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The *Federalist Papers*, the Commerce Clause, and Federal Tort Reform

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In the modern era, Congress has enacted many federal "tort reform" statutes[2] that supersede contrary state laws, and judicial precedents leave little doubt as to their constitutionality.[3] Even President Ronald Reagan, known for his

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2. *See, e.g.*, Employers' Liability Act of 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51 (2006)); Price-Anderson Act, Pub. L. No. 85-256, § 4, 71 Stat. 576, 576-79 (codified as amended at 42 U.S.C. § 2210(e) (2006 & Supp. 2009); Atomic Testing Liability Act, Pub. L. No. 107-314, div. D, tit. XLVIII, § 4803, (codified as amended at 50 U.S.C. § 2783 (2006)); National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, tit. III, 100 Stat. 3755 (codified at 42 U.S.C. §§ 300aa-1 to 300aa-34 (2006)); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund Act), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-28, 4611-12, 4661-62, 6911a, 9651-61, 9671-71 (2006)); General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 note (2006)); Cruise Ship Liability, Pub. L. No. 104-324, § 1129, 110 Stat. 3901, 3984-85 (1996); Bill Emerson Good Samaritan Food Donation Act, Pub. L. 104-210, 110 Stat. 3011 (1996) (codified at 42 U.S.C. § 1791 (2006)); Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C. §§ 14501-14505 (2006)); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 161, 111 Stat. 2570, 2577-78 (codified at 49 U.S.C. § 28103 (2006)); Aviation Medical Assistance Act of 1998, Pub. L. No. 105-170, 112 Stat. 47 (codified at 49 U.S.C. § 44701 note (2006)); Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (codified at 21 U.S.C. §§ 1601-1606 (2006)); Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (1999) (codified as amended at 15 U.S.C. §§ 6601-6617 (2006)); Cardiac Arrest Survival Act of 2000, Pub. L. No. 106-505, § 404, 114 Stat. 2314, 2338-40 (codified at 42 U.S.C. § 238q (2006)); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 201(b), 115 Stat. 230, 235 (codified as amended at 49 U.S.C. 44303 (2006 & Supp. 2009)); September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (codified at 49 U.S.C. § 40101 note (2006)); Paul D. Coverdell Teacher Protection Act of 2001, Pub. L. No. 107-110, §§ 2361-2368, 115 Stat. 1425, 1667-70 (codified at 20 U.S.C. § 6731-6738 (2006)); Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020, 116 Stat, 1758, 1826 (codified at 28 U.S.C. § 1369 (2006)); Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 304, 863, 890, 1201, 1402, & 1714-1717, 116 Stat. 2135.

3. The Congressional Research Service

> concludes that enactment of tort reform legislation generally would appear to be within Congress's power to regulate commerce, and would not appear to violate principles of due process or federalism. . . . In concluding that Congress has the authority to enact tort reform "generally," we refer to reforms that have been widely implemented at the state level, such as caps on damages and limitations on joint and several liability and on the collateral source rule.

HENRY COHEN & VANESSA K. BURROWS, CONG. RESEARCH SERV., FEDERAL TORT REFORM LEGISLATION: CONSTITUTIONALITY AND SUMMARIES OF SELECTED STATUTES 1 (2008). In 2006, Congress passed the Protection of Lawful Commerce in Arms Act, which prohibits all lawsuits in either state or federal court

deference to the states,[4] established a special task force to study the need for tort reform that concluded the federal government should address the modern tort liability crisis in a variety of ways.[5] Still, some question the appropriate constitutional role of Congress in enacting federal tort reform.[6] This Article explores the support for federal tort reform found in the constitutional principles articulated by James Madison, Alexander Hamilton, and other leading founding figures, with particular emphasis on the *Federalist Papers*.

THE CALL FOR A CONSTITUTIONAL CONVENTION TO PRODUCE A FEDERAL POWER TO REGULATE "HARMONIOUS" COMMERCIAL INTERCOURSE AMONG THE STATES

When Virginia, led by Madison and four other commissioners, first initiated the movement that led to the drafting of the Constitution, its sole purpose was "to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent *harmony*."[7] This

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against the firearms industry for damages resulting from the unlawful use of firearms by others. *See id.* at 28. That federal tort-reform law was upheld as coming within Congress's Commerce Clause authority by the Second Circuit Court of Appeals, which wrote, "We find that Congress has not exceeded its authority in this case, where there can be no question of the interstate character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail." City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 395 (2d Cir. 2008).

4. *See* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1148 (1997) ("President Reagan promised with his 'New Federalism' to devolve authority to state and local governments and to alleviate the burdens of federal regulation on both lower levels of government and the private sector.").

5. That task force, called the Tort Policy Working Group, consisted of representatives of ten Reagan Administration agencies and the White House. The final report of that task force concluded as follows: "In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways." DEP'T OF JUSTICE, TORT POLICY WORKING GRP., REPORT ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 80 (1986). Indeed, the Reagan task force specifically made the following recommendations: "eliminate joint and several liability," *id.* at 64, "provide for periodic payments of future economic damages," *id.* at 69, "schedule [limit] contingency fees" of attorneys, *id.* at 72, and "limit non-economic damages to a fair and reasonable amount." *Id.* at 66. Regarding the limit on noneconomic damages, the report concluded:

> Non-economic damages such as pain and suffering, mental anguish and punitive damages are inherently open-ended. They are entirely subjective, and often defy quantification. . . . Moreover, because such damages are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results. Accordingly, such damages are particularly suitable for a specific limitation.

Id. (footnote omitted).

6. *See* Julian Pecquet, *GOP Clashes over Medical Malpractice*, THE HILL (Feb. 9, 2011, 1:03 PM), http://thehill.com/blogs/healthwatch/state-issues/143009-tea-party-influence-sparks-gop-clash-over-tort-reform (recounting debate surrounding appropriateness of federal tort reform).

7. Resolution of the General Assembly of Virginia, January 21, 1786, Proposing a Joint Meeting of Commissioners from the States to Consider and Recommend a Federal Plan for Regulating Commerce, *reprinted in* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE

proposal led to the Annapolis Convention, which in turn called for the Philadelphia Convention of 1787.[8]

At the Philadelphia Convention, before the powers of the federal government were enumerated separately in Article I, Section 8, of the Constitution, a general description of the purpose of those powers was adopted by the Constitutional Convention in what has become known as "Resolution VI." On May 29, 1787, Edmund Randolph, who led the Virginia delegation along with James Madison, "[r]esolved . . . that the National Legislature ought to be impowered . . . to legislate in all cases . . . in which the *harmony* of the United States may be interrupted by the exercise of individual Legislation."[9] That portion of Randolph's motion was agreed to without debate or dissent.[10] As Madison later made clear, "It can not be supposed that these descriptive phrases [in Resolution VI] were to be left in their indefinite extent to Legislative discretion" and that "[a] selection & definition of the cases embraced by them was to be the task of the Convention" in approving the more specific enumeration of congressional powers in Article I, Section 8, of the Constitution.[11] Still, as we will see, even *after* the Commerce Clause was drafted as a specifically enumerated congressional power, it was described by Madison in the *Federalist Papers* as necessary toward the "[m]aintenance of *harmony* and proper intercourse among the States."[12] And Hamilton wrote in the *Federalist Papers*, "Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and

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UNITED STATES OF AMERICA xlvii, xlvii (Gaillard Hunt & James Brown Scott eds., 1920). The resolution provided as follows:

> Resolved, that Edmund Randolph, James Madison, Jr., Walter Jones, St. George Tucker, and Meriwether Smith, Esquires, be appointed Commissioners, who, or any three of whom, shall meet such Commissioners as may be appointed in the other States of the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent *harmony*; and to report to the several States such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same.

Id. (emphasis added). Johnson's Dictionary of 1785 defines "harmony" as "1. The just adaptation of one part to another. . . . 2. Just proportion of sound; musical concord. . . . 3. Concord; correspondent sentiment." SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

8. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 9-13 (Adrienne Koch ed., 1966).

9. *Id.* at 31 (emphasis added).

10. *Id.* at 44.

11. Letter from James Madison to John Taylor (1833), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 524, 526 (Max Farrand ed., 1911). The letter itself was apparently unsent.

12. THE FEDERALIST NO. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added); *see also* Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), *in* 2 THE WRITINGS OF JAMES MADISON 214, 218 (Gaillard Hunt ed., 1901) ("The necessity of harmony in the com[m]ercial regulations of the states has been rendered every day more apparent.").

control."[13]

Further, on August 20, 1787, four days after the Commerce Clause had been adopted by the Constitutional Convention, Gouverneur Morris of Pennsylvania and Charles Pinckney of South Carolina, in proposing the establishment of a Council of State, described the functions of the future Secretaries of "Domestic Affairs" and "Commerce and Finance" as follows:

> 2. The Secretary of Domestic Affairs who shall be appointed by the President and hold his office during pleasure. It shall be his duty to attend to . . . *the State of Agriculture and manufactures*, the opening of roads and navigations . . . ; and he shall from time to time recommend such measures and establishments as may tend to promote those objects.
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> 3. The Secretary of Commerce and Finance, who shall be also appointed by the President during pleasure. It shall be his duty to superintend all matters relating to the public finances, to prepare & report plans of revenue and for the regulation of expenditures, and also to recommend such things as may in his Judgment promote the commercial interests of the U.S.[14]

While this amendment was not adopted, Madison recorded no objection to the scope of the powers proposed for the cabinet members, indicating that members of the Convention believed the Commerce Clause would grant the national government power over manufactures and agriculture in the aggregate economic interests of the union.

In sum, the Commerce Clause was intended to allow Congress the authority to help ensure that the nation operated, at least in some measure, as a uniformly well-tuned, harmonious commercial enterprise.

THE IMPORTANCE OF THE *FEDERALIST PAPERS* TO A PROPER UNDERSTANDING OF THE COMMERCE CLAUSE

While there was little debate over the Commerce Clause during the Constitutional Convention debates, James Madison and Alexander Hamilton, writing under the joint anonymous pseudonym "PUBLIUS," after the famous defender of the Roman Republic,[15] produced an extended and unified written defense of the proposed Constitution that was published in newspapers around the country as the States decided whether or not to ratify the nation's supreme legal document. This comprehensive set of essays became known collectively as the *Federalist Papers*, and they are considered today to be the most authoritative source of the meaning of the Constitution. James Madison

13. THE FEDERALIST NO. 80, *supra* note 12, at 477-78 (Alexander Hamilton).

14. MADISON, *supra* note 8, at 487 (emphasis added).

15. *See* Mortimer Sellers, *The Roman Republic and the French and American Revolutions*, *in* THE CAMBRIDGE COMPANION TO THE ROMAN REPUBLIC 347, 347 (Harriet I. Flower ed., 2004).

himself called the *Federalist Papers* "the most authentic exposition" on the Constitution.

In preparation for the opening of classes at the University of Virginia, which Thomas Jefferson founded, Jefferson wrote Madison regarding the teaching of the Constitution to students at the new university in a way that instructed them on the principles of government upon which the Constitution was based. Madison responded to Jefferson, stating, "The 'Federalist' may fairly enough be regarded as the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared & the Authority which accepted it."[16] The results of that correspondence and collaboration were brought forth in a meeting of the University of Virginia Board of Visitors on March 4, 1825. Jefferson, the author of the Declaration of Independence, and Madison, the father of the Constitution, were members of this Board. The following resolution, adopted by Jefferson, Madison, and the Board on that day, describes what they collectively thought were the authentic sources of American principles of government and of the Constitution, with the *Federalist Papers* ranking second only to the Declaration of Independence in importance:

> A resolution was moved and agreed to in the following words:
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> Whereas, it is the duty of this Board to the government under which it lives, and especially to that of which this University is the immediate creation, to pay especial attention to the principles of government which shall be inculcated therein, and to provide that none shall be inculcated which are incompatible with those on which the Constitutions of this State, and of the United States were genuinely based, in the common opinion; and for this purpose it may be necessary to point out specially where these principles are to be found legitimately developed:
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> Resolved, that it is the opinion of this Board . . . that on the distinctive principles of the government of our State, and of that of the United States, the best guides are to be found in,
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> 1. The Declaration of Independence, as the fundamental act of union of these States.
>
> 2. The book known by the title of—The Federalist, being an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its genuine meaning.[17]

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16. Letter from James Madison to Thomas Jefferson (Montpellier, Feb. 8, 1825), *in* JAMES MADISON: WRITINGS 807, 808 (Jack N. Rakove ed., 1999).

