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Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes

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Summary

This report considers the constitutionality of federal tort reform legislation, such as the products liability and medical malpractice reform proposals that have been introduced for the last several Congresses. Tort law at present is almost exclusively state law rather than federal law, although, as noted in the appendix to this report, Congress has enacted a number of tort reform statutes.

Part I of this report concludes that Congress has the authority to enact tort reform legislation generally, under its power to regulate interstate commerce, and to make such legislation applicable to intrastate torts, because tort suits generally affect interstate commerce. However, it may be unconstitutional for tort reform legislation to be applied to particular intrastate torts that do not substantially affect interstate commerce.

In concluding that Congress has the authority to enact tort reform "generally," we refer to reforms that have been widely implemented at the state level, such as caps on damages and limitations on joint and several liability and on the collateral source rule. More specialized types of reforms are not necessarily immune from constitutional challenge. For example, some state courts have struck down statutes that provide that a portion of punitive damages awards must be paid to state funds (although other state courts have upheld such statutes).

Part I also concludes that there would appear to be no due process or federalism (or any other constitutional) impediments to Congress's limiting a state common law right of recovery. The only exception concerns requiring alternative dispute resolution that limits the right to a jury trial.

Part II considers alternative dispute resolution alternatives, some of which could have constitutional problems. The Seventh Amendment would preclude Congress from eliminating the right to a jury trial in common law tort actions brought in federal court. Congress may, however, eliminate the right to bring common law tort actions in federal court, or eliminate common law tort actions themselves.

Congress apparently may create Article I tribunals, such as arbitration panels, to hear tort claims, if it alters tort claims so that they are no longer traditional common law actions (but rather are like no-fault workers' compensation claims), or if it allows *de novo* review by an Article III court, with the right to a jury trial, of traditional common law tort actions (rather than allow merely traditional appellate review). It apparently may also opt for a middle ground by altering the common law cause of action somewhat but not wholly, and by pro-viding for something less than *de novo* review by an Article III court, provided that the Article III court is not required to be too deferential to the findings of the Article I tribunal.

Finally, a strong argument may be made that Congress has the power to eliminate jury trials in tort actions brought in state court, but this is uncertain.

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Introduction

This report considers the constitutionality of federal tort reform legislation, such as the products liability and medical malpractice reform proposals that have been introduced for the last several Congresses. A tort is a civil (as opposed to a criminal) wrong, other than a breach of contract, that causes injury for which the victim may sue to recover damages. Torts include negligent acts, such as medical malpractice, and acts, such as selling defective products, for which one can be held strictly liable (liable even in the absence of negligence). Tort law at present is almost exclusively state law rather than federal law, although, as noted in the appendix to this report, Congress has enacted a number of tort reform statutes.

Part I of this report concludes that enactment of tort reform legislation generally would appear to be within Congress's power to regulate commerce, and would not appear to violate principles of due process or federalism. However, it may be unconstitutional for tort reform legislation to be applied to particular intrastate torts that do not substantially affect interstate commerce. In concluding that Congress has the authority to enact tort reform "generally," we refer to reforms that have been widely implemented at the state level, such as caps on damages and limitations on joint and several liability and on the collateral source rule. More specialized types of reforms are not necessarily immune from constitutional challenge. For example, some state courts have struck down statutes that provide that a portion of punitive damages awards must be paid to state funds (although other state courts have upheld such statutes).

Part II of this report considers alternative dispute resolution alternatives, some of which could have constitutional problems. Part III is a conclusion. The report ends with an appendix describing selected federal tort reform statutes.

Part I: Tort Reform Generally

A. Commerce Power

A federal statute is constitutional if it is enacted pursuant to a power of Congress enumerated in the Constitution and if it does not contravene any provision of the Constitution. The enumerated power pursuant to which federal tort reform could be enacted is Congress's power "To regulate Commerce with foreign Nations, and among the several States" (Art. I, § 8, cl. 3).[1] One might ask, however, whether tort law is "commerce," and, if it is, whether federal tort reform legislation would be constitutional as applied to purely *intrastate* torts.

The Supreme Court has held that Congress's power to regulate interstate commerce includes the power to regulate any activity that "exerts a substantial effect on interstate commerce" (*Wickard v. Filburn*, 317 U.S. 111, 125 (1942)), or is within a "*class of activities* . . . within the reach of federal power" (*Perez v. United States*, 402 U.S. 146, 154 (1971) (emphasis in original)). Furthermore, "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 277 (1981).[2]

The Supreme Court has held that the business of insurance constitutes interstate commerce for purposes of the Commerce Clause (*United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944)), and, whether or not tort reform would in fact substantially affect the business of insurance, it would not appear irrational for Congress to conclude that it would. Consequently, there seems little doubt that tort reform legislation, in general, would be within Congress's commerce power.

However, it may be unconstitutional for tort reform legislation to be applied to particular intrastate torts that arguably do not substantially affect interstate commerce. An example might be an assault by one individual upon another where the assault has no connection with organized crime or any commercial activity. This is because, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court, for the first time since 1936, declared a federal statute unconstitutional for exceeding Congress's Commerce Clause authority. In *Lopez*, it struck down the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."

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[1] In addition, under its power to spend for the "general Welfare of the United States" (Art. I, § 8, cl. 1), Congress may require the states to implement tort reform as a condition of their acceptance of federal funds. South Dakota v. Dole, 483 U.S. 203, 206 (1987) (Congress "may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys with compliance by the recipient with federal statutory and administrative directives'").

[2] In *United States v. Lopez*, 514 U.S. 549, 559 (1995), the Supreme Court made clear that, to be subject to federal regulation, an activity must "substantially affect" and not merely "affect" interstate commerce.

The Court in *Lopez* "identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce.[3] Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at 558-559 (citations omitted).

The Court in *Lopez* then noted that, if the Gun-Free School Zones Act of 1990 was "to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Id.* at 559. The Act, however, had "nothing to do with 'commerce' or any sort of economic enterprise . . . [and] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. The same apparently could be said of some torts, such as the assault example suggested above. But it does not appear that it could be said with respect to torts that substantially affect commerce, such as the manufacture of defective products or medical malpractice.

There has been one Supreme Court case since *Lopez* that addressed the reach of the Commerce Clause. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court struck down a section of the Violence Against Women Act of 1994 that created a federal cause of action against any person "who commits a crime of violence motivated by gender," whether interstate or intrastate. In striking down the provision, the Court noted that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case" (*id.* at 610), and "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[4] *Id.* at 613.

