protections designed to minimize the liability of defendants as compared to what their liability would be under state law. While the justification asserted for these reforms—encouraging beneficial social and economic activities—is similar to that proffered for earlier phases of tort reform, the nature of several of the proposals is sufficiently different to present a number of new constitutional issues.

With regard to the Commerce Clause, laws such as the Food Donation Act and Volunteer Protection Act will not only have a significant impact on intrastate activity, but also regulate non-commercial, volunteer activity. The question presented by these laws is whether the Commerce Clause permits preemption of state law where Congress finds there is a connection to interstate commerce, or the courts are required to consider whether the nexus is simply too tenuous to justify intrusion on the traditional state law tort system.

In the event Commerce Clause authority is struck down in the context of a particular tort reform, courts may also be presented with the issue of whether the law is authorized by Congress' power under Section Five of the Fourteenth Amendment. In particular, this issue may arise with respect to punitive damage limitations, given the Court's recent decisions in *BMW of North America v. Gore*[488] and *Honda Motor Co. v.*

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[486] *See* Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. § 40101 note (1994));Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C.A. § 1791 (West Supp. 1998));Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. §§ 14501- 14505 (West Supp. III 1997));Pub. L. No. 105-134, § 111 Stat. 2570 (codified at 49 U.S.C.A. § 28103 (West Supp. 1998)); Biomaterials Access Assurance Act of 1988, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (codified at 21 U.S.C. § 1601-1606 (1998)); Y2K Act, Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. §§ 6601-17 (1999)).

[487] *See* The Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998); Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997); Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997).

[488] 64 U.S.L.W. at 4339.

Oberg.[489] The critical question is whether these tort reforms would be viewed as merely implementing these court-made constitutional constraints, or whether the tort reforms represent an entirely new legislative restrictions on the states.

In terms of the Fifth Amendment, a number of recent tort reforms would abrogate common law rights without providing any direct offsetting legal benefit to plaintiffs. There is some doubt as to whether a legislative *quid pro quo* is constitutionally required to comport with the Fifth Amendment. However, if a court finds such a requirement does exist, the courts will be forced to consider whether any legal benefit provided by the laws must apply to impacted litigants in particular or society as a whole, and the extent the legal benefit must offer a reasonably comparable substitute to harmed plaintiffs.

The Seventh Amendment jury trial issues raised by the tort reforms are also somewhat novel. If the Court takes up this question, it will need to consider whether the Seventh Amendment applies to federal legislation abrogating state court jury rights and the extent reforms such as damage caps represent factual issues (traditionally considered by juries) or legal issues (traditionally resolved by legislatures).

As for the Tenth Amendment, the third wave tort reforms described in this article not only alter state substantive tort law, but in some cases go on to proscribe detailed state court procedures. Although federalism-based challenges to federal tort reforms have been unsuccessful in the past, in recent years the Court has shown renewed interest in the Tenth Amendment in *New York v. United States*[490] and *Printz*.[491] Under these cases, the principal issue for pending tort reforms will be whether they constitute a "commandeering" of the state legislative process, or merely require that state courts honor federal law.

Political constraints have mandated that the third wave reforms enacted to date be relatively narrow and modest in their scope. It is perhaps because of these limitations that no case has yet arisen presenting these constitutional issues in the context of a recently enacted reform.[492] However, if Congress enacts any of the broader reforms currently being considered, the courts will likely be faced with the constitutional questions noted in this article.

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489 *See* 512 U.S. at 418.

490 505 U.S. at 144.

491 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (5-4 decision).

492 For example, the dissenting views to the House Judiciary Report on the Volunteer Protection Act noted that a Westlaw search of indicated the legislation would not have altered the decision of any case reported over the prior seven years. H.R. Rep. No. 105-101, pt. 1, at 17 (1997).