Mr. BREAUX. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Louisiana is recognized.

COMMON SENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The Senate continued with the consideration of the bill.

Mr. BREAUX. Mr. President and my colleagues, here we go again, back on the famous product liability reform bill. I think one of the things that Members do in an effort to try to get legislation passed, I would say sort of tongue in cheek, when they are uncertain about the merits, they label it ''reform.'' We have had the Tax Reform Act, we have had the Health Reform Act, we have had the Product Liability Reform Act, and no matter whether it is real reform or not, if you call it reform long enough and loud enough and enough people hear it, then a lot of constituents will start writing and saying, ''You have to be for that reform act that is pending in the Senate or pending in the House. I am not really sure what it does, but if it says that it is reform, it must be good and you had better vote for it if you ever want to come back and get reelected or speak with your constituents in any kind of civilized fashion.'' I say here we are again, because once again in this Congress, the Senate is going to be called upon to address what some have called a Product Liability Reform Act.

I raise the question at this time as to why we need to be doing this because, in fact, I think this is something that, over the many decades, years and years of our country's history, has been an area that has been reserved to the States in order for the various State legislators to look at these issues and make decisions based on what is appropriate and proper when it comes to dealing with the personal injuries of the people who reside in their respective States.

Now, there are some in this Congress who will say no, we are going to do it all from Washington, and we do not care how long the States have done it or how intense they have been in their efforts at laying out systems that make sense for the people of their respective States—no, we do not care about that. We are going to take it all here, here in Washington. We are going to do it all from Washington because we know best.

I suggest just this. People in some parts of our Government here in Washington, and some parties here, are saying when it comes to some subjects like product liability reform—again, the word reform is attached to everything you want to change; let us reform it—they make the point that States are so backwards and so inefficient and so ineffective in handling personal injury cases, they would say that we are going to bring it all to Washington, but that with welfare reform, the Federal Government is so ignorant and so slow and so messed up that when it comes to welfare reform, we are going to send that to the States.

They say we are going to block grant all the welfare programs and rules and regulations on welfare and send it to the various States—all 50 States. Let each State decide what is best for the people of that State when it comes to welfare programs and how to reform it because the States know best and the Federal Government is really too slow and too ignorant to make the right decision. But when it comes to product liability, the States are so slow and so dumb and do not know what to do we are going to take that jurisdiction away from them and bring that jurisdiction to Washington because Washington will do a much better job. The inconsistency of those positions in my opinion is irreconcilable.

I would suggest that in areas where the States have worked their will and where they have done a good job we should leave it alone. I would suggest that when it comes to product liability, the phrase ''if it ain't broke don't fix it'' applies. I would also suggest that those who say this is such a crisis of litigation that it threatens the very legal institutions by which we govern ourselves, look at the facts at what is happening out there. Is there an explosion of litigation? Ask anybody in this body who would be willing to answer this question of the amount of litigation that says we have to supercede what the States have done and bring it all here to Washington.

I think the facts are clearly just the opposite. In all State courts in 1992, all tort cases or cases that people sued because of personal injury in civil courts amounted to just 9 percent of the total civil cases filed. And product liability suits, of which we are talking about today, accounted for only 4 percent of all the tort filings in all of the civil courts, in all of the State courts, in the Nation. That amounted to .0036 percent of the total civil case load of all of the State courts in the United States of America—.0036 percent.

When we read those figures, one might ask the question. Why in the world does anybody think that there is a problem? Why does anybody think, if it is that small a number of lawsuits being filed that represent product liability suits, that it is such a mess that we would have to take it away from the States and we are going to do it in Washington, we are going to make it right in Washington because we in Washington know best what is best for the people of my State of Louisiana, or any other State in the Union, that we know so much more about how to solve this we are going to do it in Washington. People back in Louisiana say, ''Senator, are not you saying at the same time that we do such a lousy job on handling personal injury product liability legislation in my State that you are going to take it to Washington but when you talk about welfare reform, Washington does such a lousy job you want all the States to handle it?'' Why is it any different?

We are talking about laws that affect the health and safety and the future of the people of a prospective State. When it comes to those areas I am a strong States rights Senator. I believe the rights of the States should not be trampled on. The rights of the States to govern what happens within their territorial boundaries should not be superseded by the Federal Government without a legitimate and an overriding mandate as to why we should do it on the Federal level.

I would suggest that when only .0036 percent of all civil cases filed in State courts amount to cases filed dealing with product liability, that it is not a national problem, justifying jerking the rug out from under the States and say, no. Here in Washington we are going do it, and we are going to do it a lot better than you have been able to do it back home. I do not buy that.

I will say to my colleagues in the Senate that my own State of Louisiana has addressed these problems, and they have handled it in the State legislative bodies. Interestingly enough, some people say, ''Well, this is a big battle between business and plaintiffs. It is a big battle between the people who get sued and the people who do the suing. And there are too many people doing the suing. So we have to pass legislation in Washington to protect those who are getting sued.'' That is not so where I come from because I asked the Congressional Research Service to compare the legislation that is pending in the Senate, and legislation passed the House as well with the laws that we already have on the books in Louisiana. Do you know what they found? Here is the concluding paragraph. This ought to knock somebody's socks off who is saying we should be doing what some have suggested.

Conclusion: H.R. 956, which I understand is the pending bill, the House passed product liability bill. H.R. 956 would be more favorable to the plaintiffs than is Louisiana law with respect to product seller liability.