17. Minutes of the Board of Visitors, Univ. of Va. (Mar. 4, 1825), *reprinted in* J. DAVID GOWDY, THE WASHINGTON, JEFFERSON & MADISON INST., THOMAS JEFFERSON & JAMES MADISON'S GUIDE TO UNDERSTANDING AND TEACHING THE CONSTITUTION 3-4 (2010), *available at* http://www.wjmi.org/DOCS/Guide_to_Teaching_the_Constitution.pdf.

Chief Justice John Marshall had previously written that the *Federalist Papers* are "of great authority," and that they should be especially deferred to where they address the powers the Constitution grants to the federal government.[18]

In the *Federalist Papers*, James Madison and Alexander Hamilton described the need for a new federal Constitution that gave Congress the power to regulate "Commerce . . . among the Several States."[19] That power, according to the authors of the *Federalist Papers*, was necessary not only to allow Congress to address abuses committed by the states at the time, but also to address "future contrivances"[20] crafted by states that would similarly act to limit consumers' free access to voluntarily provided goods and services in a robust national economy, which the new Constitution empowered Congress to foster.[21]

More recently, state tort law has been used in ways that limit the flow of goods and services from state to state, and stifle innovation and the free mobility of talent necessary for a strong national economy and citizenry. This article explores the extent to which the arguments presented in the *Federalist Papers*,[22] many of them too often overlooked, support congressional efforts to enact federal tort reform.

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18. Cohens v. Virginia, 19 U.S. 264, 418 (1821). Justice Marshall stated:

> The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution . . . . Its intrinsic merit entitles it to this high rank . . . . These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it.

Id. at 418-19.

19. U.S. CONST. art. I, § 8, cl. 3. While the clause is often referred to colloquially as allowing the regulation of only commerce "between" the states, the clause itself uses the term "among," not "between." Johnson's Dictionary of 1785 defines "amongst" as "1. Mingles with . . . ; Conjoined with others, so as to make part of the number." JOHNSON, *supra* note 7.

20. THE FEDERALIST NO. 42, *supra* note 12, at 267-68 (James Madison) (emphasis added).

21. Academic research that narrowly examines the use of the word "commerce" during the Founding debates tends to miss the broader arguments Madison, Hamilton, and other founders made in favor of Congress's power under the Commerce Clause, arguments that often do not use the word "commerce" itself, but rather employ more general concepts to elaborate both the larger purposes of the Commerce Clause and the original meaning of the word "commerce." *See, e.g.*, Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

22. This Article draws its arguments from the following *Federalist Papers*, spanning the following major topics the authors addressed in defending the new Constitution: THE FEDERALIST NOS. 11 and 12 (describing the utility of the Union for people's political prosperity); 15, 17, and 22 (describing the insufficiency of the Articles of Confederation); 27, 28, and 32 (describing the necessity of a stronger federal government); 41, 42, and 46 (describing the sum of power vested in the federal government); and 56 (describing the House of Representatives). *See* THE FEDERALIST NO. 1, *supra* note 12, at 36 (Alexander Hamilton) (describing major topics each of the *Federalist Papers* explores).

THE *FEDERALIST PAPERS*' FREE ENTERPRISE ARGUMENTS FOR THE COMMERCE CLAUSE

Madison and Hamilton make clear in the *Federalist Papers* that one of the most important purposes of the new Constitution was its grant to Congress of the power to regulate commerce such that voluntarily provided goods and services could cross freely from state to state and thereby grow the new nation's economy. Indeed, Madison and Hamilton wrote that if there was one point of consensus among the citizens of the new nation, it was the importance of the development of America's free-enterprise system, and that it was Americans' commercial drive—its "adventurous" commercial "spirit"—that made its people unique. As Hamilton wrote:

> The importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject. . . .
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> . . . [T]he adventurous spirit, which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe.[23]

Referring to the defects of the Articles of Confederation, which granted the federal government very limited powers during the Revolutionary War,[24] Hamilton wrote of the reasons the articles were "altogether unfit for the administration of the affairs of the Union," specifically because of their "want of a power to regulate commerce." [25] Hamilton stressed: "The utility of such a power has been anticipated under the first head of our inquiries . . . . It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence."[26] As Madison described it, the Constitution would grant the federal government several powers, including the Commerce Clause authorities necessary toward "[m]aintenance of harmony and proper intercourse among the States."[27]

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23. THE FEDERALIST NO. 11, *supra* note 12, at 84-85 (Alexander Hamilton). Madison also said, in the seminal speech he gave defending the Commerce Clause at the Virginia convention called to ratify the Constitution, "All agree that the general government ought to have power for the regulation of commerce." James Madison, Speech in the Virginia Ratifying Convention on Direct Taxation (June 11, 1788), *in* JAMES MADISON: WRITINGS, *supra* note 16, at 366, 378.

24. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.3 (4th ed. 2007) ("The lack of a centralized authority over commerce and the conflicting economic interests of the new states led to what may best be described as economic chaos under the Articles of Confederation . . . .").

25. THE FEDERALIST NO. 22, *supra* note 12, at 143 (Alexander Hamilton).

26. *Id*. at 143-44.

27. THE FEDERALIST NO. 41, *supra* note 12, at 256 (James Madison).

The authors of the *Federalist Papers* wrote that Congress's power to regulate commerce was essential to the new nation's ability to grow economically strong, and to protect itself, including through its funding of a world-class navy to maintain America's means of selling goods and services worldwide. As Hamilton wrote:

> Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth. This situation would even take away the motive to such combinations by inducing an impracticability of success. An active commerce, an extensive navigation, a flourishing marine would then be the inevitable offspring of moral and physical necessity. We might defy the little arts of little politicians to control or vary the irresistible and unchangeable course of nature.
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> . . . .
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> To this great national object, a NAVY, union will contribute in various ways. Every institution will grow and flourish in proportion to the quantity and extent of the means concentered towards its formation and support.[28]

A robust national economy, facilitated by Congress's use of the Commerce Clause, was also necessary to provide the tax revenues to support the operations required for the federal government to fulfill its other constitutionally required duties. As Hamilton wrote:

> The ability of a country to pay taxes must always be proportioned in a great degree to the quantity of money in circulation and to the celerity with which it circulates. Commerce, contributing to both these objects, must of necessity render the payment of taxes easier and facilitate the requisite supplies to the treasury. . . .
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> . . . .
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> . . . And it cannot admit of a serious doubt that this state of things must rest on the basis of a general Union. As far as this would be conducive to the interests of commerce, so far it must tend to the extension of the revenue to be

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28. THE FEDERALIST NO. 11, *supra* note 12, at 87, 89 (Alexander Hamilton). Madison also supported the first tariff bill in the First Congress on the grounds that it was a regulation of commerce designed to boost domestic manufacturing in order to create a national economy robust enough to support a navy. *See* 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 196 (Joseph Gales & William Seaton eds., 1834) (1789).

> If it is expedient for America to have vessels employed in commerce at all, it will be proper that she have enough to answer all the purposes intended; to form a school for seamen, to lay the foundation of a navy, and to be able to support itself against the interference of foreigners.

Id.

drawn from that source.[29]

Hamilton understood that lower taxes and fewer business regulations would increase, not decrease, federal revenues. As he wrote in the *Federalist Papers*, "If duties are too high, they lessen the consumption; the [revenue] collection is eluded; and the product to the treasury is not so great as when they [regulations] are confined within proper and moderate bounds."[30] Hamilton wrote that only a regime of limited regulations, enforced by Congress, would ensure the free flow of commerce between the states that was necessary to help ensure that citizens in all states would always have access to what they wanted from the markets, including an ability to draw from goods and services in other states:

> An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another.[31]

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29. THE FEDERALIST NO. 12, *supra* note 12, at 92-93 (Alexander Hamilton).

30. THE FEDERALIST NO. 22, *supra* note 12, at 142-43 (Alexander Hamilton).

31. THE FEDERALIST NO. 11, *supra* note 12, at 89 (Alexander Hamilton). Hamilton later famously argued in favor of the constitutionality of Congress's creation of a national bank under its Commerce Clause authority, arguing that such a bank would facilitate the circulation of money throughout the states. As Hamilton wrote,

> The institution of a bank has also a natural relation to the regulation of trade between the States; in so far as it is conducive to the creation of a convenient medium of *exchange* between them and to the keeping up a full circulation, by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns.

Alexander Hamilton, Opinion on the Constitutionality of a National Bank (Feb. 23, 1791), *in* ALEXANDER HAMILTON: WRITINGS 613, 637 (Joanne B. Freeman ed., 2001). While James Madison initially opposed the constitutionality of the creation of a national bank, he limited his argument to Congress's lack of a specific authority to grant charters of incorporation under "1. The power to lay and collect taxes to pay the debts, and provide for the common defense and general welfare: Or, 2. The power to borrow money on the credit of the United States: Or, 3. The power to pass all laws necessary and proper to carry into execution those powers." James Madison, Speech in Congress Opposing the National Bank, *in* JAMES MADISON: WRITINGS, *supra* note 16, at 480, 482-83. Madison did not address the constitutionality of the national bank under Congress's Commerce Clause authority. Later, as President in 1815, Madison vetoed legislation establishing the Second Bank of the United States, but on policy rather than constitutional grounds, because, as he wrote, he was

> [w]aiving the question of the constitutional authority of the legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in the acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation . . . .

In sum, the *Federalist Papers* describe how Congress's Commerce Clause power is necessary to grow the Union "in a commercial light" to promote "the supply of reciprocal wants at home" among all the states and allow "[t]he veins of commerce in every part [to] be replenished" through "a free circulation of the commodities of every part"[32] so goods and services could get where they were needed among the states, when they were needed.

THE *FEDERALIST PAPERS* AND THE NEED TO COUNTER LIMITS ON THE FLOW OF GOODS AND SERVICES AMONG STATES

As Madison claimed, "There are regulations in different states which are unfavorable to the inhabitants of other states . . . . This will not be the case when uniform regulations will be made" by Congress.[33] Regarding the free flow of products between states, Hamilton also argued that the Constitution was necessary to prevent states from favoring in-state interests at the expense of out-of-state interests.[34]

James Madison, Veto Message (Jan. 30, 1815), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 555, 555 (James D. Richardson ed., 1899). The next year, when the bill establishing the bank was rewritten to satisfy President Madison's policy objections, he signed it into law. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 227-46 (1957).

32. THE FEDERALIST NO. 11, *supra* note 12, at 89 (Alexander Hamilton).

33. Madison, *supra* note 23, at 378-79. When the Virginia ratifying convention met in Richmond, Madison opposed the notion that Virginia's ratification of the Constitution be conditioned on the adoption of additional amendments, realizing that a conditional acceptance would amount to a rejection insofar as it would threaten to encourage further extended debate surrounding the Constitution and doom its ultimate ratification. *See* RICHARD BROOKHISER, JAMES MADISON 74-75 (2011). Ultimately, Virginia agreed to ratify the Constitution without condition, and to only recommend that certain amendments subsequently be adopted. *See id.* at 75. One such recommended amendment could arguably have limited future federal tort reforms had it become part of the Constitution. It stated, "That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, compleatly [sic] and without denial . . . and that all establishments or regulations contravening these rights, are oppressive and unjust." CREATING THE BILL OF RIGHTS 18 (Helen E. Veit et al. eds., 1991). However, no such amendment to the Constitution was adopted.

34. *See* THE FEDERALIST NO. 7, *supra* note 12, at 62-63 (Alexander Hamilton). Hamilton contended:

> Competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance. *We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest.* The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.

