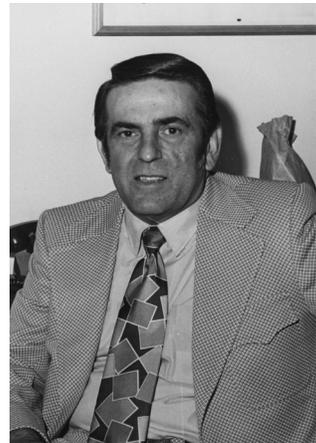


# The First Attempt at Federalizing Tort Law and Why It Failed

Ian J. Drake

In the 1970s, the U.S. Congress meticulously considered the possibility of creating a federal law of torts. The federal effort began almost a decade after many state supreme courts had expanded manufacturer liability for defective products. The state-level expansion caused a reaction among state and federal legislatures. The initial federal presence took the form of investigatory efforts, but those were soon followed by legislative proposals. The federal legislative proposals occurred simultaneously with some states' efforts to enact their own products liability laws. Although the states' tort laws might present variations on a theme, the possibilities for federal intervention in the areas of products liability law, insurance law, and the general common law of torts held the promise of an altogether new, unified tune.<sup>1</sup> By the early 1980s, the federal foray into products liability law—a policy area previously left largely to the states—would be known as “tort reform.” However, the initial federal proposals were never enacted. This article examines the initial federal proposals of the 1970s and 1980s, and the political interests and actors involved, and offers an explanation as to the failure to enact them.



Rep. Abner J. Mikva, (D-ILL) co-sponsored a House bill to allow a tax deduction to businesses that allocated money to a reserve fund to pay for product liability claims.

The history of how these proposals fared demonstrates the vibrancy of federalism in the 1970s and early 1980s. The workers' compensation systems in the states provided both the impetus for and chief obstacle to these federal proposals. In this context, federalism means not only a division of sovereignty between the states and federal government, but also a concern for the possible unintended consequences generated by new federal initiatives in light of existing state policies and programs. Products liability law was injected into the pluralist politics established after the New Deal at both the state and national levels. In short, the

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<sup>1</sup> This paper is concerned only with the federal efforts. The state efforts are the subject of a forthcoming paper. “Tort Reform and American Political Economy,” Proceedings of the Ohio Academy of History (2011) (forthcoming).

expansion of manufacturer liability at the state level in the 1960s and early 1970s caused a reaction at the federal level with the objective of protecting manufacturers in the 1970s. The proposals to wholly federalize tort law failed, however, because state workers' compensation systems would be adversely impacted, and federal legislators feared unintended consequences from the federal takeover of both workers' compensation and tort law. After that initial failure, "tort reform" would become (and remains to this day) a contentious set of policy proposals. This paper examines the character and quality of that initial federal reaction.

### **Early Federal Efforts at Tort Reform**

On April 18, 1969, Ossie Stanfield, an employee of General Electric Cabinet Company in Rockford, Illinois, was injured on the job while operating a boring and cutting machine. As a result of the accident, "the three middle fingers on her left hand were amputated to the knuckle."<sup>2</sup> The machine had been made by Medalist Industries, Inc., a manufacturer of capital goods.<sup>3</sup> Stanfield sought recovery through two avenues: first, by filing a workers' compensation claim and, second, by suing the manufacturer of the machine.<sup>4</sup> In the 1970s, the latter remedy was much more recent and powerful, since it allowed a relatively easy route to recovery to Stanfield under a recently expanded rule called strict liability. Strict liability, also known as absolute liability or no-fault liability, allows wrongdoers to be held liable for an injury caused to another without regard to whether the wrongdoer was at fault. In products liability, this form of liability was new in the 1960s, a decade that saw numerous state supreme courts lead a switch from an at-fault, negligence-based standard to an expanded no-fault standard. The state courts changed their states' tort doctrines in order to allow plaintiffs to more easily recover from manufacturers of defective products.<sup>5</sup>

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<sup>2</sup> *Stanfield v. Medalist Industries, Inc.*, Complaint, p. 1, para. 3 (filed Oct. 6, 1970), No. G-23773, Clerk of Court of 17th Judicial Circuit, Winnebago County, Rockford, Illinois.

<sup>3</sup> Capital goods are used in workplaces to make other goods. The machines are very specialized, require high levels of instruction for users, frequent supervision, and, depending on the complexity of the machine, frequent maintenance.

<sup>4</sup> *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996; 309 N.E.2d 104; 1974 Ill. App. LEXIS 3109 (Ill. App. 2d Dist., 1974).

<sup>5</sup> George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," *Journal of Legal Studies* 14, No. 3 (1985): 461–528; Priest, "The Current Insurance Crisis and Modern Tort Law," *Yale Law Journal* 96, No. 7 (1987): 1521–90; Priest, "Understanding the Liability Crisis," *Proceedings of the Academy of Political Science* 37, No. 1, New Directions in Liability Law (1988): 196–211; G. Edward White, *Tort Law in America: An Intellectual History* (expanded ed.) (New York: Oxford University Press, 2003). Strict liability was one of the most important of many changes in tort law in the 1960s. See Robert E. Keeton, *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard University Press, 1969), 169–76.

Prior to enactment of workers' compensation laws, workplace injuries in the 19th century were subject to the common law rules, which made it very difficult for injured employees to recover damages.<sup>6</sup> If an employee assumed the risk of dangerous work or was injured by a co-worker, then no recovery was possible against the employer.<sup>7</sup> Progressive Era reformers sought to give injured employees a right to recover in such situations. During the first couple of decades of the 20th century, states enacted workers' compensation laws, which bypassed court-created common law doctrines by providing no-fault protection to employees injured on the job. The no-fault approach of workers' compensation laws eliminated the need to determine who was at fault, whether it was the co-worker, employer, or even the injured employee.<sup>8</sup> The old common law rules have been considered by some legal historians to have been protectionist rules benefiting industry developed by 19th-century courts during that rapidly industrializing century.<sup>9</sup> Similarly, workers' compensation laws have been seen as protectionist legislation for workers in the early 20th century.<sup>10</sup> Workers' compensation is a system that has often been praised for accomplishing two objectives: the compensation of injured parties and the deterrence of "unsafe conduct."<sup>11</sup> Illinois's

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<sup>6</sup> Fellow employees caused most workplace injuries in the 19th century. Nineteenth-century state courts had developed a rule that prevented the injured party from recovering from the employer: the fellow-servant rule. Under this rule, an employee was deemed to have assumed a "risk to his safety in the service of his master" from fellow servant, or co-workers who might be negligent in the performance of their work duties, or from the inherently dangerous nature of the work involved, by virtue of his employment. This language comes from the English case that established the fellow servant rule, *Priestly v. Fowler*, 3 M. & W. 1 (1837), quoted in "Comment: The Creation of a Common Law Rule: The Fellow-Servant Rule, 1837–1860," *University of Pennsylvania Law Review* 132 (1984): 579, 586–87. The fellow-servant rule was created for the purpose of protecting businesses in the industrial era, but the comment author argues that it was adopted in different American jurisdictions haphazardly, without clarity, and with exceptions that demonstrated the resistance of many jurisdictions to the rule. The assumption of the risk in employment was recognized in the first case in the United States to establish the fellow-servant rule, *Farwell v. Boston & Worcester Rail Road Corp.*, 45 Mass. (4 Metc.) 49 (1842). In that case, Massachusetts Chief Justice Lemuel Shaw noted that an employee "takes upon himself the natural and ordinary risks and perils incident to the performance of" his job. *Ibid.*, 57.

<sup>7</sup> The employee had a claim right against his negligent co-worker, but usually such suits would be in vain because the co-workers often had few, if any, assets. See Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2001, 2005), 225 n. 57.

<sup>8</sup> The fellow-servant rule also had been weakened in the 19th century by court-created doctrines, such as a duty to create a safe workplace and an exclusion of supervisors from the fellow-servant rule. Over two-dozen states passed employers' liability acts, which expanded corporations' liability to their employees and weakened the fellow-servant rule. Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, MA: Harvard Univ. Press, 2008), 27–28.