I repeat that again. The bill before the Senate would be more favorable to plaintiffs than is Louisiana law with respect to product seller liability. This is from the Congressional Research Service dated March 17, 1995. Therefore, if businesses say we get sued too much, we know we need changes in the law and we want more protection, my goodness. The bill that we have pending before us today on the Federal level is more favorable to the plaintiffs than what Louisiana has already done to limit product liability suits and to make it more difficult to prove damages and to recover. Louisiana has already drafted legislation. It is on the books. It is the law of the land in my State.

Therefore, I argue not whether we should be benefiting plaintiffs or whether we should be benefiting those who make defective products. My argument is that we should not be taking this jurisdiction away from the States who have had to address these issues, for countless numbers of years. The States know the needs of people and they know the needs of the companies that produce products that operate in their respective States. The question is; and I will ask it until someone can give me a good answer. Why is it necessary to usurp the jurisdiction of the States and make the argument that some things the Federal Government knows best and we are going to handle it here in Washington?

When I was in law school they used to call it forum shopping. They used to say you pick the district where you want to file the suit depending on the type of judge you have, and you file it where you have the best judge for your particular cause. If you are a defendant or a plaintiff, you forum shop. I would suggest that the companies that are concerned about defective products that they may have produced, say in some States we get a good deal but I bet we can get a better deal if we bring it to Washington. So let us forum shop. Let us see if the U.S. Congress can take away all the jurisdiction from the States and bring it all to Washington because big brother in Washington knows better than the people of our respective States.

I just cannot get passed the point argued by some people. On welfare reform, the Federal Government is so dumb we are going to give it all to the States. But on product liability the States are so dumb we will give it to the Federal Government. That is forum shopping. Pick the issue and find where you are going to handle it, pick the best forum, the best results on a particular issue.

The point I am trying to make here today is the States have in fact addressed product liability. For my State, as the CRS has concluded, the Federal bill is better for plaintiffs than our State law. But I side with the States. I side with my legislatures who have looked over Louisiana and said this is what the people of my State want. This is what is best for our State. They passed it by majority vote. The laws have been signed into law by the Governor of our State, and it is the law of the land. For the life of me I cannot decide why that should be changed and have everything sent to Washington for a change.

In addition to that, I am concerned about the fairness of this legislation. I do think it is one-sided. I do think on the Federal bill we do not treat people who are injured with the same rights and the same standards as we do the people who have made defective products. That is not fair. If there is anything we ought to be following as our guideline on legislation that affects human health and safety, it is fairness. It is how people are treated, both who make the products that are defective and that cause injuries and how we treat people who are injured by those defective products. Nobody should have an advantage. We should speak of fairness. We should speak of a level playing field. Everybody should be treated equally.

But I will assure you that my reading of the legislation S. 565 does not provide any basic system of standard of fairness. Let me give you an example. The bill S. 565 provides a series of hurdles and limitations on the ability of people who are injured, that they have to cross over in order to be able to recover from manufacturers who make defective products. But it expressly exempts business from many of the same requirements that we put on individuals who are injured, many of them quite seriously by defective products. The standards, in other words, for the people who are injured and what they have to show and what they have to prove in order to get recovery from their bodily injury is different from the standards that this bill places on business, when they have injuries that are economic injuries caused by the same defective products.

I would suggest that is wrong; that is not fair; that is not balanced; that is not a level playing field. Let me give you an example. If company A, for instance, purchased a piece of equipment from company B, and that piece of equipment was defective and one day explodes, company A that bought it could sue company B that manufactured for the economic injury they suffered. They could sue for the loss of profits they would have made if that piece of equipment had not broken or exploded. They could sue the company that sold them that product for all of their lost profits caused by the disruption of that accident.

On the other hand, let us take the family of the poor worker who was operating that machinery which exploded in the same factory. When he or she brings their case to the courts of the land under this legislation, they must face limitations and hurdles in order for them to recover.

To make matters even worse, under the Senate Commerce Committee's version of the bill, if that machinery, for instance, had been in place for 20 years or more, the injured person in the family could not even bring litigation to recover any of their losses for their injuries while the business would not be restricted in any way.

Why is it all right for the business to be able to sue for lost economic profits because of a piece of defective equipment but the individual who may be injured physically by this same piece of defective equipment is somehow prohibited from bringing a case against the company merely because it had been in place for maybe 20 years?

What is fair about that? Why should they not both be prohibited from bringing the case or both allowed to bring a cause of action for defective equipment? How can you say this is fair?

I talked a little bit about punitive damages. It is really interesting; remember when I talked about Louisiana, that we have already addressed this? In Louisiana, there are no punitive damages, period—none—for product liability. You cannot get punitive damages for a product liability case in Louisiana. That is what the legislature said. That is the law of our land. This bill allows it. This bill says we can have punitive damages limited to $250,000 or three times economic losses of the person who is injured.

Now, I do not know why there is a huge rush to do this in the first place. My State has done it. I wish they had not done it. I disagree with it. But this bill says punitive damages—which are intended to say to a manufacturer, you have done wrong; do not do it again; you will be penalized—will be limited to $250,000 or three times the economic damages. That sounds like an awful lot if it is a mom and pop product manufacturer, but if it is an international business? Does it mean a lot to them, when they may make more than that in profits in an hour? Is it really a deterrent to say you are only going to be able to have punitive damages of $250,000 or three times economic losses? If I was a big international manufacturer and I saw that my punitive damages were going to be limited, why worry about it. That is just the cost of doing business. I am going to make the product, sell a lot of it and if somebody litigates this and takes 4 or 5 years to finally get a judgment against me, I will just pay the judgment and if the punitive damage is so low, why worry about it?

