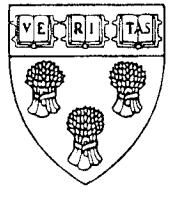


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# ARTICLE

# FEDERALISM AND FEDERAL LIABILITY REFORM: THE UNITED STATES CONSTITUTION SUPPORTS REFORM

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*Three recent Supreme Court decisions have bolstered the arguments and efforts of opponents of federal tort reform initiatives. This Article contends that these decisions do not stand in the way of liability reform at the federal level. The authors maintain that courts in the modern era have reviewed economic legislation with great deference and should continue to do so. Accordingly, neither the Commerce Clause nor the Tenth Amendment impose limitations on Congress's ability to enact tort reform measures.*

Virtually every American has heard the conservative call to protect "states' rights." It is a political staple of conservative causes.[1] Ironically, however, in recent debates about federal tort reform legislation, the call to respect states' rights has been trumpeted by some very unlikely sources—liberal members of Congress[2] and consumer advocates who have traditionally sup-

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[1] *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995).

[2] *See* H.R. REP. NO. 105-702, at 25–28 (1998) (minority views in House Judiciary Committee Report on Class Action Jurisdiction Act of 1998); S. REP. NO. 105-32, at 64, 78–80 (1997) (minority views in Senate Commerce Committee Report on Product Liability Reform Act of 1997); S. REP. NO. 104-69, at 64–66 (1995) (minority views in Senate Commerce Committee Report on Product Liability Fairness Act); H.R. REP. NO. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act); H.R. REP. NO. 104-64, at 35–36, 40–41 (1995) (minority views in House Judiciary Committee Report on Common Sense Legal

ported federal regulation of everything from food package labeling[3] to local activities like used car sales[4] and funeral home practices.[5] Both Presidents Ronald Reagan and George Bush, on the other hand, supported federal product liability reform legislation, notwithstanding their ideological preference for an expanded role for state governments.[6]

Civil justice reform has turned the world of states' rights upside down. A basic explanation for this phenomenon is political. Opponents of federal liability reform legislation enjoy pointing out an apparent inconsistency in conservative philosophy.[7] They can show that the ascent to power of the Republican-controlled Congress early in 1995 was based, in part, on a pledge that members would reduce the role of the federal government and give more policymaking authority to the states.[8] Various federal initiatives sought to "devolve power to the states in areas such as welfare, school lunch programs, legal services for the poor, speed limits on interstate highways, and other spheres in which the federal government had played a dominant role for decades."[9] Federal civil justice reform was and continues to be an exception to this pattern.

Standards Reform Act of 1995).

[3] *See* 21 C.F.R. § 101 (1995) (requiring uniform labeling of all packaged food products with ingredients and specific nutritional information).

[4] *See* Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455 (1995) (prohibiting misrepresentation of the mechanical condition of a used vehicle and requiring used car salesmen to disclose warranty information to consumers prior to sale); Odometer Disclosure Requirement, 49 C.F.R. § 580 (1995) (requiring transferor of motor vehicle to provide a written disclosure of odometer mileage and its accuracy to protect purchasers who rely on odometer readings in selecting used cars).

[5] *See* Funeral Industries Practice Rule, 16 C.F.R. § 453 (1995).

[6] *See* C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 96–98 (1983) (explaining the Reagan administration's reasons for supporting national product liability legislation); Joe Davidson, *Bill to Limit Product Liability Lawsuits by Consumers Fails in Senate, But Barely*, WALL ST. J., Sept. 11, 1992, at C13 (stating that "President Bush strongly supported [federal product liability reform legislation] and made it a hot campaign topic with a comment at the Republican convention").

[7] *See supra* note 2 and accompanying text. Conservatives also enjoy pointing out an apparent inconsistency in liberal philosophy. The same members who have expressed a resounding "no" to federal civil justice and liability reform legislation strongly support the Consumer Products Safety Commission, in part because products flow in interstate commerce. *See* 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, 605–06 (1997).

[8] *See* H.R. Rep. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act).

[9] Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE J. REG. 429, 329 (1996) (describing the public policy and constitutional bases for federal involvement in tort law). *See also* Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, 14 YALE J. REG.



Another explanation for the prominence of federalism in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and such legislation is enacted, the U.S. Constitution may provide the only mechanism to nullify the law. Our experience in working on tort reform at the state level has taught us that, once legislation is enacted, it is likely to be challenged on constitutional grounds by the Association of Trial Lawyers of America ("ATLA") and the political allies of the organized plaintiffs' bar.[10]

We believe that there are certain rational goals of civil justice reform that, as a practical matter, can only be accomplished at the federal level.[11] The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

For example, Congress is uniquely suited to enact a national solution to provide predictability in the product liability system.[12] Predictability reduces unnecessary legal costs and allows consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, as a practical matter, cannot achieve this goal on a national level.[13] For that reason, the National Governors' Association ("NGA") has adopted resolutions on several different occasions calling for Congress to enact federal product liability legisla-

371 (1996) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states); Robert L. Rabin, *Federalism And The Tort System*, 50 RUTGERS L. REV. 1 (1997) (characterizing 1996 federal product liability reform legislation as part of a recent series of efforts to achieve liability reform at the federal level); Nim M. Razook, Jr., *Legal And Extralegal Barriers To Federal Product Liability Reform*, 32 AM. BUS. L.J. 541 (1995) (suggesting federal liabilty reform is inconsistent with states' rights).

[10] *See* Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at S34 (discussing judicial nullification of state tort statutes); Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislators?* (Wash. Legal Found. Feb. 1997) (asserting that legislatures and courts share a role in deciding tort law rules).

[11] *See* Schwartz & Behrens, *supra* note 7.

[12] *See* Victor E. Schwartz & Mark A. Behrens, *The Road To Federal Product Liability Reform*, 55 MD. L. REV. 1363 (1996); Sherman Joyce, *Product Liability Law In The Federal Arena*, 19 SEATTLE U. L. REV. 421 (1996).

[13] *See* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS COMMODITY TRANSPORTATION SURVEY 1–7, tbl. 1 (1977) (indicating that, on average, over 70% of goods manufactured in the United States are shipped out of state and sold).

tion.[14] The American Legislative Exchange Council, a bipartisan organization of more than 3000 state legislators from all fifty states formed in principal part to protect states' rights, also supports the enactment of federal product liability reform legislation.[15]

Further, as we argue in this Article, federal liability reform has ample basis for support in the Constitution. We address arguments to the contrary[16] based on three recent decisions by the Supreme Court—*New York v. United States*,[17] *United States v. Lopez*,[18] and *Printz v. United States*.[19] While these decisions provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level.

This Article does not advocate any particular bill in the matrix of federal tort reform legislation. Rather, it responds to questions that may be raised in general about whether civil justice reform is constitutional and comports with basic principles of federalism. By focusing on such general principles, this Article is intended to have a long "shelf life" that can contribute to constitutional debates and legal challenges in the courts for many years to come.

Part I of this Article argues that Congress has the power under the Commerce Clause of the Constitution to enact federal liability reform legislation and that state courts are bound to enforce that law under the Supremacy Clause. Part II shows that, for almost a century, Congress has enacted legislation altering state tort law, and that these laws have been held constitutional time after time. Finally, Part III maintains that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the States and, therefore, is not inconsistent with the Tenth Amendment.

[14] The NGA's most recent resolution stated in part:

> The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce. . . . Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.

S. REP. NO. 105-32, at 14 (1997) (quoting NGA policy statement).

[15] *See id.* at 15.

[16] *See* Jeffrey White, *Does Products Bill Collide with Tenth Amendment?*, TRIAL, Nov. 1997, at 30; Cynthia C. Lebow, *Federalism And Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665 (1997); Jerry J. Phillips, *Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN. L. REV. 647 (1997); Andrew F. Popper, *A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PRODS. & TOXICS LIAB. 105 (1994); 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 (1996).

[17] 505 U.S. 144 (1992) (discussing the Low-Level Radioactive Waste Policy Amendments Act).

[18] 514 U.S. 549 (1995) (discussing the Gun Free Zones Act).

[19] 521 U.S. 898 (1997) (discussing the Brady Handgun Violence Prevention Act).



## I. THE COMMERCE CLAUSE EMPOWERS CONGRESS TO ENACT FEDERAL LIABILITY REFORM LEGISLATION

### A. *The Commerce Clause*

The Commerce Clause of the Constitution gives Congress the power to regulate commerce.[20] As the Supreme Court has said, "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[21]

The Supreme Court has identified "three broad categories of activity"[22] that Congress may regulate pursuant to its Commerce Clause authority: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce, regardless of whether the activity is local or extends across state boundaries.[23]

The Supreme Court has ruled that, while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In *Wickard v. Filburn*,[24] for example, the Court upheld Congress's regulation of

[20] *See* U.S. CONST. art. I, § 8, cl. 3.

[21] United States v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)) (reaffirming that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits).

[22] *Lopez*, 514 U.S. at 558.

[23] *See id.* at 558–59. *See also* United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

[24] 317 U.S. 111 (1942).

the consumption of homegrown wheat because of its aggregate economic effect on the interstate wheat market. The Court explained that, "even if [the] activity [is] local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce."[25] The Court also concluded that Congress may regulate activity "irrespective of whether [the] effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[26]

### B. *Federal Tort Laws*

Consistent with its power to regulate commerce pursuant to the Commerce Clause, Congress has enacted a number of laws that preempt state tort law.[27]

#### 1. The Early Laws

As far back as 1908, Congress enacted a "tort substitute" for workers' compensation in the railroad field. The Federal Employers' Liability Act ("FELA"),[28] a misleadingly named federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employers, was upheld by the Supreme Court as a constitutional exercise of congressional power.[29]

Similarly, in 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA"),[30] a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States.[31] Congress enacted LHWCA both to provide injured employees with more

[25] *Id.* at 125.

[26] *Id. See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States . . . .").

[27] Maritime law, though beyond the scope of this Article, is another field in which Congress has been active in setting tort policy rules. *See generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY ch. VI (2d ed. 1975).

[28] Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (1994)).

[29] *See infra* notes 78–82 and accompanying text.

[30] 33 U.S.C. §§ 901–944 (1994).

[31] *See generally* Kane v. United States, 43 F.3d 1446, 1449 (Fed. Cir. 1994) (describing workers' compensation acts).



immediate and less expensive relief than that available in a common law tort action[32] and to provide employers with liability that was "limited and determinative."[33] Again, the Supreme Court held that Congress had the constitutional power to enact this piece of federal tort legislation.[34] These are just two examples among many that illustrate Congress's active, longstanding participation in setting national tort liability rules.[35]

#### 2. Recent Laws Setting National Tort Policy Rules: 1993–1998

Almost nine decades after the enactment FELA, the 103d Congress enacted the General Aviation Revitalization Act of 1994 ("GARA"),[36] which established an eighteen-year statute of repose, or outer time limit on bringing litigation, for accidents involving general aviation aircraft.[37] GARA was predicated on Congress's power to regulate interstate commerce. Enough time has passed to conclude that GARA has been successful in its goal of revitalizing the light aircraft industry, which could not have been accomplished by state action alone.

A March 1997 hearing of the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects.[38] John Moore, senior vice president of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986, but as a result of

[32] *See* Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983) (holding that, although the LHWCA was enacted to help injured employees, the Act was not intended to provide compensation to injured employees for expenses that are the direct result of the employee's own post-injury misconduct).

[33] Smither & Co., Inc. v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957) (citing Bradford Electric Co. v. Clapper, 286 U.S. 145, 159 (1932)) (describing the compromises made by both employees and employers through the enactment of statutes like the LHWCA).

[34] *See infra* notes 93–103 and accompanying text.