<sup>9</sup> Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard, 1977), 209–10 (United States); J. H. Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworths, 1990), 471 (United Kingdom).

<sup>10</sup> Friedman, *A History of American Law*, 517.

<sup>11</sup> Abraham, *The Liability Century*, 11.

first workers' compensation law was enacted in 1911.<sup>12</sup> By the mid-1970s, workers' compensation was an entrenched remedy, guaranteeing that workers received financial compensation, including all of their medical treatments, for their on-the-job injuries. The Illinois Supreme Court had adopted strict tort liability in 1965.<sup>13</sup>

Injured workers in Illinois, like Ossie Stanfield, benefited from the ability to not only recover through the workers' compensation system, administered by a state-established commission, but additionally through the tort system, administered by the state courts. Stanfield was not faced with an either-or choice of remedies; rather she could use both systems as avenues of recovery. Although workers' compensation statutes typically prohibited negligence suits against employers or fellow employees, a suit against a third-party (a party outside the employment relationship) was typically allowed. Even though Stanfield had recovered through her workers' compensation carrier, she filed a common law product liability lawsuit against the manufacturer of the machine, asking for \$150,000.<sup>14</sup>

Workers' compensation law was the "original tort reform" because it was an effort by employers, employees, and state governments to completely reshape the (judge-made) fault-based common law system governing workplace injuries into a no-fault compensation system.<sup>15</sup> Over the course of the 20th century, many American state courts sought to make products liability law a similarly functioning no-fault system. In the 1970s, most products liability law remained in the purview of the states.<sup>16</sup> There were federal requirements regarding products pursuant to regulations issued by the Consumer Products Safety Commission (CPSC).<sup>17</sup> However, the relatively broad new application of

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<sup>12</sup> *Deibeikis v. The Link-Belt Co.*, 261 Ill. 454, 464, 104 N. E. 211, 215 (1914) held that the Illinois legislature had the constitutional power to abolish and modify common law torts.

<sup>13</sup> *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E. 2d 182 (1965). The Illinois Supreme Court extended strict liability beyond the sale of food, a rule that had existed in the state since 1897, to the sale of goods, which in *Suvada* was a "reconditioned" farming tractor.

<sup>14</sup> Law Docket and Fee Book, No. G-23773, Circuit Court of the 17th Judicial District, Winnebago County, Illinois. Based on changes in the Consumer Price Index, \$150,000 in 1970 would be worth approximately \$887,000 in 2012. "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present," *MeasuringWorth.com* (accessed May 23, 2013), <http://www.measuringworth.com/uscompare/>.

<sup>15</sup> Abraham, *The Liability Century*, 39.

<sup>16</sup> The one large exception was the federal role in food and drugs. Under the Food and Drug Administration, the federal government regulated the manufacture, sale, and distribution of food and drugs in the nation. Without such federal regulation, food and drugs would have been subject to the various states' common laws and state legislation. Food and drugs had also been the areas where the states had applied strict liability via common decisions.

<sup>17</sup> The CPSC develops "voluntary standards for industry," issues regulations, and issues recalls and bans of products. CPSC website, <http://www.cpsc.gov/about/faq.html#wha>.

strict liability in the manufacturing of goods was state-level law, which affected companies that conducted business in multiple states. Such companies were subject to compliance with different legal standards in different states. The varying state liability standards made a single national standard appealing to some manufacturers. The “federalization” of tort law was plausible because the U.S. Constitution’s Commerce and Supremacy clauses would likely allow any federal tort law to preempt state common law tort doctrines.<sup>18</sup>

It appears that the manufacturers most interested in the federalization of tort law were capital goods makers.<sup>19</sup> Without these specialized manufacturers the federal proposals for tort reform would likely have never happened. However, these initial complainants are surprising, since the defective goods that spurred the expansion of products liability law at the state level prior to the 1970s were *consumer* goods—items such as foods, cosmetics, cars, and home appliances.<sup>20</sup> Yet, the goods that spurred pleas for federal intervention in state tort laws were capital goods. This is not a facile point. The purpose of expanding liability in the states was to reform state tort law in order to protect innocent, injured consumers. As California Supreme Court judge Roger Traynor contended, modern “mass production” and “advertising and marketing devices” had “lulled” the modern consumer into incompetence for “investigat[ing] . . . the soundness of a product.”<sup>21</sup> Traynor was no doubt thinking of general consumer goods.<sup>22</sup> Yet, capital goods manufacturers and their employees—like Medalist Industries and Ossie Stanfield—acutely felt the impact of the strict liability doctrine. Capital goods makers were the organized interests that spearheaded the national effort to federalize American tort law.

### **The 1970s: The First Proposals for Complete Federalization of Tort Law**

Tort law has traditionally been within the purview of the states. There is no federal common law of torts. However, the 20th century witnessed assertions of lawmaking power by the federal government in matters that were interstate in character. For example, the Employers’ Liability Act of 1908 was a federal law that abrogated the common law fellow-servant rule and the defenses of contributory negligence and

<sup>18</sup> Thomas H. Koenig and Michael L. Rustad, *In Defense of Tort Law* (New York: New York University Press, 2001), 4; Robert Bork and Daniel Troy, “Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce,” *Harvard Journal of Law & Public Policy* 25, No. 3 (2002): 849–93.

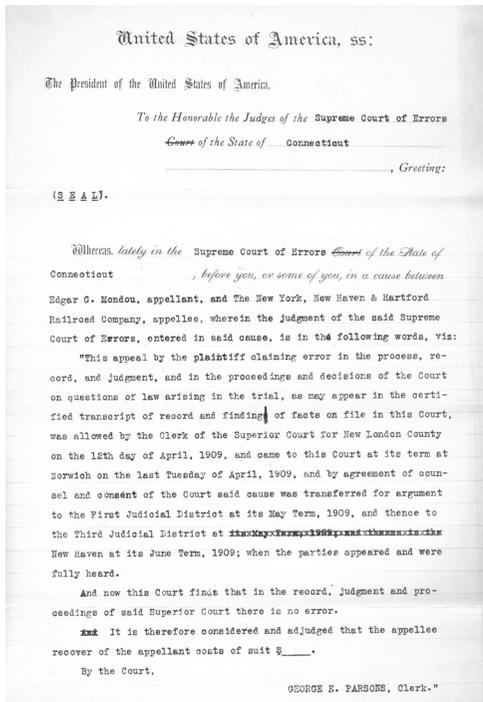
<sup>19</sup> Capital goods are large, complex machines used in factories to make other machines or consumer goods.

<sup>20</sup> The leading cases from the 1960s that created strict tort liability involved defective consumer goods. *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963) (wood lathe); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (automobile).

<sup>21</sup> *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 461–468, 150 P.2d 436, 440–444 (Cal. 1944) (J. Traynor, concurring).

<sup>22</sup> The *Escola* case in which Traynor voiced his opinion concerned an exploding soda pop bottle.

assumption of the risk for employees of common carriers (basically the railroads) across interstate lines.<sup>23</sup> In 1912 in *Mondou v. New York, N.H. & H.R. Co.*,<sup>24</sup> the U.S. Supreme Court upheld the constitutionality of the federal abrogation of these state tort law doctrines under the Commerce Clause power. Accordingly, there was a basis for a federal role in tort law in matters of interstate commerce. During the New Deal, Congress found that the Supreme Court concurred with its views that the power under Article I, Section 8, of the Constitution to regulate “commerce



In *Mondou v. New York* (1912), the Supreme Court helped establish a federal role in tort law and paved the way for employees to recover damages for workplace injuries.

goods manufacturers throughout the nation in the early and mid-1970s. The early 1970s saw a marked increase in lawsuits against such manufacturers, and many of these suits were filed by plaintiffs who had been injured on the job and compensated under their state workers' compensation system. For example, federal government studies in the 1970s determined that “40 percent of overall payments by product liability insurers were made to injured workers who were already

among the several states” was a broad power, allowing federal lawmaking in interstate and intrastate matters that ultimately had some “effect” on interstate commerce.<sup>25</sup> Congress not only had a clear power to regulate commerce among the states but, under the “effects doctrine,” Congress was also allowed to regulate matters that were traditionally matters of state law. The development of federal power throughout the 20th century had set the stage for a possible federal takeover of tort law, including products liability law.