In *Lopez*, the Court noted that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." 514 U.S., at 562. It added, however:

> But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no substantial effect was visible to the naked eye, they are lacking here.

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[3] This power enables Congress to regulate noncommercial activities that cross state lines. Thus, in *Caminetti v. United States*, 242 U.S. 470 (1917), the Court upheld a federal statute that it a crime knowingly to transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose," even though the statute, as interpreted by the Court, was not limited to "commercialized vice." *Id.* at 484.

[4] The Court added: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. By contrast, the Court will uphold Commerce Clause regulation of *interstate* activity that is not economic in nature; see note 3, *supra*.

Id. at 563. In *Morrison*, the Court found Congress's findings "substantially weakened" by their reliance on a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." 529 U.S., at 615.

B. Due Process

At one time, it might plausibly have been suggested that limitations on tort reform might violate the Fifth Amendment's protection against federal deprivations of property without due process of law. However, in 1978, the Supreme Court, upholding the Price-Anderson Act's limitation on liability for accidents resulting from the operation of privately owned nuclear power plants, wrote:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of common law." The "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," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88, n.32 (1978) (citations omitted).

In 1985, the Supreme Court, without written opinions, upheld the constitutionality of California statutes that placed caps in medical malpractice cases on, respectively, noneconomic damages and lawyers' contingent fees.[5]

C. Federalism

In *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976), the Supreme Court held that the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which prescribes the federal minimum wage, could not constitutionally be applied to employees of state and municipal governments. There was no contention that Congress's commerce power was not broad enough to encompass this sort of regulation. The contention, rather, which the Court accepted, was that the Constitution contained an affirmative limitation on this exercise of the commerce power. The Court did not name any particular provision of the Constitution as imposing the limitation in this case, but did quote an earlier case that said that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[6]

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[5] Fein v. Permanente Medical Group, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), *appeal dismissed*, 474 U.S. 892 (1985) (Justice White dissenting); Roa v. Lodi Medical Group, Inc., 37 Cal.3d 920, 211 Cal. Rptr. 77, 695 P.2d 164 (1985), *appeal dismissed*, 474 U.S. 990 (1985).

[6] 426 U.S. at 843, quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor

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In any event, the Court held that the Commerce Clause did not authorize Congress "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852. The only example the Court gave of an integral governmental function was the structuring of "employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. It added, however, that "[t]hese examples are obviously not an exhaustive catalogue." *Id.* at 851 n.16.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities*, holding that the Fair Labor Standards Act could be applied to state and municipal employees. It concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven both "impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair." *Id.* at 557. The Court found that it had "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause." *Id.* at 550. The Court did, however, "recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress's authority under the Commerce Clause must reflect that position." *Id.* at 556.

Subsequently, the Court took a step back in the direction of *National League of Cities*. In *New York v. United States*, 505 U.S. 144 (1992), the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 because it required states not participating in a regional waste disposal compact to "take title" to waste or accept liability for generators' damages. The Court readily acknowledged that Congress may regulate the interstate market in disposal of low-level radioactive waste, but noted that the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 166.

The Court discussed two methods "by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . First, under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.' . . . Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167.

But if states decline to participate in a federal scheme, Congress may not force them to do so; to have its way, Congress must preempt state law and regulate directly. The "take title" provision, rather than presenting states with a choice between regulatory participation or accepting federal preemption, required states to choose "between two unconstitutionally coercive regulatory techniques . . . . Either

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[6] (...continued)
prohibited by it to the States, are reserved to the States respectively, or to the people."

way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176.[7]

Under *New York v. United States*, the only significant federalism restraint on exercise of the commerce power is that state regulatory processes may not be "commandeered" for federal purposes; there is no federalism restraint on federal regulation of businesses and individuals in areas traditionally regulated by states. The fact that Congress has traditionally deferred in large measure to state regulation of the insurance industry, for example, does not mean that Congress must continue to do so; Congress does not invade areas reserved to the states by the Tenth Amendment "simply because it exercises its authority . . . in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 291 (1981) (upholding "steep slope" and other federal regulations of surface mining in spite of traditional state role in regulating land use).

In the case of federal tort reform proposals such as reducing awards by amounts recovered from collateral sources, Congress would not be commandeering state regulatory processes. Congress would merely be enacting federal law that preempted substantive state law, and requiring states to enforce the federal law. In *New York v. United States*, the Court cited four cases that discuss "the well established power of Congress to pass laws enforceable in state courts." *Id.* at 178. The Court added:

> These cases involve no more than an application of the Supremacy Clause's provision 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 judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause.

Id. at 178-179. One of the four cases the Supreme Court cited, *Second Employers' Liability Cases*, 223 U.S. 1 (1912), involved what today would be called tort reform. The case was a challenge to the Employers' Liability Act of 1908, which regulated the liability of common carriers by railroad to their employees; it was essentially a federal workers' compensation statute that preempted state tort law by, among other things, its "abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk . . . ." *Id.* at 49. One question before the Supreme Court was "whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 55. The Court answered the question as follows:

> When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby

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[7] Subsequently, in *Printz v. United States*, 521 U.S. 898, 935 (1997), the Court held that Congress may not "circumvent" the prohibition on commandeering a state's regulatory processes "by conscripting the State's officers directly."

> established policy for all. That policy is as much the policy of Connecticut as it the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

Id. at 57.

Part II: Alternative Dispute Resolution

One tort reform that may be considered by Congress is to require that tort claims — particularly medical malpractice claims — be decided by alternative dispute resolution (ADR) procedures, such as binding arbitration, rather than by traditional jury trials. When Congress creates a federal cause of action, it is generally free to prescribe any procedure for its enforcement, with or without a jury trial.[8] Traditional tort actions, however, such as medical malpractice and products liability, are not federal causes of action; they are governed by state law, even when they are brought in federal court on diversity grounds.[9] State laws generally provide for jury trials in tort cases brought in state courts,[10] and the Seventh Amendment to the United States Constitution generally provides for jury trials of cases arising under state law that are brought in federal court.[11] The question has arisen, therefore, as to the extent to which the Constitution permits Congress to require alternative dispute resolution, in federal or state forums, of tort claims arising under state law.

A. Seventh Amendment

If Congress were to require ADR procedures in lieu of jury trials, then the Seventh Amendment would become a consideration. The Seventh Amendment guarantees the right to trial by jury "In Suits at common law, where the value in controversy shall exceed twenty dollars."[12] Tort actions are suits at common law, so the Seventh Amendment applies to them.[13] However, the Seventh Amendment,

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[8] "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 (1989).

