

In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform

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I must admit I am a little nonplused by the situation I am in. We have the Federalist Society convening this symposium and advocating tort reform as a good thing (a belief I can only assign to political motivations and not to following the organization's professed principles). We have a scholar who supposedly represents the group's views and defends tort reform in part because he believes that our society has achieved "a sort of socialism" because "nearly all of us have some direct or indirect ownership of corporations and this means of production."¹ Thus, he holds, in this setting, that American socialism is a justification for tort reform.

To continue this topsy-turvy situation, I am to take a supposedly more liberal position: that tort restrictionist laws properly encounter insuperable constitutional obstacles. I will in fact take this position by defending judicial opinions that reflect views consistent with those articulated by such "liberal" activist judges such as Antonin Scalia, Clarence Thomas, and others who advocate a return to a doctrine of jurisprudence of original intent.² Former

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¹ Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 SETON HALL L. REV. 649, 654 (2001).

² For a discussion of the jurisprudence of original intent, see, e.g., Boris A. Bittker, *The Bicentennial of the Jurisprudence of Original Intent*, 77 CAL. L. REV. 235, 256 (1989) (noting an expansion of the understanding of original intent); William J. Michael, *The Original Understanding of Original Intent: A Textual Analysis*, 26 OHIO N.U. L. REV. 201, 220 (2000) (arguing "if a court does not interpret the text of the Constitution, as written and originally intended, the court necessarily makes law"); see also Martin John Heli, *Clearing Away the Caricature: A Review of the Attorney General's Lawyer: Inside the Meese Justice Department*, 19 J. LEGIS. 309 (1993) (reviewing DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER* (1992)). In this book review, Heli noted that the theory of original intent reflects a belief that "the words of the Constitution create and enumerate a carefully chosen form of government." *Id.* at 310. Thus, "[w]hen interpreting the Constitution, the judiciary must therefore follow the specific words of the Constitution. If the words are

United States Attorney General Edwin Meese was present at this symposium earlier. I think he would have been amused to be categorized as such a liberal activist.³

Let us start by understanding what tort reform is. Tort reform, or as I like to call it, tort restrictionism, is nothing more than the use of outsized political clout to skew the legal system in favor of the powerful. The advantages that businesses obtain in the political system are enlisted to obtain similar advantages in the courtroom. At its most basic and essential level, the tort restrictionist agenda represents dissatisfaction with the legal system, most particularly dissatisfaction with judges and juries (this attitude is particularly prevalent amongst those who are frequent defendants in personal injury cases). Although it may be dressed up in the rhetoric of non-existent litigation explosions,⁴ insurance crises,⁵ horrifying economic consequences,⁶ unconscionable jury awards,⁷ and frivolous lawsuits,⁸ tort restrictionist laws

ambiguous, judges must interpret and apply them in a manner so as to at least not contradict the Constitution itself." *Id.*

³ Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989). Former Attorney General Meese has advocated a return to the jurisprudence of original intent. *Id.* Farber wrote that Meese recognized the dual function that many courts have assumed, and emphasized that the job of the court system is to "say what the law is," not to *make* law and policy, "which is the job of the legislatures." *Id.* For an early and fulsome description of Meese's version of original intent, see Attorney General Edwin Meese III, Address Before the American Bar Association, Washington, D.C. (July 9, 1985), reprinted in FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 10 (1986) (hereinafter FEDERALIST SOCIETY, GREAT DEBATE). For a response outlining the limits of that approach, see Justice William J. Brennan, Jr. Address at Georgetown University (Oct. 12, 1985), reprinted in FEDERALIST SOCIETY, GREAT DEBATE at 11.

⁴ See, e.g., Deborah Jones Merritt & Kathryn Barry, *Is the Tort System in Crisis? New Empirical Evidence*, OHIO ST. L.J. 315, 398 (1999) (demonstrating that litigation trends provide no support for claims about a litigation explosion or for a need for relief from lawsuits).