The motive for a federal law of torts was the dramatic increase in liability insurance rates experienced by many capital

<sup>23</sup> U.S., Congress, Federal Employers' Liability Act (35 Stat. 65, 1908).

<sup>24</sup> 223 U.S. 1, 49, 57 (1912).

<sup>25</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

entitled to” workers compensation. Of the approximately 120,000 permanently disabled workers who collected benefits averaging \$4,000 in 1974, about 30,000 also successfully recovered (through litigation or negotiation) product liability tort claims in the average amount of \$40,000.<sup>26</sup> In the mid-1970s, insurance industry analysts were advising insurers to work with their insured manufacturers to reduce the costs and likelihood of a products liability lawsuit. In 1976 one journal advised insurers and manufacturers to work with trade associations to develop industry-wide guidelines and advised individual manufacturers to create written safety guidelines for employees and supervisors, keeping detailed records on enforcement and the entire production, distribution, and sales process.<sup>27</sup> Evidence suggested insurers were experiencing greater losses because of the recent expansion of strict tort liability. By 1976, the Insurance Services Office (ISO), the main rating organization of the insurance industry, noted that since 1969, premiums for product liability coverage had more than doubled and losses had more than tripled.<sup>28</sup> By the late 1970s, there was empirical evidence that strict liability led to higher insurance premiums for manufacturers and those costs were passed on to consumers in the form of higher prices.<sup>29</sup> Accordingly, the threat as perceived by capital goods manufacturers in the mid-1970s was substantial.

The earliest federal tort law proposals were made in 1976 during the 94th Congress, and it is important to note that these were largely bipartisan efforts. Democrats and Republicans had constituents who complained about the “product liability problem.” What would later become popularly known as tort reform had not yet become an ideological issue, dividing the two major political parties. The initial 1976 bills in the U.S. House and Senate proposed such actions as a federal study of insurance rate increases,<sup>30</sup> changes in federal

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<sup>26</sup> American Law Institute, “Reporters’ Study on Enterprise Responsibility for Personal Injury, Vol. II: Approaches to Legal and Institutional Change” (Philadelphia: ALI, 1991), ALI/ALI-ABA Library, Philadelphia, PA, 183–84.

<sup>27</sup> “How to Control Product Liability Losses,” *Journal of American Insurance* 52, No. 2 (1976): 20–22.

<sup>28</sup> “Product Liability: A Tale Written in Red Ink,” *Journal of American Insurance* 52, No. 3 (1976): 16–17.

<sup>29</sup> James L. Croyle, “An Impact Analysis of Judge-Made Products Liability Policies,” *Law & Society Review* 13, No. 4 (1979): 949–69.

<sup>30</sup> Multiple bills were proposed in 1976 and 1977 by Republicans and Democrats, many of whom were from states with substantial manufacturing sectors in heavy industry. All of these bills ended in committee. E.g., H. Res. 1569 (for the study of “product liability and professional liability insurance rate increases”), chiefly sponsored by Rep. Ronald M. Mottl (D-OH). *Congressional Record*, 94th Cong., 2nd sess., 1976, vol. 122, pt. 5, p. 32031; H. Res. 6300 (for improving “the safety of products manufactured and sold in interstate commerce, to reduce the number of death and injuries caused by such products”), sponsored by Rep. Ronald A. Sarasin (R-CT), referred to the House Committee on Interstate and Foreign Commerce, Apr. 19, 1977. *Congressional Record*, 95th Cong., 1st sess., 1977, vol. 123, pt. 9, p. 11145.

tax laws,<sup>31</sup> and insurance laws benefiting small businesses.<sup>32</sup> Most importantly, there were bills that proposed the wholesale federalization of tort law.<sup>33</sup>

In 1977 both houses of Congress held subcommittee hearings on the possibility of the federalization of tort law. From April through December of 1977, the House of Representatives Committee on Small Business, Subcommittee on Capital, Investment and Business Opportunities held hearings on product liability and related insurance issues.<sup>34</sup> Similar, briefer hearings were begun in April 1977 in the Senate's Committee on Commerce, Science, and Transportation, Subcommittee for Consumers.<sup>35</sup> The ostensible issues presented in those hearings concerned the availability of product liability *insurance* at “reasonable rates” and whether the emergent tort liabilities in various states were the causes of extraordinary insurance rate increases across the nation. However, the purpose for such committee hearings—on the part of the hearings’ proponents—appears to have been to set the stage for federal legislation to regulate product liability insurance rates or enact a federal tort law, which would have pre-empted state laws (both common law and statutory) regarding the liabilities of manufacturers to injured consumers and workers.

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<sup>31</sup> E.g., H. Res. 7711 (to amend the federal tax code to “provide that trusts established for the payment of product liability claims and related expenses shall be exempt from income tax” and allowing a deduction “for contributions to such trusts”), co-sponsored by Rep. Charles W. Whalen, Jr. (R-OH), referred to the House Committee on Ways and Means, June 19, 1977. *Congressional Record*, 95th Cong., 1st sess., 1977, vol. 123, pt. 15, p. 18336; H. Res. 10196 (to amend the federal tax code to “provide a deduction for certain amount paid to a reserve for payment of product liability losses”), co-sponsored by Rep. Abner J. Mikva (D-IL), referred to the House Committee on Ways and Means, Dec. 1, 1977. *Congressional Record*, 95th Cong., 1st sess., vol. 123, pt. 29, p. 38303; S. 3489 (to “allow additional carryback of 7 years for excessive net operating losses attributable to product liability”), sponsored by Sen. John C. Culver (D-IA), referred to the Senate Committee on Finance, Sept. 8, 1978. *Congressional Record*, 95th Cong., 2nd sess., 1978, vol. 124, pt. 21, p. 28573.

<sup>32</sup> E.g., H. Res. 4200 (“to amend the Small Business Act by authorizing the Small Business Administration to furnish reinsurance for property liability insurers for small business concerns which would not otherwise be able to obtain product liability insurance on reasonable terms”), chiefly sponsored by Rep. John J. LaFalce (D-NY), referred to the House Committee on Small Business, Mar. 1, 1977. *Congressional Record*, 95th Cong., 1st sess., 1977, vol. 123, pt. 5, p. 5612.

<sup>33</sup> H. Res. 13209 (“to establish Federal product liability tort law standards”), co-sponsored by Rep. John J. LaFalce (D-NY), referred to the House Committee on Interstate and Foreign Commerce, June 21, 1978. *Congressional Record*, 95th Cong., 2nd sess., 1978, vol. 124, pt. 14, p. 18342; S. 1706 (to establish federal product “standards”), co-sponsored by Sen. Richard G. Lugar (R-IN), referred to the Senate Committee on Commerce, Science, and Transportation, June 16, 1977. *Congressional Record*, 95th Cong., 1st sess., vol. 124, pt. 26, p. 35575.

<sup>34</sup> The hearings’ transcripts were published in five volumes. U.S., Congress, House, Committee on Small Business, Subcommittee on Capital, Investment and Business Opportunities, *Product Liability Insurance, Parts 1–5*, hearing, 95th Cong., 1st & 2nd sess., Apr.–Dec., 1977 (Washington, D.C.: GPO, 1979) (hereinafter “House, vol. #, p. #”).

<sup>35</sup> U.S., Congress, Senate, Committee on Commerce, Science, and Transportation, Subcommittee for Consumers, *Product Liability Insurance*, hearing, 95th Cong., 1st sess., Apr. 1, 1977 (Washington, D.C.: GPO, 1979) (hereinafter, “Senate, p. #”).