Madison described one of the purposes of the Constitution's Commerce Clause as follows:

> A very material object of this power [of Congress] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these [States] at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. *We may be assured by past experience that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility*.[35]

Madison predicted that, in the future, citizens would see the rise of new forms of rules and regulations in the states that would increase the costs of things nationwide, and that Congress would need its Commerce Clause authority to counter those cost-increasing influences. The purpose of the Commerce Clause was therefore not limited to the need for Congress to regulate the sorts of imposts and duties imposed by states on out-of-state goods.[36] Rather, the purpose of the Commerce Clause was also to give Congress the power to regulate as-yet unknown means the states could use to limit commerce in a way that would increase the costs of goods and services for American consumers. As Hamilton wrote:

> It may perhaps be replied to this, that whether the States are united or disunited there would still be an intimate intercourse between them which would answer the same ends; but [without the Commerce Clause] *this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes*, which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests can only result from a unity of government.
>
> There are other points of view in which this subject might be placed, of a striking and animating kind. But they would lead us too *far into the regions of*

Id.

35. THE FEDERALIST NO. 42, *supra* note 12, at 267-68 (James Madison) (emphasis added).

36. Indeed, if the only problem intended to be addressed by the Commerce Clause was that posed by the states' imposition of imposts and duties on things from other states, it would have been superfluous, as Article I, Section 10, clause 2 provides that "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." U.S. CONST. art. I, § 10, cl. 2.

futurity, and would involve topics not proper for a newspaper discussion.[37]

Hamilton wrote later in the *Federalist Papers*:

> [W]e must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. . . . Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.[38]

Nor was the purpose of the Commerce Clause limited to granting Congress the ability to regulate commerce in products. As Hamilton wrote, the purpose of the Commerce Clause was also to promote the commerce conducted by merchants, mechanics, and "all orders of man [who] look forward with eager expectation and growing alacrity to this pleasing reward of their toils."[39]

According to Hamilton:

> The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares. By multiplying the means of gratification, . . . it serves to vivify

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37. THE FEDERALIST NO. 11, *supra* note 12, at 90 (Alexander Hamilton) (emphasis added). Hamilton also foresaw the need under the Commerce Clause for Congress to be able to counter state limits on the free flow of goods and services nationwide "far into the regions of futurity." *Id.* At the time of the Constitution's ratification, there was relatively little domestic trade, let alone pervasive tort laws, and consequently, the modern barriers to commerce among the states caused by modern tort law had not yet materialized as they have today. *See* EMORY R. JOHNSON ET AL., 1 HISTORY OF DOMESTIC AND FOREIGN COMMERCE OF THE UNITED STATES 174, 193 (1915). Johnson and van Metre state:

> Domestic trade of great volume occurs only when there is a sectional diversity of products for which there is a great intersectional demand. Diversity of production of this kind did not exist to a large extent during colonial days, and even at the time of the adoption of the Constitution there was no indication that conditions favorable to a large interregional domestic commerce would soon arise. But . . . events . . . foreshadowed a fundamental change in the economic organization of the nation.
>
> . . . Out of the change heralded by these . . . events was to grow a domestic commerce, both coastwise and internal, more valuable than the foreign or domestic trade of any other nation in the world. . . .
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> . . . .
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> . . . After the close of the Revolution, the rapid settlement of the region west of the Appalachian highland and the development of a sectional diversity of occupation—manufacturing in the New England and Middle States, grain-raising in the Ohio Valley, and cotton-raising in the South—gave rise to a large internal trade.

Id.

38. THE FEDERALIST NO. 34, *supra* note 12, at 207 (Alexander Hamilton).

39. THE FEDERALIST NO. 12, *supra* note 12, at 91 (Alexander Hamilton) (emphasis added).

> and invigorate all the channels of industry, and to make them flow with greater activity and copiousness. The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer—all orders of men look forward with eager expectation and growing alacrity to this pleasing reward of their toils.[40]

THE NEED FOR A CONGRESSIONAL POWER TO REGULATE CITIZENS, NOT JUST STATE LEGISLATURES

Further, whereas the Articles of Confederation only allowed the federal government to regulate states as states, Hamilton and Madison argued that the new Constitution was required to allow the federal government to enact national legislation that applied to the conduct of *individual citizens* within the states, not just to the conduct of state legislatures. As Hamilton wrote, "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."[41]

As Hamilton continued, federal laws enacted under the Commerce Clause, and under Congress's other constitutional authorities, must be applicable to state citizens directly through the courts:

> The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquility, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It [the federal government] must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States.[42]

Hamilton further made clear that laws passed by Congress would not require

40. *Id*. (emphasis added).

41. THE FEDERALIST NO. 15, *supra* note 12, at 108 (Alexander Hamilton).

42. THE FEDERALIST NO. 16, *supra* note 12, at 116.

the intervention of state legislatures, writing:

> [I]f the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. No omissions nor evasions would answer the end. They would be obliged to act, and in such a manner as would leave no doubt that they had encroached on the national rights.[43]

CONGRESS'S POWER TO OCCASIONALLY "INTRUDE" ON STATE AND LOCAL AUTHORITIES, IN FURTHERANCE OF PROMOTING NATIONAL COMMERCE AND WHEN SUPPORTED BY THE PEOPLE

Hamilton and Madison recognized that the general rule should be that Congress would leave to the states those "authorities . . . judged proper to leave with the States for local purposes."[44] They made clear, however, that such a general rule could be deviated from by Congress when the states did not administer such authorities "with uprightness and prudence," especially when it came to the administration of authorities related to federal issues such as "[c]ommerce, finance, [international] negotiation, and war."[45] As Hamilton elaborated:

> AN OBJECTION of a nature different from that which has been stated and answered in my last address may perhaps be likewise urged against the principle of legislation for the individual citizens of America. It may be said that it would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. *Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository.* The

43. *Id.* at 117. In this regard, while some federal tort reform statutes contain provisions that allow state legislatures to "opt-out" of their provisions, the cited passages from the *Federalist Papers* indicate that while such provisions allowing state legislatures to "opt-out" from coverage under federal tort reform statutes may sometimes be prudent as a matter of policy, they are not required as a matter of constitutional law. *See, e.g.*, 42 U.S.C. § 14502 (2006).

44. THE FEDERALIST NO. 17, *supra* note 12, at 118 (Alexander Hamilton).

45. *Id.*

> administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be *desirable* cares of a general jurisdiction. It is therefore *improbable* that there should exist a *disposition* in the federal councils to usurp the powers with which they are connected . . . .
>
> But let it be admitted, for argument's sake, that mere wantonness and lust of domination would be sufficient to beget that disposition; still it may be safely affirmed, that the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control the indulgence of so extravagant an appetite. It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments, *if they administer their affairs with uprightness and prudence*, will generally possess over the people . . . .[46]

While fully expecting state governments, being closer to the people, to administer their laws in a way that would appeal to their citizens, Hamilton foresaw that in some instances states would administer their laws so poorly that they would lose the "affection" of the people, providing a reason for Congress to "better administ[er]" those functions in which there was a federal interest, such as commerce. As Hamilton explained:

> It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; *unless the force of that principle should be destroyed by a much better administration of the latter* [that is, better administration by the federal government].[47]

Hamilton generally saw that the distribution of power under the new Constitution would depend on the ability of each part to produce better or worse policies, in the estimation of the people.[48] As Hamilton wrote, "I believe it may be laid down as a general rule that [the people's] confidence in and

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46. *Id.* at 118-19 (emphasis added); *see also* THE FEDERALIST NO. 23, *supra* note 12, at 155 (Alexander Hamilton) ("The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend.").

47. THE FEDERALIST NO. 17, *supra* note 12, at 119-20 (Alexander Hamilton).

48. *See* THE FEDERALIST NO. 68, *supra* note 12, at 414 (Alexander Hamilton) ("[W]e may safely pronounce that the true test of a good government is its aptitude and tendency to produce a good administration.").

obedience to a government will commonly be proportioned to the goodness or badness of its administration."[49] And as David Epstein has explained this passage:

> Hamilton here is rather emphatic in suggesting that the central government can, if it does its job well, win the popular attachment away from its natural object, the states. . . . Thus the relative spheres of the central and state governments will depend on the relative attachment of the people, which may be expected to change in the future. The central government will have to prove itself by good administration. . . . While the Constitution does enumerate the objects of the central government, the partition between states and nation will not be as much a legal issue as a political one.[50]

State governments, of course, were well known at the time to be capable of maladministration, and Madison wrote that abuses by state governments contributed more than anything else to the need for a new Constitution.[51]

Hamilton also wrote that the federal government would often be the preferable source of legislation when state and local politics operated to the disadvantage of the people:

> And that on account of the extent of the country from which those [the federal representatives], to whose direction they will be committed, will be drawn, they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities, which in smaller societies frequently contaminate the public deliberations, beget

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49. THE FEDERALIST NO. 27, *supra* note 12, at 174 (Alexander Hamilton).

50. DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 53 (1984). "Hamilton suggests that the form [of government] can have a 'tendency' toward a certain quality of rule. The proposed Constitution forms several of its branches in a way which is intended to contribute to an aptitude and tendency toward energy and stability." *Id.* While some might object to any federal rules preempting state law on the grounds that it would set federal policy down a "slippery slope" in which other federal preemption rules would more easily follow, the *Federalist Papers* argue that if such a slippery slope exists, where the slope is placed, and at what angle, is up to the voting citizenry. Further, such a slope would be consistent with the *Federalist Papers*' understanding of the Commerce Clause, provided that it pointed toward further limits on nationally significant state interference with the free flow of voluntarily offered and accepted goods and services nationwide. *See* THE FEDERALIST NO. 11, *supra* note 12, at 89 (Alexander Hamilton).

51. *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* JAMES MADISON: WRITINGS, *supra* note 16, at 142, 149. Madison states:

> The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast [sic] friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

Id.

> injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.[52]

In Madison's famous *Federalist No. 10*, he relates that good federal legislation accounts for the public good, and not merely the well-being of a subset of local persons, asking "what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?"[53] In doing so, he makes clear that legislators should act not like judges, who consider the particular interests of the few litigants before them, but as representatives of the greater good in which any ill effects, in the aggregate, can be countered by federal legislation when necessary.[54] Indeed, Madison explains, "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national [government], the local and particular to the State legislatures."[55]

In the end, Madison and Hamilton agreed that when it came to the Constitution's division of powers between the states and the federal government, it was the people themselves who would decide where the balance should rest on particular issues. As Madison wrote:

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

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52. THE FEDERALIST NO. 27, *supra* note 12, at 175 (Alexander Hamilton). This concept is explored in more detail in *Federalist No. 10*, which famously describes how only a large, extended republic that includes a wide variety of groups who are similarly powerful but devoted to disparate interests is most likely to reduce the chances that any one faction will come to dominate the others. *See* THE FEDERALIST NO. 10, *supra* note 12, at 80 (James Madison) ("To secure the public good and private rights against the danger of such a [majority] faction, and at the same time to preserve the spirit and form of popular government, is then the great object to which our inquiries are directed."). More recently, as Richard Posner has pointed out, because "the larger and more heterogeneous the polity, the greater are the transaction costs of organizing a dominant coalition . . . monopolies of political power are more easily achieved at the state than at the federal level." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 695, 698 (5th ed. 1998). For that reason, for example, it may often be much easier for those interested in keeping tort liability as expansive as possible to impose their will through politics at the state, rather than the federal, level.

53. THE FEDERALIST NO. 10, *supra* note 12, at 79 (James Madison).

54. *See id.* Madison also stated that federal representatives sent by the people to Congress would have the requisite knowledge to enact laws regarding the proper regulation of commerce, writing, "A proper regulation of commerce requires much information . . . but as far as this information relates to the laws and local situation of each individual State, a very few representatives would be very sufficient vehicles of it to the federal councils." THE FEDERALIST NO. 56, *supra* note 12, at 347 (James Madison).

