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Liability Reform: Carpe Diem

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The 2004 elections marked a victory not only for values voters but also for business groups, which formed a united front, mounted a concerted and resourceful electoral effort, and prevailed up and down the line. Corporate America's impressive display of unanimity and muscle presents a splendid opportunity to unclog the arteries of commerce. A triple bypass of liability reform, sensible judicial appointments, and curbs on the power of state attorneys general will answer to the task. Exploiting the opportunity at hand will require an energetic executive, a focused Congress, and sustained business engagement. Missing it spells peril.

The Corporate Scorecard

In the bowels of Washington, D.C., the notion of a united "corporate America" looks like a bizarre liberal projection. On any given day on K Street, the car guys fight the oil guys, who also fight the ethanol guys. The broad business interest in a competitive economy is often lost in the rent-seeking strife among conflicting interests. And such parochial concerns often spill over into corporations' election strategies.

Not this time. In the 2004 elections, business groups acted in concert and helped to elect officials broadly sympathetic to economic competition and efficiency. The impact of business contributions and get-out-the-vote efforts in federal races (for example, the defeat of former Senate minority leader Tom Daschle) is hard to assess. But business involvement clearly proved decisive in numerous state judicial and attorney general elections, as well as in state referenda. For the first time in a recent election cycle, business outspent trial lawyers in state judicial races.

One single issue generated corporate unanimity and determination: the continued liability explosion. Race after race, referendum after referendum, pitted business against trial lawyers and labor unions on this issue. Time and again, business prevailed. Some unlikely victories came in states that went solidly for the Kerry-Edwards ticket; others came in places like Illinois and West Virginia, some of whose jurisdictions had appeared beyond repair.

Business targeted thirteen judicial races and prevailed in twelve, including five ground-shifting races in West Virginia, Mississippi, Ohio, and Illinois. In West Virginia, voters knocked off an incumbent supreme court justice whose rulings protected billion-dollar claims brought by his son, a prominent trial lawyer. Mississippi and Ohio each elected three business-backed justices, thus ensuring that comprehensive liability reforms (Mississippi) and asbestos liability reforms (Ohio) will survive judicial challenges. In Illinois, in a race that cost a mind-blowing $10 million, Republican Lloyd Karmeier unseated the plaintiff lawyers' justice Gordon Maag, himself a former personal injury lawyer. In a virtually unheard-of event, Maag also lost the retention vote for his seat on Illinois' Fifth Appellate Court, which presides over the judicial Gehenna of Madison County. His successor will be appointed by the Illinois Supreme Court, where anti-liability justices now have a majority.

Business groups won all attorney general races they had targeted. In Indiana, Republican AG Steve Carter successfully defended his position. Business-backed

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candidates prevailed in a contentious race in Pennsylvania and, miraculously, in Washington, where Rob McKenna, a former Republican council member from King County (Seattle), succeeded Democrat Christine Gregoire in the AG's office. Along with a pickup in Colorado, where former AG and now-Senator-elect Ken Salazar will be replaced with a gubernatorial appointee, the elections yielded a net gain of three Republican AGs.

Voters in several states approved tort reforms, often by wide margins—contingency fee limitations (Florida, 64 to 37); attorney fee limitations in medical malpractice cases (Nevada, 59 to 41); and mandatory mediation before litigation against health care providers (Wyoming, 53 to 47). Limits on pain and suffering awards failed in Oregon and Wyoming, but only by 49 to 51 margins.

A hugely important liability reform passed in California. Voters voted 55 to 44 for Kerry but still approved, by an astounding 59 to 41 margin, a constitutional amendment ("Prop 64") that sharply limits private lawsuits under the state's Business and Professions Code. That one-of-a-kind law allowed literally anyone to sue any business in the state, on behalf of the general public, for unlawful or unfair business practices. The statute facilitated legal extortion of dry cleaners, car dealers, and other industries, as well as ideological crusades in legal garb. (In a famous case that reached the U.S. Supreme Court, a self-proclaimed activist successfully sued Nike over its employment practices in third-world countries.) Prop 64 ends those practices by providing that private plaintiffs must themselves have suffered an injury before they may sue.