[35] Numerous other congressional tort policy enactments that have been declared constitutional are described later in this Article. *See* discussion *infra* Part II.

[36] Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101). *See generally* David Moffitt, Note, *The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGIS. & POL'Y 215 (1995).

[37] GARA did not provide any new basis for federal court jurisdiction; cases that would have been decided by a state court before GARA became effective on August 17, 1994, remain in state court today, subject to the application of the federal "ceiling" on tort liability. GARA also did not preempt shorter state statutes of repose that may apply to bar a tort claim.

[38] *See* S. REP. NO. 105-32, at 41–42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997). *See generally* Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, A.B.A. J., at 28 (Jan. 1996) ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

GARA, is now back in the single engine aircraft business.[39] At the time of the subcommittee's hearing, Cessna's small aircraft division had more than 650 employees and had plans to double employment in 1998.[40] John Peterson of the Montgomery County Action Council of Coffeyville, Kansas—the home of Cessna's new small aircraft plant—testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators.[41] The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed.[42] After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county.[43]

Similarly, Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1000 workers.[44] Likewise, John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their right to sue.[45] AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes—aircraft that had flown safely for more than two decades.[46]

The 104th Congress enacted a number of other tort and civil justice reform measures:

> The Small Business Job Protection Act of 1996[47] included a provision that: (1) holds punitive damages received in personal injury suits subject to federal income tax by eliminating the possibility for an exclusion from taxable gross income; (2) eliminates the possibility of an exclusion for personal injury damages in cases that do not involve physical injury or illness; and (3) provides that emotional distress is not by itself a physical injury or sickness;

[39] *See* S. REP. No. 105-32, at 41.
[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] *See id.* at 42.
[44] *See id.*
[45] *See id.*
[46] *See id.*
[47] 26 U.S.C. § 104 (Supp. II 1996).



> The Federally Supported Health Centers Assistance Act of 1995[48] extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers;
>
> The Aviation Disaster Family Assistance Act of 1996[49] limited unsolicited contacts from lawyers and insurance company representatives with airline crash victims or their families;
>
> The Bill Emerson Good Samaritan Food Donation Act of 1996[50] provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals; and
>
> The Private Securities Litigation Reform Act of 1995[51] placed limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934.[52]

The 105th Congress continued the trend toward greater federal involvement in deciding liability rules by enacting several other tort reform laws:

> The Volunteer Protection Act of 1997[53] provided limited immunity for volunteers acting on behalf of a nonprofit organization, creating a national standard of punitive damages liability for volunteers, and abolishing joint liability for noneconomic damages in tort actions involving volunteers;
>
> The Amtrak Reform and Accountability Act of 1997[54] created a federal standard for punitive damages awards in tort cases brought against Amtrak by its passengers and capped Amtrak's tort liability at $200 million for each rail accident;

[48] 42 U.S.C. §§ 201, 233 (Supp. II 1996).
[49] 49 U.S.C. § 1136 (Supp. II 1996).
[50] 42 U.S.C. § 1791 (Supp. II 1996).
[51] 15 U.S.C. § 77 (Supp. II 1996) (enacted over the veto of President Clinton).
[52] A product liability reform bill cleared both the House and Senate in the 104th Congress, but was vetoed by President Clinton. That legislation, among other reforms, capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or $250,000; abolished joint liability for noneconomic damages; limited the liability of product sellers to their own negligence or failure to comply with an express warranty; established a complete defense to liability if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs; reduced a defendant's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product; and set a 15-year statute of repose on litigation involving workplace durable goods (e.g., machine tools). *See* H.R. CONF. REP. No. 104-481 (1996). President Clinton vetoed the bill on May 2, 1996. *See* John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14.
[53] 42 U.S.C.S. § 14503 (Law. Co-op. 1998).
[54] 49 U.S.C.S. § 28103 (Law. Co-op. 1998).

The Biomaterials Access Assurance Act of 1998[55] provided suppliers of the raw materials and component parts used to make implantable medical devices with a mechanism to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant;

The Year 2000 Information and Readiness Disclosure Act[56] banned, with a few exceptions, the use of "Year 2000 readiness disclosure" statements by plaintiffs as evidence in court to prove the truth or accuracy of a company's assertions about dealing with the Year 2000 computer problem and protects companies from liability for Year 2000 statements they made that are alleged to be false, inaccurate, or misleading unless it is proven that the company knew the statement was false, inaccurate, or misleading and made it with an intent to deceive or mislead; and

The Securities Litigation Uniform Standards Act of 1998[57] made federal courts the sole venue for most securities class action fraud lawsuits involving fifty or more parties. The law was enacted to close a loophole in the Private Securities Litigation Reform Act of 1995.[58] That law raised the standard for filing such suits in federal courts, but was undermined when lawyers shifted their filings to state courts.[59]

### C. *The* Lopez *Decision Does Not Undermine the Authority of Congress to Enact Liability Reform Legislation*

Despite the long history of congressional involvement in matters having an effect on interstate commerce, opponents of federal liability reform have questioned whether Congress has the authority to enact liability reform legislation in light of the holding of *United States v. Lopez*.[60]

In *Lopez*, the Court considered whether Congress's enactment of 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

[55] 21 U.S.C.S. § 1605 (Law. Co-op. 1998).

[56] Pub. L. No. 105-271, 112 Stat. 2386, 2389 (1998) (to be codified at 15 U.S.C. § 78a).

[57] 15 U.S.C.S. §§ 77–78 (Law. Co-op. 1998).

[58] *See supra* text accompanying note 51.

[59] *See* S. REP. No. 105-182, at 3 (1998); H.R. REP. No. 105-640, at 8 (1998); H.R. REP. No. 105-803, at 13 (1998).

[60] 514 U.S. 549 (1995). *See, e.g.*, Phillips, *supra* note 16.



believe, is a school zone,"[61] was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "[t]he Act neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."[62]

Conceptually, *Lopez* was not a Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[63] Moreover, "respondent was a local student at a local school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm ha[d] any concrete tie to interstate commerce."[64]

The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce. These cases directly support Congress's Commerce Clause authority over liability law.[65] In fact, rather than limiting Congress's Commerce Clause authority, the *Lopez* decision can be read to support legislation that would regulate the firearms industry in a manner more explicitly connected with interstate commerce, such as a limit on the liability of gun manufacturers in order to promote the development of the firearms industry or

[61] Pub. L. No. 101-647, § 1702(b), 104 Stat. 4789, 4844 (1990) (current version at 18 U.S.C. § 922(q)(2)(A) (1998)).

[62] *Lopez*, 514 U.S. at 551. *See also* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 1999 WL 111891, at *10 (4th Cir. Mar. 5, 1999) (holding that the Violence Against Women Act, which created a civil cause of action against private parties who commit acts of gender-motivated violence, exceeded Congress's Commerce Clause authority because the activity Congress sought to regulate—violent crime motivated by gender animus—was "not itself even arguably commercial or economic," and it "lack[ed] a meaningful connection with any particular, identifiable economic enterprise or transaction"). *See generally* Herbert Hovenkamp, *Judicial Restraint And Constitutional Federalism: The Supreme Court's Lopez And Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 633 (1996); Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995).

[63] *Lopez*, 514 U.S. at 561.

[64] *Id.* at 567.

[65] *See supra* notes 22–26 and accompanying text. *See also* Patrick Hoopes, *Tort Reform In the Wake of* United States v. Lopez, 24 HASTINGS CONST. L.Q. 785 (1997) (discussing how the *Lopez* decision represented a retreat from the Supreme Court's traditionally expansive interpretation of Congress's authority under the Commerce Clause).

an imposition of requirements on gun manufacturers to promote firearms safety.[66]

## II. Federal Tort Laws Have Been and Should Be Declared Constitutional

### A. *Courts Have Respected the Role of Congress in the Development Of Tort Law*

For almost a century, the Supreme Court and the lower courts have upheld numerous federal tort law statutes against constitutional challenges. The courts have uniformly held that such economic legislation comes clothed with a presumption of constitutionality that is subject to a highly deferential rational basis standard of review. In every modern case, the legislation has been found to pass constitutional muster.

#### 1. Limitation of Shipowners' Liability Act

The Limitation of Vessel Shipowners' Liability Act and the Harter Act (collectively "the LSLA")[67] were the first major federal tort policy statutes to be challenged in the Supreme Court. The LSLA, enacted to promote commercial shipping, exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of the ship owner.[68] In addition, the LSLA limited ship owners' liability for any loss or destruction of goods aboard their ships.[69]

The Supreme Court upheld the constitutionality of the LSLA in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*[70] The case arose when the Providence Company, a defendant in state tort suits filed by the Hill Company to recover damages

[66] *See Lopez*, 514 U.S. at 563 (indicating that Congress has the power to enact legislation regulating firearms possession explicitly connected with or having an effect on interstate commerce). *See also* Scott M. Richmond, Note, Printz v. United States: *If Congress Cannot Force State Legislatures to Implement Federal Policy, Why Should It Be Able to Force State Executives?*, 7 Widener J. Pub. L. 325, 371 (1998) ("Congress has the power, under the Commerce Clause, to regulate handgun sales involved in interstate commerce.").

[67] 46 U.S.C.A. §§ 181–196 (1994).

[68] 46 U.S.C.A. § 182.

[69] 46 U.S.C.A. § 183.

[70] 109 U.S. 578 (1883).



arising from a fire aboard one of Providence's ships, sought to limit its liability and suspend the state suits in accordance with the LSLA.[71]

The Supreme Court held that there was "no doubt that Congress had [the] power to pass the [LSLA]."[72] Quoting from an earlier decision, *The Lottawana*,[73] the Court reaffirmed Congress's "authority under the commercial power . . . to introduce such changes [in maritime law] as are likely to be needed,"[74] and indicated that it "perceive[d] no reason for entertaining any serious doubt" that Congress's power under the Commerce Clause "may be extended to the securing and protection of the rights and title of all persons dealing [in shipping]."[75] The Court added that because Congress acted within its lawful authority to regulate interstate commerce, the LSLA was "binding on all courts and jurisdictions throughout the United States."[76] The Court went on to hold that the purpose of the LSLA would be frustrated unless the institution of proceedings in a federal district court superseded the prosecution of claims for the same losses and injuries in other courts.[77]

#### 2. Federal Employers' Liability Act of 1908

In *Mondou v. New York, New Haven & Hartford Railroad Co.*,[78] the Supreme Court upheld the constitutionality of the Federal Employers' Liability Act of 1908 ("FELA"),[79] which established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce.[80] Federal and state courts were given concurrent jurisdiction to decide FELA cases.[81]

[71] *See id.* at 579–80.

[72] *Id.* at 589.

[73] 88 U.S. (21 Wall.) 558 (1874) (addressing Congress's power to make changes to maritime law).

[74] *Providence*, 109 U.S. at 589 (quoting *The Lottawana*, 88 U.S. at 577).

[75] *Id.* at 590 (quoting *The Lottawana*, 88 U.S. at 577).

[76] *Id.*

[77] *See id.* at 587.

[78] 223 U.S. 1 (1912).

[79] 45 U.S.C. §§ 51–60 (1994).

[80] *See supra* note 28 and accompanying text. In *Howard v. Illinois Central Railroad Co.* (the Employers' Liability Cases), 207 U.S. 463, 496–97 (1908), the Court struck down a 1906 version of FELA, finding that the 1906 Act exceeded Congress's Commerce Clause authority because it "embrace[d] . . . matters and things domestic [or intrastate] in their character."