55. THE FEDERALIST NO. 10, *supra* note 12, at 83 (James Madison).

> . . . .
>
> If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . . .[56]

Hamilton generally described the structure established by the Constitution as erecting scales rather than fixed barriers, writing that "the people . . . will hold the scales in their own hands, it is to be hoped [they] will always take care to preserve the constitutional equilibrium between the general and the State governments."[57] And the people could choose for the scale to come to rest on any particular issue in ways that "check[ed] the usurpations of the state governments."[58] As Hamilton elaborated:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate.[59]

In sum, while the proximity of local government to the people will tend to produce local policies that the people prefer to federal alternatives, that may not always be the case in fact. While there is a natural tendency to the contrary, Congress can regulate state law to further the national goal of a robust American economy under the authority of the Commerce Clause, and it should do so when it has the support of the people.[60]

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56. THE FEDERALIST NO. 46, *supra* note 12, at 294-95 (James Madison).

57. THE FEDERALIST NO. 32, *supra* note 12, at 197 (Alexander Hamilton).

58. THE FEDERALIST NO. 28, *supra* note 12, at 181 (Alexander Hamilton).

59. *Id.* at 180-81.

60. Some claim that "tort law—the body of rules by which persons seek damages for injuries to their person and property—has always been regulated by states, not the federal government," and that "[t]ort law is at the heart of what is called the 'police power' of states." Randy E. Barnett, *Tort Reform and the GOP's Fair-Weather Federalism*, WASH. EXAMINER (May 21, 2011), http://washingtonexaminer.com/opinion/op-eds/2011/05/tort-reform-and-gops-fair-weather-federalism. However, the U.S. Supreme Court has recognized that "the taxation authority of state government" is also "central to state sovereignty." *See* Dep't of Revenue of Oregon v. ACF Indus., Inc., 510 U.S. 332, 345 (1994). Yet, the *Federalist Papers* speak directly to Congress's power under the Commerce Clause to counteract the drag a state's taxing power could place on the national economy. *See, e.g.*, THE FEDERALIST NO. 42, *supra* note 12, at 267-68 (James Madison). Congress has the authority under the Commerce Clause to counteract state power when state power is used in a way that contravenes the purpose of the clause, which is to allow Congress to remove state barriers to a robust national economy. That congressional power applies whether a state is exercising its state police power or state taxing authority. Indeed, Madison stated at the Constitutional Convention that Congress's power to regulate taxation to raise

SUMMARY AND RELATION TO CURRENT TORT LAW

From the above-quoted passages from the *Federalist Papers*, the following outline of the purpose of the Constitution's Commerce Clause can be ascertained, as it applies to modern tort law.

THE "FUTURE CONTRIVANCE" OF TORT LAW'S MODERN EXPANSION OF PRODUCTS AND PROFESSIONAL LIABILITY, AND ITS ADVERSE ECONOMIC EFFECTS

As the authors of the *Federalist Papers* wrote, the "importance of the Union, in a commercial light" relies on the "adventurous spirit, which distinguishes the commercial character of America."[61] And "there is no object, as it respects the interests of trade and finance, that more strongly demands a federal superintendence" than the "power to regulate commerce."[62] An "active commerce" should be "the offspring of moral and physical necessity"[63] and Congress should have the power to provide that "[t]he veins of commerce in every part [of the Union] will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part."[64] The Commerce Clause was necessary not just to allow Congress to protect against state policies that interfered with commerce at the time, but also to protect against state policies based on "future contrivances" that result in "serious interruptions of the public tranquility."[65]

One such "future contrivance" is the vast expansion of tort liability in the states, and the adverse economic effects of such an expansion. The relatively recent rise in virtually limitless tort liability, regarding both products and professional liability, is one future variant of state systems that restrict Americans' access to goods and services in national, private markets. Tort law began to change significantly in the nineteenth century,[66] but in ways that

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revenue and its power to regulate commerce would often be impossible to distinguish from one another. *See* MADISON, *supra* note 8, at 445-46.

> Mr. Madison . . . [said] [t]he word *revenue* was ambiguous. In many acts, particularly in the regulations of trade, the object would be twofold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue should be the sole object, in exclusion even of other incidental effects. When the Contest was first opened with [Great Britain] their power to regulate trade was admitted. Their power to raise revenue rejected. An accurate investigation of the subject afterward proved that no line could be drawn between the two cases.

Id.

61. THE FEDERALIST NO. 11, *supra* note 12, at 84-85 (Alexander Hamilton).

62. THE FEDERALIST NO. 22, *supra* note 12, at 143-44 (Alexander Hamilton).

63. THE FEDERALIST NO. 11, *supra* note 12, at 87, 89 (Alexander Hamilton).

64. *Id.* at 89.

65. THE FEDERALIST NO. 42, *supra* note 12, at 267-68 (James Madison) (emphasis added).

66. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 349 (2002). Friedman states:

largely checked, rather than expanded, such liability.[67] But with the creation of an insurance system, courts began to increasingly foist liability[68] on those with insurance regardless of fault,[69] including vital specialists like doctors,[70] with huge awards for unquantifiable and often arbitrary damages such as those for emotional distress and pain and suffering.[71] Noneconomic damages, often also called "nonpecuniary" or "pain and suffering" damages, are "[d]amages that cannot be measured in money."[72] As such, noneconomic damages are inherently unquantifiable and subject to vastly varying, and potentially limitless, assessments. The process for awarding pain-and-suffering awards has been called "analytically impenetrable. The law provides no guidance, in terms of any benchmark, standard figure, or method of analysis, to aid the jury in the process of determining an appropriate [pain-and-suffering] award."[73]

> [T]he heart and soul of tort law is the law relating to personal injury. This was essentially a creation of the nineteenth century—a creation, to be more exact, of the railroad and the factory. . . . Out of the many lawsuits that followed, a whole new body of law—tort law—was constructed, built up (mainly by the courts) piece by piece, and case by case.

Id. At the time of the founding and for some time thereafter, out-of-control state litigation was kept largely in check in the states by strict limits on lawyers' fees, which no longer prevail. *See* Paul Taylor, *The Difference Between Filing Lawsuits and Selling Widgets: The Lost Understanding that Some Attorneys' Exercise of State Power Is Subject to Appropriate Regulation*, 4 PIERCE L. REV. 45, 53-55 (2005).

67. *See* FRIEDMAN, *supra* note 66, at 349-50.

> In essence, nineteenth-century tort law was a law of limitation: a law that set boundaries to the liability of enterprise; a law that made it difficult . . . to collect for personal injury. In the twentieth century, the old tort system was completely dismantled; the courts and the legislatures limited or removed the obstacles that stood in the way of plaintiffs; and a new body of law developed, law which favored the plaintiffs—to a point where people spoke about a liability 'explosion.'

Id. (footnote omitted)

68. *See id.* at 350. "The typical tort case pitted an injured individual against a corporation (often a big corporation). The corporation, more likely than not, carried insurance. Under these conditions, the courts lost whatever zeal they once had for protecting the erosion of capital through lawsuits." *Id.*

69. *See id.* at 355-56. "The tort system in general changed radically, especially after the 1940s . . . . Defenses have eroded, and courts (and legislatures) have expanded liability to a point that the nineteenth century would have considered sheer, utter madness." *Id.*

70. *See id.* at 366. "Medical malpractice was a growing subfield of the law of torts, roughly from the 1950s on . . . . [M]alpractice cases were rare in the nineteenth century, and remained so well into the twentieth century." *Id.*

71. *See* FRIEDMAN, *supra* note 66, at 358. "[C]ourts in the nineteenth century were loath to allow a plaintiff to recover damages for emotional distress (as opposed to physical injury) . . . . In the twentieth century, this doctrine began to unravel." *Id.*

72. *See* BLACK'S LAW DICTIONARY 418 (8th ed. 2004) (nonpecuniary damages).

73. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 265 (1989). Because of the problems inherent in potentially unlimited noneconomic damages awards, many states have limited such awards through legislation. In upholding California's statutory $250,000 limit on such damages, the California Supreme Court stated that the purposes of those reforms are to "provide a more stable base on which to calculate insurance rates" by

> the unpredictability of the size of large noneconomic damage awards, resulting from the inherent

As legal historian Lawrence Friedman has summarized, "The dramatic extension of the tort system in the twentieth century is unquestionably real. People brought lawsuits which would have been unthinkable in the nineteenth century, or even in the earlier part of the twentieth."[74]

The annual direct cost of American tort litigation has been reported to exceed $250 billion, almost 2% of gross domestic product,[75] and that dramatic expansion of tort liability has negatively affected businesses both small[76] and large.[77] A report by the U.S. Chamber Institute for Legal Reform concluded,

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> difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses [and to] promote settlements by eliminating the unknown possibility of huge awards for pain and suffering that can make litigation more than worth the gamble.

Fein v. Permanent Med. Grp., 695 P.2d 665, 683 (Cal. 1985). Some federal tort reform proposals are modeled on the same state legislation and would apply the same uniform rules on noneconomic damages in healthcare lawsuits nationwide. *See, e.g.*, Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011, H.R. 5, 112th Cong. (2011).

74. FRIEDMAN, *supra* note 66, at 372.

75. *See* TOWERS PERRIN, 2009 UPDATE ON U.S. TORT COST TRENDS 5 (2009), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf (costs as of 2008); *see also* Sebastian Mallaby, *The Trouble with Torts*, WASH. POST, Jan. 10, 2005, at A17. Mallaby writes:

> The most complete study of the tort system's cost comes from the consulting firm Tillinghast-Towers Perrin. Tillinghast's clients are mainly insurers, which are at loggerheads with the trial bar, so you may mistrust its data. Nonetheless, Tillinghast has published seven updates to its original 1985 study, refining its methodology along the way. Its numbers are the best available. And they are stunning.
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> . . . [T]he really shocking thing is where the billions went. Injured plaintiffs—the fabled little guys for whom the system is supposedly designed—got less than half the money.
>
> According to Tillinghast's 2002 data, plaintiffs' lawyers swallowed 19 percent of the $233 billion [in annual tort costs]. Defense lawyers pocketed an additional 14 percent, and other administrative costs, mainly at insurance firms, accounted for a further 21 percent. The legal-administrative complex thus guzzled fully 54 percent of the money in the tort system, or $126 billion. . . .
>
> No other system for compensating misfortune has such outrageous administrative costs. . . .
>
> . . . [T]he tort system's administrative costs are a scandal . . .
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> . . . .
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> . . . Measured as a share of GDP, America's tort system is more than twice as expensive as it was in 1960, twice as expensive as the current systems in France or Canada, and three times as expensive as the system in Britain. A reasonable goal for the American tort system is to halve it.

Mallaby, *supra*.

76. In 2004, the nation's oldest ladder manufacturer, family-owned John S. Tilley Ladders Company of Watervliet, New York, near Albany, filed for bankruptcy protection and sold off most of its assets due to litigation costs. Founded in 1855, the Tilley firm could not handle the cost of liability insurance, which had risen from 6% of sales a decade ago to 29%, even though the company never lost an actual court judgment. "We could see the handwriting on the wall and just want to end this whole thing," said Robert Howland, a descendant of company founder John Tilley. *See* Carrie Coolidge, *The Last Rung: The Tort System Takes Down a 149-Year-Old Ladder Manufacturer*, FORBES, Jan. 12, 2004, at 52.

77. As Bernie Marcus, cofounder and former chairman of The Home Depot, has described:

> An unpredictable tort system casts a shadow over every plan and investment. It is devastating for

"The tort liability price tag for small businesses in America is $88 billion a year" and that "[s]mall businesses bear 68 percent of business tort liability costs, but take in only 25 percent of business revenue."[78] In 2008, the tort liability costs for small businesses were estimated to be $133.4 billion.[79]

The arguments made in the *Federalist Papers* support federal products liability reforms that prevent some states from disadvantaging nationally sold and distributed products through state tort laws that stifle national commerce.[80] A modern manifestation of the problem Madison foresaw is that, today, some states' tort laws allow virtually unlimited lawsuits that increase the costs of selling products or services that cross into their jurisdictions. The modern term applied to that phenomenon is the "tort tax,"[81] and when it is applied to national industries, it is passed on to consumers everywhere. The result is higher prices and lost jobs across multiple states, or nationwide. When that happens, Congress can, and often should, enact federal tort reform to preserve federalism principles.

