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Constitutionality of Automobile Accident Compensation Reform by Federal Law—A Second Look

C. Dallas Sands*

The “first look” at this subject, as part of the *Department of Transportation Automobile Insurance and Compensation Study*,¹ was taken before any reform proposals had been reduced to concrete bills for consideration by Congress and before other components of the Study had assembled the rich harvest of pertinent information and made it available for examination. That discussion was therefore unavoidably speculative and hypothetical in nature.

It treated the commerce and spending powers as the most obvious sources of constitutional authority for congressional legislation to improve the system for compensating victims of automobile accidents. Reflecting the belief that congressional power stemming from those constitutional roots still is not unlimited, it postulated that the evils to be remedied must be (1) economic in nature in order for the commerce power to support federal remedies,² and (2) national (trans-state) in scope to justify federal remedies under either the commerce power or the spending power.³ The “first look” noted that the evils to be remedied were the faults in the system for allocating the costs of automobile accident losses, not of the losses themselves. Furthermore, the faults with which the system was most often charged were “most naturally and obviously related to humanitarian considerations and the ideal of justice” whereas “factual documentation [had] not yet been published which would support a confident judgment that the evils in our present system have a substantial adverse bearing on the national economy.”⁴ For that reason, I concluded that although the question was doubtful enough that a deliberate congressional finding that federal reforms were needed for economic reasons probably would pass muster with the

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1. U.S. DEP'T OF TRANSPORTATION, CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM 59 (April 1970).

2. *Id.* at 68.

3. *Id.* at 68, 82.

4. *Id.* at 60, 74, 76.

Supreme Court, the proofs on which Congress could base such a finding had not yet been made.⁵

A vast amount of pertinent information has subsequently been provided in the reports which were the work product of the DOT study. This second look reviews that information as it bears on the question of congressional power. Particular reference is made to bills that have now been proposed.

The principal bills are forthrightly regulatory in nature.⁶ They prohibit the operation of vehicles on public highways without first-party insurance coverage conforming to prescribed standards and provide qualified exemptions from tort liability for damages caused in motor vehicle accidents.⁷

By reciting a purpose to regulate interstate commerce, the titles of all of the principal bills make it explicit that they rely on the commerce clause as the source of constitutional authority. Findings to support use of the commerce power were recited in a policy section of the first bill to be introduced in the Senate last session, and in three of the House bills introduced in this session.⁸ Even though reciting a purpose to regulate commerce in a bill, or even in an enacted statute, does not make it so,⁹ these statements afford some insight into the thinking of those who contributed to their formulation of constitutional foundations for congressional action. They declared that the free flow of interstate commerce was obstructed by the following circumstances:

- (1) The great number of motor vehicles operated within the

5. *Id.* at 93.

6. S. 945, 92d Cong., 1st Sess. (1971); H.R. 3968, 4994, 5220, 6528, 7514, 10222, 10808, 92d Cong., 1st Sess. (1971).

Also pending are allied bills to facilitate no-fault insurance coverage in group policies: S. 946, 947, 92d Cong., 1st Sess. (1971); H.R. 3970, 4995, 5221, 5459, 92d Cong., 1st Sess. (1971).

There is also pending in each house a resolution to urge the states to take the initiative in enacting no-fault plans: H.R. Con. Res. 241, 92d Cong., 1st Sess. (1971).

Bills similar to some of those now pending were initially introduced in the last Congress, *i.e.*, S. 4339, 4340, 4341, 91st Cong., 2d Sess. (1969).

7. The main difference of substance between different bills has to do with whether the exemption from tort liability applies to catastrophic losses. Tort liability would continue for damages for catastrophic harm in excess of economic losses under S. 945; H.R. 3968, 5220, 5460, 7514. The exemption would extend to damages for even catastrophic loss under H.R. 10222 and 10808.

S. 945 and H.R. 3968, 5220, and 5460 carry short titles of "Uniform Motor Vehicle Insurance Act."

H.R. 7514, 10222, and 10808 have short titles of "National No-Fault Motor Vehicle Insurance Act."