[81] *See* 45 U.S.C. § 56. The Jones Act, 46 U.S.C.A. § 688 (1994), a FELA-like statute

In *Mondou,* railroads unsuccessfully challenged the constitutionality of the legislation on several grounds. The Court in *Mondou* held that Congress had not exceeded its Commerce Clause authority by enacting tort rules which deviated from the common law. In an oft-quoted passage, the Court held 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 great 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.*[82]

The Court also noted that despite the fact that employer liability had traditionally been a matter of state law, Congress had a legitimate interest in replacing the patchwork of state laws with uniform, national legislation "to promote the safety of the [railroad] employees and to advance the commerce in which they are engaged."[83]

Furthermore, the Court held that the "classification" created by FELA (i.e., the distinction it makes between interstate railroad carriers, which are subject to liability, and all other parties, which are not) did not doom the statute under the Due Process Clause of the Fifth Amendment,[84] even though it could "occasion some inequalities."[85] The Court held that tort law classifications are constitutionally permissible under the Fifth Amendment as long as the classification has a rational basis.[86] Tested by that standard, the Court held, FELA was "not objectionable."[87] The Court pointed out that it had repeatedly sustained "[l]ike classifications of railroad carriers and employees for like purposes" under the Equal Protection Clause of the Fourteenth Amendment.[88]

that permits seamen injured in the course of employment to maintain an action for damages at law, also has been interpreted to provide federal and state courts with concurrent jurisdiction to decide Jones Act cases. *See* Engel v. Davenport, 271 U.S. 33 (1926).

[82] *Mondou*, 223 U.S. at 50 (emphasis added) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[83] *Id.* at 51.

[84] The Court assumed the clause to be the equivalent of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 53.

[85] *Id.*

[86] *See Mondou*, 223 U.S. at 53.

[87] *Id.*



After resolving FELA's constitutionality, the Court moved to settle FELA's preemptive effect over state laws covering railroad employer liability. The Court explained that although Congress had chosen not to regulate the field of railroad carrier liability in the past, and although the subject fell within the police power of the states in the absence of congressional action, Congress was not therefore precluded from acting.[89] To the contrary, once Congress acted, "the laws of the states, in so far as they cover the same field, [were] superseded, for necessarily that which is not supreme must yield to that which is."[90]

The Court went on to explain that FELA did not present federalism problems because Congress was not setting state policy. Rather, Congress was establishing federal policy to be implemented by the states in accordance with the Supremacy Clause. The Court held:

> [W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure.[91]

The Court added that it did not perceive that FELA would cause any appreciable inconvenience or confusion for state courts, and that in any case, such inconvenience or confusion would not change its holding:

> We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules

[88] *Id.*

[89] *See id.* at 54–55.

[90] *Id.* at 55.

[91] *Id.* at 56–57.

> of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger.[92]

### 3. The Longshore and Harbor Workers' Compensation Act

In *Crowell v. Benson*,[93] the Supreme Court was asked to decide the constitutionality of the Longshore and Harbor Workers' Compensation Act ("LHWCA").[94] The LHWCA created a no-fault compensation scheme that provided fixed awards to employees injured upon the navigable waters of the United States.[95]

The Court began by holding that the federal power to alter, amend, or revise the maritime law gave Congress the authority to define the substantive rights of employees under the LHWCA (in this case, by providing for recovery in the absence of fault, establishing classifications based on type of injury, fixing the range of compensation for disability or death, and designating the classes of beneficiaries).[96]

Next, the Court addressed whether the substantive rights created by the LHWCA violated the Due Process Clause of the Fifth Amendment.[97] The Court, applying a deferential rational basis test, held that neither the classifications created by the statute nor the extent of compensation provided were unreasonable.[98] In light of the difficulties associated with determining actual damages in maritime cases, the Court held, Congress was justified in providing for the payment of damages in amounts that would reasonably approximate a claimant's probable damages.[99] The Court also noted that the plaintiff's Fifth Amendment objections were substantially similar to those which the Court had rejected in challenges to state workers' compensation laws under the Due Process Clause of the Fourteenth Amendment.[100]

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[92] *Id.* at 58–59.
[93] 285 U.S. 22 (1932).
[94] 33 U.S.C. §§ 901–950 (1994) (originally entitled "Longshoremen's and Harbor Worker's Act").
[95] *See supra* notes 30–33 and accompanying text.
[96] *See Crowell*, 285 U.S. at 39.
[97] *See id.* at 41.
[98] *See id.*
[99] *See id.*
[100] *See id.* at 42.



After upholding the constitutionality of the LHWCA's substantive provisions, the Court turned to the LHWCA's procedural requirements. The plaintiff's procedural objections to the LHWCA focused on the administrative authority conferred by the Act.[101] The Court held that the use of the administrative method to assess the cause, character, and effect of claimants' injuries fell "easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments,"[102] and did not constitute an unconstitutional invasion of judicial power.[103]

### 4. The Drivers Act

In 1961, Congress enacted the Drivers Act[104] to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring in the course of their employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the-job accidents.[105] "[M]oved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ,"[106] Congress decided to forbid suits against federal drivers, but to permit suits against the United States for tort liability arising out of accidents caused by a driver's negligence.[107]

a. *Private citizen and federal driver.* The Drivers Act was challenged on constitutional grounds in *Nistendirk v. McGee*,[108] a personal injury action arising out of an automobile accident between a private citizen and a federal employee (in this instance, a rural mail carrier). The plaintiff initially brought a negligence action against the mail carrier in Missouri state court. The

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[101] *See id.* at 42–45 (detailing the significant amount of discretion granted to a single deputy commissioner under the Act).
[102] *Id.* at 47.
[103] *See id.* at 54 (holding that the LHWCA's reservation of the judiciary's power to deal with matters of law appropriately preserved the exercise of the judicial function).
[104] 28 U.S.C. § 2679(b)–(e) (1994).
[105] *See* Carr v. United States, 422 F.2d 1007, 1009 (4th Cir. 1970).
[106] *Id.* at 1012.
[107] *See* 28 U.S.C. § 2679(b), (d) (1994).
[108] 225 F. Supp. 881 (W.D. Mo. 1963).

United States removed the case to federal court and was substituted as the defendant pursuant to the Drivers Act.[109] The plaintiff, seeking to obtain full damages and wanting to avoid trying the case under the Federal Tort Claims Act, moved to remand the case to state court on the ground that the Drivers Act violated the Fourteenth Amendment of the United States Constitution.[110]

The court rejected plaintiff's argument that the Drivers Act violated the Fourteenth Amendment by replacing a common law remedy with a statutory one.[111] The court noted that, in *Silver v. Silver*,[112] the Supreme Court, in sustaining the abolition of a non-paying passenger's right to sue his host for negligence, had held that "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."[113] The court concluded that because Congress had a legitimate interest in insulating federal drivers from liability, the Drivers Act constituted a valid exercise of legislative power under the Necessary and Proper Clause of Article I.[114]

b. *Federal employee and federal driver cases.* Most of the litigation involving the Drivers Act has involved claims by federal employees injured by government drivers, since prior to passage of the Act, civilian government workers injured in the course of employment as a result of the negligence of a fellow-employee were not limited to claims against the United States under the Federal Employees' Compensation Act ("FECA").[115] They also had the right to bring a common law tort action

[109] *See id.* at 881.

[110] *See id.* at 882. Plaintiffs also argued that the Act violated the Seventh Amendment and the jury trial provision of the Missouri Constitution. *See id.* The court quickly disposed of plaintiff's Seventh Amendment challenge, holding that "the guarantees of the Seventh Amendment do not apply" to statutory causes of action against the federal government. *See id. See also* Gustafson v. Peck, 216 F. Supp. 370, 371 (N.D. Iowa 1963) (holding that the Seventh Amendment does not guarantee a right to a trial by jury in a state court); Adams v. Jackel, 220 F. Supp. 764, 765 (E.D.N.Y. 1963) (Seventh Amendment does not guarantee a right to a trial by jury in a claim for restitution against a collector of internal revenue). The court dismissed the plaintiff's argument that the Drivers Act violated the Missouri Constitution's jury trial guarantee, noting that the argument was without merit in light of the Supremacy Clause of the United States Constitution. *See Nistendirk*, 225 F. Supp. at 882.

[111] *See Nistendirk*, 225 F. Supp. at 882.

[112] 280 U.S. 117 (1929).

[113] *Nistendirk*, 225 F. Supp. at 882 (quoting *Silver*, 280 U.S. at 122).

[114] *See id.*

[115] 5 U.S.C. §§ 8101–8193 (1994).



against the negligent co-worker.[116] Congress, however, did not "specifically consider whether or not this cause of action against a fellow government employee should survive" passage of the Drivers Act.[117] That issue was addressed by a number of courts, which uniformly held that the Drivers Act abrogated the traditional common law rule.[118] Those decisions, in turn, produced litigation challenging Congress's authority to do so.

The Fourth Circuit addressed the constitutionality of the Drivers Act in *Carr v. United States*.[119] The plaintiff, a government employee injured by a federal driver, argued that the abrogation of a government employee's common law action against a fellow employee for negligence violated the Due Process Clause of the Fifth Amendment, because the Drivers Act did not create a new benefit as a quid pro quo.[120] Furthermore, the plaintiff argued, the Drivers Act violated the Equal Protection Clause of the Fifth Amendment, because it created an impermissible distinction between federal employees injured in vehicular accidents caused by fellow employees and federal workers injured in other job-related activities. Only Drivers Act plaintiffs were specifically barred from bringing tort actions against negligent co-employees.[121]

The Fourth Circuit rejected the plaintiff's due process argument, noting that it had already been rejected by the Supreme Court.[122] Moreover, even though a common law action could no longer be brought against the United States, the Fourth Circuit said, the Drivers Act itself provided an adequate quid pro quo, because it provided plaintiff with "valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible."[123]

The court rejected the plaintiff's equal protection challenge on the ground that the classification created by the Drivers Act did not penalize the exercise of any constitutional right.[124] Therefore,

[116] *See* Noga v. United States, 411 F.2d 943, 944 (9th Cir. 1969).

[117] *Carr*, 422 F.2d at 1010.

[118] *See* Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968); *Noga*, 411 F.2d at 943; Van Houten v. Ralls, 411 F.2d 940 (9th Cir.); Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967).

[119] 422 F.2d 1007 (4th Cir. 1970).

[120] *See id.* at 1010.

[121] *See id.* at 1011.

[122] *See id.* at 1010 (noting the Court's rejection of the argument's premise in *Silver*).

[123] *Carr*, 422 F.2d at 1011.

[124] *See id.*

the court held, the statutory classification did not have to be justified by a compelling governmental interest. Rather, it came "clothed with a presumption of constitutionality" and would be upheld as long as Congress had a rational basis for enacting the legislation.[125] The court concluded that "the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem."[126]

The Third Circuit reached a similar conclusion in *Thomason v. Sanchez*.[127] The plaintiff, a serviceman, was injured when he was struck by an automobile operated by another serviceman. He had no remedy at all against the United States, because of the so-called "*Feres* doctrine,"[128] and thus presented a highly compelling appeal.[129] The plaintiff in *Thomason* argued that he should be allowed to proceed against the defendant and the defendant's automobile insurer.[130]

The Third Circuit, however, rejected the plaintiff's argument that common law tort actions against fellow government employees had survived passage of the Drivers Act.[131] The Third Circuit also rejected the plaintiff's argument that the Drivers Act, as applied to him, deprived him of all remedies at law and, therefore, constituted a denial of due process under the Fifth Amendment.[132] Adopting the reasoning of the Fourth Circuit in *Carr*,[133] the Third Circuit held that Congress was justified in passing the Drivers Act to relieve the heavy automobile insurance burden on federal drivers.[134]

### 5. Black Lung Benefits Act of 1972

In *Usery v. Turner Elkhorn Mining Co.*,[135] the Supreme Court upheld the constitutionality of Title IV of the Federal Coal Mine

[125] *Id.* at 1012.
[126] *Id.*
[127] 539 F.2d 955 (3d Cir. 1976).
[128] In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.
[129] *See Thomason*, 539 F.2d at 956.
[130] *Id.* at 957.
[131] *See id.* at 958.
[132] *See id.* at 959–60.
[133] *See supra* notes 123–126 and accompanying text.
[134] *See Thomason*, 539 F.2d at 959–60.
[135] 428 U.S. 1 (1976).



Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972.[136] The black lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease.[137] Coal mine operators challenged a number of the black lung benefit provisions as unconstitutional.

First, the operators contended that the Black Lung Benefits Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former miners who terminated their work in the industry before the Act passed. The operators argued that "the Act spreads costs in an arbitrary manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business."[138]

The Court made it clear that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality."[139] It then held that Congress was justified in its decision to provide for the retroactive application of liability under the Black Lung Benefits Act.[140] The Court stated that, whether it would have been wiser for Congress to have chosen a cost-spreading scheme that was broader or more practical under the circumstances was "not a question of constitutional dimension."[141]

Second, the coal mine operators challenged the two alternative methods set forth by Congress for proving "total disability" due to black lung disease, a prerequisite for compensation under the Act.[142] The Court held, however, that the standards adopted by Congress could not be deemed to be "purely arbitrary" and, thus, were constitutionally valid.[143]

Third, the operators argued that a provision of the Act which provided that no claim for benefits could be defeated based solely on the results of a chest x-ray violated due process. The operators argued that x-ray evidence was frequently the only

[136] 30 U.S.C. §§ 901–962 (1994). *See generally* Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Benefits Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665 (1989).
[137] *See* 30 U.S.C. § 901 (1994).
[138] *Usery*, 428 U.S. at 18.
[139] *Id.* at 15.
[140] *See id* at 16.
[141] *Id.* at 19.
[142] *See id.* at 20.
[143] *Id.* at 29.

evidence that they could put forth to rebut a black lung claim.[144] The Court noted, however, that Congress was presented with "significant evidence" that x-ray testing was not an accurate indicator of the absence of disease.[145] Thus, "Congress was faced with the problem of determining which side should bear the burden of the unreliability."[146] The Court held that the fact that "Congress ultimately determined 'to resolve doubts in favor of the disabled miner' [did] not render the enactment arbitrary under the standard of rationality appropriate to th[e] legislation."[147]

### 6. The Price-Anderson Act

The Price-Anderson Act,[148] as amended in 1975, limited the aggregate liability for a single nuclear incident to $560 million to be paid from contributions from nuclear power plant operators, private insurance, and the federal government. In addition, the amended Act required operators to waive certain legal defenses in the event of an extraordinary nuclear incident.[149]

The Price-Anderson Act was critical to the development of the private nuclear power industry in the United States.[150] Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, "the potential liability dwarfed the ability of the nuclear power industry and private insurance companies to absorb the risk."[151] Without reasonable and defined limits on liability, there might not be a nuclear power industry as we know it today.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[152] individuals who lived close to proposed nuclear power plants and two organizations sought to prevent construction of the planned facilities by obtaining a declaration that the Price-

[144] *See id.* at 31.
[145] *Id.* at 31–32.
[146] *Id.* at 32.
[147] *Id.* at 34 (quoting S. REP. No. 92-743, at 11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315).
[148] 42 U.S.C. § 2210 (1994).
[149] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 65 n.5 (1978). "The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of the risk are all waived in the event of an extraordinary nuclear occurrence." *Id.*
[150] *See id.* at 64.
[151] *Id.*
[152] 438 U.S. 59 (1978).



Anderson Act was unconstitutional.[153] After deciding that plaintiffs had standing to challenge the Act,[154] the Supreme Court addressed plaintiffs' argument that the Act violated the Due Process Clause, because of the alleged arbitrariness of the $560 million statutory ceiling on liability.[155]

The Court rejected plaintiffs' contention that the Act should be subjected to an intermediate standard of review, holding that the Price-Anderson Act was a "classic example of an economic regulation" that could only be overcome by a showing that Congress acted in an "arbitrary and irrational way."[156] In light of this standard, the Court held that the Act passed constitutional muster because the liability cap bore a rational relationship to Congress's desire to stimulate the private sector's involvement in nuclear power.[157] Importantly, the Court stated that, while any cap could be characterized as arbitrary in some sense, the decision to fix a $560 million ceiling was not the "kind of arbitrariness" that would flaw an otherwise constitutional law.[158]

Plaintiffs' remaining due process objection was that the liability limitation failed to provide a satisfactory quid pro quo for the common law rights of recovery that the Act abrogated. The Court, however, expressed doubt whether the Due Process Clause requires that a statutory compensation scheme either duplicate the recovery available at common law or provide a reasonable substitute.[159] The Court cited earlier decisions which "clearly established" that "[a] person has . . . no vested interest in any rule of the common law."[160] It also cited an earlier decision that held that the "Constitution does not forbid the . . . abolition of old [rights] recognized by the common law, to attain a permissible legislative object."[161] The Court went on to hold that, even if there were a quid pro quo requirement, the assurance of a

[153] *See id.* at 67.
[154] *See id.* at 81.
[155] *See id.* at 84.
[156] *Id.* at 83.
[157] *See id.* at 84. *Cf.* Indemnity Ins. Co. of N. Am. v. Pan Am. Airways, 58 F. Supp. 338, 340 (S.D.N.Y. 1944) (upholding against a due process attack the Warsaw Convention, a treaty which limited the liability of airlines for injuries or deaths to aircraft passengers).
[158] *Duke Power*, 438 U.S. at 86.
[159] *See id.* at 88.
[160] *Id.* at 88 n.32 (quoting *Mondou*, 223 U.S. at 50 (quoting *Munn*, 94 U.S. at 134 )).
[161] *Id.* (quoting *Silver*, 280 U.S. at 122).

$560 million fund provided a "just substitute" for the common law rights replaced by the Act.[162]

Finally, the Court held that the Price-Anderson Act did not violate the Equal Protection Clause because the "general rationality" of the Act's liability ceiling provided "ample justification for the difference in treatment between those injured in nuclear incidents and those whose injuries are derived from other causes."[163]

### 7. Swine Flu Act

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act")[164] was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial decisions holding polio vaccine manufacturers strictly liable for vaccine-related injuries.[165] In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season.[166] Modeled after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries.[167]

The constitutionality of the Swine Flu Act was first addressed in *Sparks v. Wyeth Laboratories, Inc.*[168] Plaintiff, who had suffered serious injuries following a swine flu immunization, alleged that the Act violated the Due Process Clause of the Fifth Amendment, because it abrogated common law causes of action against program participants.[169] The court held, however, that plaintiff had "no vested interest in any rule of the common

[162] *Id.* at 93.
[163] *Id.* at 93–94.
[164] Act of Aug. 12, 1976, 90 Stat. 1113 (repealed 1978). *See generally* Colleen Courtade, et al., 57A Am. Jur. 2d Negligence § 540 (1989).
[165] *See* Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (holding a polio vaccine manufacturer strictly liable for failure to warn individuals receiving the vaccine); Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir.) (same).
[166] *See* Sparks v. Wyeth Laboratories, Inc., 431 F. Supp. 411, 415 (W.D. Okla. 1977) (detailing the Swine Flu Act's legislative history to explain why it was enacted in haste).
[167] *See* Act of Aug. 12, 1976, 90 Stat. 1113, 1114 (repealed 1978).
[168] 431 F. Supp. 411 (W.D. Okla. 1977).
[169] *See id.* at 416.



law."[170] Moreover, while a replacement or substitution of remedies was "perhaps not technically necessary for due process," Congress did provide "an alternative, efficacious remedy against the United States."[171] The court noted that federal statutes similar to the Swine Flu Act had "always been found to be constitutional when challenged," including the Drivers Act upon which the Swine Flu Act was modeled.[172]

Plaintiff also alleged an equal protection violation.[173] The court noted, however, that "such routine equal protection considerations as 'compelling governmental interest' or 'suspect' classifications or 'fundamental' interests [were] simply not involved" in challenges to economic legislation.[174] Thus, the court dismissed plaintiff's challenge.[175]

Finally, the court addressed plaintiff's argument that the Swine Flu Act violated the Tenth Amendment.[176] The court pointed out that plaintiff's argument rested "mainly upon cases declaring early pieces of New Deal legislation to be unconstitutional . . . [and that] the spirit if not the letter of those cases ha[d] been overruled in subsequent decisions."[177] The court stated that the Swine Flu Act simply allowed the federal government to work with the states and imposed no coercion on them.[178]

*Sparks* was influential in leading other courts to reject similar constitutional challenges to the Swine Flu Act. In *Wolfe v. Merrill National Laboratories, Inc.*,[179] plaintiff's "unarticulated major premise" was that the Swine Flu Act unconstitutionally compelled her participation in the program, causing her to suffer serious injury.[180] The court easily dismissed plaintiff's claim,

[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *See id.* at 417.
[174] *Id.* at 418.
[175] *See id. See also* DiPappa v. United States, 687 F.2d 14 (3d Cir. 1982) (holding that Swine Flu Act did not violate the Due Process Clause of the Fifth Amendment). The court also rejected a Seventh Amendment challenge raised by plaintiff, stating that the right to jury trial guarantee is inapplicable where a sovereign waives its immunity and noting that the Seventh Amendment had never been held to apply against the States under the Fourteenth Amendment. *See Sparks*, 431 F. Supp. at 418–19. *See also* Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307 (5th Cir. 1978) (holding that Swine Flu Act did not violate Seventh Amendment).
[176] *See Sparks*, 431 F. Supp. at 418.
[177] *Id.*
[178] *See id.* at 420.
[179] 433 F. Supp. 231, 236 (M.D. Tenn. 1977).
[180] *Id.* at 237.

noting that she voluntarily chose to accept the benefit of the federally administered vaccine.[181] The court also discussed plaintiff's allegation that the Swine Flu Act violated the Tenth Amendment.[182] The court stated that, as a grant program, the Swine Flu Act fell within the power of Congress to spend funds for the "general welfare."[183] Accordingly, "Congress acted within its constitutionally ordained powers in passing the Act."[184]

### 8. Atomic Weapons Testing Liability Act

In *Hammond v. United States*,[185] the First Circuit upheld the constitutionality of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985 ("Atomic Weapons Testing Liability Act")[186] against a challenge brought by a widow for the death of her husband, a civilian employee of the Department of Defense and observer at several atomic weapons tests, from radiation poisoning. The Atomic Weapons Testing Liability Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries.[187]

The First Circuit noted that Congress had previously passed laws (the Drivers Act and the Swine Flu Act) that substituted the federal government as the defendant for particular types of tort suits and required plaintiffs to seek relief through the Federal Tort Claims Act.[188] The court also noted that when those statutes had been challenged for alleged due process violations, they were consistently evaluated under the rational basis test and declared constitutional.[189] The court then evaluated the Atomic Weapons Testing Liability Act under a rational basis standard and concluded that Congress's desire to shield government contractors from public embarrassment arising from litigation was rationally related to its decision to abolish common law tort claims against the contractors.[190] In addition, the court reasoned that, since the government was required to pay the judgments obtained against the contractors, it was neither irrational nor arbitrary for Congress to subject all potential plaintiffs uniformly to Federal Tort Claims Act limitations.[191] Accordingly, the court held that the Atomic Weapons Testing Liability Act did not violate the Due Process Clause.[192]

The court also rejected plaintiff's Tenth Amendment challenge to the Act.[193] Plaintiff relied on *National League of Cities v. Usery*[194] to argue that, by abolishing the state common law actions against government contractors, Congress "invaded rights reserved to the states."[195] The court, however, determined that plaintiff's argument was without merit, because *National League of Cities* had been overruled.[196]