While some may argue that federal action to address overly expansive state tort liability is unnecessary because businesses can simply avoid states that have oppressive tort laws, Madison rejected that argument against congressional action. As Madison argued, Congress should have the power to enact rules that allow products and services to enter into a state "jurisdiction" without having to worry that doing so would dramatically increase the price of their products and services elsewhere.[82]

> start-ups. The cost of even one ill-timed abusive lawsuit can bankrupt a growing company and cost hundreds of thousands of jobs. CEOs and their boards are forced to lower their aspirations and hold back on innovations to manage defensively. This is holding our nation back from competing effectively in the global marketplace and offshore competition is seriously cutting into market share for U.S. companies.

WASH. LEGAL FOUND., CONVERSATIONS WITH . . ., at 5 (Fall 2004), http://www.wlf.org/upload/102504CW Fall2004.pdf.

78. JUDYTH PENDELL & PAUL HINTON, U.S. CHAMBER INST. FOR LEGAL REFORM, LIABILITY COSTS FOR SMALL BUSINESS 1 (June 2004) (defining "small business" as "those with less than $10 million in annual revenue and at least one employee in addition to the owner").

79. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, TORT LIABILITY COSTS FOR SMALL BUSINESS 1 (July 2010).

80. *See* THE FEDERALIST NO. 22, *supra* note 12, at 145 (Alexander Hamilton) ("[Y]et we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.").

81. *See, e.g.*, LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, PAC. RESEARCH INST., U.S. TORT LIABILITY INDEX: 2008 REPORT 10 (2008) (concluding excessive tort liability imposes "an annual 'excess tort tax' of $7,848 on a family of four.").

82. THE FEDERALIST NO. 42, *supra* note 12, at 267-68 (James Madison). Madison, in his own notes on the debates over the Commerce Clause at the Constitutional Convention, described himself (in the third person) as saying the following about the Commerce Clause:

> Whether the States are now restrained from laying tonnage duties [under the Commerce Clause] depends on the extent of the power "to regulate commerce." These terms are vague, but seem to exclude this power of the States. . . . He was more & more convinced that the regulation of

The *Federalist Papers* set out why Congress must provide for a free economy generally because

> [t]he ability of a country to pay taxes must always be proportioned in a great degree to the quantity of money in circulation and to the celerity with which it circulates. Commerce, contributing to both these objects, must of necessity render the payment of taxes easier, and facilitate the requisite supplies to the treasury.[83]

The Commerce Clause was necessary to allow Congress to help "multiply the means of [people's] gratification," which would "serve[] to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness."[84] That congressional power necessarily requires federal legislation to apply to "the persons of the citizens . . . through the medium of the courts of justice."[85] Further, "the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves."[86]

The medical profession has been particularly hard-hit by the dramatic expansion of tort liability. Before the 1960s, only one physician in seven had ever been sued in his entire lifetime,[87] whereas today's rate is about one in seven physicians sued per year.[88] The direct costs of medical malpractice

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> Commerce was in its nature indivisible and ought to be under one [federal] authority.

MADISON, *supra* note 8, at 644-45.

83. THE FEDERALIST NO. 12, *supra* note 12, at 92-93 (Alexander Hamilton).

84. *Id.* at 91 (emphasis added).

85. THE FEDERALIST NO. 16, *supra* note 12, at 116 (Alexander Hamilton).

86. *Id.* at 117 (Alexander Hamilton).

87. *See Opinion Survey of Medical Professional Liability*, 164 J. AM. MED. ASS'N 1525, 1583-94 (1957).

88. *See* RANDALL R. BOVBJERG, URBAN INST., MEDICAL MALPRACTICE: PROBLEMS & REFORMS (1995). Further, the Harvard Medical Practice Study found that over half of the filed medical professional liability claims studied were brought by plaintiffs who suffered either no injuries at all, or, if they did, such injuries were not caused by their healthcare providers, but rather by the underlying diseases. *See* HARVARD MED. PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 11-5 (1990) ("[T]he tort system imposes the costs of defending claims on [healthcare] providers who may not even have been involved in an injury, let alone a negligent injury."). The researchers studied forty-seven medical malpractice claims that resulted in litigation. *See id.* at 7-1.

> In 14 cases, the physicians reviewed the record and found no adverse event. For most of these cases, the physicians examined the outcome and concluded that the cause was the underlying disease rather than medical treatment. . . . In these 14 cases, our physician reviewers took a stand opposite to that of the plaintiff-patient's expert."

Id. at 7-33. Further, the reviewers found that in an additional ten cases, an adverse event occurred, but there was no negligence on the part of the healthcare provider. *Id.* Of the forty-seven claims that the researchers analyzed, less than half demonstrated any actual negligence, and many demonstrated no discernable injury. *See* PAUL WEILER ET AL., A MEASURE OF MALPRACTICE 71 (1993). Of those forty-seven,

claims jumped by an average of 11.9% per year from 1975 to 2002.[89] While Hamilton saw Commerce Clause regulations as necessary to help grow the economy and expand the federal tax base,[90] the modern, tort-driven practice of "defensive medicine"[91] shrinks the economy and weakens the tax base by diverting taxpayer resources to unnecessary tests and procedures. Under current state tort rules, healthcare workers seek to avoid the costs of lawsuits to themselves by conducting many additional, unnecessary, and costly tests and procedures and shifting those costs to federal taxpayers in the form of federally paid-for medical services.[92]

The cost of defensive medicine has been widely debated, but even the lower range of estimated costs are large. As one report recently summarized the evidence:

> The latest estimate [of the costs of defensive medicine], from an analysis just published in *Health Affairs*: $45.6 billion annually (in 2008 dollars), accounting for more than 80% of the $55.6 billion total yearly cost of the medical liability system. The authors [from Harvard University and the University of Melbourne] . . . include estimates of defensive medicine costs

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> 10 claims involved hospitalization that had produced injuries, though not due to provider negligence; and another three cases exhibited some evidence of medical causation, but not enough to pass our probability threshold. That left 26 malpractice claims, more than half the total of 47 in our sample, which provided no evidence of medical injury, let alone medical negligence.

Id.

89. *See* TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE 2 (2003), *available at* https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf

90. *See* THE FEDERALIST NO. 22, *supra* note 12, at 143-44 (Alexander Hamilton). "If [state-imposed] duties are too high, they lessen the consumption; the [revenue] collection is eluded; and the product to the treasury is not so great as when [the regulations] are confined within proper and moderate bounds." *Id.*

91. A survey released in 2010 found defensive medicine is an issue for all physicians. The results, published in the *Archives of Internal Medicine*, found that 91% of the 1231 doctors who responded to the survey "reported believing that physicians order more tests and procedures than needed to protect themselves from malpractice suits." That view was held by the vast majority of generalists (91%), medical specialists (89%), surgeons (93%), and other specialists (94%). The survey asked physicians to rate their level of agreement with two questions: "Doctors order more tests and procedures than patients need to protect themselves from malpractice suits"; and "Unnecessary use of diagnostic tests will not decrease without protections for physicians against unwarranted malpractice suits." Overall, 91% of doctors surveyed agreed with both statements. *See* Tara F. Bishop et al., *Physicians' Views on Defensive Medicine: A National Survey*, 170 ARCHIVE INTERNAL MED. 1006, 1081-83 (2010).

92. As one physician explained:

> Just one successful lawsuit against a physician for a missed diagnosis can damage his ability to maintain his credentials, cost him . . . in increased liability insurance, jeopardize his financial assets, and even end his career. Why risk our own money when we can use somebody else's to protect us, even if it costs millions?

How I Am Learning to Throw Money Away with Both Hands and a Big Shovel, PANDABEARMD.COM (Feb. 5, 2008), http://www.pandabearmd.com/2008/02/05/how-i-am-learning-to-throw-money-away-with-both-hands-and-a-big-shovel/.

> both for hospitals ($38.8 billion) and for physicians ($6.8 billion), calculated by looking at costs in high- and low-liability environments. The thought is that the difference represents [increased] spending due to fear of being sued—i.e. defensive medicine.
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> . . . .
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> The total costs of the medical liability system constitute about 2.4% of total health-care spending, the authors write. That's "not trivial," they write, and because some of these costs "stem from meritless malpractice litigation," flaws in the system are worth addressing.[93]

A 2009 study by the Pacific Research Institute estimates that defensive medicine costs $191 billion a year,[94] while a separate 2008 study by PricewaterhouseCoopers puts the number even higher at $210 billion.[95]

The Congressional Budget Office (CBO) has estimated the costs of defensive medicine to federal taxpayers. On October 9, 2009, the CBO, using conservative estimation models, concluded that a federal tort reform package would reduce the federal budget deficit by an estimated $54 billion over the next ten years.[96] According to another CBO report, "CBO estimates that, under [federal tort reform proposals], premiums for medical malpractice insurance ultimately would be an average of 25 percent to 30 percent below what they would be under current law."[97] Lower healthcare lawsuit-liability premiums would reduce healthcare costs for everyone and increase the supply of vital doctors by allowing more of them to continue practicing, including in higher-

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93. Katherine Hobson, *How Much Does Defensive Medicine Cost? One Study Says $46 Billion*, WALL ST. J. HEALTH BLOG (Sept. 7, 2010, 1:16 PM), http://blogs.wsj.com/health/2010/09/07/how-much-does-defensive-medicine-cost-one-study-says-46-billion/.

94. *See* LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, PAC. RESEARCH INST., THE FACTS ABOUT MEDICAL MALPRACTICE LIABILITY COSTS 2 (2009), *available at* http://www.pacificresearch.org/docLib/20091007_HPPv7n10_1009.pdf.

95. *See* PRICEWATERHOUSECOOPERS' HEALTH RESEARCH INST., THE PRICE OF EXCESS: IDENTIFYING WASTE IN HEALTHCARE SPENDING 1, 17 n.18 (2008).

96. *See* Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Senator Orrin G. Hatch (Oct. 9, 2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/106xx/doc10641/10-09-tort_reform.pdf.

97. COST ESTIMATE, CONG. BUDGET OFFICE, H.R. 4600 HELP EFFICIENT, ACCESSIBLE, LOW COST, TIMELY HEALTHCARE (HEALTH) ACT OF 2002 (Sept. 25, 2002), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/38xx/doc3815/hr4600ec.pdf [hereinafter 2002 CBO COST ESTIMATE]. The Government Accountability Office has found that rising litigation awards are responsible for the skyrocketing medical professional liability insurance premiums which have driven doctors out of business. The "GAO found that losses on medical malpractice claims—which make up the largest part of insurers' costs—*appear to be the primary driver of rate increases in the long run*." U.S. GEN. ACCOUNTING OFFICE, GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES, 4, 25 (June 2003), *available at* http://www.gao.gov/new.items/d03702.pdf. The GAO also concluded that insurer profits "are not increasing, indicating that insurers are not charging and profiting from excessively high premium rates" and that "in most states the insurance regulators have the authority to deny premium rate increases they deem excessive." *Id.* at 32.

risk medical fields.[98] Further, according to the CBO, an

> analysis [of federal tort reform legislation] indicated that certain tort limitations, primarily caps on awards and rules governing offsets from collateral-source benefits, effectively reduce average premiums for medical malpractice insurance. Consequently, CBO estimates that, in states that currently do not have controls on malpractice torts, [federal tort reforms] would significantly lower premiums for medical malpractice insurance from what they would otherwise be under current law.[99]

The federal costs of defensive medicine have even drawn the attention of the National Commission on Fiscal Responsibility and Reform, which President Barack Obama created to help address the nation's massive federal debt. The commission announced its support for federal healthcare litigation tort reforms in its final December 2010 report, as a means of reducing the federal debt. As the Commission stated in a report that was endorsed by 61% of its members (by a vote of 11-7)[100]:

> Most experts agree that the current tort system in the United States leads to an increase in healthcare costs. This is true both because of direct costs—higher malpractice insurance premiums—and indirect costs in the form of over-utilization of diagnostic and related services (sometimes referred to as "defensive medicine"). The Commission recommends an aggressive set of reforms to the tort system.
>
> Among the policies pursued, the following should be included: 1) Modifying the "collateral source" rule to allow outside sources of income collected as a result of an injury (for example, workers' compensation benefits or insurance benefits) to be considered in deciding awards; 2) Imposing a statute of limitations—perhaps one to three years—on medical malpractice lawsuits; 3) Replacing joint-and-several liability with a fair-share rule, under which a defendant in a lawsuit would be liable only for the percentage of the final award that was equal to his or her share of responsibility for the injury . . . .
>
> Many members of the Commission also believe that we should impose statutory caps on punitive and non-economic damages, and we recommend that

98. *See* Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 J. AM. MED. ASS'N 2618, 2622 (2005). The authors of this article found that state tort reform laws intended to restrict the growth of malpractice insurance premiums led to an increase in high-malpractice-premium specialty physicians due to reduced retirements and increased entry into practice, and stated, "For example, direct [tort] reforms led to increased growth in the supply of emergency medicine physicians of approximately 11.5% . . . . Effects for anesthesiology and radiology were also larger than the average effect . . . ." *Id.*

99. 2002 CBO COST ESTIMATE, *supra* note 97.