⁵ See, e.g., Daniel J. Capra, 'An Accident and a Dream:' *Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339, 376 (2000) (demonstrating the so-called insurance crisis of the 1980s "was caused not by lawsuits, but rather by a cyclical downturn combined with questionable underwriting practices and a drop in interest rates").

⁶ See Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. L. REV. 397 (2000) (demonstrating that the so-called "tort tax" and its attendant claims about dire economic effects is a massively inflated concept of rhetorical significance but otherwise without substance).

⁷ See, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) (detailing tort reformers' versions of the facts from frequently cited examples of supposedly indefensible case results and finding the actual facts support the results in those cases).

⁸ Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1195-96 (1992) (describing the many filters that exist to eliminate frivolous lawsuits).

are little more than relief to the habitually negligent and the intentionally reckless.

I do not mean to talk about this abstractly. Let us consider the evidence in the two cases that we are examining: *Best v. Taylor Machine Works*,⁹ and *State ex rel Ohio Academy of Trial Lawyers v. Sheward*.¹⁰ Was there any basis for the Illinois Supreme Court in *Best* to strike down Public Act 89-7?¹¹ Consider this: It was introduced at 11:40 p.m. at night, voted out of committee the very next day, voted off the floor of the lower house that week, and the following week passed by the senate.¹² This was a pure, political power play. I mention this not because these are invalidating criteria, but because defenders of the law often expend enormous rhetoric on the “superior” ability of legislatures to investigate a problem, gather facts and deliberate about solutions.¹³

Public Act 89-7 was shocking in the reach of its provisions. This sixty-seven-page bill (which, at that time, commanded a place in the *Guinness Book of World Records* of lengthy tort reform laws) was so offensive that the Defense Research Institute,¹⁴ a group of defense lawyers that favors tort reform, said that it went “too far” in giving businesses an advantage and destroyed the jury system.¹⁵

The Illinois law was struck down, largely on separation of powers and special legislation grounds. While it was still on the books, however, it was eclipsed by Ohio’s proposed tort restrictionist law, House Bill 350.¹⁶ This

⁹ 689 N.E.2d 1057 (Ill. 1997).

¹⁰ 715 N.E.2d 1062 (Ohio 1999).

¹¹ See *Best*, 689 N.E.2d at 1065. Public Act 89-7 set forth several proposals. For instance, it limited compensatory damages for non-economic injuries to \$500,000. *Id.* Public Act 89-7 established a mandatory consent requirement, “by which every patient who files a personal injury lawsuit is deemed to agree to the unlimited disclosure of his or her medical history, records, and other medical information to any party who has appeared in the action and who requests such information.” *Id.* at 1089. If the plaintiff failed to comply, his or her case would be involuntarily dismissed. *Id.* In addition, the law partially abolished joint and several liability and made major changes to products liability law. *Id.* at 1059. Public Act 89-7, including these core provisions, was held unconstitutional by the Supreme Court of Illinois on the basis of separation of powers, the prohibition against special legislation, and the right to privacy. *Id.* at 1104.

¹² *Id.* at 1065 (describing the legislative history of Public Act 89-7).

¹³ See, e.g., Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745 (1997).

¹⁴ Information about the Defense Research Institute is available at <http://www.dri.org> (last visited May 16, 2001).

¹⁵ Darryl Van Duch, *Illinois Tort Reform: A Cautionary Tale*, NAT’L L.J., Dec. 9, 1996, at A1.