This is the point I wish to make here. I do not know why people think there is such a rush of litigation that provides for punitive damages that we need to change the law. The statistics I have show only 355 punitive damage awards in product suits occurred from 1965 to 1990. That is in the Nation. Only 355 cases between the years 1965 and 1990 ever awarded punitive damages, and half of these awards were reduced or overturned on appeal. And in three fourths of these cases the defendants took steps to improve the safety of their product. Of course, that is the point of having punitive damages. They say to a manufacturer of a product that they knew was defective or likely to be, we want you to make some changes; we want you to do things differently. The threat, even a small threat of punitive damages for detective products makes a great deal of sense and should not be changed.

This portion of the bill, quite frankly, discriminates against low and middle income people. I think it discriminates against women, infants and children by limiting the damages to three times the economic injury or $250,000.

I give you an example. The same type of lawsuit for a defective product against company A. The product causes

injury to an insurance executive or a businessman who is making $1 million a year and doing very well in society. Now, compare that with the same injury from the same product to perhaps an ordinary housewife who is not employed except within the home, is not employed as a salaried person. If the injury causes the executive to miss 1 year of work and causes the housewife to miss 1 year of work, the executive would be able to receive $3 million in punitive damages—three times his economic loss. And, for the same conduct, the housewife would only receive a very small amount, $250,000, for the same type of injury, in the same case, with the same defective product. I do not think that is fair.

So I will conclude. We will have a lot of time to debate this over the period of time that is allotted for us to consider this legislation. But the two points I have tried to make today are quite simple. No. 1, the States are already doing this. And to all Members of Congress who have stood in the Chambers of the House and Senate over the years and said I am for States rights, the Federal Government should not interfere where it is not necessary, the Federal Government does not always know best—the people of the States know what is best as communicated through their State legislatures—I say that we should not be yanking the rug out from under the States. We should not be usurping the power of the States to handle personal injury legislation affecting the people of that State concerning products that injure them.

Point No. 2 I think is equally simple and not difficult to understand. The legislation that is before the Senate at this time is simply not fair. It is simply a piece of legislation that discriminates against those who have and those who do not have. The goal of this legislation should not be for us to try to make it better for one category of Americans over another category of Americans; that the goal should be to create a system of balance, a level playing field, and a system of fairness for all of our citizens, whether they be businesses that make products or people who use those products. It should not be a guiding light for us to say we are going to do everything we can to help those who make the products but discriminate against those who use the products.

I think in the couple of cases that I have tried to cite this bill does not provide the fairness that we as Members of this body should be striving to accomplish through this legislation.

Mr. President, I will have more to say on this legislation as the debate continues but at this point I yield the floor.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. I thank the Chair.

Mr. President, I have sought recognition to comment preliminarily on the pending legislation, and it is my view that some reform would be useful—illustratively, the alternative dispute resolution or perhaps the collateral source rule which would limit a recovery where the plaintiff has already been compensated by insurance proceeds.

It is true, as to the collateral source rule, that the plaintiffs contend they should not be foreclosed because they have paid for the insurance, but there are valid considerations I think in such a situation where having been compensated there should not be a double recovery.

In looking at this legislation, it is my view that we must exercise care in what we do here and that we must proceed with a scalpel and not a meat ax, and that, as the Founding Fathers declared it, the Senate should function as the saucer to cool the tea which has come from the House of Representatives.

As a practicing lawyer, I represented both plaintiffs and defendants in personal injury cases, represented both sides in security act cases. In my early days in the practice of the law with the Philadelphia firm Barnes, Dechert, Crassmeier and Rhoads, which later became Dechert, Price and Rhoads, I represented the Pennsylvania Railroad in the defense of personal injury cases. I represented a plaintiff in a widely noted product liability case.

In the course of that activity in the practice of law and having been on the Judiciary Committee for the past 14 years-plus, it is my view that the Congress should proceed with caution in altering the decisions of the courts which have been built up over many years, many decades, really many centuries.

As was pointed out in the treatise on the American Law of Torts by Stewart M. Speiser, Charles F. Krause, and Alfred W. Gans, tort law has been used to control behavior for over 2,000 years. As Prosser and Keeton on the law of torts point out, the tort rules, including product liability, are evolutionary accretions, and the decisions on which they are based have been handed down by the courts in a very methodical way with extraordinary analysis over long periods of time.

The seminal case was the decision in England in Winterbottom versus Wright, where the broad language of Lord Amiger laid down the first rule that the original seller of goods was not liable for damages caused by their defects to anyone except his immediate buyer or one in privity with him. That rule stood for a very long period of time until the celebrated case of McPherson versus Buick Motor Co., where Judge Cardozo of the New York Court of Appeals, the highest appellate court in New York, later Justice Cardozo, ruled that a manufacturer was liable for negligence to the buyer of an automobile, a rule that now seems strange that it had to be a change in the law to say that the manufacturer would be liable to the person who ultimately bought the automobile as opposed to limiting the claim of the buyer of the automobile to a company which sold him the car and then leaving it up to that company to go back to the manufacturer.