100. *See* Editorial, *Our View on Fiscal Reform: Deficit Commission Shows How to Harpoon Budget "Whales"*, USA TODAY (Dec. 5, 2010, 7:50 PM), http://www.usatoday.com/news/opinion/editorials/2010-12-06-editorial06_ST_N.htm.

Congress consider this approach and evaluate its impact.[101]

State tort law can also have dramatic effects on the interstate movement of those with valuable skills,[102] including medical skills.[103] Studies show that doctors migrated to Mississippi and Texas following their enactment of

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101. NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH 39-40 (Dec. 2010), *available at* http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf.

102. One study, which ranked states based, in part, on how onerous their liability systems were on business based on a survey of business owners and managers, sought to "determine whether freer states tend to attract more people and less free states tend to repel them." WILLIAM P. RUGER & JASON SORENS, MERCATUS CTR. AT GEORGE MASON UNIV., FREEDOM IN THE 50 STATES: AN INDEX OF PERSONAL AND ECONOMIC FREEDOM 8, 18, 61, 65 (2011). The researchers concluded, "Substantively, the results show that an increase of 0.5 points on the freedom scale . . . increases net migration to a whopping 5.9 percentage points of 2000 population." *Id*. at 18.

103. *See* Chiu-Fang Chou & Anthony T. Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 HEALTH SERVICES RES. 1271, 1273 (2009). Chou and Lo Sasso explain:

> State malpractice damage award caps appear to attract high medical malpractice specialties such as OB/GYNs and surgeons. Health professional shortage area (HPSA) designation appears to attract only those OB/GYNs and primary care physicians (PCPs) without education debt, which would suggest that subsidy and loan repayment programs are not necessarily outweighing the perceived costs of locating in areas designated as underserved.

Id. Kessler, Sage, and Becker claim:

> The adoption of "direct" malpractice reforms [such as caps on damages] led to greater growth in the overall supply of physicians. Three years after adoption, direct reforms increased physician supply by 3.3%, controlling for fixed differences across states, population, states' health care market and political characteristics, and other differences in malpractice law. Direct reforms had a larger effect on the supply of nongroup vs group physicians, on the supply of most (but not all) specialties with high malpractice insurance premiums, on states with high levels of managed care, and on supply through retirements and entries than through the propensity of physicians to move between states. Direct reforms had similar effects on less experienced and more experienced physicians.

Kessler et al., *supra* note 98, at 2618. Fred Helling and William Encinosa state:

> Adjusting for a variety of factors in a multivariate regression model, we found that States with caps on noneconomic damages experienced about 12 percent more physicians per capita than States without such a cap. Moreover, we found that States with relatively high caps were less likely to experience an increase in physician supply than States with lower caps.

FRED HELLINGER & WILLIAM ENCINOSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE IMPACT OF STATE LAWS LIMITING MALPRACTICE AWARDS ON THE GEOGRAPHIC DISTRIBUTION OF PHYSICIANS 1 (2003), *available at* http://www.ahrq.gov/RESEARCH/tortcaps/tortcaps.pdf; *see also* Jonathan Klick & Thomas Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, 36 J. LEGAL STUD. S121, S132 (2007) ("[C]aps on noneconomic damages have a robust, positive, and statistically significant effect on the location decisions of physicians in high-risk specialties."); NORTHWESTERN UNIV. FEINBERG SCH. OF MED., ILLINOIS NEW PHYSICIAN WORKFORCE STUDY 4 (2010) (polling residents and finding that many wish to leave their state to avoid its "hostile" medical malpractice environment, and concluding that "[a]pproximately one-half of graduating Illinois residents and fellows are leaving the state to practice . . . . [T]he medical malpractice liability environment is a major consideration for those that plan to leave Illinois to practice.").

significant tort reform.[104] Without some uniformity in the law to control healthcare costs, many states will continue to suffer under doctor shortages.

While the authors of the *Federalist Papers* wrote that the Commerce Clause was necessary to allow Congress to "multiply the means of [people's] gratification," which would "serve[] to vivify and invigorate all the channels of industry, and to make them flow with greater activity and copiousness,"[105] the current state tort regime is driving doctors out of their practices, a problem that has been particularly acute in the fields of ob-gyn and trauma care as well as in rural areas.[106] According to a Massachusetts study, 38% of physicians have reduced the number of higher-risk procedures they provide, and 28% have reduced the number of higher-risk patients they serve, out of fear of liability.[107] The American College of Obstetricians and Gynecologists has concluded that the "current medico-legal environment continues to deprive women of all ages, especially pregnant women, of their most educated and experienced women's health care physicians."[108] Today, one-third of orthopedists, trauma surgeons, and emergency room doctors will probably be sued in any given year.[109] Nearly half of hospital emergency departments say they have had to divert ambulances due, in part, to a shortage of specialists[110] and three-quarters report having inadequate specialist coverage.[111] Neurosurgeons face liability lawsuits

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104. *See* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 OBSTETRICS & GYNECOLOGY 335, 337, 338 fig.3 (2011) ("[T]he number of [Medical Assurance Company of Mississippi]-insured physicians increased in Mississippi after the implementation of tort reform."); Ronald M. Stewart et al., *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J. AM. C. SURGEONS 463, 466 (2011).

> With respect to access, tort reform reduces a major disincentive for the continued practice of surgery in a given geographic or specialty area, potentially increasing access to care. Removing or reducing this disincentive to practice is particularly important given the current and looming shortage of surgeons, particularly in general surgery. From 2003 to 2009, the Texas population increased 12% from 22,118,509 to 24,782,302; during the same time period, the number of licensed physicians practicing in the state increased 24%, from 38,035 to 47,084. Post-tort reform, physician practice in the state grew at double the rate of the Texas population.

Stewart et al., *supra*.

105. THE FEDERALIST NO. 12, *supra* note 12, at 91 (Alexander Hamilton) (emphasis added).

106. David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. S143, S160 (2007) (finding that state damage caps "increase physician supply in the most rural areas").

107. MASS. MED. SOC'Y, INVESTIGATION OF DEFENSIVE MEDICINE IN MASSACHUSETTS 4-5 (2008), *available at* http://www.massmed.org/AM/Template.cfm?Section=Research_Reports_and_Studies2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27797.

108. JEFFREY KLAGHOLZ & ALBERT L. STRUNK, OVERVIEW OF THE 2009 ACOG SURVEY ON PROFESSIONAL LIABILITY 5 (2009), *available at* http://www.acog.org/~/media/Departments/Professional%20Liability/2009PLSurveyNational.pdf?dmc=1&ts=20120225T1625584259.

109. Richard E. Anderson, *Defending the Practice of Medicine*, 164 ARCHIVES INTERNAL MED. 1173, 1174 (2004).

110. AM. COLL. OF SURGEONS, A GROWING CRISIS IN PATIENT ACCESS TO EMERGENCY SURGICAL CARE 2 (2006).

111. *Id*. at 3.

every two years on average.[112] And the American College of Obstetricians and Gynecologists 2009 Medical Liability Survey found almost 91% of medical professionals surveyed had experienced at least one liability claim filed against them.[113]

The Association of American Medical Colleges has predicted that by 2015 the shortage of physicians across all specialties will more than quadruple to almost 63,000,[114] and specialists have predicted that would be the "first time since the 1930s that the ratio of physicians to the population will start to decline."[115] The American Academy of Family Physicians has projected the shortfall of family physicians will reach 40,000 by 2020.[116] The supply of doctors available to treat America's citizens has become an issue of national concern.

FEDERAL TORT REFORM WHEN "PRUDENT" FOR A "BETTER ADMINISTRATION" OF NATIONAL ECONOMIC AFFAIRS

The statistics outlined above indicate a need for tort reforms that can be enacted at the state level. In the absence of state action, however, the *Federalist Papers*' understanding of the Commerce Clause allows ample room for federal action.

The *Federalist Papers* make clear that while "[t]he administration of private justice between the citizens of the same State . . . can never be *desirable* cares of a general [federal] jurisdiction," Congress could legislate on such subjects when the states did not administer such authorities "with uprightness and *prudence*," especially when it came to the administration of authorities related to federal issues such as "[c]ommerce, finance, negotiation, and war."[117]

Hamilton described the "general rule" as one in which "[the people's] confidence in and obedience to [each level of] government will commonly be proportioned to the goodness or badness of its administration."[118] Far from prohibiting Congress from regulating state lawsuits to foster commerce, the *Federalist Papers* explicitly foresee the enactment of such federal regulations when necessary to "check the usurpations of the state governments"[119] and

112. Richard E. Anderson, *Effective Legal Reform and the Malpractice Insurance Crisis*, 5 YALE J. HEALTH POL'Y L. & ETHICS 341, 345 (2005).

113. *See* KLAGHOLZ & STRUNK, *supra* note 108, at 4.

114. ASS'N OF AM. MED. COLLS., PHYSICIAN SHORTAGES TO WORSEN WITHOUT INCREASES IN RESIDENCY TRAINING 2 (2010), *available at* https://www.aamc.org/download/150612/data/md-shortage.pdf.

115. Tammy Worth, *Agencies Warn of Coming Doctor Shortage*, L.A. TIMES (June 7, 2010), http://articles.latimes.com/2010/jun/07/health/la-he-doctor-shortage-20100607.

116. Janice Lloyd, *Doctor Shortage Looms as Primary Care Loses Its Pull*, USA TODAY (Aug. 18, 2009), http://www.usatoday.com/news/health/2009-08-17-doctor-gp-shortage_N.htm.

117. THE FEDERALIST NO. 17, *supra* note 12, at 118-19 (Alexander Hamilton) (emphasis added). John Jay also refers to Congress's power to see "trade prudently regulated" in *Federalist No. 4*. THE FEDERALIST NO. 4, *supra* note 12, at 49 (John Jay).

118. THE FEDERALIST NO. 27, *supra* note 12, at 174 (Alexander Hamilton).

119. THE FEDERALIST NO. 28, *supra* note 12, at 181 (Alexander Hamilton).

when the federal government is perceived as having "a much better administration" of things.[120] Such a "better administration" can occur because federal representatives are "less apt to be tainted by the spirit of faction" than state officials, who can sometimes "beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust."[121]

Stark measures of such disgust regarding the poor state regulation of lawsuits are found in public-opinion polls. One poll found that 83% of likely voters believe there are too many lawsuits in America, 76% believe lawsuit abuse results in increased prices for goods and services, and 65% say they would be more likely to vote for congressional candidates who supported curbs on lawsuit abuse.[122] Another poll, following the 2008 elections, found that 83% of voters believe the number of frivolous lawsuits is a serious problem, including 77% of democrats, 80% of independents, and 92% of republicans.[123] The public supports additional reforms of state healthcare litigation as well.[124]

Consider also whether the combined effect of the prevailing state legal regimes exhibits the "uprightness and prudence" the authors of the *Federalist Papers* presumed would generally prevail in the states.[125] Tort law has become, in large part, an extension of the public policy regime—with its emphasis on deterrence and cost-benefit analysis—but it is largely administered

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120. THE FEDERALIST NO. 17, *supra* note 12, at 119 (Alexander Hamilton); *see also* THE FEDERALIST NO. 46, *supra* note 12, at 295 (James Madison) ("If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a *better administration* as will overcome all their antecedent propensities." (emphasis added)).