The trial lawyers' "Plan B" strategies bombed. In Nevada, the plaintiffs' bar pushed the "Stop Frivolous Lawsuits and Protect Your Legal Rights Act." Similar to a federal proposal peddled by the Kerry-Edwards campaign, the Nevada constitutional amendment would have penalized "vexatious and frivolous" litigation, meaning the tiny number of cases that already get lawyers disbarred. The same amendment would have *repealed* recent tort reforms and, moreover, barred the legislature from enacting future liability limitations—though only careful reading of the proposed text revealed those designs. The Nevada voters took that care and sent the cleverly packaged trial lawyers' bill of rights down to a whopping defeat (37 to 63).

In Alabama, Georgia, and Illinois, plaintiffs' lawyers pumped millions of dollars into the campaigns of conservatives who ran primarily on a social and religious platform in the hope of diverting support from business-backed rival candidates. Excepting the inconsequential Alabama race, the strategy failed, with business-backed candidates winning primaries and elections.

The 2004 results strongly suggest that the seemingly inexorable liability tide in the states can be stemmed after all. What accounts for that accomplishment? And how does one build on it?

Coordination Matters

In retrospect, one could have seen it coming. Once-notorious Alabama fixed its tort system and its courts many years ago, as did Texas. More recently, some equally unlikely tort Meccas, such as Mississippi, Florida, and Ohio, also managed to enact meaningful reforms. Some states (notably Texas) owe their success to the energetic efforts of homegrown reform organizations, often supported by determined private entrepreneurs rather than the Fortune 500. But national business groups have joined the fight, both financially and by successfully identifying and supporting judicial and AG candidates. While unprecedented in their breadth and impact, the 2004 victories reflect a long-term trend. That trend, though, is itself a bit of a mystery.

In the battle over tort reform, business operates in an asymmetric world. The American Trial Lawyers Association (ATLA) proudly proclaims that it—unlike corporate America—does not endorse judicial candidates or coordinate campaign contributions. Well, it need not do so. Plaintiffs' lawyers know in advance where they are going to play—their home courts. With respect to claims that migrate easily from one venue to another (such as asbestos cases), the plaintiffs' bar will do fine so long as it can keep a handful of jurisdictions open for business. In short, trial lawyer contributions will naturally find their way to the "right" contests and candidates. In contrast, corporate defendants can be sued just about anywhere and so must contend, electorally as well as in litigation, in an impossibly large number of states and jurisdictions. That reality persistently threatens to splinter business coalitions and to dissipate energies.

Much of the credit in overcoming these coordination problems goes to the Chamber of Commerce and its Institute for Legal Reform (ILR). ILR identifies problem jurisdictions, targets particularly important races for

voter education campaigns, and directs resources to those races. Those efforts often serve as reliable signals for beleaguered industries to steer funds in the same direction. In Illinois and elsewhere, this concentration of resources allowed business to match trial lawyers and unions dollar for dollar.

The Race Has a Bottom

Without diminishing the chamber's accomplishments, the improved use and coordination of business resources does not quite explain why the voters should embrace liability-limiting candidates and reforms. Especially after a long string of corporate scandals (some trumped up, some real), the liability issue is easily demagogued by trial lawyers who promise to give citizens their "day in court" and by attorneys general who vow to "hold corporations to account." Moreover, even perfectly rational voters may often think it to their advantage to vote for liability-maximizing judges, AGs, and laws.

To be sure, a state that exposes doctors to erratic liability verdicts will lose the doctors. Voters will consider that trade-off and often vote to limit medical malpractice awards. (California has one of the nation's most restrictive medical malpractice laws because it is more health-obsessed than liability-happy.) Most liability laws, however, such as consumer class actions or products liability, operate extraterritorially. Producers cannot escape *any* state where their products may be sold or shipped. Under those conditions, many theorists predict, state liability law will race to the bottom: every state will seek to loot out-of-state corporations and to transfer the proceeds to in-state constituencies. The endeavor should do nothing to impede and might even promote business location in the state, as firms hope that in-state employment and investment will provide some protection against parochial judges, juries, and AGs.

Many states and officials have made precisely that calculation. California and Texas long thought that they could sustain both a competitive economy and an entrepreneurial plaintiffs' bar. Attorney General Eliot Spitzer routinely crows about the billions he procures for the State of New York, and he plainly believes that his "corporate evildoer of the month" campaigns are wholly consistent with New York City's status as capitalism's global citadel. But such stratagems have lost political purchase. Texas and now California have moved to restrict liability laws. And while Spitzer continues to enjoy high approval ratings, a Spitzer Mini-Me who boasted about his leading role in "reforming" the national pharmaceutical industry went down to defeat in Pennsylvania.