The Ninth Circuit Court of Appeals dismissed additional constitutional challenges to the Atomic Weapons Testing Liability Act in *In re Consolidated United States Atmospheric Testing Litigation.*[197] Plaintiffs, military and civilian participants in the United States atmospheric nuclear weapons testing program and their families, alleged that the Act constituted a "taking" for purposes of the Fifth Amendment, because it substituted a remedy against the government under the Federal Tort Claims Act for state tort law causes of action against government contractors who participated in the federal weapons testing program.[198] In addition, plaintiffs alleged that the Act violated the Due Process

[181] *See id.* at 238.
[182] *See id.*
[183] *Id.*
[184] *Id.*
[185] 786 F.2d 8 (1st Cir. 1986).
[186] 42 U.S.C. § 2212 (1988) (repealed 1990).
[187] *See id.*; *Hammond*, 786 F.2d at 9.
[188] *See Hammond*, 786 F.2d at 12–13.
[189] *See id.* at 13.
[190] *See id.* at 13–14.
[191] *See id.*
[192] *See id.* The court also held that the Atomic Weapons Testing Liability Act did not violate equal protection for the same reasons. *See id.* at 15.
[193] For further discussion of Tenth Amendment challenges to federal tort reform legislation, see *infra* notes 253–382 and accompanying text.
[194] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See infra* notes 267–287 and accompanying text.
[195] *Hammond*, 786 F.2d at 15.
[196] *See id.* at 15 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). The court also rejected a claim that the Act violated the prohibition against ex post facto laws, noting that the prohibition applies only to criminal or penal statutes. The court also held that the Act was not punitive, so it did not constitute a bill of attainder. Finally, the court refused to apply the Contracts Clause to the federal government. *See id.* at 16.
[197] 820 F.2d 982 (9th Cir. 1987).
[198] *See id.* at 988.

Clause of the Fifth Amendment and the separation of powers doctrine.[199]

The court began its takings analysis by noting that courts had found it "well settled" that a "plaintiff has no vested right in any tort claim for damages under state law."[200] Accordingly, denial of plaintiffs' state tort law cause of action did "not translate into a cognizable taking claim."[201] The court also pointed out that the Act did not abrogate claims arising from atomic weapons tests, but instead subjected claimants to a statutory procedure that plaintiffs could reasonably expect to apply to them.[202]

Next, the court held that, because Congress had acted within its war powers and Commerce Clause authority, and no fundamental right or suspect classification was involved, the rational basis standard of due process review applied to plaintiffs' due process claim. Under that standard, the court held, plaintiffs had not met their burden of proving that the Act was "wholly arbitrary and irrational in purpose and effect, i.e., not reasonably related to a legitimate congressional purpose."[203] According to the court, the weapons testing program had been a crucial government function from its inception, and Congress reasonably believed that relieving contractors of liability would encourage their participation in the program.[204]

Finally, the court rejected plaintiffs' separation of powers claim. The court said that legislation does not run afoul of the separation of powers doctrine unless Congress "presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'" [205] Those limitations did not exist with respect to the Atomic Weapons Testing Liability Act, because Congress did not direct courts to make certain findings or fact or require them to apply an unconstitutional law.[206]

[199] *See id.* at 989–92.
[200] *Id.* At 988.
[201] *Id.*
[202] *See id.*
[203] *Id.* at 990 (quoting *Hammond*, 786 F.2d at 8).
[204] *See id.* at 991.
[205] *Id.* at 992 (citations omitted).
[206] *See id.* The court also held that the Act did not violate the Seventh Amendment, because "[t]here is no right to jury trial against the sovereign." *Id.*



### 9. National Childhood Vaccine Injury Act of 1986

The National Childhood Vaccine Injury Act of 1986[207] was enacted to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies.[208] The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons are required to file a petition in the United States Court of Federal Claims demonstrating, among other things, harm including "unreimbursable expenses . . . in an amount greater than $1,000."[209]

In *Black v. Secretary of Health and Human Services*,[210] plaintiffs challenged the constitutionality of the $1,000 threshold requirement on Fifth Amendment equal protection grounds. They argued that by making eligibility for the program turn on incurring $1,000 of unreimbursable expenses, Congress made it more difficult for indigent persons to qualify for compensation, because indigents often have their medical expenses defrayed by government programs such as Medicaid.[211] The court held, however, that the Act's eligibility requirement "was not designed to disadvantage poor persons, and the fact that it may disproportionately disqualify certain groups, including indigents and persons who enjoy the benefits of other medical programs, d[id] not give rise to an equal protection violation."[212]

The court explained that drawing lines to create distinctions for eligibility in social programs was "peculiarly a legislative task" that "may be rational even if it does not do a perfect job of selecting those cases that appear to be appropriate subjects of congressional concern."[213] The court then held that "it was rational for Congress to conclude, that as a general matter, those

[207] 42 U.S.C. §§ 300aa-1 to 300aa-34 (1994).
[208] *See generally* Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future*, 48 OHIO ST. L.J. 387 (1987); Daniel A. Cantor, Note, *Striking A Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act*, 44 AM. U. L. REV. 1853 (1995).
[209] 42 U.S.C. § 300aa-11(c)(1)(D)(i).
[210] 93 F.3d 781 (Fed. Cir. 1996).
[211] *See id.* at 787.
[212] *Id.*
[213] *Id.* at 788.

who incur only modest expenses or whose expenses are reimbursed from other sources present less compelling cases for compensation than those who incur large, unreimbursed expenses."[214] Thus, there was no constitutional flaw in the $1,000 threshold requirement, "particularly in light of the 'strong presumption of constitutionality' that attaches to legislation conferring monetary benefits."[215]

### 10. Price-Anderson Act Amendments of 1988

The 1988 Amendments to the Price-Anderson Act ("1988 Amendments")[216] created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal.[217] After the 1979 Three Mile Island incident near Harrisburg, Pennsylvania, plaintiffs who wished to have their tort claims remain in state court challenged the jurisdictional and removal provisions of the 1988 Amendments in *In re TMI Litigation Cases Consolidated II*.[218] They argued that the legislation violated Article III of the Constitution[219] because the public liability actions subject to the Act did not "arise under" the laws of the United States.[220]

The Third Circuit began its analysis with a close examination of the scope of Congress's power to authorize federal courts to decide nondiversity cases turning on state law rules of decision. The court noted that the Supreme Court had distinguished between "pure jurisdictional statutes" and those mixing elements of federal and state law.[221] The central teaching of those cases, the Third Circuit said, was that a nondiversity case "cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant."[222] On the other hand, courts evaluating mixed federal and state schemes have focused upon

[214] *Id.*
[215] *Id.* (quoting Mathews v. De Castro, 429 U.S. 181, 185 (1976)).
[216] 42 U.S.C. §§ 2014, 2210 (1994).
[217] *See id.*
[218] 940 F.2d 832 (3d Cir. 1991).
[219] *See* U.S. CONST., Art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").
[220] *See In re TMI Litig.*, 940 F.2d at 835.
[221] *See id.* at 849–51 (discussing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); and Mesa v. California, 489 U.S. 121 (1989)).
[222] *Id.* at 849.



congressional intent and have formulated their decisions with flexibility "in order to honor the presumption in favor of a statute's constitutionality."[223]

Turning to the 1988 Amendments at issue, the Third Circuit examined the legislative history and held that Congress had clearly expressed its intention that state law provide the content of and operate as federal law governing public liability cases resulting from nuclear incidents.[224] By federalizing state substantive law, Congress established the constitutional foundation for the Act's jurisdictional and removal provisions. The court then said that it would have reached the same conclusion even if state law itself, rather than state law operating as federal law, formed the basis for decision, because the level of federal involvement in the field of nuclear energy and the need for "uniformity, equity, and efficiency in the disposition of public liability claims" provided sufficient "federal elements" to support the legislation.[225]

The Third Circuit then turned to plaintiffs' collateral constitutional arguments that the retroactive application of the 1988 Amendments to cases already pending in state court violated principles of "federalism, state sovereignty, due process, and equal protection."[226] The Third Circuit's survey of relevant law led it to conclude that the legislation survived each of these challenges, because the provision for retroactivity was rationally related to Congress's desire to avoid inefficiencies and inconsistent outcomes in claims resulting from a single nuclear incident.[227]

### 11. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act")[228] amended the Federal Tort Claims Act to provide for the substitution of the United States as

[223] *Id.* at 855.
[224] *See id.* at 855–56.
[225] *See id.* at 856–57.
[226] *Id.* at 860.
[227] *See id.* at 861. *See also* In re TMI, 89 F.3d 1106 (3d Cir. 1996) (holding that retroactive application of the 1988 Amendments did not violate due process); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (upholding constitutionality of the 1988 amendments against an Article III challenge).
[228] 28 U.S.C. § 2679 (1994).

a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment. Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in *Westfall v. Erwin*,[229] which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and discretionary in nature."[230] Congress saw the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees.[231]

The Westfall Act was challenged in *Sowell v. American Cyanamid Co.*,[232] involving a government employee who was seriously injured at work and sought to bring a negligence action against his co-employees. The Eleventh Circuit held that "the great weight of authority" supported the constitutionality of the statute.[233] The court also held that the statute's retroactive application did not render it unconstitutional, because "a legal claim affords no definite enforceable property right until reduced to a final judgment."[234] The court concluded that Congress's desire to preserve employee morale, maintain federal agencies' ability to carry out their missions, and sustain the vitality of the Federal Tort Claims Act provided a rational basis for the Westfall Act.[235]

### 12. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA"),[236] which created an eighteen-year statute of repose for general aviation aircraft, is the most recent congressional tort policy statute to withstand constitutional scrutiny. At least three courts have declared GARA to be constitutional "economic legislation."[237]

[229] 484 U.S. 292 (1988).

[230] *Id.* at 300.

[231] *See generally* Daniel A. Morris, *Federal Employees' Liability Since The Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act)*, 25 CREIGHTON L. REV. 73 (1991).

[232] 888 F.2d 802 (11th Cir. 1989).

[233] *Id.* at 805. *See also* Connell v. United States, 737 F. Supp. 61 (S.D. Iowa 1990) (holding that retroactive application of the Westfall Act was not unconstitutional).

[234] *Sowell*, 888 F.2d at 805.

[235] *See id. See also* Salmon v. Schwarz, 948 F.2d 1131 (10th Cir. 1991) (holding that the Westfall Act did not violate the Seventh Amendment).

[236] Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101) (1994).

[237] *See* Rixon v. Smith, No. 96-714 (W.D. Pa. Jan. 6, 1997) (holding that GARA can be constitutionally applied retroactively); Pollack v. Agusta, S.P.A., Nos. 94-7769, 94-7770 (C.D. Cal. Dec. 6., 1995) (GARA did not violate due process or deprive plaintiffs of a property right); Schneider v. Cessna Aircraft Co., No. 542343 (Super. Ct. Sacramento Cty., Cal. July 29, 1996) (GARA does not violate due process).



### B. *Federal Tort Laws Should Be Upheld: The Mistake of* Lochner *Should Not Be Repeated*

It is important for courts to follow the significant body of case law discussed above supporting the authority of Congress to enact laws setting national tort policy objectives. Any new decision overturning federal liability legislation would create a precedent that courts in the future could utilize to nullify a wide array of federal legislation, even outside the context of tort reform.