121. THE FEDERALIST NO. 27, *supra* note 12, at 175 (Alexander Hamilton).

122. *See* Press Release, Am. Tort Reform Ass'n, Voters Say "Too Many Lawsuits," According to New National Poll on Tort Reform (Feb. 27, 2003), *available at* http://www.atra.org/newsroom/voters-say-too-many-lawsuits-according-new-national-poll-tort-reform.

123. *See* Press Release, Inst. for Legal Reform, Voters' Resounding Call for 'Change' Did Not Include Wanting More Lawsuits (Nov. 5, 2008), *available at* http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1221.

124. *See* Ricardo Alonso-Zaldivar & Trevor Tompson, *AP Poll: Support for Curbs on Malpractice Lawsuits*, NEWSDAY (Nov. 19, 2009), http://www.newsday.com/business/ap-poll-support-for-curbs-on-malpractice-lawsuits-1.1606931.

> The AP poll found that 54 percent favor making it harder to sue doctors and hospitals for mistakes taking care of patients, while 32 percent are opposed. . . .
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> . . . .
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> Support for limits on malpractice lawsuits cuts across political lines, with 58 percent of independents and 61 percent of Republicans in favor. Democrats are more divided. Still, 47 percent said they favor making it harder to sue, while 37 percent are opposed. . . .
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> . . . .
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> In the poll, 59 percent said they thought at least half the tests doctors order are unnecessary, ordered only because of fear of lawsuits.

Id.

125. *See* Paul Taylor, *Strengthening Democracy Through Tort Reform*, *in* MATERIALS ON TORT REFORM 64, 64-66 (Andrew F. Popper ed., 2010).

by state judges whose decisions often overturn statutes enacted by state legislatures. Lawyers who sue in tort have also become, in large part, state actors[126] who exercise state power for their own financial gain.[127] They can file complaints after paying nominal filing fees, at their unfettered discretion, and immediately subject defendants to the threat of a default judgment against them (enforced by the state) if they fail to respond, thereby requiring those defendants to spend money and other resources toward their own defense, no matter how frivolous the claims against them.[128] Plaintiffs' lawyers can exert the leverage they enjoy in virtue of this state-enforced economic-bargaining advantage to extort monetary settlements from defendants that fall just short of the costs of defense that would be necessary for defendants to litigate the case to a costly "victory," since the current American legal regime generally does not require lawyers filing frivolous lawsuits to pay the defendants' costs of defending themselves, or impose other significant penalties that would deter meritless lawsuits.[129] Members of no other profession enjoy the same coercive

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126. As leading legal ethics scholar Geoffrey Hazard has written, "The function of lawyer is closely related to the exercise of government power. We wish to control the exercise of government power through constitutions and laws. So also we wish to use constitutions and laws to control the exercise of the quasi-governmental power that is exercised through our profession." Geoffrey C. Hazard, Jr., *The Legal and Ethical Position of the Code of Professional Ethics*, *in* 5 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 5, 7 (Louis Hodges ed., 1979).

127. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 707 (8th ed. 2011) ("[T]he legal process relies for its administration primarily on private individuals motivated by economic self-interest rather than on altruists or officials.").

128. *See* D. Rosenberg & S. Shavell, *A Model in which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 4 (1985).

> Suppose, for instance, that the plaintiff files a claim and demands $180 in settlement. The defendant will then reason as follows. If he settles, his costs will be $180. If he rejects the demand and does not defend himself, he will lose $1000 by default judgment. If he rejects the demand and defends himself, the plaintiff will withdraw, but he will have spent $200 to accomplish this. Hence, the defendant's costs are minimized if he accepts the plaintiff's demand for $180; and the same logic shows that he would have accepted any demand up to $200. It follows that the plaintiff will find it profitable to file his nuisance claim; indeed, this will be so whenever the cost of filing is less than the defendant's cost of defense.

Id.

129. Sanctions for the filing of frivolous lawsuits are not mandatory in thirty-eight states and the District of Columbia. *See* ALA. R. CIV. P. 11 (Alabama); ALASKA R. CIV. P. 11 (Alaska); ARK. R. CIV. P. 11 (Arkansas); CAL. CODE CIV. PROC. § 128.5 (California); COLO. R. CIV. P. 11 (Colorado); CONN. GEN. STAT. ANN. § 52-190a (Connecticut); DEL. SUP. CT. CIV. R. 33 (Delaware); D.C. R. CIV. P. 11 (D.C.); FLA. R. CIV. P. 1.150 (Florida); HAW. R. CIV. P. 11 (Hawaii); ILL. SUP. CT. R. 137 (Illinois); IND. R. TRIAL P. 11 (Indiana); LA. CODE CIV. PROC. ANN. art. 864 (Louisiana); ME. R. CIV. P. 11 (Maine); MD. RULE 1-311 (Maryland); MASS. R. CIV. P. 11 (Massachusetts); MINN. R. CIV. P. 11.03 (Minnesota); MISS. CODE ANN. § 11-55-5; MISS. R. CIV. P. 11 (Mississippi); MO. SUP. CT. R. 55.03 (Missouri); NEB. R. CIV. P. ST. § 25-824 (Nebraska); N.H. SUP. CT. R. 59 (New Hamphsire); N.J. STAT. ANN. § 2A:15-59.1 (New Jersey); N.M. DIST. CT. R. CIV. P. 1-011 (New Mexico); N.D. R. CIV. P. 11 (North Dakota); OHIO CIV. R. 11 (Ohio); 12 OKLA. ST. ANN. § 2011 (Oklahoma); OR. R. CIV. P. 17 (Oregon); PA. R. CIV. P. 1023.1, 1023.4 (Pennsylvania); R.I. R. CIV. P. 11 (Rhode Island); S.C. R. CIV. P. 11 (South Carolina); TENN. R. CIV. P. 11.03 (Tennessee); TEX. CIV. PRAC. & REM. CODE § 10.004 (Texas); UTAH R. CIV. P. 11 (Utah); VT. R. CIV. P. 11 (Vermont); VA. SUP. CT. R. 1:4, 4:1 (Virginia);

power to extort money from innocent people and businesses by merely filing a piece of paper. Consequently, lawyers have become more politically influential, and governments and (largely elected) state court judges[130] have created means for satisfying a greater and greater demand for their services[131] while providing greater and greater protections for lawyers from lawsuits directed against them, at the expense of other professions. In the field of malpractice, for example, judges (almost all former lawyers) have crafted rules that make it much more difficult to sue a lawyer for malpractice than to sue a doctor for malpractice.[132] And judges are too often eager to accede to lawyers' demands that the power of the judiciary be expanded at the expense of other branches of government, and

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WASH. R. CIV. P. 11 (Washington); W. VA. R. CIV. P. 11 (West Virginia); WIS. STAT. ANN. § 802.05 (Wisconsin); WYO. R. CIV. P. 11 (Wyoming).

130. Roughly 87% of state court judges are elected in some capacity. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 MICH. ST. L. REV. 849, 890 (2001). Twenty-five states rely solely on judicial elections to select state judges. *See* ARK. CONST. art. VII, § 29; CAL. CONST. art. VI, § 16; FLA. CONST. ART. V, § 10; GA. CONST. art. VI, § 7, para. 1; IDAHO CONST. art. VI, § 7; ILL. CONST. art. VI, § 12; KAN. CONST. art. III, § 6; KY. CONST. § 117; LA. CONST. art. V, § 22; MICH. CONST. art. VI, §§ 2, 6; MISS. CONST. art. VI, § 145; MONT. CONST. art. VII, § 8; NEV. CONST. art. VI, §§ 3, 5; N.M. CONST. art. VI, § 33; N.C. CONST. art. IV, § 9, 10, 16; N.D. CONST. art. VI, §§ 7, 9; OHIO CONST. art. IV, § 6; OKLA. CONST. art. VII, § 3; OR. CONST. art. VII, § 1; PA. CONST. art. V, § 13; TENN. CONST. art. VI, §§ 3-4; TEX. CONST. art. V, §§ 2, 7; WASH. CONST. art. IV, §§ 3, 5; W. VA. CONST. art. VIII, §§ 2, 5; WIS. CONST. art. VII, §§ 4, 5, 9. Of those states, nine rely on partisan elections and eleven rely on nonpartisan elections. *See* Schotland, *supra*, at 886 n.196; *see also* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 314 (2002).

131. *See* Taylor, *supra* note 66, at 51 (elaborating on history of attorney regulations).

> Attorneys' fees were heavily regulated in the American Colonial Era and in the Post-Revolutionary Period. Then, in the mid-nineteenth century, New York's influential Field Code of Civil Procedure rejected any regulation of attorneys' fees but conceded that a "loser-pays" rule was justified by the costs attorneys could impose on innocent victims simply by virtue of filing a lawsuit. In the years that followed, however, fee-shifting provisions materialized in this country in a manner that benefited plaintiffs only, and not defendants. The result has been an abdication of any significant limits on the power of attorneys to file lawsuits, the encouragement of the filing of lawsuits through fee-shifting rules that benefit plaintiffs alone, and—with the rise of the numbers and influence of attorneys in America—the triumph of rules that only create additional demand for attorneys.

Id.

132. *See* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 162, 187 (2011). Barton states:

> It is much harder to prove legal malpractice than medical malpractice. This is because lawyers have enjoyed several unique advantages as defendants in malpractice actions. . . . Courts have justified many of these differences on the now-familiar ground that lawyers are special and need special treatment. . . .
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> When other types of litigants argue that the threat of a lawsuit disrupts their place of business or their ability to do a job, courts are generally unsympathetic . . . . When this reasoning is used against lawyers or courts, however, there is an overriding public policy interest in avoiding lawsuits. Between these rules and the relative lack of judicial or disciplinary authority oversight, what is keeping us safe from incompetent or malicious lawyering?

Id.

democracy generally.[133]

While manufacturers have no practical way of keeping their products out of certain states, personal injury lawyers generally get to choose the forum (and consequently the law) of their choice.[134] As a result, the jurisdictions most friendly to personal injury lawyers can unfairly impose the costs of their rules on consumers nationwide and redistribute income from out-of-state parties to in-state parties.[135] When Madison described the purpose of the Commerce Clause as providing for

> the relief of the States which import and export through other States, from the improper contributions levied on them by the latter . . . [that] load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the

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133. *See* Dennis Jacobs, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855, 2857-58 (2007). Jacobs explains:

> Public interest cases afford a judge sway over public policy, enhance the judicial role, make the judge more conspicuous, and keep the law clerks happy.
>
> Whether fee-paid or pro bono publico, when lawyers present big issues to the courts, the judges receive the big issues with grateful hands; the bar patrols against inroads on jurisdiction and independence and praises the expansion of legal authority; and together we smugly congratulate ourselves on expanding what we are pleased to call the rule of law.
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> Among the results are the displacement of legislative and executive power, the subordination of other disciplines and professions, and the reduction of whole enterprises and industries to damages.
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> . . . .
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> . . . [O]ur highly ramified litigation system imposes vast costs on other fields of endeavor, on our democratic freedoms, and on the unrepresented and the non-litigious.

Id.

134. *See* Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16 (referencing so-called "magic jurisdiction" in forum selection). Richard "Dickie" Scruggs, one the nation's wealthiest personal injury attorneys, described these "magic jurisdictions" as follows:

> "[W]hat I call the 'magic jurisdiction' . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected . . . They've got large populations of voters who are in on the deal. . . . And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is."

Id. (quoting Dickie Scruggs).

135. *See* RICHARD NEELY, THE PRODUCTS LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988). Former West Virginia Supreme Court Justice Richard Neely states:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will reelect me.