¹⁶ See *Sheward*, 715 N.E.2d at 1073 n.6. The Supreme Court of Ohio described House Bill 350 as:

[T]he latest effort at civil justice reform, and . . . the most comprehensive and multifarious legislative measure thus far. More important, it changes the

mammoth 246-page bill was passed on the basis of tall tales and alleged problems in other states. The legislature sought to slay dragons that did not exist in Ohio. For example, the legislative history reveals that two proponents urged passage of the law on the basis of distorted versions of the infamous McDonald's hot coffee case.¹⁷ Of course, what the Ohio legislature thought it could do about a single case in New Mexico is beyond me. Equally as curious, a representative of the National Federation of Independent Businesses¹⁸ urged the Ohio legislature to engage in civil justice reform on the basis of the alleged size of the Illinois Girl Scout Council's liability premiums.¹⁹

The Ohio State Legislature might as well have asserted that the passage of this bill would cure cancer. It was enacted over a period of eighteen months, unlike the rush in Illinois, but it is clear that political considerations overrode constitutional ones. A subcommittee of the House Select Committee on Tort Reform issued a report that said, "On a number of issues, proponents did not provide a compelling rationale to link a proposed change in H.B. 350 with a specific problem in existing law. On some troubling proposals, the Subcommittee specifically asked for such a rationale to be provided, without any response from proponents."²⁰ Nonetheless, the subcommittee approved the changes. The General Assembly's own Legislative Service Commission found many constitutional

complexion of the reform debate into a challenge to the judiciary as a coordinate branch of government. It marks the first time in modern history that the General Assembly has openly challenged this court's authority to prescribe rules governing the courts of Ohio

Id. The law, in part, attempted to place caps on compensatory and punitive damages, provide new rules on the apportionment of damages, change rules of procedure and evidence, apportionment of damages, abrogate the collateral source rule, limit jurisdiction, impose new statutes of limitation and repose, dictate new legal presumptions, and rewrite the law of medical malpractice and products liability. *Id.* at 1090-95.

¹⁷ *Liebeck v. McDonald's Restaurants*, CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994) (awarding plaintiff \$160,000 compensatory damages and \$2,700,000 punitive damages for product defect, breach of the implied warranty of merchantability, and breach of warranty of fitness for a particular purpose). The judge then reduced the punitive award to \$480,000, three times the compensatory award. Subsequent to the remittitur the parties entered into a post-verdict settlement. See ATLA, *The McDonald's Scalding Coffee Case*, at <http://www/atla.org/cjfacts/other/mcdonald/ht> (last visited May 20, 2001).

¹⁸ Information about the National Federation of Independent Businesses is available at <http://www.nfib.com> (last visited Mar. 16, 2001).

¹⁹ See *Civil Justice Reform: Hearings on Am. Sub. 350 Before the Subcomm. on Limitation of Damages of the House Select Comm. on Civil Justice Reform*, 121st Ohio Gen. Assemb. 4-5 (July 18, 1995) (statement of Roger R. Geiger, State Director, National Federation of Independent Business, Ohio). For an in-depth discussion of this topic, see Robert S. Peck, *Ohio Tort "Reform" Measure Overturned*, 35 TRIAL 66 (1999).

²⁰ OHIO H. SELECT COMM. ON TORT REFORM, REPORT at 1 (Oct. 5, 1995) (copy on file with author).

infirmities that supporters of the act choose to ignore.²¹ Professor Stephen Werber, who favored many of the tort restrictions and consults with defense counsel in Ohio, noted that “in a number of areas government need is weak, the effect drastic, and the likelihood of defending against constitutional attack is minimal.”²²

The legislature also attempted in the course of this bill to change the Ohio state rules of procedure and evidence.²³ To those of us accustomed to working in the federal system, this may not seem like an odd thing. Congress often changes the federal court rules. But that is not true in most states. Many state constitutions, including Ohio's, give the state supreme court exclusive authority to set rules of procedure and evidence.²⁴ For the legislature to arrogate that power to itself is a violation of separation of powers.²⁵ These proposals made it clear that the legislature was not acting as a legislature but as a super-judiciary.