8. S. 4339, 91st Cong., 2d Sess. (1970); H.R. 3968, 5220, 5460, 92d Cong., 1st Sess. (1971). The section is the same in all four bills.

9. *See Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1921); *Dougherty v. Bethune*, 7 Ga. 90 (1899).

channels of interstate commerce upon the public streets, roads and highways of the states;

(2) The substantial amount of injury and death resulting therefrom;

(3) The insufficient, unfair distribution and untimely availability of monies under the present motor vehicle liability insurance system for the adequate rehabilitation and compensation of accident victims;

(4) The absence of uniform and sufficient requirements for:

(A) Insurance among the States as a condition to using the public streets, roads, and highways;

(B) Guaranteeing the continued availability of motor vehicle insurance supplied by private enterprise; and

(C) Meaningful price information to promote rational buying decisions and thus stimulate beneficial competition; and

(5) The failure to promote the general welfare by not recognizing sufficiently the plight of motor vehicle accident victims while promoting the national policy of accelerating the construction of the Federal-Aid Highway Systems.¹⁰

The way in which these circumstances were said to “obstruct the free flow” of interstate commerce was “by increasing unnecessarily the hazards of travel” within interstate channels and by “otherwise affecting such commerce.”¹¹ These findings were followed by a declaration that —

It is the purpose of this Act to provide for the general welfare by requiring a system of motor vehicle insurance which will be uniform among the States, which will guarantee the continued availability of such insurance and meaningful price information; and which will provide sufficient, fair, and prompt payment for rehabilitation and losses due to injury and death arising out of the operation and use of motor vehicles within the channels of interstate commerce, and otherwise affecting such commerce.¹²

Since the declared purpose is to serve the general welfare by measures calculated to alleviate evils which attend use of the “channels of interstate commerce,” the authors of the declaration evidently conceived congressional power

10. See note 8, *supra*.

11. *Id.*

12. *Id.*

to rest on the ideal of a national motor transportation system, just as a similar conception was found to sustain extensive federal controls over matters having to do with rail transportation.¹³ Although treating every public street, road, or highway as part of a national system goes beyond legislative or judicial precedent in connection with rail transportation,¹⁴ legislation defining the rights and liabilities of everyone using the system in matters connected with such use is readily comprehended within the principles under which the Federal Employers Liability Act of 1908 was sustained.¹⁵

But these legalisms seem unrelated to the substantive realities pertinent to a judgment about the distribution of function, responsibility, and authority in the federal system. It is hard to see the connection between the real reasons for automobile accident compensation reform and the question whether every person on every trip on any public way in the country is engaged in interstate commerce. Use of this conception of a national motor transportation system has the appearance of verbal posturing to rationalize action prompted by other considerations. The position seems to treat the Constitution as an irrelevancy to be gotten around when it complicates matters instead of a set of guidelines to be either followed in good spirit or overtly changed when they prove to be unwise. Perhaps this is why the findings and declaration of policy have been omitted from more recent bills.

At best, hackneyed verbalizations of constitutional idiom inserted into the findings and policy of a bill are less convincing than factual documentation of constitutionally germane reasons for congressional action. Studies such as those carried out by the Department of Transportation (DOT) can provide such documentation. However, the DOT Study was addressed primarily to the question whether reforms were needed, and only incidentally to whether reforms by federal law would be constitutional within our federal scheme of things.¹⁶ Never-

13. *Wisconsin R.R. Comm'n v. Chicago, B. & Q.R.R.*, 257 U.S. 563 (1922). See *Southern Ry. v. United States*, 222 U.S. 20 (1911).

14. *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Southern Ry. v. United States*, 222 U.S. 20 (1911).

15. *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

16. For the insights they provide concerning the general thrust of the Study, descriptive titles of the various reports are listed below:

Public Attitudes Toward Automobile Insurance (March 1970); The Origin and Development of the Negligence Action (March 1970); Automobile Accident Litigation (April 1970); Comparative Studies in Automobile Accident Compensation (April 1970); Constitutional Problems in Automobile Accident Compensation Reform (April 1970); Economic Consequences of Automobile Accident Injuries (April 1970) Vols. I & II; Structural Trends and Conditions in the Automobile Insurance Industry (April 1970); Insurance Accessibility for the Hard-to-Place Driver (May 1970); Mass Marketing of Property and Liability Insurance (June 1970) (by Spencer Kimball and Herbert Deneberg); An Analysis of Complaints

theless, the reports contain a wealth of data that may be interpreted with reference to the question of whether defects in the old system have *national* economic significance.