Early in my own legal career, I had an occasion to litigate in some depth a product liability case captioned Thompson versus Reidman and General Motors. That case achieved some note, having been reviewed in law review articles because it established a new rule which enabled a passenger in an automobile to sue the seller of the automobile, Reidman Chevrolet Co., and also the manufacturer, General Motors.

It seems that such a decision back in 1961, when it was cited as one of the important cases in the law of the development of product liability in the law of torts by Prosser and Keeton that by the hindsight of the intervening years seems strange that there would be any question about the standing of a passenger in an automobile to sue the seller of the automobile, Reidman Motor Co., and the manufacturer. But it was. And it is an indication of the kind of accretion, or what I call encrustation, of the common law that I studied in great depth in the course of bringing that litigation as a plaintiff's lawyer. When I represented the passenger, a man named Pete J. Thompson, against the driver of the automobile, William Gray, who was a sergeant in the military, and did not learn until some 2 years and 9 months after the incident that the cause was a stuck accelerator pedal and then found that the statute of limitations, 2 years in the State of Pennsylvania, had expired. Then I took a look at the Uniform Commercial Code, which had a 4-year statute of limitations, and sought to sue on behalf of the passenger against Reidman, which sold the car, and General Motors, the manufacturer. I faced a motion to dismiss. And the prevailing law at that time was that a passenger could not collect because the passenger was not in privity. And that is the legal term where the individual did not have a contract with the seller of the automobile, Reidman Motor Co., as did the buyer, William Gray. And there was no privity that the passenger had with General Motors.

I argued that the court ought to create an exception to the privity rule because it was an analogy to the guest in a household. The Uniform Commercial Code had established a standing of a guest in a household to sue the seller of a product, like a toaster or an oven, or the manufacture of the product. The U.S. District Court for the Eastern District of Pennsylvania decided in my favor.

As I say, the case was noted in some of the law reviews. And then, a plaintiff in Allegheny County noted it and filed a lawsuit out of privity and the case went to the State supreme court which decided that privity was necessary as a matter of Pennsylvania

law. The rule is that on substantive decisions, under Erie versus Tompkins, it is the State law which governs. Then General Motors and Reidman Chevrolet Motor Co. came back to the eastern district court and moved to dismiss and the judge reversed himself and my case was thrown out of court, as the expression goes.

In the course of that litigation, it was quite an extensive research job that I undertook to give me some substantial appreciation of how we come to these rules of law.

While not directly relevant from the point of view of product liability, I then found an exception to the statute of limitations under the Soldiers and Sailors Civil Relief Act of 1940, even though this was many years later, and was able to press the claim in tort and ultimately took the case to trial and after several days of trial received a settlement in the case.

But I refer to the decision at some length because of the insights which I gained from that decision. And as I sit through the markups in the various committees—and the markup, for those who may be listening on C–SPAN and are not familiar with precisely what we do, is where we take a bill in a committee and decide how we ought to change the law or what law we ought to make as a matter of public policy. These markups, where we write the legislation which later comes to the floor, follow hearings where very frequently, although there are maybe 18 members of the committee, as, for example, on the Judiciary Committee, there are only one or two present. It has been my observation that our markups do not necessarily reflect the epitome of reason and experience as we do the best we can.

So that, by contrast, to the way the encrustations occurred in the judicial decisions since 1842, when these issues were considered, through the 1916 case in Buick versus McPherson and the 1961 decision that I personally participated in in Thompson versus Reidman and General Motors, I approach the field of legislative changes in tort liability with some substantial concern.

The issues which we are considering were considered, to a substantial extent, in a law review article which I think is worthy of some reference by Prof. Gary T. Schwartz from the UCLA law school, as published in the Georgia Law Review in the spring of 1992. And the point that Professor Schwartz makes, which I think is worth noting here, is the way that the courts have responded in a rational, case-by-case, stare decisis way to important public policy considerations.

Professor Schwartz points out at page 697 of the Georgia Law Review, volume 26, as follows:

> Consider the New Jersey Supreme Court which had voted unanimously in favor of hindsight liability in failure to warn cases in Chadha and then voted again unanimously against hindsight liability in Feldman 2 years later. In explaining the turnabout in Feldman, the court acknowledged the heavy criticism that the Chadha case had provoked in the law reviews.

Then Professor Schwartz goes on to point to other changes when he notes the evolution of the views of the distinguished supreme court justice of California's highest court, Justice Stanley Mosk. He says:

> As a member of the California court in the 1960's and 1970's, Justice Mosk was deeply involved in the fashioning of the strict products liability doctrine. In 1978, the court majority, in a somewhat conservative vein, ruled the principles of comparative negligence can reduce the plaintiff's recovery in a strict products liability action. Justice Mosk's dissenting opinion began with the complaint that ''this will be remembered as a dark day when this court, which heroically took the lead in originating the doctrine of products liability, beat a hasty retreat almost to square one. The pure concept of products liability so pridefully fashioned and nurtured by this court is reduced to a shambles.