These initial proposals and congressional hearings exemplified the post–New Deal state at work. On the one hand, they revealed the conflicting interest groups competing for the attention and protection of the federal government. On the other, they revealed a problem of federalism: a conflict between state-level policymaking and federal policymaking. The hearings reveal the conflicts produced by the nature of the American federal system: any new federal tort or insurance law, based on powers articulated during the New Deal would probably disturb the long-standing workers’ compensation systems of the states, an achievement of the Progressive Era. The hearings demonstrated the persistence and relevance of political concerns that have existed ever since the creation of the New Deal state, including the opportunities for federal legislation created by perceptions of crises; the opportunities federal legislation creates for different interests to enact long-desired policy preferences; the potential leadership role the President can take in formulating and advocating federal legislation; and the politics inherent in the modern administrative state. Finally, as a practical legislative process matter, the House hearings were important because they occurred shortly after the post-Watergate reforms of the committee system, whereby subcommittees were “institutionalized,” meaning they no longer existed “at the sufferance of the chairmen of standing committees.” Thus, subcommittees were more robust and “participate[d] actively in the legislative process.”<sup>36</sup> The hearings occurred during the early years of such increased subcommittee participation and demonstrate the importance of the detailed investigative work of congressional subcommittees.

In the House hearings, Members of Congress from districts with manufacturers of capital goods forthrightly stipulated the reasons for the hearings. In response to letters from capital goods makers in their congressional districts, the representatives surveyed companies in their districts and found respondents who were self-described as a “manufacturer of polishing machinery in New York”; “a specialty manufacturer in Ohio”; “a manufacturer of custom-designed machinery in New York”; and “a manufacturer of light production machinery in Ohio.”<sup>37</sup> Although the House subcommittee was expressly concerned with matters affecting small businesses, it is striking that consumer goods manufacturers were not represented in the initial complaints to Congress. Consumer goods makers would later testify in the hearings, but only after the capital goods makers had initiated the process with their complaints.

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<sup>36</sup> Ross K. Baker, *House and Senate* (New York: Norton, 1989), 174.

<sup>37</sup> “Joint Prepared Statement presented by Hon. Charles W. Whalen, Jr. [3rd Dist., OH], Hon. Edward W. Pattison [29th Dist., NY], Hon. Donald J. Pease [13th Dist., OH], Hon. Joel Pritchard [1st Dist., WA], Hon. Newton I. Steers, Jr. [8th Dist., MD] on *Product Liability Insurance—Survey Findings*,” House, vol. 1, p. 10.



Rep. Robert J. Cornell (D-WI) surveyed his constituents to determine the extent of the rate increases in his district.

Representative Robert J. Cornell (D-WI) noted that he had received “a couple of letters” in the fall of 1976 from “some of the businessmen [in his district] complaining about the increase in product liability insurance rates.” In response to the letters, Cornell sent out “approximately 500 letters to constituents on [his] National Federation of Independent Business mailing list.” By the time of the congressional hearings, he had already received 50 responses, “largely from manufacturers and distributors of capital equipment.”<sup>38</sup> Cornell’s comments evidenced pluralism in its purest form: proposing an inquiry and legislation in response to cumulative constituent demands.

The Members of Congress and the capital-goods makers told “horror stories” of dramatic liability-insurance rate increases and products liability lawsuits. For example, Congressman Joel Pritchard (R-WA) recounted an anecdote told to him by a swimming pool contractor, a constituent from his congressional district, who claimed that in the past three years<sup>39</sup> his liability insurance premiums had gone from \$5,000 to \$170,000, and during that period a claim had been made for one of their pools. The claim regarded a pool that had been installed without a diving board because the pool’s design was “not configured to take one.” After completion of the pool’s construction, the pool’s owner installed a diving board, a swimmer became a paraplegic after using the diving board, and the owner then sued the manufacturer, claiming a defective design.<sup>40</sup> Similarly, Representative Les Aucoin (D-OR) cited a letter from a Portland, Oregon, manufacturer who claimed his product-liability insurance premiums increased from \$300 in 1975, to \$9,000 in 1976, to \$55,000 in 1977.<sup>41</sup>

Similar hearings were held on Senate Bill 403, which sought to establish federal legislation regarding “liabilities arising out of product related injuries, and for other purposes.”<sup>42</sup> Senator James B. Pearson (R-KA), a sponsor of the Senate bill, chaired the Senate subcommittee hearings, and noted that in 1975 he began receiving complaints

<sup>38</sup> House, vol. 1, pp. 31–32.

<sup>39</sup> Presumably this period covered roughly 1973–76.

<sup>40</sup> House, vol. 1, p. 17.

<sup>41</sup> House, vol. 1, p. 27.

<sup>42</sup> Senate, p. 3.

from “small manufacturers and retailers” in his state who complained about difficulties in getting product liability insurance and about rising premiums. Pearson started the hearings noting hopes that Congress would “attempt some responsible initiative to stabilize product liability insurance rates, to increase the availability of product liability insurance at [a] reasonable cost,” and to establish more predictable standards regarding tort recovery. Pearson viewed the issue from two perspectives: the manufacturer’s and the consumer’s. Manufacturers wanted lower premiums. Consumers were harmed by the failure of manufacturers to have insurance coverage, which resulted in uncompensated claims and the “patchwork pattern” of liability among the states that made the tort system unpredictable.<sup>43</sup>

Such constituent complaints were presented as representative of an emergent problem for small businesses nationwide. For example, five Members of Congress conducted their own joint survey of small businesses—chiefly capital-goods manufacturers—in their districts in Ohio, Washington state, New York, and Maryland. One-third of the respondents claimed they could not afford liability coverage or could not find a carrier that would sell such coverage. Based upon the responses, the average increase in commercial general liability insurance premiums between 1970 and 1977 was 944.6 percent, but sales volumes increased only an average of 162.1 percent during the same period. Thus, the premiums had increased 5.8 times faster than annual sales.<sup>44</sup> Later investigation by the Department of Commerce’s Interagency Task Force on Product Liability concluded that liability insurance premiums “increased substantially” in the mid-1970s. The increases were most marked for “manufacturers of industrial equipment, industrial chemicals, and metal castings.”<sup>45</sup> These were the very kinds of manufacturers—privately held, capital-goods makers—whose complaints initiated the federal effort at tort reform in the 1970s.

What did these constituents want from Congress? Although most industry complaints pointed to a product liability insurance problem, the manufacturers’ complaints and recommendations to Congress went far beyond insurance reforms. They demanded a federal takeover and wholesale reform of tort law to protect their interests. For example, the five Members of Congress led by Joel Pritchard (R-WA) urged a wide array of changes, including a federal reinsurance pool as a “short-term answer to the present crisis,” a

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<sup>43</sup> Senate, p. 1.

<sup>44</sup> House, vol. 1, pp. 3–4. The five congressmen were Charles W. Whalen, Jr. (3rd Dist., OH); Edward Pattison (29th Dist., NY); Donald J. Pease (13th Dist., OH); Joel Pritchard (1st Dist., WA); and Newton I. Steers (8th Dist., MD).