A survey of the economic consequences of automobile accident injuries [*Survey*] documented the magnitude of the automobile accident problem with nationwide statistics.¹⁷ It reported that in 1967, according to one way of estimating, there were 2,075,000 personal injuries sustained in automobile accidents. Another estimate, made by the National Center for Health Statistics, counts 3,096,000 people who "sustained injuries that required medical attention or resulted in one day or more of restricted activity."¹⁸ In 1967, economic losses from auto accidents amounted to \$10.5 billion—\$1.2+ billion for medical expenses, \$4.2+ billion for lost wages, \$4.8 billion for property damage, and \$.2 billion for other expenses.¹⁹ "Aggregate economic losses [in 1967] for seriously injured persons and fatalities" amounted to \$5.1 billion or \$9.1 billion, depending on whether future lost earnings for fatalities who had no dependents and whose losses of future earnings accrue only to society, are counted.²⁰ Of the 1967 loss \$3.4 billion (32%) was incurred by 45,000 very seriously or fatally injured victims who sustained losses of \$25,000 or more and average losses of \$76,000.²¹ Also, "the approximately 22 million victims who suffered only property damage (in 1967) incurred total losses of about \$3.8 billion."²²

in Selected Automobile Insurance Markets (July 1970) (by Douglas G. Olson, assisted by August R. Ralston); Automobile Personal Injury Claims (July 1970), Vols. I & II; Causation, Culpability and Deterrence in Highway Crashes (July 1970) (by David Klein and Julian H. Waller); Economic Regulations and Insurance in the United States (July 1970) (by John G. Day); Insolvencies Among Automobile Insurers (July 1970) (by Douglas G. Olson); A Study of Assigned Risk Plans (August 1970) (by Dennis F. Reinmuth and Gary K. Stone); Motor Vehicle Assigned Risk Plans (August 1970) (by William T. Hold, assisted by Harry P. Haiduk); Price Variability in the Automobile Insurance Market (August 1970) (by Calvin H. Brainard and Stephen A. Carbine); Rehabilitation of Auto Accident Victims (August 1970) (by John Henle); Public Attitude Supplement to the Economic Consequences of Automobile Accident Injuries (September 1970); Quantitative Models for Automobile Accidents and Insurance (September 1970) (by Joseph Ferreira, Jr.); Driver Behavior and Accident Involvement: Implication for Tort Liability (October 1970); Compensation for Motor Vehicle Accident Losses in the Metropolitan Area of Washington, D.C. (December 1970); The Price and Availability of Automobile Liability Insurance in the Nonstandard Market (January 1971) (by Douglas G. Olson, assisted by Frank G. Vukmanic); Motor Vehicle Crash Losses and Their Compensation in the United States (March 1971) (by John A. Volpe).

17. UNITED STATES BUREAU OF THE CENSUS & WESTAT RESEARCH, INC., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES (April 1970) [hereinafter cited as *SURVEY*].

18. *Id.* at 43.

19. See U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 4 Table 1 (March 1971) (prepared by J. Volpe) [hereinafter cited as *VOLPE*].

20. *SURVEY*, *supra* note 17, at 23, 40.

21. *Id.* at 89-90.

22. *VOLPE*, *supra* note 19, at 6.

Net reparations from all sources received by 1967's victims were reported at \$6.5 billion.²³ "On the average, about half of total personal and family economic loss was recovered."²⁴ About nine out of ten victims recovered some losses. Amounts recovered from all sources came to more than double the amount of under \$500 losses, while "only 30% was recovered when losses exceeded \$25,000" confirmed the existence of a serious mismatch between reparations received and losses actually sustained.²⁴ The tort system's heavy responsibility for this mismatch is shown by the fact that tort recoveries averaged four and one-half times the amounts of losses under \$500 and only one-third (net) of losses over \$25,000.²⁵

The *Survey* further disclosed that:

About one-third of recovery for personal and family losses due to serious injury or fatality was from tort (claims against another party or his insurance company), 15% from medical and auto medical insurance, 14% from life insurance, 6% from collision insurance, and 24% from wage replacement sources (sick leave, workmen's compensation, Social Security, and other sources of replacement for actual or future wage losses).²⁶

. . . .