Id.

> former,[136]

he foresaw the problem in which products or services would be made to cost more to consumers in one state because other states would levy costly duties on those products and services that passed through. A similar "future contrivance" we see today is that some states, by allowing lawsuits to be brought for unlimited damages in cases involving products or services that touch their jurisdictions, are raising the costs of providing those products and services to out-of-state customers, resulting in higher prices and lost jobs across multiple states or nationwide.

Because the common law imposes neither a duty on private entities to act for another's benefit nor liability for failing to act,[137] in most instances, if a private entity decides not to provide a good or service, that private entity cannot be sued. On the other hand, in most instances, when a private entity voluntarily acts, it opens itself up to costly lawsuits claiming the private entity's actions fell short in some way. At the same time, judges cannot be sued for failing to clarify the case law in ways that encourage private entities to provide goods and services, because the long-established doctrine of judicial immunity provides judges with vast protection from lawsuits claiming their actions or inactions harmed the public.[138] And while jury decisions can be checked by courts to some extent,[139] judges often fail to fulfill their role as legal gatekeepers, and allow reckless claims to proceed.[140] While legislatures have a role in checking the power of judges and juries,[141] duly elected representatives in state legislatures that enact statutes that aim to do just that see those same state statutes often overturned by the very judges whose failures the state

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136. THE FEDERALIST NO. 42, *supra* note 12, at 267-68 (James Madison).

137. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (stating that, absent a special relationship, an actor is under no duty to aid or protect a third party).

138. The Supreme Court has held that absolute judicial immunity applies to protect judges even when they are accused of acting maliciously or corruptly. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967) ("This immunity applies even when the judge is accused of acting maliciously and corruptly."). This is so even though, as Peter Huber has written, "[t]he legal system has no special competence to assess and compare public risks, and the legal process is not designed or equipped to conduct the broad-ranging, aggregative inquiries on which sensible public-risk choices are built." Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 310-11, 329 (1985).

139. For example, courts can issue a judgment notwithstanding the verdict. *See* BLACK'S LAW DICTIONARY 860 (8th ed. 2004) (judgment).

140. *See* Philip K. Howard, *When Judges Won't Judge*, WALL ST. J. (Oct. 22, 2003), http://online.wsj.com/article/0,,SB106678134382899700,00.html. Howard contends:

> Judges today consider civil justice as a private dispute, rather than a use of state power. They can't imagine on what basis they should have the authority to limit claims. Just let the two litigants slug it out in front of the jury. As one judge suggested to me, "Who am I to judge?"

Id.

141. Juries exercise government power, and just like any other entity that exercises government power, they should be subject to reasonable checks.

legislatures sought to address.[142]

Under such circumstances, it may often be prudent for Congress to enact tort reform rules to better administer commerce among the states.

LIMITING PRINCIPLES

The Constitutional Convention was convened to create a more powerful, but still limited, federal government, and a system of enumerated congressional powers that contained an enumerated power without limit would have thwarted that core purpose. And so the Commerce Clause was understood by Madison and Hamilton as being confined to limited purposes.[143]

From the preceding discussion, one can discern at least two limiting

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142. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 919-20 (2001). Schwartz and Lorber explain that

> state constitutions are usually lengthy, prolix, and filled with open-ended provisions. These provisions are malleable and provide an opportunity for a judge who perceives the judiciary to be the dominant branch of government to easily forget the appropriate powers of its co-equal branch, the legislature. For example, a number of state constitutions have so-called 'open courts' provisions. As a practical matter, they are intended to provide citizens of a state with justice and reasonable access to the courts. Open court provisions, however, can be stretched to suggest that *any* time a legislature in *any* way limits any person's rights to sue, it is violative of the 'open courts' provision. There is no state constitutional history that suggests this extreme result. Respect for fundamental principles of separation of powers abhors such an interpretation. Nevertheless, in the area of civil justice reform and judicial nullification of legislative efforts to improve our system of justice, such interpretations have grown like weeds in some jurisdictions.

Id.

143. The limiting principles articulated by Madison and Hamilton are in contrast to the vast powers some anti-federalists believed the Commerce Clause would grant the Congress. As one anti-federalist wrote, "By sect. 8. of article 1, Congress are to have the unlimited right to regulate commerce, external and *internal* . . . . The right to regulate trade, without any limitations, will, as certainly as it is granted, transfer the trade of this state to [Philadelphia,] Pennsylvania." Letter from James Winthrop (Agrippa) to the Massachusetts Convention (Jan. 14, 1788), *reprinted in* 2 THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 536, 539-40 (E.H. Scott ed., Chicago, Albert, Scott & Co. 1894). Another anti-federalist argued that because the Constitution prohibited only the Congressional regulation of the slave trade, and no other form of commerce, it implied that Congress's power to otherwise regulate commerce was plenary. *See* Luther Martin's Information to the General Assembly of the State of Maryland (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 27, 61-62 (Herbert J. Storing ed., 1981).

> It was urged, that by this system, we were giving the general government full and absolute power to regulate commerce, under which general power it would have a right to *restrain, or totally prohibit* the *slave trade*: it must therefore, appear to the world absurd and disgraceful to the last degree, that we should *except* from the exercise of that power, the *only branch* of *commerce* which is *unjustifiable in its nature*, and *contrary* to the *rights of mankind*—That on the contrary, we ought *rather to prohibit expressly* in our *constitution*, the *further importation of slaves*; and to *authorise* the general government from time to time, to make such regulations as should be thought most advantageous for the *gradual abolition of slavery*, and the *emancipation* of the *slaves* which are already in the States.

Id.

principles governing the *Federalist Papers*' understanding of the limits on Congress's Commerce Clause power. First, only those congressional regulations that facilitate voluntary commerce, and not those that interfere with it, fulfill the purpose of the Commerce Clause as described in the *Federalist Papers*. As David Epstein has written, describing the argument in the *Federalist Papers*,

> Government's promotion of commerce stimulates "all orders of men," moved by the "eager expectation" of "reward," to exercise their acquisitive faculties. This policy is consistent with justice, because it impartially benefits those who exert their faculties, and it also contributes to the aggregate interests of the community. Commercial policies are therefore one field in which government may devise and pursue "enlarged plans" for the public good.[144]

Second, as Madison wrote, the states' interference with the free flow of goods and services nationwide must be significant enough to become a danger to "the great and aggregate interests" that are the proper domain of the federal government.[145] Hamilton later made the same argument at the New York Convention to ratify the Constitution, saying that under the Constitution

> [t]he powers of the new government are general, and calculated to embrace the *aggregate* interest of the Union, and the general interest of each state, so far as it stands in relation to the whole. The object of the state governments is to provide for their internal interests, as unconnected with the United States, and as composed of minute parts or districts.[146]

Later, in arguing for the constitutionality of Congress's creation of a national bank, Hamilton wrote:

> [The jurisdiction] of the general government [is] intended to be directed to

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144. EPSTEIN, *supra* note 50, at 165 (quoting THE FEDERALIST NOS. 12, 46).

145. *See* THE FEDERALIST NO. 10, *supra* note 12, at 83 (James Madison) ("The federal Constitution forms a happy combination in this respect; the great and *aggregate* interests being referred to the national, the local and particular to the State legislatures." (emphasis added)). Madison states:

> Every one knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the *aggregate* prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations?

THE FEDERALIST NO. 46, *supra* note 12, at 296 (James Madison) (emphasis added).

146. Alexander Hamilton, Speech in the New York Ratifying Convention on Interests and Corruption (June 21, 1788), *in* ALEXANDER HAMILTON: WRITINGS, *supra* note 31, at 496, 498-99 (emphasis added).

> those general political arrangements concerning trade on which its *aggregate* interests depend, rather than to the details of buying and selling. Accordingly such only are the regulations to be found in the laws of the United States; whose objects are to give *encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures*. And it is in reference to these general relations of commerce, that an establishment which furnishes facilities to *circulation* and a convenient medium of exchange and alienation, is to be regarded as a regulation of trade.[147]

THE REGULATION OF COMMERCE IN THE FIRST CONGRESS

It is worth noting that during his later service during the First Congress as a member of the House of Representatives, Madison[148] spearheaded legislation that made clear he understood the Commerce Clause to give Congress the power to enact legislation that had the purpose and effect of bolstering its domestic manufacturing economy, and he construed the nation's first federal law imposing tariffs as supported by the Commerce Clause. That first tariff law included in its text a statement that it was intended not only to provide money to support the government and to pay debts, but also for "the encouragement and protection of manufactures."[149] Supporting the legislation on the House floor, Madison said:

> [H]owever much we may be disposed to promote domestic manufactures, we ought to pay some regard to the present policy of obtaining revenue . . . the States that are most advanced in population, and ripe for manufactures, ought to have their particular interests attended to in some degree. *While these states retained the power of making regulations of trade, they had the power to protect and cherish such institutions; by adopting the present constitution, they have thrown the exercise of this power into other hands [that is, Congress]*; they must have done this with an expectation that those interests would not be neglected here.[150]

As one historian has written, this illustrates that "a measure could qualify as a regulation of commerce even though it took the shape of a tax; not form but

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147. Hamilton, *supra* note 31, at 638 (emphasis added).

148. Madison was the leading Member of the House in the First Congress, and regarding legislation, during its first session, "[e]xcept for the judiciary act [of 1789], fashioned in the Senate, Madison had taken the lead at every stage." RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 293 (1971); *see also* ROY SWANSTROM, THE UNITED STATES SENATE, 1787-1801, *reprinted as* S. Doc. No. 100-31, at 267 (1988) ("The leading Member of the First Congress was, by all odds, James Madison . . . .").

149. An Act for Laying a Duty on Goods, Wares, and Merchandises Imported into the United States, ch. 2, § 1, 1 Stat. 24, 24 (1789) (tariffs).

150. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, *supra* note 28, at 115-16 (emphasis added). Madison took this position while also stating "my general principle . . . that [domestic] commerce ought to be free, and labor and industry left at large to find its proper object . . . ." *Id.* at 117.

purpose and effect were determinative."[151] Madison understood Congress to have the authority under the Commerce Clause to enact legislation that would boost the national economy as a whole by "protect[ing] and cherish[ing]" commerce among the states.[152]

By the same logic, Congress could act under the Commerce Clause to enact tort reform legislation that would boost domestic commercial entities and allow them to better compete with foreign commercial entities,[153] as tort costs to businesses in the United States are the highest as a percent of gross domestic product among those reported for other industrialized countries, and more than double the estimates for countries such as the United Kingdom, France, and Japan.[154]

CONCLUSION

The authors of the *Federalist Papers*, considered to be the most authoritative exposition on the Constitution, advocated for a Commerce Clause that Congress could use to remove state barriers to trade that weakened the national economy. The examples they gave illustrating the need for the Commerce Clause encompass, by their logic, some federal tort reforms regarding both state products and personal liability law, insofar as such reforms are required to counteract significant negative impacts on America's free-enterprise system. In the understanding of the authors of the *Federalist Papers*, the Constitution would allow Congress to enact federal laws to better administer legal regimes governing the federal interest of national commerce when state governments acted in ways that significantly disserved the commercial interests of Americans. Today, in new ways that the authors of the *Federalist Papers* foresaw, state tort-law regimes have resulted in sometimes dysfunctional incentive structures that have limited economic innovation and productivity on a national scale. Under such circumstances, Congress can enact uniform rules to better administer free commerce among the states.

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151. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 57 (1997).

152. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, *supra* note 28 at 116; *see also* THE FEDERALIST NO. 11, *supra* note 12, at 89 (Alexander Hamilton).

153. THE FEDERALIST NO. 11, *supra* note 12, at 89 (Alexander Hamilton). "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but *for exportation to foreign markets*." *Id.* (emphasis added).

154. *See* TOWERS PERRIN, U.S. TORT COSTS AND CROSS-BORDER PERSPECTIVES: 2005 UPDATE 4 (2006), *available at* http://www.towersperrin.com/tillinghast/publications/reports/2005_Tort_Cost/2005_Tort.pdf.