In part, moral outrage against the plaintiff bar's overreach may account for this welcome change. The populist passions that have been invoked against Halliburton and insurance companies can be and have also been mobilized against plutocrat trial lawyers and their AG enablers. In perhaps larger part, liability laws have proven a good proxy for a state's general political and economic climate. Once that recognition sets in, loot-thy-neighbor strategies lose appeal.

For decades, Mississippi relied on agriculture, military installations, and trial lawyers—industries that depend on transfer payments from other states. Lo, reliance on the exploitation of strangers (offset only by the intermittent export of quarterbacks named Manning) is not a winning long-term proposition. At one end, a parasitic strategy fails to generate much in-state wealth, as billionaire lawyers spend most of their money elsewhere. At the other end, ruinous liability laws after all impede the location of productive enterprise within the state. In the course of a no-holds-barred political brawl, Toyota informed Mississippi officials that the company's decision on building a production facility in the state would depend on the enactment of liability reform. In a sense, the location decision has nothing to do with liability, as Mississippi courts would exercise jurisdiction over Toyota even if its cars were built on Pluto. The company simply used its leverage to discipline an outlier state. By all accounts, its public pronouncements played an instrumental role in helping to enact tort reform in, of all places, Mississippi.

A few decades ago, virtually all Southern states were economic backwaters. Mississippi et al. relied on transfer payments, as epitomized by expansive product liability laws. Then North Carolina et al. began playing to their comparative advantages (such as right-to-work laws) and created productive, prosperous economies. At the end of the day, states must follow one strategy or the other, and there is no question who has had the better of it. The voters may have come to realize that exploitation has its price.

Unfinished Business

It is far too early to celebrate an end to the liability crisis. It remains difficult and expensive to turn liability-dependent states around, as the trial lawyers and their constituencies dig in their heels. Race-to-the-bottom

dynamics have been checked but hardly put out of operation. A few small, desperate states—New Mexico, which sports both a socialist AG and an intransigent Supreme Court; and Montana, where asbestos litigation has driven the legal climate from bad to worse—are volunteering to become the next Mississippi. Some lawsuits (such as asbestos claims) migrate easily from one state to another, meaning that liability reform in some or even most states may do little to reduce aggregate liability. The election of more business-friendly state AGs has done nothing, and cannot do much, to curb AG entrepreneurship—as shown below, the most virulent form of state exploitation under the liability umbrella, and the one that will prove the hardest to combat.

An effective response to these problems demands complementary federal interventions. (Solving collective action problems among the states is what the federal government is supposed to do.) As the game shifts to the Washington arena, though, the united corporate front that proved so effective in electoral combat may again dissolve into squabbling and none-too-effective lobbies, monitored only imperfectly by their corporate principals and outgunned by the trial bar and its nonprofit pilot fish.

Consider S. 1428, the "Commonsense Consumption Act of 2003." Substantially identical to already-enacted state statutes, this lobbyist-crafted bill aims to avert a flood of obesity-related lawsuits. It bars any claim of injury resulting from a person's weight gain or obesity—and then *exempts* from that prohibition any case where the seller "knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product." The appropriately named bill does consume common sense: it bars nothing and may even authorize state law claims that are preempted under existing federal law. Referring to the state equivalents of the bill, professor John Banzhaf (the Rumpelstiltskin of obesity litigation) rejoiced that "thank goodness our opposition is not very smart—none of the bills which have passed would have stopped any of the lawsuits which we've been successful on so far."[1]

This sort of tort-reform-as-usual spells ruin. Corporate America must find some way to transport unity of purpose from the campaign trail to the Washington Beltway—and to insist on results rather than tin trophies. That is no small task, but the demonstrable appeal of liability reform in the recent elections, coupled with the reelection of a reform-minded administration and the consolidation of GOP leadership in the Senate, provides a favorable environment. Three agenda items merit serious investments of political capital and business resources: federal liability reform, the appointment of federal judges, and curbs on the powers of state AGs.

Federal Liability Reform

During the first Bush II term, Congress considered medical malpractice reform, asbestos litigation reform, and class action reform. All three bills easily passed the House; all three foundered repeatedly on the impossibility of finding the requisite sixty votes in the Senate. All three will make a reappearance. The priorities should depend on the extent to which the bills have a good chance of enactment, address problems that cannot be addressed by the states, and unite rather than divide business constituencies. On all three dimensions, class action reform should come first.