Legal costs amounted to about one-fourth of total recovery under tort for serious injury or fatality cases.²⁷

. . . .

On the average, 16 months elapsed between date of accident and final settlement of tort claim. Larger economic losses were settled after longer delays and small losses after shorter delays.²⁸

23. *Id.* at 14.

24. *Id.* at 36.

25. *Id.*

26. *SURVEY*, *supra* note 17, at 2. Sources of compensation were broken down as follows:

Almost half received some medical insurance benefits.

35 percent recovered from auto medical insurance.

45 percent recovered from tort claims.

30 percent received benefits from collision insurance.

About 65 percent of seriously injured and fatalities were covered by some form of medical and hospital insurance. About 54 percent were covered by auto medical policies.

27. *Id.* Claims against another party were made in 65 percent of serious injury or fatality cases. About 65 percent of those who made such claims retained counsel, and 74 percent of those retaining counsel actually filed lawsuits. About eight percent of lawsuits filed actually reached verdict. Thirty percent of families with incomes under \$5,000 retained counsel, compared to 42 percent of families with incomes over \$10,000. The ratio of reparations to loss was 0.38 for low income families and 0.61 for high income families. Persons with higher educational achievement had a greater tendency to retain counsel and also had a higher ratio of recovery to loss.

28. *Id.* at 3.

Males in the age group 15 to 44 constituted 20% of the population but suffered 39% of the serious injuries and fatalities.

Both actual and future wage losses of serious injuries or fatalities were poorly compensated for—about 15% from sick leave, workmen's compensation, Social Security and similar sources and an unknown amount from tort. Total net tort recovery, however, was only about one-fifth of total wage loss, so it is clear that total recovery of wage loss was relatively small.²⁹

Insurance is bound to have a critical place in any system of rationalizing the distribution of costs of automobile accidents. The monumental proportions of the auto insurance business and the extent of its concentration, which reveal the degree to which insurance is part of both the problem and the solution, were documented in reported findings from another part of the *Study*.³⁰ Because of

29. *Id.* at 4.

30. U.S. DEP'T OF TRANSPORTATION, STRUCTURAL TRENDS AND CONDITIONS IN THE AUTOMOBILE INSURANCE INDUSTRY (April 1970).

(1) There were 858 individual auto insurance companies in 1968 that wrote \$11.4 billion in earned auto premiums. Adjusting for group ownership of auto insurance companies indicates there are slightly under 600 decision-making firms in the auto insurance industry nationwide. In auto liability coverages there are only about 450 decision-making firms nationwide.

(2) Of the over 800 individual auto insurance companies in 1967 the 174 companies with over \$10 million in earned auto premiums accounted for 86.6 percent of industry premiums. Thus the relatively large number of auto insurers with earned auto premiums under \$10 million accounted for only 13.4 percent of industrywide earned auto premiums.

(3) There were 179 individual auto insurance companies licensed in only 1 state in 1967. These companies accounted for 21.6 percent of the number of companies but only 4.5 percent of net premiums written of all auto lines. At the other end of the geographic coverage spectrum there were 261 companies that were licensed in 30 or more states accounting for 31.5 percent of the number of companies and 80 percent of net premiums written.

(4) Local auto insurance companies, on the average, are much less diversified within the property-liability insurance industry. The 179 local companies had 78 cents of each property-liability net premium dollar in auto lines while the 261 national companies had only 46 cents of each premium dollar in auto lines in 1967.

(5) The number of new entrants into the auto insurance industry has declined significantly in recent years dropping from an average of 15 per year from 1955-64 to only 6.5 per year from 1965-68. There was only one new entrant in 1967 and 1968 that was not affiliated with an already established insurance group.