[9] Suits based on state law may be brought in federal court only if the matter in controversy exceeds $75,000 and the plaintiff and defendant are domiciled in different states. This is known as "diversity of citizenship." 28 U.S.C. § 1332.

[10] "The constitutions of 48 states . . . have civil jury provisions roughly analogous in form and substance to the seventh amendment." Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Catholic University Law Review 737, 739 (1989).

[11] Simler v. Connor, 372 U.S. 221 (1963).

[12] "Common law" refers to law created by state courts, on a case-by-case basis.

[13] This does not mean that juries must operate exactly as they did at common law. In *Colgrove v. Battin*, 413 U.S. 149 (1973), the Supreme Court upheld rules adopted in a federal district court authorizing civil juries composed of six persons. By the reference in

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unlike most of the Bill of Rights, does not apply in state courts,[14] where most tort actions are brought. It does apply, however, to cases arising under state law that are brought in federal court on diversity grounds.[15]

Therefore, Congress may not eliminate the right to a jury trial in common law tort actions brought in federal court. It may, however, eliminate the right to bring common law tort actions in federal court. One way to do this would be to abolish diversity jurisdiction in tort suits; *i.e.*, to prohibit tort suits arising under state law from being brought in federal courts.[16] Another way would be to alter tort suits to the point that they could no longer be considered "Suits at common law" to which the Seventh Amendment would apply.

Congress has done the latter with respect to torts inflicted upon federal workers in the workplace. The Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 *et seq.*, provides for compensation to federal employees for disability or death resulting from work-related injuries, whether the result of a tort or otherwise. Employees can recover without proof of fault on the part of the government or its employees, but are prohibited from bringing a tort action arising under state law against the government or its employees.[17] An injured employee seeking recovery must file a claim with the Secretary of Labor, who determines whether the employee is entitled to an award. There is no right to a jury trial, nor to judicial review. The Supreme Court has held that such an arrangement does not violate the Seventh Amendment because it "abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."[18]

It appears, therefore, that Congress may prohibit common law tort suits from being brought in federal court, but may not take the less radical step of allowing them to be brought in federal court but prohibiting them from being heard by juries. If Congress may not require common law tort suits to be heard by a federal court without a jury, then it also may not require them to be decided by a federally

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[13] (...continued)
the Seventh Amendment to the "common law," the Court wrote, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury." *Id.* at 155-156 (emphasis in original). Presumably, allowing a less than unanimous verdict would also be permissible, even though a unanimous verdict was required at common law.

[14] Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916). The Seventh Amendment does apply in District of Columbia courts. Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

[15] Simler v. Connor, *supra* note 11.

[16] Congress, pursuant to the Constitution (Art. III, § 1) "may from time to time ordain and establish," and hence limit the jurisdiction of, "inferior" federal courts. (Art. I, § 3, directly establishes the Supreme Court.)

[17] *See* 5 U.S.C. § 8116(c) (United States' liability under FECA is exclusive); 28 U.S.C. § 2679(b)(1) (federal employees are immune from tort actions arising under state law).

[18] Mountain Timber Co. v. Washington, 243 U.S. 219, 235 (1917).

established arbitration panel or other federally established non-judicial forum.[19] To do so would violate not only the Seventh Amendment; it would violate Article III of the Constitution.

B. Article III

Article III, section 1, provides that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may establish, and that the judges of both the supreme and inferior courts shall hold life tenure "during good Behavior," at an irreducible compensation. Federal courts created under this provision are commonly known as "Article III courts." In addition, however, Congress, pursuant to its powers enumerated in Article I, may establish Article I "legislative" courts in "specialized areas having particularized needs and warranting distinctive treatment."[20] Article I judges need not be granted life tenure or irreducible salaries.

However, since only Article III courts may exercise the judicial power of the United States, Congress's power to create Article I courts is limited to the above "specialized areas." Except in these areas, Congress may not provide for federal judicial power to be exercised by federally established arbitration panels, or by any federal forum other than an Article III court.

In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, the Supreme Court "identified three situations in which Art. III does not bar the creation of legislative courts."[21] These three situations are territorial courts, military courts, and courts created to adjudicate cases involving "public rights."[22] With respect to the third situation, *Marathon* elaborated:

> [A] matter of public rights must at a minimum arise "between the government and others." In contrast, "the liability of one individual to another under the law as defined," is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.[23]

Subsequently, the Court rejected the notion that public rights must at a minimum arise between the government and others.[24] In *Granfinanciera, S.A. v. Nordberg*, the Court wrote:

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[19] Whether Congress may require the use of non-federally established arbitration panels is considered in Section F, below.

[20] Palmore v. United States, 411 U.S. 389, 408 (1973).

[21] 458 U.S. 50, 70 (1982).

[22] *Id.* at 64-70.

[23] *Id.* at 69-70 (emphasis in original; citations omitted).

[24] Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 586 (1985).

> The crucial question, in cases not involving the Federal Government, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.[25]

C. Article III / Seventh Amendment Equivalence

The constitutional problem with placing common law tort actions in an Article I tribunal is equivalent to the constitutional problem with denying jury trials in such cases. In *Granfinanciera, S.A. v. Nordberg*, the Court noted that Congress cannot

> conjure away the Seventh Amendment by mandating that traditional legal [*i.e.*, common law] claims be . . . taken to an administrative tribunal. In certain situations, of course, Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. Congress' power to do so is limited, however, just as its power to place adjudicative authority in non-Article III tribunals is circumscribed.[26]

That is, the situations in which Congress may deny the right to a jury trial are the same situations in which Congress may place a matter outside of an Article III court. In the Court's words:

> [I]f a statutory cause of action is legal [*i.e.*, common law] in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. . . . [I]f the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal [*i.e.*, common law] in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.[27]

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[25] 492 U.S. 33, 54-55 (1989) (citation omitted).

[26] *Id.* at 52 (emphasis in original; citations omitted).

[27] *Id.* at 53-54.

D. Applying Article III and the Seventh Amendment

Whether a federal statute requiring tort claims to be decided by an Article I tribunal would violate Article III, and whether it would violate the Seventh Amendment, amount to the same question. But what is the answer? Before examining some Supreme Court decisions that may shed light on it, we should emphasize that the question arises only if Congress were to establish a federal non-Article III forum to hear traditional tort claims. If Congress instead were simply to prohibit states from using jury trials in tort cases, but did not establish an Article I forum for such cases, then it might raise another constitutional issue (which is discussed in Section F, below) but it would not raise an Article III / Seventh Amendment issue.[28] This is because state courts were created pursuant to state laws or constitutions and do not exercise federal judicial power, and because the Seventh Amendment does not apply to them.