It may be unnecessary to raise this point in light of the very strong record of success that federal liability statutes have had against constitutional challenges. Lest anyone forget, however, it is worth reflecting on a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "*Lochner* era" (after the unsound constitutional law decision, *Lochner v. New York*[238]), the Court nullified state and federal legislation that it disagreed with as a matter of public policy, using the Constitution as a cloak to cover its highly personalized decisions.[239]

Just as plaintiffs during the *Lochner* era implored the Supreme Court to utilize an expansive view of the Constitution to override legislation, claimants in the future may seek to convince courts to utilize an expansive view of the Constitution to impose their economic policy views upon the nation. Courts should reject this invitation, as they have done for almost a century in the field of federal tort law.

[238] 198 U.S. 45 (1905). In *Lochner*, the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because *I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*

*Id.* at 75 (emphasis added).

[239] *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 to 8-7 (2d. ed. 1988).

The need for courts to respect Congress's authority to enact legislation setting tort policy rules is reinforced by the doctrine of *stare decisis*, and by the importance of the statutes themselves. For example, because of the National Childhood Vaccine Injury Act, diseases which once threatened to end the lives of American infants prematurely are now prevented with a routine series of childhood vaccinations.[240] Without the Price-Anderson Act, the private nuclear power industry in the United States might not have developed.[241] The General Aviation Revitalization Act of 1994 breathed life back into an important American industry. Instead of continuing on the path toward extinction, the general aviation industry is now booming.[242] The Biomaterials Access Assurance Act of 1998 will help ensure the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints, that are needed by millions of people each year.[243]

### C. *The Supremacy Clause Requires States to Enforce Federal Liability Reform Legislation*

Once Congress enacts legislation pursuant to the Constitution, the Supremacy Clause[244] prohibits the states from enforcing any local laws that conflict with the statute. To the extent the various states have liability laws that interfere with, or are contrary to, federal laws enacted by Congress, the state laws are preempted.[245] As Chief Justice Marshall explained:

> [T]o such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the Constitution, . . .

[240] *See* Denis J. Hauptley & Mary Mason, *The National Childhood Vaccine Injury Act*, 37 FED. B. NEWS & J. 452 (1990) (stating that the Act effectively controlled liability costs for vaccine manufacturers, prevented the withdrawal of crucial vaccines from the market, and averted epidemics of certain childhood illnesses in the United States.)

[241] *See Duke Power*, 438 U.S. at 64 (discussing congressional passage of the Price-Anderson Act in response to concerns that the private sector would be forced to withdraw from nuclear power production).

[242] *See supra* notes 38–43 and accompanying text.

[243] *See* H.R. REP. NO. 105-549, pts. 1 and 2 (1998) (reports from the House Committee on the Judiciary and the Committee on Commerce regarding the Biomaterials Act).

[244] U.S. CONST. art. VI, § 2.

[245] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding California's Franchise Investment Law unconstitutional because it directly conflicted with federal legislation).



> [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.[246]

The Supremacy Clause also requires state courts to enforce federal laws, even though that requirement is in a sense a federal command requiring state court action.[247] In *Testa v. Katt*,[248] the Supreme Court addressed the Rhode Island Supreme Court's refusal to enforce the federal Emergency Price Control Act of 1942.[249] The Act provided a treble-damages remedy for persons who bought goods for more than the amount of the federal ceiling price and gave jurisdiction over claims under the Act to state as well as federal courts. The Supreme Court upheld the federal program, stating that the position of the Rhode Island Supreme Court "fl[ew] in the face of the fact that the States of the Union constitute a nation" and "disregard[ed] the purpose and effect" of the Supremacy Clause.[250] State courts were directed to heed the federal Act as "the prevailing policy in every state."[251] More specifically, the Court explained:

> [T]his Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claflin v. Houseman*, 93 U.S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the States as though they were laws emanating from a foreign sovereign. *Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon States, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It asserted that the obligation of States to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. . . .*[252]

[246] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

[247] *See New York*, 505 U.S. at 178–79 (noting that the Supremacy Clause directs state courts to take action to enforce federal law, but that no comparable constitutional provision allows Congress to force state legislators to act); *Mondou*, 223 U.S. at 57–58 (1912) (stating that, in some instances, action must be taken by state courts to enforce a federally established penalty).

[248] 330 U.S. 386 (1947).

[249] Ch. 26, 56 Stat. 23 (codified at 50 U.S.C. app. § 107 (1976)) (repealed 1947).

[250] *Testa*, 330 U.S. at 389.

[251] *Id.* at 393.

[252] *Id.* at 390–91 (emphasis added).

## III. Recent Tenth Amendment Decisions Do Not Undermine Congressional Authority to Enact Tort Policy Legislation

The United States Constitution grants certain powers to the Federal Government. Where federal legislation is authorized by one of those powers, "Congress may impose its will on the States."[253] All other powers are reserved for the States under the Tenth Amendment, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[254]

### A. *The Traditional View: Judicial Deference to Congressional Authority*

Historically, the Supreme Court has recognized Congress's "extraordinary power" to enact legislation and has been reluctant to invoke the Tenth Amendment to limit that authority.[255] *Maryland v. Wirtz*[256] is the archetypal case adopting the traditional view that courts should not apply substantive limits on federal authority under the Tenth Amendment if Congress is exercising one of its enumerated powers and has a rational basis to do so. In *Wirtz*, the Court upheld the constitutionality of amendments to the Fair Labor Standards Act ("FLSA")[257] that required the states to adopt federal minimum wage and overtime standards for state employees of hospitals, institutions, and schools.[258] The Court refused to distinguish economic activity engaged in by

[253] Gregory v. Ashcroft, 501 U.S. 452, 460 (1990) (discussing how the Supremacy Clause is the textual authority granting the federal government power over the states in the U.S. system of federalism).

[254] U.S. Const. amend. X. *See also* The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution . . . are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[255] *See Gregory*, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."). *See also* Laurence H. Tribe, American Constitutional Law §§ 5-20 (2d. ed. 1988).

[256] 392 U.S. 183 (1968).

[257] 29 U.S.C. §§ 203–218 (1994).

[258] *See* 29 U.S.C. § 203(d).



private persons from that engaged in by states,[259] and declared that courts should not use the Tenth Amendment to "carve up the commerce power to protect enterprises . . . simply because those enterprises happen to be run by the States."[260]

In 1976, the Court departed briefly from its longstanding reluctance to invoke the Tenth Amendment and attempted to devise affirmative limits on Congress's Article I powers. In *National League of Cities v. Usery*,[261] the Court declared that the Tenth Amendment prohibited Congress from interfering with the core sovereign functions of the states, even where those functions affected interstate commerce.[262] That case challenged the validity of the 1974 amendments to the FLSA. The Court held that, insofar as the amendments operated directly to displace the states' ability to structure "integral operations" in areas of "traditional government functions" (i.e., employee-employer relationships in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation), they were not within Congress's Article I authority.[263]

Nine years later, however, the Court overruled the *National League of Cities* case in *Garcia v. San Antonio Metropolitan Transit Authority*.[264] The *Garcia* case and a 1988 case, *South Carolina v. Baker*,[265] showed the Court's return to its previous position on the Tenth Amendment.[266]

#### 1. *Garcia v. San Antonio Metropolitan Transit Authority*

In *Garcia v. San Antonio Metropolitan Transit Authority*,[267] the Court revisited the question of whether the Commerce Clause empowered Congress to enforce the federal wage and overtime

[259] *See Wirtz*, 392 U.S. at 197.

[260] *Id.* at 198-99.

[261] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[262] *See National League of Cities*, 426 U.S. at 840–52.

[263] *Id.* at 852.

[264] 469 U.S. 528 (1985). *See generally* Martha A. Field, Comment, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84 (1985) (arguing against the concept of the Supreme Court granting the states constitutional immunities as a constraint on Congress's use of its delegated powers).

[265] 485 U.S. 505 (1988).

[266] *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 289–90 (1981) (holding that the Tenth Amendment does not prohibit Congress from passing laws that preempt state regulations); FERC v. Mississippi, 456 U.S. 742, 764 (1982) (same).

[267] 469 U.S. 528 (1985).

requirements in the 1974 amendments to the FLSA against the states in areas of "traditional governmental functions."[268] The San Antonio Metropolitan Transit Authority ("SAMTA") challenged the Act's validity after "the Department of Labor formally amended its [FLSA] interpretive regulations to provide that publicly-owned mass-transit systems were not entitled to immunity under *National League of Cities*."[269]

The Court began its analysis by restating the well-settled principle that Congress's Commerce Clause authority extends to intrastate economic activities that affect interstate commerce.[270] The Court noted that, were SAMTA privately owned, it would unquestionably be obligated to follow FLSA's requirements.[271] Therefore, any constitutional exemption SAMTA could obtain from FLSA's requirements had to rest on its status as a governmental entity rather than on the nature of its operations.[272]

The Court went on to outline the prerequisites for governmental immunity set forth in *National League of Cities*, focusing in particular on the exception for "traditional governmental functions."[273] The Court said that its own attempts to articulate affirmative limits on congressional authority had failed to establish a workable standard for defining "traditional governmental functions."[274] Moreover, attempts by federal and state courts to distinguish "traditional" functions from "nontraditional" functions had proven to be "impracticable and doctrinally barren."[275] The Court also expressed skepticism that a case-by-case approach would eventually establish a workable standard, citing its own poor experience in the related field of state immunity from federal taxation.[276]

Next, the Court explored alternative ways to define state immunity, but rejected those as unmanageable as well. It conceded that making immunity turn on a "traditional" standard would prevent courts from accommodating changes in the historical functions of states.[277] In addition, the Court said that it had previously rejected the idea of determining a nonhistorical standard for immunity based on the identification of "uniquely" governmental functions.[278]

[268] *Id.* at 530.
[269] *Id.* at 534–35.
[270] *See id.* at 537.
[271] *See id.*
[272] *See id.*
[273] *See id.* at 537–38.
[274] *See id.* at 539.
[275] *Id.* at 557.
[276] *See id.* at 540.
[277] *See id.* at 543.



The Court also expressed concern that any rule that would establish judicially imposed definitions of "traditional," "integral," or "necessary" state governmental functions would "inevitably invite[] an unelected federal judiciary to make decisions about which state policy it favors and which ones it dislikes."[279] Accordingly, the Court held:

> We, therefore now reject, as unsound in principle and unworkable in practice, a rule for state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles because it is divorced from those principles.[280]

The Court then turned to the underlying issue that confronted it in *National League of Cities*—the manner in which the Constitution insulates states from the reach of Congress's power under the Commerce Clause. The Court said that it had "no license to employ freestanding conceptions of state sovereignty"[281] in deciding when the Constitution protects "the States as States,"[282] because the Framers had chosen to ensure a role for the states in the federal system through the structure of the federal government itself.[283] The Court stated:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the political process

[278] *See Garcia*, 469 U.S. at 545.
[279] *Id.* at 546.
[280] *Id.* at 547.
[281] *Id.* at 550.
[282] *Id.* at 554.
[283] The Court pointed out that "the composition of the Federal Government was designed in large part to protect States from overreaching by Congress." *Id.* at 550–51. The Framers thus gave the states a role in selecting the executive and legislative branches, provided for the equal representation of states in the Senate, and prohibited any constitutional amendment divesting a state of equal representation in the Senate without the state's consent. *See id.* at 551.

rather than to dictate a "sacred province of state autonomy."[284]

The Court reinforced its conclusion that the federal political process effectively preserves the interests of the states by pointing out the high level of funding that states receive from the federal government in the form of general and program specific grants in aid.[285]

The Court then held that the federal wage and overtime requirements in the FLSA, as applied to SAMTA, were not "destructive of state sovereignty or violative of any constitutional provision."[286] SAMTA was simply being placed in the same position as other employers. The Court also pointed out that, while the FLSA would raise costs for mass-transit systems, Congress had provided countervailing financial assistance—thus reinforcing the Court's "conviction that the national political process systematically protects States from the risk of having their functions in [the area of mass-transit] handicapped by Commerce Clause regulation."[287]

### 2. *South Carolina v. Baker*

In *South Carolina v. Baker*,[288] the Court was asked to decide the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Act").[289] The Tax Act removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were issued in registered form.[290] Congress believed that

[284] *Id.* at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). *See also* Thomas H. Odom, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1666 (1987) (indicating that *Garcia* is significant because it "calls for the development of new theories of federalism-based limitations on the commerce power").