Federal reform of medical malpractice may do more harm than good. Notwithstanding the propaganda on both sides, we know very little about the real-world effects of particular reforms. Those effects, moreover, may cut both ways. For example, a rigorous study by AEI adjunct scholar Jonathan Klick suggests that liability limitations on medical malpractice may well help states retain doctors—but also reduce levels of care for at least some patient populations.[2] Even assuming that every state should be compelled to make the same trade-off, states have adequate incentives to consider the competing risks. At least so long as state law is trending in an anti-liability direction, experimentation is quite probably preferable to a federal "reform" that might get it wrong, rob the reform states of their just rewards, and discourage laggard states from experimenting with their own, possibly more effective reforms.

Asbestos liability reform is a higher priority. The U.S. Supreme Court has twice implored Congress to address the "elephantine mass" of asbestos claims. The leading proposal is Senator Orrin Hatch's bill to establish a $140 billion compensation fund. The fund would be supported by corporate contributions; awards would be made in accordance with medical criteria. Alas, the desperate attempt to round up Democratic votes prompted a weakening of provisions that bar legal

claims outside the fund, posing a real risk that the plaintiffs' bar will rake off the $140 billion and then start all over again. Worse yet, the difficulty of allocating funding responsibilities between insurers and manufacturers, and among individual firms within the industries, prompted intense jockeying among corporate lobbies to inflict costs on their rivals. The prospective losers in this game have kept mum only because they did not expect the bill to pass in any event. Should the bill move closer to enactment (for example, as a result of the pickup of GOP Senate seats), the barely suppressed disagreements will break out into the open.

Without denying the urgency of addressing the asbestos mess, this particular vehicle needs a new set of wheels before the next rollout.

Class action reform revolves around "diversity jurisdiction"—that is, the question of whether cases among parties from different states must be heard in state or federal court. Current rules reserve federal court jurisdiction for cases of "complete diversity," where all plaintiffs and all defendants reside in different states. When plaintiffs' lawyers find a single plaintiff and a single nominal defendant (say, the local automobile dealer) in their preferred state court jurisdiction, a million-man class action against Ford Motor Company will proceed in that biased venue.

Federal diversity reform would provide for the removal of national or multistate class actions to federal court. That prospect is the trial bar's bane and the great hope of every corporate defendant. Diversity reform cannot be attained in and by the states, which obviously have no control over federal jurisdiction rules; it is the province and the long-neglected *constitutional* obligation of the Congress. The Founders provided for federal diversity jurisdiction precisely so as to shield out-of-state defendants from being home-cooked in the plaintiff's forum. Current diversity rules—the byproduct of statutory provisions and judicial interpretations that long predate modern class actions—defy that constitutional purpose.

One version of a class action reform bill was very nearly enacted shortly before the 2004 election, failing in the Senate only because of parliamentary maneuvering on unrelated issues. In addition, the desperate scramble for the sixtieth Senate vote led to unwarranted concessions on important details, which merit revisiting in light of the more favorable composition of that body. Beyond those difficult tactical decisions, though, the strategic call is easy: business, the White House, and Congress should put class action reform front and center.

Federal Judges

Corporate America's unwillingness to have anything to do with federal judicial appointments is legendary. Business sat out the bloody battles over the Robert Bork and Clarence Thomas nominations. Its record in recent brawls over appellate judges has been equally lackluster. Judge William Pryor, the former attorney general of the State of Alabama, worked miracles to beat the trial bar in that state. He also took a courageous stand against an Alabama Supreme Court justice's insistence on defying federal law governing the display of religious symbols on government property. Even so, religious groups strongly supported Judge Pryor's recess appointment to the Eleventh Circuit Court of Appeals while business groups did not lift a finger. Under present political circumstances, continued indifference is a gentle form of corporate suicide.

Why Care? Corporations seem to presume that federal judicial appointments are about abortions (which the Fortune 500 do not do) or racial quotas (which they like). Also, individual firms may figure that they have no way of knowing what side (conservative or liberal) they might be on in future cases, which means that they have a stake in the nominees' competence but not their ideology. This is a miscalculation.