But to what extent may Congress require that tort claims be decided by an Article I tribunal? In *Thomas v. Union Carbide Agricultural Products Co.*, the Supreme Court noted that *Northern Pipeline* had established "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review."[29] The same undoubtedly applies to traditional tort actions arising under state law. However, this quotation suggests that Congress may vest tort claims in a non-Article III forum if it does at least one of two things: (1) alters tort claims so that they are no longer traditional common law actions, or (2) allows *de novo* review, with the right to a jury trial, of traditional common law tort actions, rather than allow merely traditional appellate review. In other words, Congress apparently may require that traditional common law tort actions initially be heard in a federal non-Article III forum, without a jury, provided it allows a dissatisfied party to then seek a jury trial.[30] However, if Congress wishes to limit judicial review of tort claims, then it apparently must alter tort claims so that they are no longer traditional common law tort actions.

To what extent must Congress alter tort claims in order to place them in a non-Article III forum and not provide *de novo* review? In *Granfinanciera*, the Court held that "Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the gambit of the Seventh Amendment" if, in cases not involving the federal government, the private right that Congress creates "is so closely integrated into a public regulatory scheme as to be a matter appropriate

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[28] Prohibiting states from using jury trials in tort cases, without establishing a federal forum to decide such cases, might be done in various ways, such as by requiring binding arbitration or by allowing ordinary state court trials but requiring that judges be factfinders.

[29] 473 U.S. 568, 584 (1985).

[30] In the National Childhood Vaccine Injury Act of 1986, as amended, 42 U.S.C. §§ 300aa-1 – 300aa-34, Congress required that vaccine-related injury claims be heard by a special master designated by the United States Claims Court. However, the statute both alters the traditional common law action to a no-fault claim with limited recovery, and allows a dissatisfied claimant to bring a traditional state tort action, with some modifications.

for agency resolution with limited involvement by the Article III judiciary."[31] In *Thomas*, the Court indicated that such limited involvement may consist in judicial review that is something less than *de novo* review with the right to a jury trial.

In *Thomas*, the Court rejected the notion that a matter of public rights must at a minimum arise between the government and others.[32] Instead, it held "that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[33] *Thomas* involved a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* FIFRA requires manufacturers, as a precondition for registration of a pesticide, to submit research data to the Environmental Protection Agency (EPA) concerning the product's health, safety, and environmental effects. Congress wished to allow the EPA to consider data submitted by one registrant to support the registration of the same or a similar product by another registrant, and therefore "provided statutory authority for the use of previously submitted data as well as a scheme for sharing the costs of data generation."[34] In order to avoid a "logjam of litigation that resulted from controversies over data compensation," Congress provided for "a system of negotiation and binding arbitration to resolve compensation disputes among registrants."[35] "The arbitrator's decision is subject to judicial review only for 'fraud, misrepresentation, or other misconduct.'"[36]

The Court considered several factors in determining that an Article III tribunal was not required to resolve these disputes. It found mandatory binding arbitration permissible in part because the right to compensation for shared data "does not depend on or replace a right to . . . compensation under state law."[37]

> The right created by FIFRA is not purely a "private" right, but bears many of the characteristics of a "public" right. Use of a registrant's data to support a follow-on [*i.e.*, subsequent] registration serves a public purpose as an integral part of a program safeguarding the public health. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication.[38]

Thus, to use the words of the Court in *Granfinanciera* a few years later, *Thomas* involved a private right that was "closely integrated into a public regulatory

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[31] 492 U.S. at 52, 54.

[32] 473 U.S. at 586.

[33] *Id.* at 587.

[34] *Id.* at 572.

[35] *Id.* at 573.

[36] *Id.* at 573-574.

[37] *Id.* at 584.

[38] *Id.* at 589.

scheme."[39] In addition, the Court in *Thomas* cited the fact that "no unwilling defendant is subjected to judicial enforcement power as a result of the agency 'adjudication,'"[40] and that FIFRA, while it limits judicial review, it "does not preclude review of the arbitration proceeding by an Article III court."[41]

In *Commodity Futures Trading Commission v. Schor*, the Supreme Court again emphasized that, in determining whether an Article III tribunal is required, it

> has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of law, they might also unduly restrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.[42]

The opinion in *Schor* reveals how nonformalistic the Court's approach is in this area:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[43]

The Court in *Schor* upheld a congressional grant of adjudicatory powers to a federal agency, the Commodity Futures Trading Commission (CFTC). The Court emphasized that the CFTC's

> adjudicatory powers depart from the traditional agency model in just one respect: the CFTC's jurisdiction over common law counterclaims. . . . Aside from its authorization of counterclaim jurisdiction, the [statute] leaves far more of the "essential attributes of judicial power" to Article III courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*.[44]

Specifically, CFTC orders are reviewed under the "weight of the evidence" standard, "rather than the more deferential standard found lacking in *Northern*

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[39] 492 U.S. at 54.

[40] 473 U.S. at 591.

[41] *Id.* at 592.

[42] 478 U.S. 833, 851 (1986) (citations omitted).

[43] *Id.*

[44] *Id.* at 852.

Pipeline." Furthermore, "[t]he legal rulings of the CFTC . . . are subject to *de novo* review."[45]

In *Northern Pipeline* the Court found unconstitutional the delegation to an Article I tribunal — the United States Bankruptcy Court — of the adjudication of the right to recover contract damages. Although discharge in bankruptcy "may well be a 'public right'" and if it is may be delegated to an Article I court, the right to recover contract damages is a state-created private right and as such may not be delegated to an Article I court.[46] In response to the argument that "the bankruptcy court is merely an 'adjunct' to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts,"[47] the Supreme Court observed that "the judgments of the bankruptcy courts are apparently subject to review only under the more deferential 'clearly erroneous' standard."[48] Such limited review gave the bankruptcy courts more power than was permissible for an "adjunct."