(6) National concentration of industry earned auto premiums accounted for by leading auto insurer groups in 1968 was 27 percent for the 4 largest, 38 percent for the 8 largest and 56.6 percent for the 20 largest. This compared to 18.7 percent for the top 4 in 1955, 28.8 percent for the top 8 and 46.3 percent for the 20 largest. Though concentration nationally in auto insurance is not high compared to many other industries, a marked upward trend in concentration among leading groups is evident from 1955 to

their statistical eloquence, some of those findings deserve attention.³¹

1968. The composition and rank of the 20 largest groups has been relatively stable over the past 10 to 15 years.

(7) Concentration among the largest companies or groups at the state level is higher than on a national basis and tends to vary inversely with premium volume in the state. Average concentration among the 10 states with direct premiums written of \$275 million or more in 1967 was 35 percent among the 4 largest, 49.9 percent for the 8 largest and 72.7 percent for the 20 largest. For the 15 states with direct premiums written of under \$50 million the simple average of the 4 largest was 42.9 percent, 8 largest 60.6 percent and 20 largest 84.6 percent.

(8) Leading national insurers by-and-large are also leading insurers in the individual states. For example, for the 50 states and the District of Columbia in bodily injury coverage in 1968, the 20 largest national insurers held 47 first ranked positions, 39 second place positions, 41 third ranked positions and 36 fourth ranked positions. In 25 states an auto insurer not among the 20 national groups of 1968 held one or more of the three leading positions in the three major lines of auto coverage in 1968.

(9) The compound annual growth rate from 1955-68 of earned premiums for 7 direct writers among the 20 largest auto insurance groups of 1968 was 10.3 percent compared to 9.1 percent for 13 agency writers. Four direct and five agency writers had a compound annual growth rate of over 10 percent during the period. Among 145 individual companies with earned auto premiums of \$10 million or more, 109 agency companies had a compound annual growth rate of 9.1 percent in earned auto premiums compared to 11.1 percent for 36 direct writers.

(10) The pace of merger activity involving property-liability insurers has accelerated in recent years. A total of 580 property-liability insurers were acquired in the 9 years from 1960-68 involving \$10 billion in admitted assets. In 1968 alone \$4.8 billion in admitted assets were acquired—48 percent of the \$10 billion acquired during the entire period 1960-68.

(11) In recent years the predominant type of acquisition involving acquired property-liability insurers with \$10 million or more in admitted assets has been non-insurance companies acquisition of auto insurers. In 1968 there were 13 "other" or "pure" large conglomerate mergers involving 82.4 percent of auto insurer assets acquired in that year. (Table 22, p. 40) The 25 "other" large conglomerate acquisitions of auto insurance companies from 1960 through the first 9 months of 1969 involved \$6.6 billion—60 percent of \$10.8 billion in admitted assets acquired.

(12) Restrictions placed on the operating practices of insurance companies in some states have prompted some insurers to seek ways of minimizing regulatory supervision. The formation of holding companies by major insurance companies has been the means to accomplish this end. The holding company structure provides a more flexible vehicle to accomplish diversification. While insurers have not been particularly active in acquiring companies outside the insurance industry, there has been significant effort directed toward developing capabilities in related financial services activities such as premium financing, real estate development, marketing of computer services, small loan operations, and development and marketing of mutual funds.

(13) Nonmerger exits from the auto insurance industry in the 1960's accelerated significantly compared with the period 1955-60. Although only 19 nonmerger exits were recorded for the period 1955-60, 77 were identified during the 8-year period 1961-68. Involuntary exits by receivership and failure accounted for 77 of the 96 nonmerger exits recorded from 1955-68. There were 19 voluntary withdrawals during the period. Three states had 5 or more failures from 1955-68: Illinois 12, Pennsylvania 12 and Texas 5.

Id. at 2-4.