On the vital question of class actions, for example, we have two very different legal regimes—that of the Seventh Circuit Court of Appeals, whose restrictive doctrines have made multistate class actions an endangered species; and that of the Second Circuit, which has become the Madison County of the federal judiciary. For another example, the last four Supreme Court appointees have each proven substantially more hostile than their predecessors to the federal preemption of state tort law.[3] As a result, preemption doctrines—which are often the only viable defense against far-fetched state law claims—have been greatly weakened and may be on the verge of a fateful collapse. Corporate bellyaching over these trends, which have everything to do with the judges' constitutional perspective, is a poor substitute for the failure to pay attention at the front end.

The Matrix. With business so new to the game and all, it may be worth spelling out a rough matrix that might shape its involvement in federal judicial nominations.

The first order of business is to think principle. Just as business has managed to unite behind state judges, it should cooperate in support of first-rate federal nominees who actually comprehend the Constitution—who will enforce the rules that are in the document and reject the snazzy rights that are not. While serious constitutionalism does not invariably guarantee "pro-business" results, it would be silly to deny the correlation. Justices who rely on international law to invent homosexual rights will soon deploy that body of "law" against corporations.[4] Serious constitutionalists will do neither.

Second, the Supreme Court, business, and the country would all benefit from the appointment of justices with an awareness of both the importance and the real-world dynamics of business litigation. The sitting justices have resolutely refused to tackle the inconsistencies and absurdities that, after decades of neglect, afflict nearly every area of private litigation. To revert to an earlier example, the justices have steadfastly declined to resolve the doctrinal riddles and circuit splits that dominate class action litigation, and most appellate lawyers have long abandoned all hope of persuading the Court to bring some order to the field. Apart from the fact that many justices prefer sexy constitutional questions to seemingly humdrum business issues, the persistent failure to raise those issues in the course of judicial nominations sends a powerful signal both to the appointees and to sitting justices that nothing is *expected* of them in that arena. Small wonder they behave accordingly.

Judicial indifference has been accompanied by a dismaying ignorance about the real-world practice of law. In *Clinton v. Jones* (1997), in the course of holding that a sitting president lacks immunity from civil suits, the Court dismissed the president's concerns over vexatious and burdensome litigation on the grounds that even the busiest officeholder could surely find time for a few depositions. As Justice Breyer (the only sitting justice with relevant experience) noted in a powerful and characteristically lone opinion, the majority's holding betrays an utter incomprehension of the purposes, contours, and dynamics of modern litigation. That same incomprehension has produced seriously deficient high court decisions on matters from asbestos to international antitrust disputes.[5]

Ideal nominees, then, will combine constitutional seriousness with attention to, and practical knowledge of, business litigation. In large measure, those orientations are congruent. A jurist who has experienced the horrors of modern mass tort litigation will not readily view diversity or class action doctrines as beneath the Supreme Court's dignity. A serious constitutionalist will enforce the rules that protect business against state bias and exploitation—commercial problems that preoccupied the Founders to the point of obsession.

The Price of Inaction. A serious constitutionalist who comprehends commercial litigation should be acceptable to the social constituencies that to date have monopolized judicial politics on the conservative side. A perfect example is Judge Michael McConnell of the Tenth Circuit Court of Appeals—a renowned constitutional scholar and, before his appointment, an experienced business lawyer and beyond question the nation's leading scholar and practitioner on the religion clauses of the First Amendment. Conversely, though, not every social conservative is acceptable to business. Many respectable jurists, including some whose names have been bandied about as potential Supreme Court nominees, are "strict constructionists" who, by inclination or career path, neither know nor care about business litigation and who falsely associate state tort law and AGs with "federalism" and "states' rights."[6] Business has every incentive to express opposition to such candidates and every right to insist on nominees whose views reflect the full range of conservative principles. Social-conservative constituencies, for their part, have one excellent reason to respect business concerns: corporate muscle will prove necessary to break the impending filibusters. Without some implicit bargain and active cooperation among those constituencies, the upcoming battles may end badly for both.

State Attorneys General

The AGs portray their activism as a response to federal abdication and interest group capture. In a functional (though not a normative) sense, they are right. The first multistate AG task forces, on antitrust and airline regulation, were organized in the 1980s, in direct response to the Carter and Reagan administrations' deregulatory initiatives in those areas. The 1998 agreement among the AGs and the nation's leading tobacco

manufacturers—which, in establishing a $246 billion national tobacco sales tax and a comprehensive regulatory regime, stands to this day as the most egregious example of AG activism—was a response to the perceived inability of federal institutions to regulate tobacco.