In *Granfinanciera*, the Court held that the Seventh Amendment requires a jury trial in a suit by a trustee in bankruptcy to recover an allegedly fraudulent monetary transfer. It reached this conclusion because

> a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private right rather than a public right as we have used those terms in our Article III decisions. In *Northern Pipeline Construction Co.* . . . the plurality noted that . . . state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings.[49]

It was not sufficient that Congress had "reclassified a pre-existing, common-law cause of action. . . . Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity."[50]

"Nor," the Court added, "can Congress' assignment be justified on the ground that jury trials of fraudulent conveyance actions would 'go far to dismantle the statutory scheme,' or that bankruptcy proceedings have been placed in 'an administrative forum with which the jury would be incompatible.'"[51]

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[45] *Id.* at 853.

[46] 458 U.S. at 71.

[47] *Id.* at 77.

[48] *Id.* at 85.

[49] 492 U.S. at 55-56.

[50] *Id.* at 60-61.

[51] *Id.* at 61 (citations omitted).

Furthermore, "[i]t may be that providing jury trials in some fraudulent conveyance actions . . . would impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'"[52]

E. Constitutionality of Establishing Federal Non-Article III Forums: Conclusion

In *Thomas*, the Court upheld the use of a non-Article III forum because, among other things, the right created was "not purely a 'private' right," and limited judicial review by an Article III court was permitted.[53] In *Schor*, the Court upheld the use of a non-Article III forum because, among other things, its adjudicatory powers over common law actions were limited, its orders were reviewed by an Article III court under a relatively non-deferential standard, and its legal rulings were subject to *de novo* review.

In *Northern Pipeline*, the Court struck down the use of an Article I forum because it was allowed to decide state-created private rights, and its decisions were subject only to deferential judicial review. In *Granfinanciera*, the Court struck down the use of an Article I forum because the right that was adjudicated was a private right.

These cases show that, as the Court wrote in *Schor*, "in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[54] However, the major factors appear to be the extent to which the cause of action constitutes a private right, and the degree of review by an Article III tribunal that is provided. If a cause of action is a traditional common law cause of action, not closely integrated into a federal regulatory scheme, then *de novo* review by an Article III court, with a jury trial, would apparently be required. If the cause of action is altered somewhat, but still resembles a common law action, then something less than *de novo* review by an Article III court might be adequate, provided the Article III court is not required to be too deferential to the finding of the non-Article III forum. If the cause of action is altered to the point that it no longer resembles a common law tort, and is closely integrated into a federal regulatory scheme, then adjudication by an Article I forum, without judicial review, may be permissible. It does not seem possible to be more specific than this, as "bright-line rules cannot effectively be employed to yield broad principles applicable to all Article III inquiries."[55]

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[52] *Id.* at 63.

[53] 473 U.S. at 589.

[54] 478 U.S. at 851.

[55] *Id.* at 857.

F. Constitutionality of Prohibiting States from Using Jury Trials, Without Establishment of a Federal Non-Article III Forum

As noted above, if Congress were to prohibit the states from using jury trials in tort cases, but did not establish a federal non-Article III forum to hear such cases, then it would raise no Article III / Seventh Amendment issue, but it would raise another constitutional issue. This issue is whether Congress, even where it would otherwise have the power to regulate under the Commerce Clause, may alter the procedures that state courts use to adjudicate state causes of action. In *New York v. United States*, discussed at page 5, above, the Court prohibited Congress from using its commerce power to commandeer state regulatory processes. Although, as noted, this restriction would not seem to preclude Congress from preempting substantive state law, it might be argued that eliminating jury trials, constituting as it would an interference with state court procedure, might amount to commandeering state regulatory processes.

This distinction between substance and procedure also finds support in the Supreme Court's approach to diversity cases, which are cases arising under state law which, because they are between citizens of different states and the amount in controversy exceeds $50,000, may be heard in federal court. 28 U.S.C. § 1332. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1937), the Supreme Court held that, in diversity cases, a federal court is bound by the substantive, as opposed to the procedural, law of the state in which it sits, "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision."[56]

In *Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945), the Supreme Court held that statutes of limitations are substantive for this purpose, and that therefore federal courts must apply state statutes of limitations in diversity cases. By "substantive," the Court meant that the statute could substantially affect the outcome of the litigation. A statute of limitations can substantially affect the outcome of litigation because it can preclude an action from even being brought. By contrast, the right to a jury trial does not have a comparably substantial effect, because in a non-jury trial a judge presumably applies the same law to the same facts as a jury would in a jury trial.

In diversity cases, "[i]t is now clear that federal law determines whether there is a right to a jury trial in a case in federal court and that state law is wholly irrelevant."[57] Although the Seventh Amendment, rather than the substantive/procedural distinction, is the main factor here, one could nevertheless argue that, if federal courts may use the federal rule with respect to jury trials of state causes of

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[56] In *Kline v. Wheels by Kinney, Inc.*, 464 F.2d 184, 187 (4th Cir. 1972), a federal court wrote: "With no North Carolina case directly on point, our judicial chore is to 'determine the rule that the North Carolina Supreme Court would probably follow, not fashion a rule which we, as an independent federal court, might consider best.'"

[57] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE : CIVIL § 2303.

action, then state courts may not be preempted from using their own rules with respect to jury trials of state causes of action.

In addition, "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. For example, state rules about the ways in which claims for relief, or defenses, or counter-defenses, must be asserted may ordinarily be applied also to federal claims and defenses and counter-defenses, providing only that the rules are not so rigorous as, in effect, to nullify the asserted rights."[58]

This general rule seems to have operated in a 1950 case in which the Supreme Court held that a state may "deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially . . . so as not to involve a discrimination against Employers' Liability Act suits . . . ."[59]

There is an apparently strong argument, however, in support of Congress's power to eliminate jury trials in state causes of action heard in state courts. The Supreme Court has held that section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, preempts conflicting state law. This statute provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable," and thus effectively eliminates the right to a jury trial in some state cases. In *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984), the Supreme Court found that "[t]he Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause," and that it preempted a state statute that had been interpreted to require judicial consideration of claims brought under a state statute. In *Perry v. Thomas*, 482 U.S. 483 (1987), and in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Supreme Court again found the Federal Arbitration Act to preempt conflicting state law. If Congress can eliminate judicial consideration of a case, then arguably it can eliminate jury consideration while retaining judicial consideration.

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[58] Hart, *The Relations Between State and Federal Law*, 54 Columbia Law Review 489, 508 (1954). The Supreme Court has qualified this rule, writing: "Federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'" Felder v. Casey, 487 U.S. 131, 150 (1988). However, federal rights of recovery would not be at issue if Congress sought to eliminate jury trials of state tort claims, and the Court's qualification would be irrelevant in such a case.