31. VOLPE, *supra* note 19, at 52.

It was elsewhere disclosed that 56% of revenues in the auto liability insurance system go for operating costs, including 33% for general overhead and 23% to pay claims investigators and attorneys for both sides.³²

Insolvencies Among Automobile Insurers came to the "conclusion that the insolvency problem has resulted in notable, unanticipated losses by policyholders and/or third party claimants."³³ Although the report concludes that the insolvency problem does not warrant federal regulation of the auto insurance business,³⁴ it indicates that some of the responsibility for inadequate protection of policyholders from consequences of insurer insolvency is attributable to absence of uniformity among state regulatory approaches and methods.³⁵

The negative influences of state pluralism in insurance regulation were likewise noted in another report. It was asserted that "insurance problems, needs and environmental influences cannot be neatly compartmentalized within state lines," and that "the necessity for insurers to comply with the diverse and often antithetical requirements of the several jurisdictions in which they operate imposes economic burdens upon insurers and ultimately upon the policyholders."³⁶

Price Variability in the Automobile Insurance Market confirmed that insurance prices vary significantly according to geographical region, so that lower prices could be achieved in peak price areas through regulations establishing a national average price level.³⁷ Of course something which the information itself cannot answer is whether this would be fair to people in areas having lower accident rates and lower repair costs. The report also noted the pressures of competitive forces to relate insurance costs to differences in risk potentials among insurance buyers. It noted further that price differentials based on risk potentials can produce prohibitive prices for high risk drivers. The report endorsed the principle that some measure of "socialization" of the costs of insurance for high risk drivers "make[s] sense within the context of a free enterprise society" to avoid banning them from all use of automobiles. It also makes clear that the larger the market within which "socialization" can be undertaken, the

32. U.S. DEP'T OF TRANSPORTATION, *INSOLVENCIES AMONG AUTOMOBILE INSURERS* 21 (1970).

33. *Id.* at 144, 145.

34. *Id.* at 40.

35. U.S. DEP'T OF TRANSPORTATION, *ECONOMIC REGULATION OF INSURANCE IN THE UNITED STATES*, 66, 67 (July 1970).

36. U.S. DEP'T OF TRANSPORTATION, *PRICE VARIABILITY IN THE AUTOMOBILE INSURANCE MARKET—ITS EXTENT, CAUSES AND RELATIONSHIPS TO 'HIGH RISK' AND OTHER PROBLEMS* 133 (1970).

37. *Id.* at 143.

greater is the measure of flexibility for fashioning national pooling or subsidy systems with which to spread the margin of prohibitive cost.³⁸

Another study reported that "the laws of the several states" impose "a multitude of unreasonable barriers to the free development of mass marketing of property and liability insurance," and asserted that there is an "urgent need to strike down" such barriers so that mass marketing "may help provide a more adequate and equitable insurance market."³⁹

All this data, viewed in relation to the problem concerning constitutionality of federal legislation, makes it obvious that the tort-insurance system as it presently operates has broad economic dimensions and that reform efforts are inextricably enmeshed in far-flung economic ramifications. The clearest overview of the dimensions of the automobile accident compensation problem in the United States appears in the preamble of a resolution now pending as the "administration" proposal in both houses of Congress. This appears to recapitulate key findings and conclusions of the DOT study and recites the following points about the present system.

It overcompensates many for small losses and undercompensates many who have large losses.

Administration costs are "inordinate."

Benefit payments are "ill timed and unresponsive to victims' needs both because of long delays in payment and because payments are predominantly in the form of lump-sum payments," making "effective rehabilitation" of victims "a practical impossibility."

State laws compel motorists to buy liability insurance without assuring its availability; state regulatory pressures on insurers have produced "socially undesirable competition in risk selection accompanied by arbitrary and capricious declinations of insurance, cancellations and refusals of renewal with the consequent growth of a high-risk automobile insurance market serviced in some cases by insurers of questionable financial stability."

It puts intolerable burdens on state insurance regulatory authorities.

It takes too much time and resources of the courts.

Court delays force the seriously injured into inadequate settlements, resulting in denial of "substantial and equal justice."

38. U.S. DEP'T OF TRANSPORTATION, *MASS MARKETING OF PROPERTY AND LIABILITY INSURANCE* (June 1970).

39. H.R. Con. Res. 241, 92d Cong., 1st Sess. (1971).

Third party liability insurance precludes having insurance premiums reflect vehicle safety and differences in repair costs.