Professor Schwartz continues:

> Ten years later, however, Justice Mosk authored the California court's opinion in Brown versus Superior Court ruling that negligence principles, rather than hindsight strict liability, apply in a prescription drug case. Three years after Brown, however, Justice Mosk concurred in the court's ruling in Anderson versus Owens-Corning Fiberglas Corp. that a hindsight analysis should be rejected in all cases involving a failure to warn even when the product is asbestos. Indeed, Justice Mosk's concurring opinion suggests that the entire doctrine of failure to warn in products liability should probably be reclassified under the heading of negligence. In this concurrence, Justice Mosk quotes his own pure concept of products liability words from the Daily and then goes on, in essence, to eat his words.

I do not expect the casual listener to be able to follow the details of this kind of commentary on this very complex, opaque, and difficult-to-understand products liability matter. But for those who are conversant in the field, it shows the evolution of a very learned and very thoughtful supreme court justice as he works through the rules.

I would suggest that when the Congress of the United States seeks to make changes on this very carefully calibrated law, which is a matter of accretion, as Professors Prosser and Keeton articulated, or incrustation, as others have, that there ought to be very great care exercised by the Congress in the procedures we undertake. Especially in the context where we are functioning now in response to a mandate from last November, that we ought to in this body exercise the Senate's traditional prerogative of the saucer which cools the tea which comes from the House of Representatives.

Without going on at much greater length than what Professor Schwartz had to say, I will quote his comments at page 702 of the Georgia Law Review to this effect, citing how there are modifications in the judicial decisions:

> The last decade has witnessed a number of judicial rulings. Thus, New Jersey has reversed itself on manufacturer's liability on unknowable hazards, Illinois has engaged in an interesting effort to abrogate the traditional tort of attorneys' malpractice, the fifth circuit has essentially overruled its presumption of causation for inherent risk-warning cases, Tennessee has eliminated joint and several liability, and Maryland has overturned precedents in reducing the availability of punitive damages. Still, for the most part in recent years, we have seen the marking by courts' unwillingness to extend precedent and by their resolution of open legal questions in a liability-restraining way.

When you take a look at some of the provisions of the current legislation where we exonerate the seller from responsibility but leave the purchaser to the manufacturer, how problemsome may that be in cases where the manufacturer may turn out to be insolvent. That determination may not be made until long after the statute of limitations has expired as to the seller or provisions under the workmen's compensation sections where the employer may be entitled to greater compensation than he has actually paid out.

It may be that useful attention may be directed to the question of service or process of foreign manufacturers who come to the United States to sell, but inordinately complex rules limit the ability of buyers in the United States to bring in those foreign sellers or changes in the rule where the issue arises as to the collection from foreign sellers.

The issue of joint and several liability is a very complex one, and it may be that there is some intermediate ground which will not subject someone liable for a tiny fraction, a percent or two, which is decided for the entire award where all others are judgment-proof. That is something which I think has to be very carefully considered as we work through the amendments on the pending legislation.

Also, the issue of damages as to what will occur where you have a case like the one involving the tragic death of our late colleague Senator John Heinz where there were tragic deaths and injury on the ground when the plane in which Senator Heinz was flying had a landing gear which apparently was not going down and a helicopter from Sun Oil came to try to help out. There was a collision, and the plane fell to the ground in a school yard in suburban Philadelphia—tragic deaths, tragic burning injuries which would not have been compensated as this bill would limit joint liability, a liability which has been eliminated in some States but something which I think we have to very, very carefully consider.

There are a series of cases which have illustrated the very dastardly conduct—searching for a right word not to be overly condemnatory—where you have the Ford Pinto case where there would be a classic case for the imposition of punitive damages if ever one existed.

It was brought to light in litigation where the defendant had the matter brought to light in a letter which was sent by Ford's chief safety officer to

the National Highway Traffic Safety Administration. It was noted in that case that Ford had sought to avoid liability or responsibility to make changes in its fuel system which was located too close to the rear bumper and lacked critical safeguards where minor collisions caused the car to burst into flames upon impact.

This letter, which contained a remarkable cost analysis saying that there ought not to be a change in the fuel system because the savings from 180 burn deaths and 180 serious burn injuries and 2,100 burn vehicles would cost $49.5 million, evaluating the deaths at $200,000 per death and the injuries at $67,000 per injury, and the vehicles at $700 per vehicle, contrasted with the cost of what the National Highway Traffic Safety Administration wanted done to change 11 million cars and a million and a half light trucks at $11 million per car and trucks which would cost $137 million.

When this effort was brought to light, it showed in as clear a way as you can conceive the necessity for a liability which would exceed the kind which is talked about here under punitive damages. Or if you deal with the Dalkon shield IUD case or the asbestos cases, where in the face of known damage the manufacturing was done again and again and again; or in the Playtex case of tampons causing toxic shock syndrome, or the flammable pajamas case, or the Dalkon shield. These instances have to be very carefully considered when this body is undertaking a review of the punitive damage issue.

There are several relatively recent decisions by the Supreme Court of the United States in this field, including one captioned TXO Production Corp. versus Alliance Resources Corp., decided by the Supreme Court in 1993, and another case is captioned Pacific Mutual Life Insurance Co. versus Haislip. Both of these decisions have opinions written by Justice Scalia, who is noted for his conservatism. While these cases involve the constitutional issues regarding punitive damages, they have some bearing on a public policy analysis which, as we know, when the Supreme Court of the United States takes up constitutional issues, they very frequently move over into being a super legislature. Some of those matters, I think, are worthy of our analysis.