The tort restrictionist law invalidated by the Ohio Supreme Court²⁶ was nothing less than a hostile takeover of the civil justice system in the service of tortfeasors on a scale that was both bold and grand. It tilted the playing field of litigation away from injured people and in favor of wrongdoers. And it was indisputably the exercise of judicial power by the legislature. Yet, in defense of this and other tort restrictionist bills, we often hear the refrain that the courts owe great deference to the public policy choices of legislatures.²⁷

²¹ Legislative Service Commission, Potential Constitutional Infirmities in H.B. 350 of the 121st General Assembly, R-121-1458 (Sept. 18, 1995) (identifying at least 13 constitutional flaws); see also *Sheward*, 715 N.E.2d at 1075 n.7 (describing essential findings of the Commission).

²² Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155, 1199-1200 (1996). After the case was pending in the Ohio Supreme Court, Professor Werber encouraged the Court to “strike constitutionally infirm sections of H.B. 350 while affirming the validity of most of its provisions.” Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539, 577 (1997).

²³ See *Sheward*, 715 N.E.2d at 1073 n.6.

²⁴ The Ohio Constitution states that the “supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right” and that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” OHIO CONST. art. IV, § 5(B).

²⁵ See *Sheward*, 715 N.E.2d at 1096. The Ohio Supreme Court recognized the legislature's attempt to trample the separation of powers, stating:

The general assembly has circumvented our mandates, while attempting to establish itself as the final arbiter of the validity of its own legislation. It has boldly seized the power of constitutional adjudication, appropriated the authority to establish rules of court and overrule judicial declaration of unconstitutionality Such a threat to judicial independence is reminiscent of a bygone era of legislative omnipotence

Id.

²⁶ *Id.* at 1102.

²⁷ See, e.g., Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103

Although this is a noble sentiment, the restriction of constitutional rights, the obliteration of the jury system, the destruction of fairness in the civil justice system, and the illicit arrogation of judicial power by the legislature is a not a mere public policy choice.

In arguing that these issues are purely a matter of public policy, the tort restrictionists have attempted to turn separation of powers on its head by asserting that the courts owe an unexamined and one-way deference to any and all legislative actions. They have labeled this "cooperation." Such a blanket deference, however, makes no sense when the legislature has intruded into the realm reserved to the Supreme Court by the Constitution.

Tort restrictions of the type enacted in Illinois and Ohio elevate the designs of today's transient legislature over the intent and words of those who framed the state's organic law.²⁸ And this is something that is extremely important to understand. Most state supreme courts do indeed adopt a jurisprudence of original intent.²⁹ So they examine why these constitutional provisions were called into being. That is what the Supreme Court of Ohio did in *Sheward*.

In 1803, when Ohio became a state, it had previously experienced life as a territory under a dictatorial governor. The Framers of the Ohio Constitution were determined not to allow a dictatorial regime to rise again. As was often the trend in that period of our history, they gave all power to the legislature. The 1802 constitution, which eventually led to statehood, allowed the Ohio Legislature to appoint the governor's cabinet, and to appoint and remove judges.³⁰ The governor had no veto power.³¹ In other words, the legislature was omnipotent. It did not take long for special interests to realize that the legislature was where the action was, and that if powerful economic interests could control the legislature, members of the legislature could carve up the state in areas of influence and essentially set up monopolies throughout the state for themselves.³²

The most notorious incident took place in 1837 when the Ohio Loan Act was passed. The Ohio Loan Act was enacted at the behest of companies that built roads and canals. Its effect was to raid the state treasury to fund these roads. The private companies then charged the citizens who funded the roads tolls to use them.³³ This was an outrageous act; it completely emptied the

W. VA. L. REV. 1 (2000) [hereinafter Schwartz, *Sound Alternative*].

²⁸ This notion was affirmed by the Ohio Supreme Court in *Sheward*, when it stated that "[m]ajoritarian preferences are transitory; the Constitution is enduring and fundamental." *Sheward*, 715 N.E.2d at 1103.

²⁹ See, e.g., *Castleberry v. Evatt*, 67 N.E.2d 861 (Ohio 1946).

³⁰ OHIO CONST. of 1802, art. II, § 16, art. III, § 8.

³¹ GEORGE W. KNEPPER, OHIO AND ITS PEOPLE 96 (1989).