<sup>45</sup> U.S., Department of Commerce, Interagency Task Force on Product Liability, *Final Report* (Washington, D.C.: 1978), VI-11-27.

national statute of limitations or statute of repose,<sup>46</sup> a national contributory negligence rule,<sup>47</sup> a “state of the art” protection standard,<sup>48</sup> and, perhaps most importantly, “uniform standards” in the form of a federal products liability law. This last item was a request for the wholesale federal takeover of products liability law.<sup>49</sup> The congressmen urged such a takeover of state law expressly because they wanted to supersede state tort law and eliminate variation from state to state. They noted that the law’s constitutional basis would be the Commerce Clause, since “practically all manufactured goods are sold in interstate commerce nowadays.” In the alternative, they proposed a “readily-adopted uniform code” that the states could adopt individually. However, they urged, “[t]he dictates of time seem to point towards the federal approach.”<sup>50</sup> This was an appeal to the perception of a crisis. Additionally, the congressmen desired some ancillary reforms, such as the awarding of federal government contracts without regard to whether firms carried product liability insurance coverage. Also, they suggested that the Small Business Administration needed to become a guarantor or lender of funds to insurers in order to cover the carriers’ needs for reserves. This would not be as costly as it might seem, they contended, because the claims filed always exceeded the claims actually paid. They wanted changes in the tax treatment of self-insurance from accumulated capital to full deduction status. Also the congressmen advocated further congressional study of lawyers’ fees, and they “wonder[ed] what role legislation would or could play” if lawyers’ fees were determined to be a problem. Finally, regarding workers compensation, the group of congressmen wanted to explore business suggestions about setting up a federal products liability program that would supersede workers’ compensation. Similarly, the Machinery and Allied Products Institute (MAPI), the self-proclaimed “spokesman for the capital goods and allied equipment industries of the United States,” argued that “an ideal solution is to make workmen’s compensation the only recourse or remedy and stop there.”<sup>51</sup> This implicitly meant that some manufacturers who sought federal intervention, such as MAPI, were seeking an end to tort liability for defective goods used in the workplace. Rather than attacking strict tort liability head-on, some manufacturers

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<sup>46</sup> Statutes of limitation provide “maximum time periods during which certain actions can be brought or rights enforced.” After the time period has run, “no legal action can be brought regardless of whether any cause of action ever existed.” By contrast, a statute of repose “cuts off [a] right of action after [a] specified time measured from delivery of product or completion of work, regardless of time of accrual or cause of action or of notice of invasion of legal rights.” *Black’s Law Dictionary*, 6th ed., (St. Paul, Minn.: West, 1990), pp. 927, 1411.

<sup>47</sup> Contributory negligence is an affirmative defense that prevents plaintiffs who negligently contribute to their own injuries or damages from obtaining any recovery from a negligent defendant.

<sup>48</sup> This standard would provide a defense that any manufacturer who had adhered to the “state of the art” in the design and/or manufacture of a product would be found to have not been at fault.

<sup>49</sup> Often referred to as a “federal pre-emption” of tort law.

<sup>50</sup> House, vol. 1, pp. 11–12.

<sup>51</sup> House, vol. 1, pp. 199–201.

would attack it by urging that workers' compensation be the sole source of recovery. However, this goal was unlikely to be realized, since no congressman actually advocated the elimination of liability for manufacturers of defective products. Nevertheless, capital goods manufacturers had come as far as getting Congress's official attention, and they might benefit by characterizing their problems in the most extreme terms and aiming as high as possible in their proposed federal solutions.

The prospective beneficiaries of any federal intervention would have been manufacturers and insurance companies. Yet, other organized interests were subject to being affected by the prospect of federal tort and insurance laws: plaintiffs' lawyers and consumer protection nonprofit organizations. The plaintiffs' bar argued against federal intervention, claiming that products liability was no different than any other area of liability and that the industry's complaints were a manufactured crisis.<sup>52</sup> Consumer advocacy groups argued that federal legislation was premature, that the state jury systems were sufficient, and they cautioned that the consequences of federal intervention were unknown.<sup>53</sup>

The congressional hearings occurred while the Commerce Department was conducting its own investigation of products liability issues. The Federal Interagency Task Force on Product Liability had been commissioned during the Ford administration and was continued during the Carter administration. Although the final report would not be issued until November 1977, a preliminary "Briefing Report" issued in January 1977 was available to participants at the congressional hearings.<sup>54</sup> The most important element from the Report for the congressional hearings was the Commerce Department's conclusion that no crisis existed regarding the cost and availability of products liability insurance. Industry groups claimed the Commerce Department's methodology was faulty and maintained that a true crisis existed.<sup>55</sup>

In November 1977 the Task Force issued its Final Report.<sup>56</sup> Sidney Harman, the Undersecretary of Commerce, contended that "horror stories" had generated "myths" about products liability. He conceded that some businesses were diminished by strict

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<sup>52</sup> Testimony of Craig Spangenberg, a plaintiffs' personal injury lawyer in private practice and chairman of the National Affairs Committee of the Association of Trial Lawyers of America, Senate, p. 64.

<sup>53</sup> Testimony of Sandra Willet, of the National Consumers League, Senate, pp. 198, 201.

<sup>54</sup> Senate, p. 38.

<sup>55</sup> House, vol. 1, p. 406.

<sup>56</sup> U.S., Department of Commerce, Interagency Task Force on Product Liability, *Final Report* (Washington, D.C.: 1978).

liability, but also that fewer harmful products were on the market.<sup>57</sup> Finally, the Task Force only voiced support for peripheral federal measures, such as the government “funneling information” to companies in support of their “loss prevention” efforts and “Government-supported reinsurance.”<sup>58</sup>

Table V-10.--Comprehensive General Liability Coverage Average  
Cost per \$1,000 in Sales, by Product and Size Categories 1976

Product Category	Less than \$2.5 million		\$2.5 to \$100 million		\$100 million and over		All Firms	
	Cost per Thousand	Number <sup>1</sup>	Cost per Thousand	Number <sup>1</sup>	Cost per Thousand	Number <sup>1</sup>	Cost per Thousand	Number <sup>1</sup>
<b>Industrial products</b>								
Industrial machinery	3.38	7	2.85	10	1.22	15	2.20	32
Metal castings	2.80	5	4.78	7	1.14	13	2.49	25
Grinding wheels	8.92	8	4.71	9	1.95	3	5.90	20
Industrial chemicals	4.60	7	3.15	14	0.61	12	2.53	33
<b>Consumer products</b>								
Power mowers	8.82	2	4.42	12	2.23	5	4.31	19
Automotive components	6.50	7	2.60	9	1.26	13	2.94	29
Pharmaceuticals	4.07	4	6.10	6	1.72	9	3.75	19
Medical services	15.79	6	3.88	6	1.49	12	5.66	24
Aircraft components	15.05	3	3.03	2	0.74	7	4.70	12
All product categories	7.42	49	3.88	75	1.24	89	3.59	213

Source: Product Liability Industry Telephone Survey, Gordon Associates, Inc., December 1976, Tables IV-10, IV-12, IV-15, IV-21, IV-26 and IV-28.

A page from The Interagency Task Force's Final Report, November 1977. It concluded that there was no crisis in the cost and availability of products liability insurance.

Over the course of the summer of 1977, the congressional hearings inquired about whether insurance-rate setting could be separated from the expansion of tort liability per se. Independent testimony suggested that products liability insurance had not been systematically analyzed, and even insurers understood the insurance market poorly.<sup>59</sup> Although premiums had recently increased, Representative Thomas A. Luken (D-OH) contended that, if rates were caused by expanded liability, then the insurance rate changes should have occurred in the 1960s, when the state-level expansion of tort liability occurred.<sup>60</sup> Mavis A. Walters, a vice president of the ISO, testified that insurance companies had revised their rates dramatically upward in 1975, which was the first industry-wide increase since 1963.<sup>61</sup> The ISO's and other insurers' testimony left the congressmen confused as to what “had actually occurred in the product liability insurance market in recent years.”<sup>62</sup> It appeared that much underwriting was “subjective.”<sup>63</sup> Nevertheless, most of the insurers had experienced increases in the number and frequency of products liability claims in the early 1970s, and they claimed they changed their rates accordingly.<sup>64</sup>

<sup>57</sup> House, vol. 4, pp. 1346–47.

<sup>58</sup> House, vol. 4, pp. 1348–49. Reinsurance is insurance that an insurer purchases to cover an insured risk, with the goal of reducing the original insurer's exposure in the event of loss.

<sup>59</sup> Testimony of Philip H. Dutter of McKinsey & Co., Inc., New York, N.Y., an “international management consulting firm” contracted by the presidential Task Force in its study of the insurance industry. House, vol. 2, p. 486.