So, Mr. President, I make these preliminary observations as we move to open debate on this product liability legislation, saying as I did at the outset that some reform would be appropriate, but urging my colleagues to subject this legislation to very, very careful analysis, because we are looking at tort law developed over some 2,000 years to influence human conduct and a stream of product liability cases originating in Great Britain in 1842, subject to very, very intensive litigation in the United States; product liability, which is not made by the plaintiff's bar or the defense bar but made by the courts of the United States, and issues on punitive damages which have reached the Supreme Court of the United States, which have been upheld in the constitutional context by justices like Justice Scalia.

I think the debate will prove useful. There are many issues to be considered. And as has been said earlier, I look forward to the debate and to an opportunity to participate extensively as we move through consideration of this important legislation.

Mr. President, I thank the Chair and yield the floor.

Mr. KYL addressed the Chair.

The PRESIDING OFFICER (Mr. FRIST). The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I, too, wish to address Senate bill 565, the Gorton-Rockefeller Product Liability Fairness Act of 1995. As the Senator from Pennsylvania has just mentioned, today marks the beginning of a historic debate in the Senate on the need for civil justice reform, because more than ever in recent years there appears to be an opportunity for us to make some real changes in law. For the first time in more than two decades, the House of Representatives has debated and passed comprehensive legal reform legislation, including product liability reform, as part of its Contract With America.

According to a Luntz Research Co. survey, ''83 percent of Americans continue to believe that our liability lawsuit system has major problems and needs serious improvements.''

Now the Senate, I suggest, must do its part to make meaningful legal reform a reality to respond to this concern on the part of the American people.

I want to begin by commending my colleagues from Washington and West Virginia for their 15-year effort to bring needed reform to the Nation's product liability laws.

I also agreed with the comments of the Senator from Pennsylvania who noted that it is important for us to be careful in the process of changing this law, because our States have different versions of product liability laws and because the law has built up expectations over the years. I also note, however, that the roughly 2,000-year development of this law, as the Senator from Pennsylvania mentioned, has changed rather dramatically just in the time since I attended law school, and that was not that long ago, Mr. President. In fact, the law was quite stable until about that time.

So I think that because of the changes in the law and the dramatic impact that those changes have had on our economy and on our society, it is time to reexamine what might be done and that it is important for the Congress to enact reasonable reforms to protect our Nation's manufacturing base from unreasonable litigation.

Historically, of course, America's strength has been in manufacturing, where much of the wealth of our Nation has been created. Although product liability law is but a small area of tort law generally, it is also a critical area in which America is losing its competitive edge. I noted, Mr. President, that this law has changed dramatically since I was in law school. The year was 1964 when I began law school. Some important decisions came down, starting with decisions from the State of California, which created a new concept called ''liability without fault.'' It is a concept that some Americans might have difficulty in understanding. I myself still have difficulty understanding why someone who is not at fault can be held liable for literally millions of dollars in damages. That is what the doctrine is called, liability without fault.

Why is the doctrine called liability without fault? Because a plaintiff who is injured has the right now to bring an action against a manufacturer for a defective product, even though it is impossible to prove that there was any negligence in the creation of that defect. In other words, Mr. President, a manufacturer cannot have exerted every bit of care possible, has been as careful as one could be in developing the plans and hiring the people to produce the product, and they could have been as careful as possible; yet, notwithstanding all of the care exercised in the creation of the product, as happens, we all know it is part of life, a mistake is made, a defect is created and someone is injured as a result. Because of that injury, and only because there was an injury, in this one limited area of our law the manufacturer can be held liable for an unlimited amount of dollar damage because of the defect, even though there was no negligence.

Mr. President, I said Americans might find this difficult to understand because of the historic notion in our tort law that you can recover against someone who is negligent, who was not careful, as a result of which you were injured and sustained damage. That has been the law for 2,000 years, until 20 years ago, or 25 years ago, when the notion began to be accepted that the status of the victim was the most important thing and that it did not really matter what the consequences were to the manufacture of a product or to our society as a result of holding manufacturers of products to this standard of liability without fault.

In other words, it did not matter with respect to the financial status of a business; it did not matter whether or not it puts the United States at a great competitive disadvantage; it does not matter that all due care was exercised. The only thing that mattered was that someone who was hurt had to be able to recover against someone.

It is so bad, Mr. President, that persons do not even have to recover just against the manufacturer of the product. It is enough to find someone in the case persons can sue and recover from.

So we identify the manufacturer of the product, we identify the wholesaler

and we identify the retailer, just to make it a simple case, although there are more complex cases. And we then find that the manufacturer has gone out of business or does not have enough insurance to cover the loss. The wholesaler, too, has gone out of business or does not have adequate insurance.

So despite the fact that the seller had nothing to do with this except that he unwrapped the box, put it on the shelf, and sold it to the consumer, who was then injured because of the defect, despite that fact, the seller can also be held responsible.

In a case where we get a judgment against all three—the manufacturer, the wholesaler, and the retailer—there is what is called joint and several liability. They are each liable for all of the dollar damage, irrespective of the relative degree of their involvement. None of them, remember, were negligent, but one of them produced a product which turned out to have a defect in it that caused the damage. All of them can be held liable. The notion has been accepted that all of them can be liable for the entire amount, so that the retailer in this case, if that is the one that has the deepest pockets, as they say, the one that can afford to pay, ends up paying the bill.

A lot of folks think that is wrong. I agree. That is why we have joint and several liability reform. But it does not go nearly far enough in this bill, as I will get to in a moment.

