

## [Federalism And Tort Reform](#)

Friday, May 27, 2011

On [Wednesday](#), we discussed the relevant parts of pending tort reform legislation. [Earlier in the month](#) we updated our favorite federalist point, which is that federal courts should not issue expansive interpretations of state tort law when sitting in diversity jurisdiction.

OK, what do those two things have to do with one another.

Well, one of our fellow travelers on tort matters, [Walter Olsen](#), has a [thoughtful piece](#) over at [Cato](#) on whether federalist principles limit the ability of congress to impose top-down tort reform on the states - although we hasten to point out that even a quasi-libertarian like him sees a role for federal tort reform in products liability and class actions. Here's his point:

[T]he Constitution contemplates federal supervision of state courts when they reach out to assert power over transactions and litigants outside their own boundaries. It has far less to say about intruding upon the authority of those courts over disputes that arose between their own residents and are unmistakably under their own law. . . . Where does this leave federal-level liability reform? It suggests a very real difference between areas like product liability and nationwide class actions—in which suits ordinarily cross state lines, and the majority of runaway verdicts are against out-of-state defendants—and more conventional kinds of tort litigation arising from car crashes, slip-and-falls, and medical misadventure, where cases are mostly filed against locally present defendants. As a rough rule of thumb, it's worth presuming that most of the local suits do not externalize heavy costs across state lines and should accordingly be left alone by Congress unless it is itself vindicating some constitutional right or coordinating the functioning of some constitutionally authorized federal government activity.

Walter doesn't say anything in particular about the punitive damages legislation we commented on, we think he'd find them to be OK, since they're tied to FDA regulation, and we think he's agree that federal regulation of the drugs and medical devices (at least those in interstate commerce) is constitutional.

But what does he think about malpractice reform? Go read [his post](#) for all the details, but basically he thinks the better way to go would be to require anybody who's care is being subsidized by the federal government have to agree to whatever limitations on suit that Congress might think is appropriate.

Interesting idea ... and an interesting question.