[285] *Garcia*, 469 U.S. at 552–553. *See also* John E. DuMont, Comment, *State Immunity From Federal Regulation—Before and After Garcia: How Accurate Was the Supreme Court's Prediction in* Garcia v. SAMTA *that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?*, 31 DUQ. L. REV. 391 (1993) (arguing that the political process has protected the states against unduly burdensome federal regulation).

[286] *Garcia*, 469 U.S. at 554.

[287] *Id.* at 555. *See also* William A. Isaacson, Garcia v. San Antonio Metropolitan Transit Authority: *Antifederalism Revisited*, 21 U. TOL. L. REV. 147 (1989) (providing historical account of the Constitutional Convention and arguing in support of the holding in *Garcia*).

[288] 485 U.S. 505 (1988).

[289] 26 U.S.C. § 103(j)(1) (1982).

[290] *See id.*



the registration requirement would prevent tax evasion that was being facilitated through the exchange of unregistered bearer bonds.[291] South Carolina, joined by the National Governors' Association as intervenor, challenged the Tax Act, contending that it violated the Tenth Amendment because it compelled States to issue bonds in registered form.[292]

The Court began its analysis by restating its holding in *Garcia* that the Tenth Amendment provides structural rather than substantive limits on Congress's legislative authority—i.e., that states must find their protection from overreaching congressional acts through elected Members of Congress.[293] The Court acknowledged that *Garcia* left open the possibility that the Tenth Amendment could be invoked to invalidate congressional regulation of state activities where there were "extraordinary defects in the national political process," but held that those defects did not exist with respect to the Tax Act.[294] South Carolina, the Court said, did not "even allege[ ] that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[295]

The Court then addressed the states' contention that the Tax Act coerced them into enacting legislation permitting bond registration and into administering the registration scheme.[296] In support of their contention, the states cited *FERC v. Mississippi*,[297] which left open the possibility that the Tenth Amendment might limit Congress's power to compel states to regulate on behalf of federal interests.[298]

In *FERC*, the Court had upheld a federal statute requiring state utility commissions to: (1) adjudicate and enforce federal standards; (2) either consider adopting certain federal standards or cease regulating public utilities; and (3) follow certain federally

[291] Ownership of a registered bond is recorded on a central list, and a transfer of record ownership requires entering the change on that list. Bearer bonds, on the other hand, leave no paper trail. Congress believed that bearer bonds facilitated tax evasion, because they could be used to avoid estate and gift taxes and as a medium of exchange in the illegal sector. *See Baker*, 485 U.S. at 508–509.

[292] The Court treated the Tax Act as banning the issuance of bearer bonds, because it would force States to increase the interest paid on bearer bonds to exceptionally high rates. Moreover, since the Act became effective, no State had issued a bearer bond. *See id.* at 511.

[293] *See id.* at 512.

[294] *Id.* at 512–13.

[295] *Id.*

[296] *See id* at 513.

[297] 465 U.S. 742 (1982).

[298] *See id.* at 761–64.

mandated procedures.[299] The Court had concluded that, whatever constitutional limitations might exist on the federal power to compel state regulatory activity, Congress had the power to require state utility regulatory commissions to adjudicate federal issues and to require that states regulating in a field open to preemption consider suggested federal standards and follow federally mandated procedures.[300]

The Court in *Baker* did not accept South Carolina's invitation to define whether the Tenth Amendment claim left open in *FERC* survived *Garcia* or posed constitutional limitations independent of those discussed in *Garcia*. It was able to avoid the issue by finding that the Tax Act presented the same type of legislation that was upheld in *FERC*: both statutes regulated state activities, neither sought to control or influence the manner in which states regulated private parties.[301]

The *Baker* Court concluded its Tenth Amendment analysis by rejecting the states' contention that the Tax Act impermissibly commandeered the state legislative and administrative process by requiring many state legislatures to amend their statutes in order to issue registered bonds, and state officials to devote substantial effort to determine how best to implement a registered bond system. The Court observed that being compelled to take administrative and legislative actions to comply with federal law was a common and often inevitable consequence faced by states wishing to engage in activities subject to federal regulation.[302] Furthermore, the Court bluntly pointed out that the states' theory of commandeering would "not only render *Garcia* a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases."[303]

### B. *Judicially Imposed Limitations on Congressional Authority*

The Supreme Court has signaled in two recent cases that the Tenth Amendment may once again return from its basic dor-

[299] *See* Public Utility Regulatory Policies Act of 1978, 15 U.S.C. § 3201, 16 U.S.C. § 2611 (1994).
[300] *See FERC*, 456 U.S. at 759–67.
[301] *See Baker*, 485 U.S. at 514.
[302] *See id.* at 514–15.
[303] *Id.* at 515.



mancy. In those decisions—*New York v. United States*[304] and *Printz v. United States*[305]—the Court addressed the federal government's ability to force states to implement or administer federal regulatory schemes.

#### 1. *New York v. United States*

*New York v. United States*[306] involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Waste Policy Act").[307] That Act sought to address a looming national shortage of disposal sites for low-level radioactive waste by directing each state to assume responsibility "for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State" within seven years.[308] The State of New York and two counties in which disposal facilities were planned in the state sought a declaratory judgment that the Waste Policy Act was inconsistent with the Tenth Amendment.[309]

Petitioners' challenge focused on three sets of "incentives" that Congress included in the Act to encourage states to comply with their statutory obligation to attain local or regional self-sufficiency in the disposal of low-level radioactive waste.[310] Monetary incentives allowed states with disposal sites to impose a surcharge on radioactive waste received from other states. The Waste Policy Act also established an escrow account from which the Secretary of Energy allocated a portion of the monies generated by this surcharge to states that complied with the federal timetable.[311] Next, access incentives allowed states with disposal sites to increase the cost of access to the sites substantially, and then to deny access altogether, to radioactive waste generated in states that failed to meet the federal timetable.[312] Finally, the most severe incentive, the "take title" provision, required states

[304] 505 U.S. 144 (1991).
[305] 521 U.S. 898 (1997).
[306] 505 U.S. 144 (1991).
[307] 42 U.S.C. § 2021b–j (1994).
[308] 42 U.S.C. § 2021c(a)(1)(A) (1994).
[309] *See New York*, 505 U.S. at 154. Petitioners also charged that the Act violated the Guarantee Clause of the Constitution, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV., § 4. The Court easily dismissed this claim. *See id.* at 183–86.
[310] *See New York*, 505 U.S. at 152–54.
[311] *See id.* at 152–53.
[312] *See id.* at 153.

that failed to make arrangements for radioactive waste disposal to take title and possession of waste generated within their borders and to accept liability for all damages directly or indirectly incurred by waste generators as a consequence of the state's failure to make arrangements by the federal deadline.[313]

The Court began its discussion by noting that the powers conferred in the Constitution "were phrased in language broad enough to allow for the expansion of the Federal Government's role,"[314] and that allows for enormous changes in the "scope of the federal government's authority with respect to the States."[315] The Court cited its "broad construction" of the Commerce and Spending Clauses, along with the Necessary and Proper Clause and the Supremacy Clause, as particularly important.[316] Nevertheless, the Court held, Congress is subject to the limitations contained in the Constitution. Those limitations, the Court explained, are "not derived from the text of the Tenth Amendment itself," but are found elsewhere in the Constitution (i.e., in Article I).[317]

The Court then distinguished the Waste Policy Act from statutes at issue in recently decided cases that involved the authority of Congress to subject state governments to generally applicable laws (e.g., *Garcia*).[318] Unlike the statutes at issue in those cases, the Court held, the Waste Policy Act did not seek to subject a state to the same legislation applicable to private parties, but instead attempted to "direct or otherwise motivate the States to regulate in a particular field or a particular way."[319]

The Court observed that, while it had "never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations,"[320] the "question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers."[321] The Court noted that the Constitutional Convention was convened, in part, because the Articles of Confederation did not give Congress the authority in most respects to govern the

[313] *New York*, 505 U.S. at 153–54.
[314] *Id.* at 157.
[315] *Id.* at 159.
[316] *Id.* at 158.
[317] *Id.* at 156.
[318] *See id.* at 160–61.
[319] *Id.* at 161.
[320] *Id.* (quoting *FERC*, 456 U.S. at 761–62).
[321] *Id.* at 163.



people directly.[322] The Convention generated many proposals for the structure of the new government, "but two quickly took center stage."[323] One plan, the "Virginia Plan," allowed Congress to regulate individuals "without employing the States as intermediaries."[324] The "New Jersey Plan," on the other hand, continued to require Congress to obtain the approval of the states to legislate, as had the Articles of Confederation.[325] This plan was criticized, however, because it "might require the Federal Government to coerce the States into implementing legislation."[326] Ultimately, the Framers opted to provide for a central government in which Congress "would exercise its legislative authority directly over individuals rather than over States."[327] The Court concluded, therefore, that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[328]

On the other hand, the Court explained that, while Congress cannot compel state regulation, it is not prohibited from encouraging a state to regulate in a particular way or attempting to influence a state's policy choices through noncoercive incentives.[329] The Court identified two tangible methods by which Congress "may urge a State to adopt a legislative program consistent with federal interests."[330] First, under its spending power, Congress can attach conditions on the receipt of federal funds as a means of influencing a state's policy.[331] Second, Congress can establish a "program of cooperative federalism" in which states may choose to regulate an activity according to federal standards or to have state law preempted by federal regulation.[332]

Under these noncoercive approaches to achieving state regulation, the Court pointed out, state governments can remain responsive to the local electorate's policy preferences and accountable to the people.[333] In contrast, if the federal government

[322] *See New York*, 505 U.S. at 163.
[323] *Id.* at 164.
[324] *Id.*
[325] *See id.*
[326] *Id.*
[327] *Id.* at 165.
[328] *Id.* at 166.
[329] *See id.*
[330] *Id.* at 166.
[331] *See id.* at 167.
[332] *Id.*
[333] *See id.* at 168.

were able to compel states to regulate, political accountability would be diminished. For instance, if members of Congress could impose unpopular policy decisions on state legislators, the state officials would "bear the brunt of public disapproval," while the federal officials who devised the program would "remain insulated from the electoral ramifications of their decision."[334]

The Court then proceeded to determine whether the Waste Policy Act's monetary, access, and take-title incentives impermissibly commandeered the states' legislative processes. The Court held that the monetary incentives included in the Act, in which Congress conditioned grants to the states upon the states' attainment of certain milestones, fell "well within the authority of Congress under the Commerce and Spending Clauses."[335] The Court also held that the access incentives in the Act, which ultimately authorized states to deny access to low-level radioactive waste generated in other states, represented a permissible exercise of Congress's commerce power.[336] Because both sets of incentives were supported by affirmative constitutional grants of power to Congress, neither was inconsistent with the Tenth Amendment.[337]

The Court found the Waste Policy Act's "take title" provision to be of a "different character" than the monetary and access incentives.[338] The "take title" provision offered states a "choice" of either regulating according to Congress's instructions or accepting ownership of waste and becoming liable for all damages waste generators suffered as a result of failure to meet the federal timetable.[339] The Court characterized the forced transfer component, standing alone, as no different than a congressionally compelled subsidy from state governments to radioactive waste producers.[340] Likewise, the requirement that states assume the liabilities of waste generators within their borders unconstitutionally directed the states to assume the liabilities of certain state residents.[341] Both types of federal actions commandeered the states for federal regulatory purposes and were inconsistent