<sup>60</sup> House, vol. 2, p. 509.

<sup>61</sup> House, vol. 2, p. 543.

<sup>62</sup> House, vol. 5, p. 1685.

<sup>63</sup> House, vol. 5, pp. 1690–91.

<sup>64</sup> House, vol. 5, pp. 1692–94.

In light of the over one-year-long, federally funded investigation of the issue, this equivocation on the virtues and vices of products liability was frustrating for the congressmen. Ultimately the Commerce Department's Task Force was ambivalent about whether federal legislation was needed. Undersecretary of Commerce Sidney Harman stated that the Task Force supported "uniformity in products liability law," but would "not specifically endorse Federal action in this area."<sup>65</sup> Such an express endorsement or rejection was probably exactly what the Congress wanted from the Task Force. Instead, the Task Force's report probably created more ambivalence than had existed before its release. It confirmed the existence of a problem, but failed to prescribe a solution or even the desirability of a federal approach. As subcommittee chairman John J. LaFalce (D-NY) stated, "I analogize it to going before the jury and the jury says, we want more facts."<sup>66</sup>



Rep. John J. LaFalce (D-NY) was greatly concerned with whether the insurance premium increases were reflective of a real crisis or merely the result of panic pricing in the insurance industry.

Notwithstanding this official ambivalence from the Task Force, Undersecretary Harman made the suggestion that federal action might be needed in the future because of looming crises in other matters, including municipal liability, professional malpractice and automobile accident reparations, and nuclear power plant accidents. Harman contended that Congress and the executive branch needed "to begin to consider the larger picture of the Federal Government's role in accident compensation." Harman predicted that "if some concerted action is not taken," then "accident compensation may produce a crisis in the 1980s."<sup>67</sup> It was surprising that, while the Task Force refused to endorse a wholesale federal takeover of state tort law, the Commerce Department urged a far more expansive federal "accident compensation" role. Such a role would dwarf any of the then-existing proposed federal takeovers of products liability law.

All interested parties could find something within the Report to support their contentions that a "very real crisis"<sup>68</sup> existed or that the Report "slowed down

<sup>65</sup> House, vol. 4, p. 1348.

<sup>66</sup> House, vol. 4, p. 1356.

<sup>67</sup> House, vol. 4, pp. 1351–52.

<sup>68</sup> Testimony of Geoffrey R. Myers, counsel for the Truck Equipment and Body Distributors Association, House, vol. 4, p. 1429.

considerably the [insurance] industry's stampede for legal insulation from injured consumers."<sup>69</sup> None of the interested parties' positions actually changed as a result of the Task Force's Final Report. Manufacturers and insurance companies still wanted federal intervention and protection, and plaintiffs' attorneys and consumer advocates still wanted to preserve the prevailing state systems of strict products liability. Also it should be noted that the witnesses remained focused on workers' compensation and capital goods manufacturers, rather than on general consumer goods.

### **Workers' Compensation and the Role of Federalism**

The hearings demonstrated the conflicts between organized interests at the state level and how the prospect of federal tort and insurance laws would affect these interests, creating new winners and losers. The hearings also substantiated that federalism was a chief concern for legislators. Some congressional officials thought the states' experiences with workers' compensation programs suggested keeping such programs at the state level.<sup>70</sup> Employers operated in a state-level workers' compensation system that provided protection to employers from tort lawsuits, while providing a guarantee of some degree of compensation to injured employees, without regard to fault. This system was a bargain struck at the state level between employers and employees during the Progressive Era.<sup>71</sup> The congressional hearings demonstrated that any federal intervention in tort and insurance law regarding products liability would impact this bargain, potentially obliterating the Progressive Era arrangements of the workers' compensation system. Additionally, the workers' compensation laws were state laws. The New Deal had greatly altered the relationship between the federal government and the states and citizens by allowing for federal legislation in matters that had theretofore been within the sole purview of the states. However, some New Deal-era programs were federally mandated, but were administered and funded by the states. For example, the Federal-State Unemployment Program is the product of the Social Security Act of 1935, but it is administered separately in each state according to federal guidelines. The amount of benefits, duration, and eligibility requirements are formally established under state law. Each state program is funded "solely on

<sup>69</sup> Testimony of Anita Johnson, staff attorney with the Environmental Defense Fund, House, vol. 4, p. 1439.

<sup>70</sup> House, vol. 1, p. 12.

<sup>71</sup> Jennifer Klein argues that employers supported workers' compensation laws because it would reduce the likelihood of a class struggle. *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton, NJ: Princeton University Press, 2003), 22. Perhaps the better description is Lawrence Friedman's. He notes that workers' compensation provided a compromise that provided both employers and employees with benefits and tried to eliminate the middlemen: lawyers. This latter hope proved to be in vain when courts expanded the scope of workers' compensation statutes and proved that the legislation created a new area of practice for lawyers. Friedman, *A History of American Law*, 517.

a tax imposed on employers.<sup>72</sup> Yet workers' compensation, with the exception of some industry-specific (e.g., maritime workers and longshoremens) and federal employee groups, had been left entirely to the states during the New Deal and in succeeding decades. Similarly, tort law had been a province of the states. Federal tort legislation threatened not only the bargains struck at the state level but also the sovereignty of the states in one of the last remaining areas where the states had clearly exercised their sovereignty.<sup>73</sup>

Federalism was a key concern for Congress. For example, Ronald A. Sarasin (R-CT) and Thomas A. Luken (D-OH) were intrigued by H.R. 1902, which proposed allowing employers to be added to suits against manufacturers. However, both congressmen noted that such a federal law would require changing states' workers' compensation laws, which prohibited such suits against employers. Luken feared the federal government would "invade" the state workers' compensation domain.<sup>74</sup> Similarly, James R. Jones (D-OK) argued for an extensive study of the tort and insurance conditions prevailing throughout the nation before any federal laws were enacted, especially because he thought prior experience with rapid federal reactions to problems only made such problems worse. Although Jones wanted to aid his constituents, he did not want to increase federal control over the economy. He noted, "Federal help is almost always coupled with Federal control." Rather he supported a "go slow" approach regarding federal legislation. Nevertheless, he still urged eventual passage of a law allowing for joinder of employers in suits against manufacturers and tax law changes to allow or encourage employers to establish self-insurance funds or the creation of pools of funds with other local employers.<sup>75</sup> Senator James B. Pearson voiced a wariness of "heavy-handed" federal legislation in matters "traditionally left to the states."<sup>76</sup> It is important to note that this was the period shortly after the Nixon administration had made much of decentralization,

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<sup>72</sup> U.S., Department of Labor, Office of Workforce Security, Division of Legislation, *Unemployment Compensation: Federal-State Partnership*, 2008, 1–2.

<sup>73</sup> The entanglement of the emergent strict liability system and the workers' compensation system would continue through the 1980s. One scholar has estimated that "almost one-fourth of all job-related product liability claims" arose out of employers or their workers' compensation insurers seeking reimbursement from manufacturers (and their insurers) for payments made under the workers' compensation systems to injured employees. W. Kip Viscusi, "Product and Occupational Liability," *Journal of Economic Perspectives* 5, No. 3 (1991): 71, 86. These are referred to as "subrogation" claims, wherein an insurer seeks reimbursement from a responsible third party for payments made to an insured claimant.

<sup>74</sup> House, vol. 1, pp. 61–62.

<sup>75</sup> House, vol. 1, pp. 50–51.