The "federal failure" cloak is wearing thin. Eliot Spitzer is now trolling after industries (such as power plants, mutual funds, and insurance companies) that are already heavily regulated, albeit at some variance with his notion of sound and sufficient regulation. No matter: any kind of regulation will leave some constituencies unhappy, and their demands will migrate to the institutions that offer to satisfy them. A federal bout of regulation that would absorb those energies—akin to the 1970s, when the country suffered a nervous breakdown and Congress feverishly produced regulatory statutes and agencies—is neither likely nor to be hoped for. State AGs will continue to serve as the central access point for regulation enthusiasts.

State-level liability reforms, by reducing opportunities for private litigation, may paradoxically increase that pressure. California AG Bill Lockyer, a former trial lawyer, vehemently opposed Prop 64, the just-enacted tort reform. Now that the measure has "gutted" private lawsuits, his office has proclaimed its intent to make up for the loss, so far as possible.[7] Unfortunately, Prop 64 provides that all moneys collected by the AG in consumer protection cases shall revert to the AG's office. While that is preferable to letting the AG sue his enemies and hand the money to his friends, it makes an over-the-top enforcement campaign a self-financing and therefore inevitable proposition.

The federal government lacks the means of regulating the powers of state AGs under state law. State legislators and governors lack the motive: contrary to time-honored principles of representative government, which presume legislative control over taxing and spending decisions, the AGs' ability to obtain lucrative settlements under open-ended laws means that they send money the legislature's way, rather than the other way around. And when offered a free ride, legislators will take it. Add to these difficulties the interstate dynamics of AG activism, and the problem begins to look insoluble. By the AGs' own lights, their objective in prosecuting national industries is not to punish individual wrongdoers but to reform those industries. The targets, for their part, will typically accede to and in fact demand a nationwide settlement. Thus, a single state of sufficient size (say, New York), or a handful of smaller states acting in unison, can instigate a coast-to-coast campaign against a disfavored industry. Non-suing states can join the campaign or else, decline—at the price of leaving "their" share of the prospective settlement proceeds on the table, for distribution to the participating states. Since that is no choice at all, even pro-business AGs will usually sign off on the action letters from the NAAG or the New York AG's office.

No clear and compelling counter-strategy is at hand. Three tentative suggestions may present opportunities to take the first and most important step—to stop the AGs' juggernaut someplace, somehow.

Abolish State Antitrust Enforcement. As a result of the *Microsoft* antitrust litigation, where states held out for additional "remedies" even after the federal government had decided to settle the case, Judge Richard Posner and others have argued that we should revoke the antitrust enforcement authority of state AGs.[8] That call should be heeded. Admittedly, antitrust may be the least problematic area of AG activism. State antitrust enforcers are more disciplined and responsible than, say, consumer protection offices, which hold no brief whatever for competition and, moreover, proceed under open-ended state laws that criminalize practically anything. (New York's Martin Act, Mr. Spitzer's statute of choice, has been described by his spokesman as an all-purpose "Swiss army knife" and by a prominent New York defense attorney—who withheld his name for fear for retribution—as "the legal equivalent of a weapon of mass destruction.")[9] Still, *Microsoft* shows that state antitrust enforcement has some dangerous potential. And while such enforcement may not do much harm in the general run of cases, no one has found it to do much good, either.

Congress should eliminate state antitrust enforcement because it can. The crux of the problem is the AGs' *parens patriae* authority to sue on their citizens' behalf. With respect to the enforcement of state law, that authority is conferred by state constitutions or statutes, which Congress can neither amend nor preempt. The AGs' authority to enforce *federal* antitrust law, in contrast, is conferred by the federal Hart-Scott-Rodino Act of 1976. That was a mistake, which a more levelheaded Congress should hasten to undo.

Split the States. A most fateful intellectual error is the belief that anything "the states" want to do is *ipso facto*

"federalism." When states legislate, regulate, and adjudicate for the principal purpose of exploiting their neighbors—their most natural inclination—the contention is ludicrous. Even so, it has gained credence among well-intentioned advocates of "federalism," and demagogues and parasites have shrewdly played to that vulnerability.[10] Pending litigation provides an opportunity to expose the error.

Twelve states, naturally led by New York and Mr. Spitzer, have sued the country's largest operators of coal-fired power plants under a "public nuisance" theory. The gist of the complaint is that the companies' CO_2 emissions contribute to global warming, from which the states claim to suffer (along with the rest of the planet). Virtually all of the offending plants are located in non-suing (mostly southern) states, whose citizens would be compelled to bear the costs of the suing states' desired abatement remedies.