[334] *New York*, 505 U.S. at 169.
[335] *Id.* at 173.
[336] *See id.*
[337] *See id.* at 173–74.
[338] *Id.* at 174.
[339] *See id.* 174–75.
[340] *See id.* at 175.
[341] *See id.*



with the Constitution's division of authority between federal and state governments.[342]

Significantly, the Court drew a sharp distinction between permissible federal legislation that directs state courts to enforce federal laws and unconstitutional legislation, such as the Waste Policy Act, that directs state officials to create and enforce a congressionally mandated regulatory scheme.[343] The Court wrote:

> Some of [the cases cited by the United States in favor of the Waste Policy Act] discuss the *well established power of Congress to pass laws enforceable in state courts*. See Testa v. Katt, 330 U.S. 386 (1947); Palmore v. United States, 411 U.S. 389, 402 (1973); see also Second Employer's Liability Cases, 223 U.S. 1, 57 (1912); Claflin v. Houseman, 93 U.S. 130, 136–37 (1876). *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.* No comparable constitutional provision authorizes Congress to command state legislatures to legislate.[344]

The Court's clarification is particularly relevant to the constitutionality of federal liability reform legislation, because these reform proposals have frequently called upon state courts to enforce federal law. Recently, some opponents of federal tort reform legislation have expansively interpreted the Court's general holding in *New York* that Congress cannot compel state legislation to suggest that Congress may lack the power to direct state judges to enforce federal liability reform legislation.[345] As the Court's opinion in *New York* demonstrates, however, federal liability reform legislation that compels state court enforcement of federal law is not in violation of the Tenth Amendment. It is

[342] *See id.* at 177. *See generally* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994).
[343] *See New York*, 505 U.S. at 178–79.
[344] *Id.* (emphasis added).
[345] *See* White, *supra* note 16, at 34; Lebow, *supra* note 16, at 690.

constitutionally permissible. This is how FELA has worked for almost a hundred years. Congress's power to act in this regard is still intact.

The concerns the Court had with the Waste Policy Act's "take title" provision in *New York* simply do not exist with respect to federal liability reform legislation. Most importantly, federal liability reform efforts seek to "exercise . . . legislative authority directly over individuals rather than over States."[346] Like the legislation upheld in *Garcia*, and unlike the Waste Policy Act's take title provision that was struck down in *New York*, federal liability reform bills have been "generally applicable laws."[347] They have never compelled state legislation or required state legislatures to enact legislation limiting tort liability.

In addition, when Congress enacts federal tort policy legislation, there is no potential for a breakdown in the national political process due to a lack of accountability. Clearly, if Congress enacts tort reform legislation, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."[348] This fact strongly supports the constitutionality of federal liability reform legislation.

### 2. *Printz v. United States*

*Printz v. United States*[349] involved a challenge to the 1993 Brady Handgun Violence Prevention Act amendments to the Gun Control Act of 1968 ("Brady Act").[350] The Brady Act required the Attorney General to establish a national system for instant background checks on prospective handgun purchasers and commanded the "chief law enforcement officer" ("CLEO") of each local jurisdiction to conduct the background checks and perform related tasks until the national system became operative.[351] The CLEOs for counties in Arizona and Montana objected to being "pressed into federal service" and contended that

[346] *New York*, 505 U.S. at 165.
[347] *Id.* at 177.
[348] *Id.* at 168.
[349] 521 U.S. 898 (1997).
[350] 18 U.S.C. §§ 921–925A (1994).
[351] *See id.*



the Act impermissibly compelled them to execute a federal law.[352]

The Court opened its opinion by noting that no constitutional text directly addressed the extent to which Congress may force state officials to execute a federal law.[353] Accordingly, the Court concluded that the answer to the CLEOs' challenge would have to come from historical understanding and practice, the structure of the Constitution, and the Court's jurisprudence.[354]

In support of the Brady Act's validity, the Government cited acts of Congress which required state courts to record applications for citizenship, transmit naturalization records, order deportations, and perform other miscellaneous duties.[355] The Court held that Congress's power to compel enforcement of federal law by state judges was well settled, but only "establish[ed] . . . that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[356] The Court explained:

> It is understandable why courts should be viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. . . . The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States.[357]

The Court then said that its acceptance of statutes imposing obligations on state courts did not imply that Congress could impose obligations on state executives.[358] Moreover, the Court observed that the "utter lack of statutes" imposing obligations on state executives suggested that Congress assumed it did not have the authority to compel state executive officers to carry out federal laws.[359] To complete the historical record, the Court acknowledged that "a number of federal statutes enacted within the past few decades [require] the participation of state and local officials," but that the persuasive force of these recent statutes

[352] *See Printz*, 521 U.S. at 904–05.
[353] *See id.* at 905.
[354] *See id.*
[355] *See id.* at 905–10 (citations omitted).
[356] *Id.* at 907 (emphasis in original).
[357] *Id.* (citations omitted).
[358] *See id.*
[359] *Id.* at 907–08.

was far outweighed by the almost 200 years of congressional avoidance of the practice.[360]

Next, the Court turned to the structure of the Constitution. Pointing to its detailed discussion of the Constitutional Convention in *New York*,[361] the Court reinforced its earlier conclusion that, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[362] The *Printz* Court further concluded that, with respect to the Brady Act, the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[363]

The Court also evaluated whether the Brady Act violated the separation of powers doctrine.[364] The Court noted that, under Article II, Section 3, the responsibility for administering federal laws rests with the Executive Branch of the federal government.[365] The Court declared that the Brady Act effectively transferred this function to thousands of state CLEOs by requiring them to administer the federally mandated background checks "without meaningful Presidential control."[366] The Court viewed Congress's transfer of the federal executive power to state officials as a constitutionally impermissible reduction of the Executive Branch's power by another co-equal branch of the federal government.[367] The Court indicated that allowing such a transfer would shatter the unity of the federal executive envisioned by the Framers, because "Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[368]

Finally, the Court turned to its prior decisions on the ability of the Federal Government to commandeer state governments to administer federal laws. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*[369] and *FERC v. Mississippi*,[370] the

[360] *Id.* at 917–18.
[361] 505 U.S. 144 (1991).
[362] *New York*, 505 U.S. at 166.
[363] *Printz*, 521 U.S. at 922.
[364] *See id.*
[365] *See id.*
[366] *Id.*
[367] *See id.*
[368] *Id.* at 923.
[369] 452 U.S. 264 (1981).
[370] 456 U.S. 742 (1982).



Court held, it sustained statutes against constitutional challenge only after establishing that they did not require the states to enforce federal law. Accordingly, the Court held, its decision in *New York*[371] striking down a provision of the Waste Policy Act that "unambiguously required the States to enact or administer a federal regulatory program . . . should have come as no surprise."[372] After rejecting the Government's attempts to distinguish the *New York* decision, the Court wrote:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[373]

The *Printz* decision does not provide a constitutional basis to nullify federal liability reform legislation. The decision makes clear that Congress cannot compel state legislatures or executives to participate in a federal regulatory or administrative scheme,[374] but it suggests no constitutional prohibition against legislation that asks state courts to enforce a federal liability law.[375] To the contrary, state courts have always been and continue to be obligated to honor such legislation. That role is entirely consistent with the Tenth Amendment and the constitutional mandate found in the Supremacy Clause.

[371] 505 U.S. 144 (1991).
[372] *Printz*, 521 U.S. at 926.
[373] *Id.* at 935.
[374] *See* Shawn E. Tuma, Note, *Preserving Liberty:* United States v. Printz *and the Vigilant Defense of Federalism*, 10 REGENT U. L. REV. 193 (1998) (discussing the federalism doctrine as a safeguard of individual liberties).
[375] See Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?* 111 HARV. L. REV. 2180, 2185–86 (1998) (indicating that the *Printz* and *New York* decisions set forth a "clear-cut rule against federal 'commandeering' of state legislative or executive officials," but do not alter the responsibility of state courts to enforce federal laws).

### 3. Driver's Privacy Protection Act Cases

Recent federal appellate and district court decisions striking down a federal law regulating the disclosure of information contained in motor vehicle registration records have been heavily influenced by the *Printz* and *New York* decisions.

In *Condon v. Reno*,[376] the Fourth Circuit permanently enjoined federal enforcement of the Driver's Privacy Protection Act of 1994 ("DPPA").[377] The DPPA restricted the states' dissemination and use of personal information contained in state motor vehicle records and imposed criminal and civil liability on state officials who failed to comply with the federal restrictions.[378] The court concluded that the DPPA exclusively regulated the disclosure of information contained in state motor vehicle records, and therefore could not be categorized as a law of general applicability permissible under *Garcia*.[379] Instead, the DPPA violated the Supreme Court's holding in *New York* that the federal government cannot compel state executives to administer a federal regulatory program.[380]

Similarly, in *Oklahoma v. United States*,[381] the court enjoined federal enforcement of the DPPA on Tenth Amendment grounds. Contrary to the provisions of the federal DPPA, Oklahoma law made motor vehicle records a matter of public record.[382] Relying primarily on *New York* and *Printz*, the court held that the DPPA impermissibly sought to "treat the Oklahoma Department of Public Safety as a subdivision of the United States" by requiring the Department to "create and maintain systems" to enforce the DPPA's provisions.[383]

[376] 155 F.3d 453 (4th Cir. 1998). *See also* Travis v. Reno, 12 F. Supp. 2d 921 (W.D. Wis. 1998), *rev'd*, 163 F.3d 1000 (7th Cir. 1998) (holding that the Driver's Privacy Protection Act violated the Tenth Amendment because it forced state officials and state employees to administer and enforce a federal regulatory scheme). *But see* Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998) (ruling that the Driver's Privacy Protection Act was authorized pursuant to Congress' Commerce Clause authority and did not violate the Tenth Amendment because, rather than requiring the state to enforce a federal regulatory scheme preventing the disclosure of driver records, the Act merely prohibited the state from releasing such records for impermissible purposes).

[377] 18 U.S.C. §§ 2721–2725 (1994).

[378] *See id.*

[379] *See Condon*, 155 F.3d at 463.

[380] *See id.* at 459.

[381] 994 F. Supp. 1358 (W.D. Okla. 1997).

[382] *See id.* at 1360.

[383] *Id.* at 1363.



Like the *New York* and *Printz* cases, the reach of the DPPA cases is limited to situations where state executives (as opposed to state courts) are forced to implement federal policy or where Congress escapes political accountability by forcing state legislators to enact a regulatory scheme. They have no bearing, directly or indirectly, on congressional enactment of a tort law that would be applicable in both federal and state court proceedings.

## Conclusion

For almost a century, Congress has enacted legislation setting national tort policy rules, and these laws have been declared constitutional time and time again as legitimate exercises of Congress's Commerce Clause authority. Future challenges to federal tort legislation are bound to fail as well, unless courts unwisely choose to abandon that substantial body of well-reasoned precedent. The United States Supreme Court's decisions in *New York*, *Lopez*, and *Printz* do not change this conclusion.

The *Lopez* opinion discussed the Commerce Clause, but it is not truly a Commerce Clause case. As the Court explained, the Gun-Free School Zones Act at issue was a criminal statute that regulated handgun possession. "[B]y its terms," the statute "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms."[384] The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce—cases that directly support Congress's Commerce Clause authority over liability law.

The *New York* and *Printz* decisions provide limits on the federal government's power over the states, but they do not preclude the enactment of civil justice reform at the federal level. In fact, the opinions make clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states. They expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state

[384] *Lopez*, 514 U.S. at 561.

executive officials to administer a federal regulatory scheme. While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not.