<sup>76</sup> Senate, p. 1.

or the devolution of governmental power to the states and localities.<sup>77</sup> However, Senator Pearson thought the affordability and availability of product liability insurance overcame such federalism concerns. He considered S. 403 “only as a first draft” and claimed he was “not wedded to any of its provisions.”<sup>78</sup>

The congressional hearings concerning products liability were not merely a response to an apparently growing national insurance problem. They were a pluralistic response in a federal system. The post–New Deal state encouraged and legitimated this behavior. Tort law had almost always been within the purview of state courts and, to a lesser degree, state legislatures. However, the nationwide trend toward the adoption of strict liability, the dramatic increases in some commercial liability insurance rates in the 1970s, the potential for rewarding organized interests through federal intervention, and the political practices of the post–New Deal state combined to make proposals for the federalization of tort law seem unexceptional and almost inevitable.<sup>79</sup>

These hearings were what had become by the 1970s an example of the normal functioning of the U.S. federal government in the post–New Deal state. The New Deal initiated a model for federal policymaking pertinent in several ways to the tort reform proposals of the 1970s. First, as Robert Higgs has argued, the New Deal provided an opportunity for policymaking in response to perceptions of national public policy crises. Higgs argued that government has grown in America during periods popularly seen as crises. Such growth is not inevitable; rather it is contingent upon the efforts of groups of people, both inside and outside of government employment, to successfully procure government action.<sup>80</sup> The

<sup>77</sup> Although Joan Hoff agrees that Nixon aimed at increased executive power vis-à-vis the federal bureaucracy, she argues that Nixon earnestly sought to increase executive power to implement a “New Federalism,” which would “restore a sense of socioeconomic community structures.” Joan Hoff, *Nixon Reconsidered* (New York: BasicBooks, 1994), 66–67. However, as Herman Belz noted, although Nixon gave rhetorical support for a return to a decentralized state, his was actually a centralizing effort to assert a greater degree of executive control over a “policy-making [federal] bureaucracy.” Herman Belz, et al., *The American Constitution: Its Origins and Development, Volume II* (New York: W.W. Norton, 1991), 661–64. True federalism would entail not only local officials’ policy preferences but also localities’ own funding mechanisms, rather than the localities’ reliance upon federal tax funds.

<sup>78</sup> Senate, p. 1.

<sup>79</sup> The notable exceptions to tort law as a state-level area of competency were the federal laws of the Progressive Era, including the Federal Employers’ Liability Act of 1908, 35 Stat. 65 (affecting tort rights of railroad workers and their employers); the Jones Act of 1920, 41 Stat. 1007 (similarly affecting the tort rights of those who worked on the navigable waters); and the Food and Drug Act of 1906, all of which played roles that had theretofore been left to state tort and contract law. Lawrence M. Friedman, *American Law in the 20th Century* (New Haven: Yale, 2002), 60–61, 360.

<sup>80</sup> Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987), 13. “Political elites” combined with “interest groups” initiated the 1970s tort reform movement. Marc Galanter, “An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,” *Arizona Law Review* 40, No. 3 (1998): 719.

failures, or incapacities, of private and public financial institutions during the Great Depression invited a firm governmental response to aid in recovery and in prevention of future institutional failures. Similar arguments seemed to apply to the liability insurance situation faced by many small manufacturers in the 1970s. Referring to a difficulty as a “crisis” was an attempt to legitimate the mobilization of the massive capacities of the federal government to combat a threat to the nation. Such a term invoked the memory of the New Deal and its impetus to be reactive in the service of compassion for the unfortunate and reformative in correcting the injustices that purportedly exist throughout the country.

Second, in relation to tort reform, Daniel Rodgers has shown that the New Deal was an opportunity for the implementation of policy proposals that by the 1930s had been desired for several decades.<sup>81</sup> In the case of the New Deal, the proposals were Progressive Era ideas about the socialization of risk on a national scale, including social insurance in the form of retirement provisions, and governmental control of aspects of the economy. In the case of modern tort reform, the proposals were partially in response to the difficulties some manufacturers, wholesalers/distributors, and retailers were having regarding the affordability of liability insurance. However, other proposals went to the heart of the common law tort systems that had long been in the purview of state courts. For example, the rules on punitive damages were among the common-law rules that had been controlled by the state courts.<sup>82</sup> Defendants’ objections to punitive damages were long-standing, and the prospect of federal tort reform offered the opportunity to enact, at the federal level, policies that had not been implemented at the state level. However, it should also be noted that the business community’s desire for federalizing an area of law—which threatened to create more opportunities for centralized political control of tort law that might ultimately threaten business interests—was an example of businesses seeking state action in support of their own interests.<sup>83</sup>

Third, as Sidney Milkis has demonstrated, the New Deal enhanced the visibility, presumptive leadership role, and power of the executive branch. President

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<sup>81</sup> Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998). Rodgers argues that Progressivism did not end with World War I, but went on to inspire much of the New Deal. The New Deal itself is seen as “the cosmopolitan progressives’ moment” because it was their “response” to the worldwide depression. *Ibid.*, 411, 446.

<sup>82</sup> Morton J. Horowitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Authority* (New York: Oxford University Press, 1992), 113–14.

<sup>83</sup> Peter Swenson, *Capitalists Against Markets: The Making of Labor Markets and Welfare States in the United States and Sweden* (New York: Oxford University Press, 2002), 203.

Franklin D. Roosevelt's highly visible policymaking role was central to the New Deal and created an expectation among many in the voting public of an active executive branch in politico-economic matters. Roosevelt's "precedent-shattering re-election to a third term . . . ratified the displacement of party politics by executive administration."<sup>84</sup> In the 1970s the Interagency Task Force on Product Liability was an executive branch effort begun by the Ford Administration. It is true that, as Milkis has noted, the "administrative politics" of the 1970s saw an increase in Congress's role in the administrative state and a consequential weakening of the "energy and responsibility" of the presidency.<sup>85</sup> Nevertheless, even during the reinvigorated administrative state of the 1970s, the Task Force's very existence shows the President had the potential for playing a leading role in tort reform, should he have desired to do so. The New Deal presidency continued through the period of tort reform. The Carter administration's half-hearted push to seek a federal role in accident compensation was at odds with the preferences of interest groups that tended to support Democrats: trial lawyers and consumer protection groups. Those groups wanted the role of the state courts to be preserved. This pluralist approach points out the role that President Carter might have played but was understandably dissuaded from pressing vigorously for because he lacked support from key constituencies. The New Deal presidency was present during the "Tort Revolution"; but its legislative power was greatly curtailed when key interests opposed it.

Finally, the New Deal served as a model for the establishment of the administrative state. Although Stephen Skowronek has convincingly evidenced the origins of the administrative state in the early Progressive period, the New Deal's programmatic responses to the Great Depression helped establish what became a permanent administrative state at the national level.<sup>86</sup> The purported professionalism and expertise in matters offered by bureaucratic government seemed well suited to the complex institutional problems encountered during the Great Depression. Although by the 1970s some scholars had begun to question the efficacy of the federal administrative state, the regulatory approach to handling politico-economic problems retained vitality. The early 1970s saw the enactment of a slew of federal laws attempting to protect consumers,

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<sup>84</sup> Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993), 142.

<sup>85</sup> Milkis, 307.

<sup>86</sup> Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge, UK: Cambridge University Press, 1990).

workers, and the environment, and the establishment of new federal entities to administer them. The New Deal spurred the rise of delegated government, in which administrative agencies were delegated legislative power by Congress, producing “administrative legislation.”<sup>87</sup> Tort reform was, for some, yet another candidate for supervision by the federal administrative state. Yet, the proposal for a new administrative agency was made at a time when the limits of the administrative state were becoming evident. Deregulation was becoming popular even among those who traditionally supported an active state. Adding yet another federal administrative entity was not a popular move in the late 1970s.