The point of this little discourse in law is simply to note the fact that some things have happened to our law over the years that have, in my view, not been based on common sense, not been based upon sound principles of law, but rather have been based upon the overriding notion that no matter what, someone who is hurt must recover. Even if he cannot find anybody that did anything wrong, and even if the party you recover against did not do anything wrong, if persons can find somebody that has deep enough pockets and they have something to do with the incident, then nail them.

That has resulted in a lot of people in our country deciding not to get into certain forms of business. Last year, fortunately, the Congress amended the law very slightly with respect to the manufacturer of airplanes because nobody was building airplanes in this country anymore. I am talking not about the big commercial jets, but the planes that a person would fly on the weekend, for example, or a small plane for business purposes.

Companies have stopped making things and people have stopped selling things because of this potential liability. That is why it is important to reform the law of product liability and why this legislation is so important.

I suggest, Mr. President, that we must ultimately go beyond product liability to comprehensively reform the entire civil justice system, and that this bill will be one of the ways in which we can do that.

In effect, we must repeal the regressive tort tax, as someone called it, that depletes our economy, raises prices, destroys jobs, stifles innovation, and reduces exports, making America less competitive in the world. This tort tax creates a capricious legal lottery that stimulates the filing of lawsuits.

One result, a very important result, is that it causes doctors to add billions to our national medical care costs each year because they must practice defensive medicine. They must order unnecessary tests or perform unnecessary procedures simply to cover the possibility that someone could claim that that last procedure or test was necessary to prevent some kind of harm to a patient; in other words, to do defensive medicine rather than the medicine that makes the most sense.

In Arizona, my own State, Mr. President, medical malpractice premiums have increased by nearly 200 percent just in the last 14 years. That is obviously reflective of the cost of the medical care which we provide. It is one of the areas that requires specific attention as we reform health care in this country today.

Attorney's fees and transaction costs are increasingly a large part of litigation expenses; in fact, approaching 50 percent. I think people would be interested to note, those who argue that we would be denying victims the right to recover, that, in fact, half of the money collected or nearly half of it goes to the lawyers—not to the victims.

The U.S. Department of Commerce has estimated that only 40 cents of each dollar expended in product liability suits ultimately reaches the victims. A Rand Corp. study showed that 50 cents of each liability dollar does not go to victims but to attorney's fees and other transaction costs.

Toward the goal of national legal reform, S. 565 represents a small but critical first step. This bill and the House bill, H.R. 956, contain many similar provisions.

They are, very quickly, a product seller provision that extends coverage of the bill to rented and leased products as well; a drug and alcohol defense provision does not go far enough; a provision creating incentive for biomaterial suppliers to make available raw material for use in medical implant devices sponsored by my colleague from Arizona, JOHN MCCAIN, and a very important provision; and finally, a provision reducing judgment amounts where a product has been misused or altered.

Beyond the provisions, the House bill is significantly broader in scope, and I support most of its additional provisions. It is my understanding this body will consider more comprehensive legal reform legislation later this year: Senator HATCH's Civil Justice Reform Act of 1995, and Senator MCCONNELL's Lawsuit Reform Act of 1995, and I will support those efforts.

I will plan to offer and support amendments to S. 565 that would broaden the legislative scope of this bill, more consistent with the House product. For example, I support expanding the scope of Senate bill 565, punitive damage reform provisions of three times a claimant's economic loss or $250,000, whichever is greater, now applicable only to product liability actions, to all civil actions.

It is important in the medical malpractice arena, in particular, where we very seldom have a product that has created a problem, to limit the liability of the physician or hospital or other health care provider in order to contain the cost of health care.

Second, I would support expanding the scope of S. 565, joint and several liability reform with respect to noneconomic damages for product liability actions to all civil actions, which I spoke to a moment ago. I will be offering an amendment to that effect.

Third, expanding Senate bill 565's $250,000 limitation on noneconomic damages in product liability actions to medical malpractice actions, as well.

I will also support the amendment of my colleague from Michigan regarding attorney disclosure requirements which would require that attorneys appearing in Federal court fully disclose at the time of retention all of the clients options, including a clear statement of the terms of compensation, and to provide an itemized accounting at the termination of representation.

I will be introducing an amendment that would preclude punitive damages from being awarded if the health care producer of a medical device or drug successfully completes the FDA approval process, unless there is a situation of fraud involved. I also believe that there may be three other amendments necessary to this bill in order to preclude it from, I would say, Mr. President, having fatal flaws.

There is one provision which relates to alternative dispute resolution where the parties seek to resolve their dispute outside of the tort lawsuit, and try to shorten the time and reduce the expenses. There is a penalty involved for the defendant in one of those situations. I believe that those provisions should be fair, equal to both the plaintiffs and the defendant, and that if there is any penalty attached for not agreeing to participate in an alternative dispute resolution mechanism, that that penalty should be provided both equally to the plaintiffs and the defendant, rather than only being a penalty for defendants.

Second, there is a good provision that says, where a plaintiff has been impaired by drug or alcohol use and is therefore more than 50 percent culpable or responsible—in some States it is called contributory negligence, where plaintiff himself or herself is at least half responsible for the injuries—there could not be recovery. It seems to me that the principle is sound but the limitation is too restrictive. Whether it is because of drug or alcohol use or because of lack of care or

concern or negligence, if plaintiff is 50 percent responsible then either there should be comparative negligence or contributory negligence should preclude a recovery. It should not just be limited in that one situation. In fact, I can think of far more egregious actions on the part of the plaintiff than simply being drunk or under the influence of alcohol.