[59] Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U.S. 1, 4 (1950). The Court continued, however: "No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it," thus not addressing the issue of the constitutionality of Congress's imposing such a restriction.

Part III: Conclusion

A. Tort Reform Generally

Congress has the authority to enact tort reform legislation generally, under its power to regulate interstate commerce, and to make such legislation applicable to intrastate torts, because tort suits generally affect interstate commerce. However, it may be unconstitutional for tort reform legislation to be applied to particular intrastate torts that arguably do not substantially affect interstate commerce.

There would appear to be no due process or federalism (or any other constitutional) impediments to Congress's limiting a state common law right of recovery. The only exception concerns requiring alternative dispute resolution that limits the right to a jury trial.

B. Alternative Dispute Resolution

The Seventh Amendment would preclude Congress from eliminating the right to a jury trial in common law tort actions brought in federal court. Congress may, however, eliminate the right to bring common law tort actions in federal court, or eliminate common law tort actions themselves.

Congress apparently may create Article I tribunals, such as arbitration panel, to hear tort claims, if it alters tort claims so that they are no longer traditional common law actions (but rather are like no-fault workers' compensation claims), or if it allows *de novo* review by an Article III court, with the right to a jury trial, of traditional common law tort actions (rather than allow merely traditional appellate review). It apparently may also opt for a middle ground by altering the common law cause of action somewhat but not wholly, and by providing for something less than *de novo* review by an Article III court, provided that the Article III court is not required to be too deferential to the findings of the Article I tribunal.

Finally, a strong argument may be made that Congress has the power to eliminate jury trials in tort actions brought in state court, but this is uncertain.

Appendix: Selected Federal Tort Reform Statutes

Employers Liability Act of 1908, 35 Stat. 65, c. 149. This statute regulated the liability of common carriers by railroad to their employees; it was essentially a federal workers' compensation statute that preempted state tort law by, among other things, its "abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk . . . . " *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 49 (1912). In this case, the Supreme Court upheld the constitutionality of the statute, including the power of Congress to regulate commerce to override state tort law. The Court wrote:

> When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established policy for all. That policy is as much the policy of Connecticut as it the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

Id. at 57.

Price-Anderson Act, 42 U.S.C. § 2210(e). This statute limits the tort liability of Nuclear Regulatory Commission licensees (such as nuclear power plants) and Department of Energy nuclear contractors for a single "nuclear incident." For example, for nuclear power plants, the liability limit is pegged to the amount of financial protection required of the licensee under a two-tiered system of privately available insurance plus industrywide pro-rata contributions. That total, including a 5 percent "surcharge" provided for in the Act, is currently $9.09 billion.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88, n.32 (1978), the Supreme Court upheld the constitutionality of the Act, writing:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of common law." The "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," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts [citations omitted].

Atomic Testing Liability Act, 42 U.S.C. § 2212. This 1990 statute, which reenacted the Warner Amendment, § 1631 of P.L. 98-525 (1984), made the Federal Tort Claims Act the exclusive remedy for suits against government contractors who carried out atomic weapons testing programs that caused injury or death due to exposure to radiation. In other words, this law immunized the contractors from

liability under state tort law and made the United States liable in their place.[60] Two federal courts of appeals upheld the constitutionality of the Warner Amendment.[61]

Other Statutes that Substitute the United States as Defendant. The Atomic Testing Liability Act is only one of many statutes that substitute the United States as the defendant in place of a private entity or person in suits arising under state tort law. The Federal Tort Claims Act itself immunizes federal employees from suits under state tort law for acts committed within the scope of employment. 28 U.S.C. § 2679(b)(1). The National Swine Flu Immunization Program of 1976, P.L. 94-380, made the United States liable for injuries arising out of the administration of the swine flu vaccine to the extent that vaccine manufacturers or distributors would be liable under state law, though it allowed the United States, if it paid any claim, to sue a vaccine manufacturer or distributor whose negligent conduct had caused the injury giving rise to such claim.[62]

Congress has also enacted more than 50 statutes that provide that various non-federal individuals or entities shall be treated as federal employees for purposes of liability.[63] These statutes generally apply to volunteers with various federal programs, including federally funded medical clinics and their officers and employees, "free clinic health professionals,"[64] members and personnel of the National Gambling Impact Study Commission, Peace Corps volunteers, and volunteers under the Volunteers in the National Forests Act of 1972 and the Volunteers in the Parks Act of 1969. A recent enactment of this type of provision was section 304 of the Homeland Security Act of 2002, Public Law 107-296, which treats manufacturers and administrators of smallpox vaccine as federal employees for liability purposes.

Volunteers and entities covered by these statutes and others may not be sued for torts committed within the scope of their employment, but victims of their negligence may sue the United States under the Federal Tort Claims Act. The United States' liability, however, is limited in various ways. The United States may not, for example, be held liable for discretionary functions (*i.e.*, policy decisions), or for punitive damages.

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[60] As it happened, because of exceptions in the Federal Tort Claims Act, the United States could not be held liable, and Congress as a consequence enacted the Radiation Exposure Compensation Act, 42 U.S.C. § 2210 note, a compensation program for individuals exposed to radiation between specified dates in 1951 and 1962.

[61] *In re* Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); Hammond v. United States, 786 F.2d 8 (lst Cir. 1986).

[62] The Swine Flu law made the United States liable not only for the negligence but for the strict liability of manufacturers and distributors, even though the United States ordinarily may not be held strictly liable under the Federal Tort Claims Act, regardless of state law.

[63] Many of these statutes are listed in CRS Report 97-579, *Making Private Entities and Individuals Immune from Tort Liability by Declaring them Federal Employees.*

[64] For additional information on these first two categories, see CRS Report RS20984, *Public Health Service Act Provisions Providing Immunity from Medical Malpractice Liability.*

National Childhood Vaccine Injury Compensation Act of 1986 42 U.S.C. §§ 300aa-1 – 300aa-34. This statute prohibits suits under state tort law against manufacturers and administrators of specified vaccines unless the claimant first files a claim for limited (*e.g.*, $250,000 cap on pain and suffering) no-fault compensation with the National Vaccine Injury Compensation Program, which is "administered by a Director selected by the Secretary" of Health and Human Services. Claims are adjudicated by the United States Court of Federal Claims and are paid by the Vaccine Injury Compensation Trust Fund, which is funded by a tax on vaccines.

A claimant dissatisfied with recovery under the Program may sue under state tort law, but the statute imposes various limitations on such suits; for example, manufacturers are not liable for failure to provide warnings directly to the injured party, as warnings to the person administering the vaccine are made sufficient. 42 U.S.C. § 300aa-22(c).

