This is an excerpt of a larger paper, "Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce," written by Robert H. Bork and Daniel E. Troy.

**Tort Reform and the Commerce Clause**

State tort law today is different in kind from the state tort law known to the generation of the Framers. The present tort system poses dangers to interstate commerce not unlike those faced under the Articles of Confederation. Even if Congress would not, in 1789, have had the power to displace state tort law, the nature of the problem has changes so dramatically so as to bring the problem within the scope of the power granted to Congress. Accordingly, proposals which may have once been clearly understood as beyond Congress's power, such as placing limits or caps on the award of punitive damages, or to eliminate join or strict liability, may now be constitutionally appropriate. See *Ollman*, 750 F.2d at 995-96 (Bork, J., concurring); *supra* at 42.

The threat state tort law presents to the national flow of goods and services has been well documented. State tort law is approaching uniformity across states, but not in the sense admired by the drafters of the Commerce Clause. At least two realities of the current system allow one or a few states to set rules nation-wide: (1) plaintiffs can often choose to sue national corporations in the jurisdiction most favorable to a large recovery; and (2) national firms engaged in interstate commerce must, at a minimum, conform to the standards set by the strictest state. A lack of congressional action allows standards to be set by a particular state instead of by the one government in which all states have a voice. This turns the Commerce Clause upside down, allowing a single state to set the national standards.[23]

[23] State laws requiring labeling requirements on products similarly interfere with interstate commerce, burdening the country's manufacturers by allowing one state to set the agenda—whichever state enacts the

The national movement of goods among the states makes it virtually impossible for a manufacturer to be able to keep its goods from being sold in each state. Accordingly, the harm each state can do with its tort law, to benefit its own citizens, can affect the flow of goods in all states, possibly making some goods disappear from the market altogether.

Legislation removing otherwise intractable barriers to interstate commerce and competition comes within the domestic portion of the Commerce Clause: "[I]t is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the several States was to insure uniformity of the regulation against *conflicting* and *discriminating* state legislation." *Kidd*, 128 U.S. at 21 (emphasis added).

This is particularly true if the tort systems of certain states operate to discriminate in favor of its citizens, explicitly or implicitly. All states may contain consumers and sellers, but some states may contain very few manufacturers, and thus may adopt rules which discriminate against (primarily out-of-state) manufacturers. Discriminatory or preferential state laws can thus lead to a tug of war, played out in the state court system, between dissatisfied consumers and manufacturers; a war which can take on monumental proportions when a national class action is certified. Even if it is not discrimination in that sense, a wilderness of different state tort standards impedes interstate commerce by requiring either a whole variety of a single product or a uniform standard set by the strictest state. Congress can use its power under the Commerce Clause to address the situation.

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most stringent rules. *See* Robert H. Bork, *Federalism and Federal Regulation: The Case of Product Labeling*, Washington Legal Foundation, Working Paper Series No. 46 (July 1991).

Some states may not necessarily seek to aid one interest at the expense of the other, but may still adopt rules—such as leaving the designation of punitive damages to the jury's unconstrained discretion, for example—which have the effect of benefiting that state's consumers, while spreading the cost of high awards among all national consumers of the goods nationally. Even if a state may have manufacturers who are being hurt by high punitive damages awards, its incentive to cap or reduce its own awards may be limited by the fact that it would be harming its own consumers, who might win lower awards, without necessarily helping manufacturers, who would be subject to high punitive damage awards in other states. *See* Michael W. McConnell, *Review: Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1494-98 (1987) ("[T]he principal countervailing consideration in favor of centralized government: if the costs of government action are borne by the citizens of State C, but the benefits are shared by the citizens of State D, E, and F, State C will be unwilling to expend the level of resources commensurate with the full social benefit of the action.").

The Commerce Clause was adapted, in part, to address this kind of collective action problem. Each state's consumers would always have benefited from free trade among the states, but the manufacturer in any one state would be harmed if its goods were taxed when going into other states and its competitors' goods were not taxed coming into its own. As Hamilton explained, part of the reason for the Commerce Clause was to give Congress the power to solve this dilemma.

> The opportunities which some states would have of rendering other tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets.

Hamilton, *Federalist* 7, at 63 (The Same Subject Continued: Concerning Dangers from Dissensions Between the States).

The federal government has at times acknowledged the modern parallel. The Reagan Administration, for example, concluded that product liability law required federal standardization. "Implicit in this decision was a determination that conflicting state product liability laws have created such significant burdens on interstate commerce that preemptive federal legislation was necessary to provide consistent nationwide treatment of product liability disputes." C. Boyden Gray, *Regulation and Federalism*, 1 Yale J. on Reg. 93,96 (1983).

Years later, the burden on interstate commerce has not lessened. Although the details of specific proposals may be open to policy disputes, the power of Congress under the original understanding of the Commerce Clause to rectify this burden should be acknowledged.