Third, there is a provision that I spoke to earlier that says that, in a product liability case, the seller should not have to pay for the manufacturer's liability. It seems to me that should apply in any kind of situation. In no case should the seller be required to pay for the manufacturer's liability simply because you cannot find the manufacturer or the manufacturer does not have insurance to pay. If the seller was not responsible in any way, then the seller should not have to pay the damages.

As I said, notwithstanding these areas in which I believe S. 565 could be broadened, I think it is important we not allow the perfect to be the enemy of the good, and therefore we should support whatever reforms we can accomplish. In the last 5 years cloture motions have effectively barred votes on the merits of bills similar to this that were supported by a majority of the Senate. We should not allow this to happen again.

So I would like to close by addressing one of the most frequently cited and most unpersuasive arguments employed by the opponents of the national legal reform, only one, but I think it is important to establish this right up front because it has the superficial sense of States rights about it and suggests that those of us who support this legislation do not trust the States.

As someone who is a very strong States' rights supporter, who is very interested in allowing local decisionmaking, I want to make very clear our basis for supporting this legislation. This legislation would not prohibit a State from enacting more restrictive provisions so we are not saying the Federal Government should take over this area of law to the exclusion of the States at all. We are simply establishing a standard. If the States wish to be more restrictive they are entitled to do so.

It is not appropriate to argue it would be an unconstitutional preemption of State authority if we were to act in this fashion. The commerce clause clearly grants the United States the authority to act. No individual State can solve the problems created by abusive litigation of the kind we have been discussing here and that is particularly true with product liability where a product may be manufactured in one State, sold in another State, and cause injury in a third State. In fact, Government figures establish that on average over 70 percent of the goods manufactured in one State are shipped out of State for sale and use. So it is clear that a national solution is required and justified by the fundamental interstate character of produce commerce.

The threat of disproportionate unpredictable punitive damages awards exerts an impact far beyond the borders of individual States, and this threat influences investment strategies, it dampens job creation and prevents new products from reaching the marketplace. In an increasingly integrated national and international economy, the confusing inconsistent patchwork of State liability awards has created a major obstacle to America's economic strength. And I think this is precisely the kind of problem the Framers gave Congress the power to address through the commerce clause of the U.S. Constitution. The Framers clearly realized the National Government needed the power to prevent the chaos that would result if every State could regulate interstate commerce. That is one of the reasons, as a matter of fact, that the Articles of Confederation were required to be amended.

Opponents of legal reform profess concern about the preemption of State law and interference with States rights, but I note that many of these same interests are enthusiastic supporters of intrusive Federal regulations imposed on the States by OSHA, by the FDA, by the EPA, and other Federal regulators. In truth, States rights is not what is being defended here but rather the status quo or else.

Why is the multimillion-dollar litigation industry the only segment of the economy that opponents of legal reform believe is beyond the reach of Federal law? Legal reform will not cause the creation of a single new Federal program or the expenditure of a single new appropriation. Legal reform will not impose new taxes or new regulations on our citizens. Legal reform will simply create clear, consistent legal standards covering civil actions brought in State and Federal court. It will enhance the essential principle of due process and, as the U.S. Supreme Court has said, due process, criminal and civil, is fundamental to our concept of ordered liberty.

So, Mr. President, I hope we keep these thoughts in mind as we debate this important, and as I said at the beginning, historic legislation, and that in the end we will have found the wisdom and courage to make these reforms so we can pass them on to the President for his signature and begin the process of restoring more sensibility, more common sense, more fairness into the U.S. tort system.

I yield the floor, Mr. President.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KYL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. KYL. Mr. President, I have several announcements and requests for unanimous consent. I would note all of these have been cleared with the minority and therefore I wish to make them at this time.

First, Mr. President, I ask unanimous consent that there now be a period for the transaction of routine morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

MESSAGE FROM THE HOUSE RECEIVED DURING THE ADJOURNMENT

Under the authority of the order of January 4, 1995, the Secretary of the Senate on April 7, 1995, during the adjournment of the Senate received a message from the House of Representatives announcing that the Speaker has signed the following enrolled bills:

H.R. 889. An act making emergency supplemental appropriations and rescissions to preserve and enhance the military readiness of the Department of Defense for the fiscal year ending September 30, 1995, and for other purposes;

S. 178. An act to provide for the safety of journeymen boxers, and for other purposes; and

S. 244. An act to further the goals of the Paperwork Reduction Act to have Federal agencies become more responsible and publicly accountable for reducing the burden of Federal paperwork on the public, and for other purposes.

The enrolled bills were signed on April 7, 1995 by the President pro tempore (Mr. THURMOND).

Under the authority of the order of January 4, 1995, the Secretary of the Senate on April 12, 1995, during the adjournment of the Senate received a message from the House of Representatives announcing that the Speaker has signed the following enrolled bill:

H.R. 1345. An act to eliminate budget deficits and management inefficiencies in the government of the District of Columbia through the establishment of the District of Columbia Financial Responsibility and Management Assistance Authority, and for other purposes.

The enrolled bills were signed on April 12, 1995 by the President pro tempore (Mr. THURMOND).

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Thomas, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United