Comprehensive Environmental Response, Compensation, and Liability Act (Superfund). This statute overrides state tort law in sections 112(e) and 309(a), 42 U.S.C. §§ 9612(e) and 9658(a). Section 112(e) provides that, "[r]egardless of any State statutory or common law to the contrary," no person who asserts a claim against the Fund shall be deemed to have waived any other claim arising from the same transaction. Section 309(a) provides that, "[i]n the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance . . . if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date," then the federally required commencement date shall govern.

General Aviation Revitalization Act, P.L. 103-298 (1994), 49 U.S.C. § 40101 note. P.L. 103-298 bars any products liability suit against a manufacturer involving planes more than 18 years old with fewer than 20 seats that are not used in scheduled service.

Cruise Ship Liability, P.L. 104-324, § 1129 (1996). This section of the Coast Guard Authorization Act of 1996 (P.L. 104-324) added 46 U.S.C. App. § 183(g):

> In a suit by any person in which the operator or owner of a vessel or employer of a crewmember is claimed to have vicarious liability for medical malpractice with regard to a crewmember occurring at a shoreside facility . . . such operator, owner, or employer shall be entitled to rely upon any and all statutory limitations of liability . . . in the State of the United States in which the shoreside medical care was provided.

Section 1129 also added 46 U.S.C. App. § 183c(b) to allow:

> contracts, agreements, or ticket conditions of carriage with passengers which relieve a crewmember, manager, agent, master, owner, or operator of a vessel from liability for infliction of emotional distress, mental suffering, or psychological injury . . . .

Such liability, however, may not be limited if the emotional distress, mental suffering, or psychological injury was the result of physical injury to the claimant or the result of the claimant's having been at actual risk of physical injury, if such injury or risk was caused by the negligence or fault of a crewmember or the manager, agent, master, owner, or operator. Such liability also may not be limited if it the emotional distress, mental suffering, or psychological injury was intentionally inflicted, or involved sexual harassment, sexual assault, or rape by a crewmember or the manager, agent, master, owner, or operator.

Bill Emerson Good Samaritan Food Donation Act, P.L. 104-210 (1996), 42 U.S.C. § 1791. P.L. 104-210 provides that a person or gleaner ("a person who harvests for free distribution to the needy"), except in cases of gross negligence or intentional misconduct, "shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product that the person or gleaner donates in good faith to a non-profit organization for ultimate distribution to needy individuals." The nonprofit organization that receives the donation shall also not be liable, except in cases of gross negligence or intentional misconduct. The statute defines "gross negligence" as "voluntary and conscious conduct (including a failure to act) by a person who, at the time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person."

Volunteer Protection Act of 1997, P.L. 105-19 (1997), 42 U.S.C. §§ 14501-14505. P.L. 105-19 provides immunity for ordinary negligence to volunteers for nonprofit organizations or governmental entities acting within the scope of their responsibilities, provided that, "if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities . . . ." The immunity does not apply to "willful or criminal conduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." This liability limitation does *not* apply to nonprofit organizations or governmental entities; they may be held vicariously liable for the ordinary negligence of their volunteers, even if volunteers are immune. Nonprofit organizations and governmental entities, however, may continue to benefit from any liability limitations provided by state law.

The Volunteer Protection Act of 1997 also eliminates joint and several liability for noneconomic damages with respect to volunteers' work for nonprofit organizations and governmental entities, and allows punitive damages only where the plaintiff establishes "by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."

The Volunteer Protection Act of 1997 preempts inconsistent state laws except to the extent that such laws provide additional protection from liability to volunteers, nonprofit organizations, or governmental entities. In addition, it allows states to enact statutes "declaring the election of such State that this Act shall not apply to such civil action in the State." If they do so, then the statute would not apply in any action if all parties to the action are citizens of the state.

Amtrak Reform and Accountability Act of 1997, P.L. 105-134, § 161 (1997), 49 U.S.C. § 28103. P.L. 105-134 limits damages in rail accidents. It permits punitive damages to be awarded, to the extent permitted by applicable state law, "only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others." It also provides: "The aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed $200,000,000."

Aviation Medical Assistance Act of 1998, P.L. 105-170 (1998), 49 U.S.C. § 44701 note. P.L. 105-170 provides that an air carrier shall not be liable for damages "arising out of the performance of the air carrier in obtaining or attempting to obtain the assistance of a passenger in an in-flight medical emergency, or out of the acts or omissions of the passenger rendering the assistance, if the passenger is not an employee or agent of the carrier and the carrier in good faith believes that the passenger is a medically qualified individual." In addition, an individual in such circumstances shall not be liable unless he or she "is guilty of gross negligence or willful misconduct."

Biomaterials Access Assurance Act of 1998, P.L. 105-230 (1998), 21 U.S.C. §§ 1601-1606. P.L. 105-230 limits the products liability under state law of biomaterials suppliers, which it defines as "an entity that directly or indirectly supplies a component part or raw material for use in the manufacture of an implant." A biomaterials supplier may be held liable under state law only if it is the manufacturer of the implant; if it is the seller of the implant in certain limited situations; or, if it is neither the manufacturer nor seller of the implant, then only if it supplied raw materials or component parts for use in the implant that either did not constitute the product described in the contract or failed to meet specifications as provided in the statute. The statute also contains special procedures for the dismissal of civil actions against biomaterials suppliers.

Y2K Act, P.L. 106-37 (1999), 15 U.S.C. §§ 6601-6617. P.L. 106-37 limits contractual and tort liability under state law in suits, other than those for personal injury or wrongful death, "in which the plaintiff's alleged harm or injury arises from or is related to an actual or potential Y2K failure . . . ." Limitations on tort liability include (1) a cap on punitive damages, of the lesser of three times the amount awarded for compensatory damages or $250,000, but the cap applies only to defendants who are individuals whose net worth does not exceed $500,000 or organizations with fewer than 50 full-time employees, (2) a "clear and convincing evidence" standard for the recovery of punitive damages, (3) the elimination of joint and several liability except in cases of specific intent to injure or knowing commission of fraud, and except in some cases in which damages against a defendant are uncollectible, and (4) except in the case of an "intentional tort arising independent of a contract," a prohibition on damages for economic loss, including lost profits or sales.