“[T]he principal problems and abuses with respect to automobile insurance clearly stem from defects in the system for compensating accident victims and from the compulsions upon motorists to obtain the insurance which sustains and upholds that system.”⁴⁰

Proof that the compensation system can measurably affect the amount of net economic losses to society which result from automobile accidents is still lacking. “When cars collide, no way of distributing the cost can undo the damage.”⁴¹ There are, however, many who believe and many who doubt that the fault system deters reckless driving and thereby prevents the losses to society due to auto accidents from being as high as they would be otherwise. The DOT Study does not convincingly resolve this dispute. An engaging point touching this same problem was made in testimony presented in hearings before the House Subcommittee on Commerce and Finance, when it was suggested that first-party insurance might, through premium differentials, induce motorists to shop for safer cars.⁴² But this, too, is speculative.

Even if net losses to society can not be undone by insurance and liability systems, national economic interests may nevertheless be affected by the way in which losses from automobile accidents are distributed. National economic well-being is prejudiced, for example, when individual economic distress resulting from uncompensated losses impairs an individual’s economic productivity. This occurs also when the timing of compensation payments prevents or postpones rehabilitation. In this respect the evils to be remedied are economic in nature and trans-state in scope, justifying exercise of the commerce power to effect a remedy.

However, one may still suspect that humanitarian considerations rooted in sympathy for the tragic plight of traffic systems, plus civic and professional concern for the reasonableness of social and legal institutions, supply the princi-

40. U.S. DEP’T OF TRANSPORTATION, CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM, *supra* note 1, at 60-61.

41. No fault insurance promises, over time, to decrease the total economic cost of accidents relative to continuation of the liability system. Insurance premium differentials, by model of auto, will begin to reflect the safety, durability and ease of repair by magnitudes vastly exceeding anything now possible. Today, the entire premium for bodily injury (if we exclude the modest element for medical or uninsured motorist) is solely a function of the safety built into some stranger’s car.

Statement of Samuel M. Loescher, Professor of Economics, Indiana University, *Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 664 (1971).

42. H.R. Con. Res. 241, 92d Cong., 1st Sess. (1971).

pal motive force for reforms in the field of automobile accident compensation. In our federal system, these matters remain generally to be determined under state law, save only as they may have a trans-state economic dimension. However, a new insight emanates from the *Study*. It is the realization that the spirit of the grant of power enabling Congress "to regulate commerce among the several states" can do more than justify federal control over interstate movements, transactions, and measures in order to secure and maintain a healthy national economy. That spirit can also reasonably justify federal remedies for non-economic evils, where the trans-state economic dimensions of the problems of fashioning a remedy make it clear that nothing short of a national remedy could be fully effective.

The Secretary of Transportation, in his concluding report to Congress and the President based on the entire DOT study expressed the following judgments:

Ultimately, the systems of the several states must be compatible. Although there are means available to overcome great diversity, these are cumbersome and a reasonable degree of national uniformity seems best. For a number of reasons motor vehicle travel is an interstate activity of major proportions and a consistent minimum standard for accident reparations involving all of the motoring public, wherever they travel, would constitute sound public policy.⁴³

Unless the doctrine that Congress' powers are limited to those that are affirmatively granted ("enumerated") in the Constitution is to be abandoned, however, the fact that something is "sound public policy" does not imply that Congress can do it. Congress still lacks any general authority to relieve from the inefficiencies of federalism by legislating compatibility and uniformity among the states in ordinary municipal law and in matters unrelated to commerce or one of the other subjects over which the Constitution entrusts stewardship to Congress. Nor is it clear that all "motor vehicle travel" is interstate activity or that all "interstate activity" comes under the commerce power.

A review of the reports from the DOT study has nevertheless led me to revise my thinking. Contrary to the conclusions drawn after my "first look" at the problem, I am now persuaded that the design of reforms is so much concerned with trans-state economic forces that national remedies may be the only ones able to cope with it. The course presently being pursued by the administration is to stimulate state initiative for the state remedies. If that effort fails to bring about effective reforms, the constitutional justification for reforms by congressional legislation under the commerce power will be established.