³² See generally ROBERT E. CHADDOCK, OHIO BEFORE 1850 (1908).

³³ See *Sheward*, 715 N.E.2d at 1077 (discussing the history of the Loan Act). See also

Ohio treasury,³⁴ and the result was agitation for the 1851 constitution that currently governs in Ohio. The 1837 Loan Act became known as the "Plunder Law."³⁵ The tenor and scope of the 1851 constitutional convention revealed an intent to put restrictions on legislative power, to strengthen the judiciary's ability to police the legislature, and to make sure that corporations (which were regarded as so evil, that an article regulating corporations was added to the Ohio state constitution) would never be able to capture control of the power-hungry legislature.³⁶ In *Sheward*, we asserted that the tort restrictionist law was indeed the new Plunder Act.

It is undeniable that the single and most constant theme in state constitutional history is the restraint of legislative power. These principles are detailed much more in state constitutions than we see in the federal Constitution. They come in the form of prohibitions on special legislation³⁷ and enhanced separation of powers provisions.³⁸ One of the primary reasons for this explicit concern for separation of power that is absent from the federal Constitution is common state experience with constant legislative forays into economic favoritism.³⁹ These are the evils that state constitutions are designed to stop. Many of the provisions were a response to the rise of large corporations with enormous economic and political power.⁴⁰

Thus, in the development of American constitutional law, we see that state constitutions are indeed a bulwark against this arrogation of authority by

David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6 and 13 of Article VIII in Historical Perspective*, 16 U. TOL. L. REV. 405, 408-09 (1985).

³⁴ *Id.* at 409.

³⁵ See KNEPPER, *supra* note 31, at 156.

³⁶ Representative of the remarks at the Constitutional Convention was one that opined: "Under the old Constitution, the legislature swallowed up all the rest of the government." 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, at 175 (1851) (remarks of Charles Reemelin). Another delegate suggested that, unless new principles restraining the General Assembly were adopted, Ohio would experience the "subversion of all our freedom, for our General Assembly might barter away one right and another till every vestige of freedom, and all proper powers of our government, might be lost by an imprudent assumption of power." *Id.* vol. 2, at 87 (remarks of Benjamin Stanton).

³⁷ See, e.g., ILL. CONST. art. IV, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.").

³⁸ See, e.g., N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). In Ohio, the provisions were much more specific. Article 2, § 32 of the Ohio Constitution forbids the general assembly from granting divorces or exercising "any judicial power not herein expressly conferred." Article IV, § 1 vests judicial power in the courts and specifically bars the General Assembly from exercising any authority "to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government."

³⁹ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 113 (1998).

⁴⁰ *Id.* at 115.

legislatures. This is not a new principle, or a different principle from what was written about in *The Federalist*. In *The Federalist*, James Madison said, “no political truth is of greater intrinsic value or stamped with greater authority by enlightened patrons of liberty” than separation of powers.⁴¹ He warned that “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.”⁴² Hamilton added that the courts have to act as “an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.”⁴³ In fact, the arrogation of power that belongs to the judiciary by the legislature is, as Madison put it, the “very definition of tyranny.”⁴⁴

Is this unusual? Are we really inventing new things? In 1923, the Ohio Supreme Court wrote that “it is quite obvious that the constitutional convention was determined upon a simplification and shortening of judicial procedure, to the end that substantial justice should be administered without denial or delay.”⁴⁵ The court also held that “[w]hether or not justice is administered without ‘denial or delay’ is a matter for which the judges are answerable to the people, and not to the General Assembly of Ohio.”⁴⁶ In fact, the court instructed in 1896 that, “when constitutional governments were established on this continent there was general familiarity with the course of judicial proceedings in the administration of the common law.”⁴⁷ Thus, the power exercised by courts is inherent, not a matter of legislative grace, as my friend Victor Schwartz has attempted to suggest by reference to reception statutes.⁴⁸

I promised to discuss more than just original intent. I promised that the views I am describing are consistent with those of Justices Scalia and Thomas. To illustrate this point, three years ago in a case called *Feltner v.*

⁴¹ THE FEDERALIST NO. 47, at 313 (James Madison) (Modern Library College ed., 1937).