Cardiac Arrest Survival Act of 2000, P.L. 106-505, § 404 (2000), 42 U.S.C. § 238q. P.L. 106-505 provides good Samaritan protections regarding automated external defibrillators (AEDs). It provides that, with exceptions, "any

person who uses or attempts to use an automated external defibrillator device on a victim of a perceived medical emergency is immune from civil liability; and in addition, any person who acquired the device is immune from such liability," except in specified circumstances.

A defendant shall not have immunity under this statute if the defendant (1) commits willful or criminal misconduct or gross negligence, (2) is a licensed or certified health professional acting within the scope of employment or agency, (3) is a hospital or clinic whose employee or agent used the AED while acting within the scope of employment or agency, or (4) is an acquirer of the AED who leased it to a health care entity, and the harm was caused by an employee or agent of the entity.

This statute supersedes state law only to the extent that a state has no statute or regulations that provide persons within the class protected by this statute with immunity for civil liability arising from the use of AEDs.

Air Transportation Safety and System Stabilization Act, P.L. 107-42 (2001), § 201(b). P.L. 107-42 provides that, "[f]or acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this Act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism and . . . shall not be responsible for losses suffered by third parties (as referred to in section 205.5(b)(1) of title 14, Code of Federal Regulations) that exceed $100,000,000, in the aggregate, for all claims by such parties arising out of such act." If the Secretary so certifies, making the air carrier not liable for an amount that exceeds $100,000,000, then "the Government shall be responsible for any liability above such amount. No punitive damages may be awarded against an air carrier (or the Government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act."

This Act was enacted on September 22, 2001, and § 201(b) therefore sunset on March 21, 2002. It was extended, however, through 2003, by section 1201 of the Homeland Security Act of 2002, Public Law 107-296. The section in the Code of Federal Regulations that § 201(b) mentions refers to "persons, including non-employee cargo attendants, other than passengers"; these are apparently the "third parties" to whom § 201(b) refers.

September 11th Victim Compensation Fund of 2001, 49 U.S.C. § 40101 note. P.L. 107-42, Title IV, as amended, created a federal program to compensate victims of the September 11, 2001 terrorist attacks. A victim or the victim's estate may seek no-fault compensation from the program or may bring a tort action against an airline or any other party, but may not do both, except that a victim or the victim's estate may recover under the program and also sue "any person who is a knowing participant in any conspiracy to hijack an aircraft or commit any terrorist act." The number of people who may recover by way of lawsuits may be limited, however, as the statute limits the liability of air carriers (including air transportation security companies and their affiliates), aircraft manufacturers, airport sponsors, or persons with an interest in the World Trade Center on September 11, 2001, to the limits of their liability insurance coverage. The statute gives the United States a right of subrogation with respect to any claim it pays under the compensation program. This means that the United States can recover amounts it pays under the

compensation program from any party whom the victim could sue (*i.e.*, a terrorist) or would have been able to sue had she or he not filed a claim under the program. The United States' subrogation rights, however, are limited to the caps mentioned above.

On March 7, 2002, the Department of Justice issued its final rule implementing the September 11th Victim Compensation Fund.[65]

Paul D. Coverdell Teacher Protection Act of 2001, P.L. 107-110, §§ 2361-2368. P.L. 107-110 limits the liability of teachers, which it defines to include instructors, principals, administrators, members of a school board, and other educational professionals or nonprofessionals who work in a school and who are called on to maintain discipline or ensure safety. The liability limitations, however, apply only in states that receive funds under "this Act" (apparently P.L. 107-110) and that do not enact a statute declaring that the Act shall not apply in the state.

The Act provides that no teacher shall be liable for ordinary negligence in performing actions that are legal and "in furtherance of efforts to control discipline, expel, or suspend a student or maintain order or control in the classroom or school." A teacher may be liable for "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher." The Act does not limit liability for harm caused by a teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires an operator or owner to possess an operator's license or to maintain insurance, and it does not apply "to misconduct during background investigations, or during other actions, involved in the hiring of a teacher."

In cases in which a teacher may be held liable, punitive damages may not be awarded "unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by . . . willful or criminal misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed." In addition, joint and several liability shall not apply to noneconomic damages.

Multiparty, Multiforum Trial Jurisdiction Act of 2002, P.L. 107-273, § 11020. P.L. 107-273, at 28 U.S.C. § 1369, provides that, under specified circumstances, federal "district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location."[66]

Homeland Security Act of 2002, P.L. 107-296, §§ 304, 863, 890, 1201, 1402, and 1714-1717. P.L. 107-296 includes six different tort liability provisions (some mentioned as amendments to statutes listed above), which limit the liability

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[65] 28 C.F.R. Part 104 [http://www.usdoj.gov/victimcompensation/finalrule.pdf]. For additional information on this statute and the Department of Justice's implementation of it, see CRS Report RL31179, *The September 11th Victim Compensation Fund of 2001*.

[66] For additional information see CRS Report RS20861, *Multiparty, Multiforum Trial Jurisdiction Act of 2002, P.L. 107-273*.

of, respectively, smallpox vaccine manufacturers and administrators, sellers of anti-terrorism technology, air transportation security companies and their affiliates, air carriers, Federal flight deck officers, and manufacturers and administrators of components and ingredients of various vaccines.[67] This last liability limitation – an amendment to the National Childhood Vaccine Injury Act of 1986, which appeared in §§ 1714-1717 of the Homeland Security Act of 2002 – was repealed by Public Law 108-7, Division L, § 102.

PROTECT Act, P.L. 108-21, § 305. Section 305 of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or the PROTECT Act (P.L. 108-21), provides that neither the National Center for Missing and Exploited Children, nor any of its officers, employees, or agents, shall "be liable for damages in any civil action for defamation, libel, slander, or harm to reputation arising out of any action or communication," unless it or he or she "acted with actual malice, or provided information or took action for a purpose unrelated to an activity mandated by Federal law."

Class Action Fairness Act of 2005, P.L. 109-2. P.L. 109-2, which is not applicable only to tort actions, amended 28 U.S.C. § 1332 to provide that the federal district courts shall have exclusive jurisdiction over any class action in which the matter in controversy exceeds $5 million and any member of a class of plaintiffs is a citizen of a state different from any defendant. Among the statute's other provisions is a new 28 U.S.C. § 1453 to govern removal of class actions from state court to federal district court.[68]

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[67] All six provisions are examined in CRS Report RL31649, *Homeland Security Act of 2002: Tort Liability Provisions.*

[68] For additional information see CRS Report RL32761, *Class Actions and Legislative Proposals in the 109th Congress: Class Action Fairness Act of 2005.*