While the federal Clean Air Act plainly preempts the states' lawsuit, the important task is to explain *why* that is so. Here goes: when it comes to the burdens and benefits of interstate commerce, the notion of "the states," collectively, is an absurd abstraction. Any allocation will involve messy distributive questions, which should be resolved in the one forum where the states and their citizens are fairly represented—the United States Congress. The attempt by Spitzer and company to obtain a better bargain after the fact necessarily entails a worse bargain for someone else. Every one of Mr. Spitzer's escapades rests on that opportunism.

That case is made most compellingly not by the defendant-corporations or the federal government but by states that find themselves at the losing end. In an ideal world, the affected states would respond to the CO_2 lawsuit by counter-suing a New York company that inflicts a global public nuisance (the *Times* perhaps?). Pending that unlikely response, the states should be encouraged to intervene in the pending case. Spitzer must be made to suffer a clear defeat someplace, somewhere. Since he will undoubtedly attribute any such defeat to global corporations, their GOP henchmen, and the Republican judiciary, it would be most useful if the opposition were joined by forces that are beyond such suspicions—New York's sister states. The far-out CO_2 case presents the best opportunity to highlight, and hopefully to arrest, the exploitative logic of AG litigation.

Rally the RAGA. In 1999, under the leadership of the aforementioned Bill Pryor, a few courageous souls formed the Republican Attorneys General Association (RAGA), with an eye toward counteracting the inordinate influence of their enterprising (and usually Democratic) colleagues. In an electoral sense, RAGA has been a success. From only a dozen AGs in 1999, the GOP has moved close to parity. RAGA has been largely ineffective, however, in stemming the tidal wave of multistate prosecutions and regulatory initiatives. The principal problem is that collective action by the AGs does not require a majority. In the words of Iowa AG Tom Miller, the Eliot Spitzer of the Midwest: "Even five to 10 AGs, if they have the resources and drive, can go ahead if they have a good case. . . . It was always a failed mission to get rid of the multistate cases by electing more Republican AGs, even a majority of Republican AGs."[11] Just so.

Even conceptually (let alone in practice), it is devilishly difficult to envision a remedy. Perhaps, RAGA members could agree among each other that none of them shall initiate a multistate proceeding, or join a non-RAGA state's request to join such, unless a supermajority of RAGA states (say, two-thirds) approve that step. Business groups could indicate their support for such mutual bonding. As things stand, Messrs. Miller and Spitzer decide to "go ahead," whereupon dissident AGs have no choice but to take the table scraps. A supermajoritarian RAGA requirement, in contrast, creates a potent holdout against regulation by litigation. This should enhance the dissenters' bargaining power vis-à-vis the lead states in distributing the proceeds.[12] More optimistically, credible opposition by a significant number of states may prompt a more balanced discussion of the costs and benefits of hastily and incestuously crafted regulatory "solutions."

Admittedly, it is hard to see why any AG should tie himself in that fashion—or why business constituencies, any one of which might at some point desire a comprehensive settlement, should encourage the effort. The reluctant recognition that this particular horse may be a donkey lends urgency to the task of finding an actual horse that can run against the Miller-Spitzer stable of stallions.

Promise and Peril

Public choice theory, as dispiriting as it is elegant, predicts that liability law will reach an equilibrium only at the point of absolute corporate liability for everything. States that can impose extraterritorial liability will race to that

bottom. Collective action problems on the corporate side—but not among plaintiffs' firms, including AGs' offices—will preclude an effective response. One industry after another will seek to buy peace with its customers' money. The tobacco industry did so in its 1998 settlement with the AGs and the trial lawyers; others have done so since.[13]

That prediction may still come true, either as a prevailing trend or at least for some industries. (The pharmaceutical industry, which is dying a death by a thousand cuts, is the leading candidate.) Even so, the recent election results demonstrate that real life, mercifully, does not work with quite the brutal ineluctability of the public choice theorists' models. States do not play the liability game in a single-issue sandbox, and once the voters recognize the costs to a productive state economy, they can be persuaded to do the right thing. Coordination problems can be overcome, provided someone finds a low-cost way of doing so. In short, politics matters.