Each of these legacies of the New Deal made tort reform seem inevitably a federal concern. Yet it was not inevitable at all. Tort reform failed in 1977–78. The ultimate fate of the then-pending tort reform bills—S. 403, H.R. 4200, and H.R. 1902—was to die in their respective committees. Although lobbying methods and appeals to the Senate differed from the House,<sup>88</sup> the tort reform efforts in both chambers failed. It appears these federal reform efforts failed because they were federal. Some senators and representatives, notwithstanding the post–New Deal approach, were still deeply concerned about federal intervention as an intrusion into matters best left to the competencies of the states. As previously indicated, in the 1970s decentralization was much discussed and promoted by the Nixon administration. Although that administration did not return the federal-state relationship to a classic federalist division of sovereignty, in which the states not only decided whether to have programs but actually funded their own programs, the question of preserving or increasing state responsibility formed the milieu in which federal tort legislation was debated. It appears the concerns over federalism sealed the bills’ fate. The workers’ compensation systems had been long established in the states, and any reform effort would intrude into this area of proven state sovereignty. Also, the House hearings left the subcommittee members confused about the nature and extent of the insurance problem, and caused them to question whether there was a crisis at all. It seems the lack of clarity about the tort systems’ effects on the cost and availability of liability insurance gave pause to elected officials. There was certainly a significant rise in insurance rates, but the solution to this problem was uncertain. Even the pro-tort reform experts disagreed on remedies and offered a myriad of federal policy proposals.

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<sup>87</sup> Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: Norton, 1979), 273–74.

<sup>88</sup> Baker, *House and Senate*, 151–71.

Finally, Congress discovered it was being asked to do something that was far more complex than originally anticipated by the proponents of federal intervention. As the chairman of the Senate hearings, James Pearson (R-KA) stated in relation to the idea of a federal law affecting tort damages, “I have been asking myself . . . why we really didn’t go into the field of damages. And the only real reason I can think of is that the complexity of what we were dealing with, and a very new subject in tort reform or change in the tort law seemed too complex to us.”<sup>89</sup> Similarly, after the Interagency Task Force’s Final Report was issued, Congressman Richard H. Ichord (D-MO), who had been on record as desiring federal legislation to “protect the small business interests,” conceded “the causation factors of the problem are multitudinous, and they are very complex. The solution, I must say, is not so easy.”<sup>90</sup> Ichord preferred adhering to the status quo rather than enacting well-intentioned legislation that produced unintended consequences.

Perhaps it would be better to substitute the words “politically unpalatable” for Pearson’s use of “complex.” The tort reform proposals being offered were comprehensive, and they had potentially far-reaching effects, many of which might not be seen at the time. Such a comprehensive federalization of tort law would not only take matters away from the state courts, but it would make the national government a policymaker in a wide array of matters that it had never previously governed. Members of Congress, even those who professed enthusiasm for the federalization of tort law, may not have wanted to adopt such responsibility and power for the federal government.

Let’s return to Ossie Stanfield’s case. The appellate court refused to allow the manufacturer to obtain indemnification from Stanfield’s employer. Strict liability made the employer’s alleged negligence irrelevant.<sup>91</sup> The trial judge dismissed the case, agreeing with the manufacturer that the machine had no defect and that Stanfield’s injury was due to the employer’s negligence. Stanfield then appealed, and the manufacturer lost a second time. The appellate court held that only a jury could decide upon defectiveness. The case was reversed and remanded to the trial

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<sup>89</sup> Senate, p. 64. Similarly, Senator Pearson later made the following comment in relation to the prospect of arbitration panels deciding products liability claims: “But there is a growing consensus not only about the courts but about the Congress too, that these institutions no longer really possess the capability of deciding enormously complex economic and technological issues today, and that the trend is toward arbitration, and administrative panels.” *Ibid.*, p. 89.

<sup>90</sup> House, vol. 4, p. 1612.

<sup>91</sup> *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996; 309 N.E.2d 104; 1974 Ill. App. LEXIS 3109 (Ill. App. 2d Dist., 1974).

court.<sup>92</sup> When Stanfield filed her original lawsuit in 1970, she demanded \$150,000. Six years later, on the day a jury had been empanelled to hear the trial of Stanfield's case, the manufacturer agreed to settle the case for \$20,000.<sup>93</sup>

Was this a products liability horror story? Although Ossie Stanfield was maimed for life, she recovered through both the state workers' compensation system and the common law tort system.<sup>94</sup> From the standpoint of manufacturer Medalist Industries this was a nightmare. Medalist Industries claimed that its product was not defective and that Stanfield was only injured because of her negligent employer. Medalist Industries had incurred the expenses of time, and it or its insurance carrier, if it had liability insurance, had incurred expenses in the defense and appeals of the case. Also, whether it settled or went to trial, it incurred substantial expenses to resolve the case.

### **Continued Limits on Reform**

Although no federal legislation was forthcoming in the 1970s, the first federal law to address high products liability insurance rates would be enacted in 1981. The Product Liability Risk Retention Act of 1981<sup>95</sup> provided for only insurance purchasing reform, and the new Reagan administration supported it, at least in part, because it did not have a "Federal regulatory role." The 1981 law did not create a federal agency or require federal funds. Manufacturers could form self-insurance cooperatives ("risk retention groups") and purchase product liability insurance across state lines. It was hoped the risk pools would allow for lower premiums and reflect the degree of actual risk and would not be impacted by the "present inflationary trends" of the early 1980s. The program was modeled on similar state-level programs for professional malpractice insurance for doctors

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<sup>92</sup> *Stanfield v. Medalist Industries, Inc.*, 34 Ill. App. 3d 635; 340 N.E.2d 276; 1975 Ill. App. LEXIS 3401 (Ill. App. 2d Dist., 1975).

<sup>93</sup> Law Docket and Fee Book, *Stanfield v. Medalist Industries, Inc.*, No. G-23773, Circuit Court of the 17th Judicial District, Winnebago County, Illinois (June 28, 1976). Using the CPI, \$20,000 in 1976 would be worth approximately \$80,600 in 2012 U.S. dollars. "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present," *MeasuringWorth.com*, <http://www.measuringworth.com/uscompare/> (accessed May 23, 2013).

<sup>94</sup> However, the standard contingency fee contract with her attorney would have been between one-fourth and one-third of her recovery, and she was additionally responsible for her attorneys' expenses, which would have substantially reduced her net recovery. On top of the attorneys' fee, Stanfield would have had to pay for her attorneys' expenses, including copies, mailings, mileage, and court fees at both the trial and appellate court levels. For a case that made two trips to the state intermediate appellate court, these would have been substantial costs.

<sup>95</sup> P.L. 97-45.

and lawyers.<sup>96</sup> The new law allowed insurance companies chartered in any state to insure manufacturers in any other state, thereby avoiding otherwise prohibitive state laws.<sup>97</sup> This narrow insurance reform avoided the federalism problems associated with the workers' compensation systems. Instead of creating a new federal agency or federalizing tort law, the 1981 law reduced state barriers to insurance availability, a much more traditional federal approach to commercial legislation. Yet, this narrow approach would not end the debate over whether tort law should be federalized. The mid-1980s would see another insurance crisis, and states would enact their own laws to restrict tort recoveries. The diverse state laws, which took their place in a national market for consumer goods, revived the question of whether a uniform federal approach would be preferable.<sup>98</sup> That question remains hotly contested to this day in Congress, where legislators have perennially introduced tort reform bills and organized interest groups have committed extensive resources supporting their respective positions.

Not only did the history of federal products liability reform begin in Congress in the 1970s, the factors limiting such reform were identified in that initial debate. The strength of the states' workers' compensation systems and the fear of unintended consequences dissuaded legislators from federalizing tort law then and remain as considerations to this day.

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<sup>96</sup> *Congressional Record*, 97th Cong., 1st sess., 1981, vol. 127, pt. 13, pp. 17707–8. Rep. James Florio (D-NJ) specifically mentioned manufacturers of gym and medical equipment.

<sup>97</sup> *Congressional Record*, 97th Cong., 1st Sess., 1981, vol. 127, pt. 15, pp. 20356–57. The insurance company had to be formed under the laws of at least one state, the District of Columbia, Bermuda, or the Cayman Islands. Groups formed in Bermuda and the Cayman Islands were required to be chartered before 1985. Text of Act, §2(a)(4).

<sup>98</sup> Jane Stapleton, *Product Liability* (London: Butterworth 1994), 32–33.