Perhaps the liability crisis had to reach extremes to provoke a coordinated response. Public choice theorists have a hard time explaining why, under the Articles of Confederation, any state paid any of its mandatory but unenforceable tax requisitions to support the union's war effort. The likely answer is that imminent threats of invasion and occupation transformed a pure public good—the common defense of the union—into something resembling a "joint product": directly threatened states made their contributions to sustain General Washington's congressional army as the only available defense.[14] In the same way, the threat of annihilation has prompted corporate cooperation in lieu of free-riding and united support for economic competition instead of rent-seeking.

Between that first step and a respectable legal regime lie miles of territory. The Founders knew that a hard-fought, unifying victory produces a moment of maximum opportunity for institutional reform—and of maximum peril, as the sense of common purpose gives way first to complacency and then to renewed dissension. We are not even there yet: Eliot Spitzer has yet to experience his Yorktown. It will prove still more difficult to preserve cooperation and seriousness of purpose beyond that point. For corporate America, the gratifying 2004 results present an opportunity and a challenge. Mostly the latter.

Notes

1. Professor John F. Banzhaf III, appearance on *Washington Journal*, C-SPAN, September 25, 2004.

2. Jonathan Klick and Thomas Stratmann, "Does Medical Malpractice Reform Help States Retain Physicians and Does It Matter?" (September 2003), available at www.aei.org/docLib/20030910_Reform.pdf.

3. For empirical evidence, see Michael S. Greve, "Preemption in the Rehnquist Court: A Preliminary Assessment," available at www.federalismproject.org/masterpages/publications/preemption%20article.pdf.

4.Witness and compare, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

5. The asbestos cases are *Amchem Products v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The antitrust case is *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S.Ct. 2466. Justice Breyer dissented in all these cases for the reasons articulated in his *Clinton* concurrence—the court's failure to recognize the realities of contemporary civil litigation.

6. For an earlier flagging and flogging of this menace, see Michael S. Greve, "The Term the Constitution Died," *Federalist Outlook* No. 18 (July–August 2003), available at www.aei.org/publication18112.

7. Carolyn Whetzel, "California Voters Approve Initiative to Limit Private Actions Enforcing Competition Laws," *Bureau of National Affairs Daily Report for Executives* 213 (November 4, 2004): B1.

8. Richard Posner, "Enforcement by State Attorneys General," in *Competition Laws in Conflict*, eds. Richard A. Epstein and Michael S. Greve (Washington, D.C.: AEI Press, 2004), 261.

9. Maureen Fan, "N.Y. Attorney General Takes Lead in Cleaning Up Wall Street," *San Jose Mercury News*, November 11, 2002, available at www.philly.com/mld/philly/business/4492502.htm?template=contentModules/printstory.jsp; Nicholas Thompson, "The Sword of Spitzer," *Legal Affairs* (May/June 2004), available at www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.html.

10. Mr. Spitzer has frequently characterized his activities as pristine examples of federalism. See, for example, Joshua Chaffin and Gary Silverman, "A Truce on Wall Street: Settlement at Last on Conflicts of Interest," *Financial Times*, December 11, 2002; Eliot Spitzer, remarks given as part of Planned Parenthood of New York City's "Toward a More Civilized Society" lecture series, April 3, 2003 ("States' rights are the future, and we want to do everything we can to promote them") available at www.ppnyc.org/facts/facts/spitzer.html. See also Douglas T. Kendall, "Ouch! You're Hurting Us: How the Court Is Stifling Innovation at the State Level," *Washington Post*, November 14, 2004.

11. Alan Greenblatt, “The Avengers General,” *Governing Magazine,* (May 2003): 52 (quoting Attorney General Tom Miller of Iowa).

12. Economic theory predicts that collective action should often founder on disagreements over the distribution of the proceeds. See, for example, Robert Cooter, “The Cost of Coase” *Journal of Legal Studies* 11, (1982): 1. It is unclear why multistate settlements rarely encounter, let alone founder on, such disagreements. The most plausible explanation is that small states, acting individually, must take whatever the large lead states will grant them—or else, nothing.

13. For a confident, since-verified prediction that highly concentrated industries will use AG liability litigation as a means of further cartelization, see Michael S. Greve, “States' Rights on Steroids,” *Federalist Outlook* No. 14 (September–October 2002), available at www.aei.org/publication14296.

14. See the terrific discussion by Keith L. Dougherty, *Collective Action under the Articles of Confederation* (Cambridge: Cambridge University Press, 2001).