⁴² THE FEDERALIST NO. 51, at 321-22 (James Madison) (Modern Library College ed., 1937).

⁴³ THE FEDERALIST NO. 78, at 506 (Alexander Hamilton) (Modern Library College ed., 1937).

⁴⁴ THE FEDERALIST No. 47, at 313 (James Madison) (Modern Library College ed., 1937) (“The accumulation of all powers, legislative executive and judiciary, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

⁴⁵ *In re Hawke*, 140 N.E. 583, 585 (Ohio 1923).

⁴⁶ *Schario v. State*, 138 N.E. 63, 64 (Ohio 1922).

⁴⁷ *Hale v. State*, 45 N.E. 199 (Ohio 1896).

⁴⁸ See Schwartz, *Sound Alternative*, *supra* note 27.

Columbia Pictures Television,⁴⁹ Justice Thomas wrote for a unanimous Court, holding that juries must determine damages in copyright cases because such cases were recognized by the common law before 1791.⁵⁰ In this case, the Supreme Court looked at what the right to trial by jury meant at the common law at the time the Seventh Amendment was added to the Constitution.⁵¹ Just as Blackstone,⁵² Coke,⁵³ the Courts of Westminster, and the colonial courts⁵⁴ all held that juries, not legislatures, determine damages under the common law, history was again decisive for Justice Thomas and the Court in *Feltner*.⁵⁵

I also find support for the separation of powers arguments I have advanced here and in these tort restrictionist law challenges in a recent decision written by Justice Scalia. In *Plaut v. Spendthrift Farms*,⁵⁶ Justice Scalia reviews a very relevant history of legislative exercise of judicial power in the states during the early years of our republic. Radical legislatures, to whom separation of powers was merely an abstract notion, regularly saw it as within their authority to “correct” judgments rendered in courts of law by vacating them and substituting their own. The result, as the Pennsylvania Council of Censors decried, was “favour and partiality” on behalf of those with political clout.⁵⁷ Justice Scalia, writing of that period for the Supreme Court, noted that “[t]his sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution . . . [who] made the critical decision to establish a judicial department independent of the Legislative Branch.”⁵⁸

⁴⁹ 523 U.S. 340 (1998).

⁵⁰ *Id.* at 353 (“The right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to [a] copyright owner.”).

⁵¹ *Id.* at 348-49.

⁵² See 3 WILLIAM BLACKSTONE, COMMENTARIES 397 (“the quantum of damages sustained . . . is a matter that cannot be done without the intervention of a jury.”).

⁵³ See 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234, at 155(b) (15th ed. 1794).

⁵⁴ See Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675 (1918) (establishing that the constitutional framers intended that the jury’s factfinding role would include assessment of the amount of damages to be awarded, an issue that has been settled at least since the time of Lord Coke).

⁵⁵ *Feltner*, 523 U.S. at 355.

⁵⁶ 514 U.S. 211, 221 (1995).

⁵⁷ *Id.* at 221.

⁵⁸ *Id.*

Defending that decision to create an independent judiciary during the ratification debates, Alexander Hamilton answered critics who suggested that revision of verdicts was an appropriate legislative power:

It is not true . . . that the parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorizes the revisal of a judicial sentence, by a legislative act. Nor is there anything in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle.⁵⁹

Hamilton thus essentially argues that every conception of the responsibilities of a court and those of a legislature rebel against the notion that the legislature can act to revise the judgments or verdicts of a tried case.

The historical record thus teaches, the Court said, that “the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a “judicial Power” is one to render dispositive judgments.’”⁶⁰ Despite that apparent lesson learned in framing the U.S. Constitution, it had to be relearned in framing today’s state constitutions after some early disastrous experiments with less than full judicial independence. It thus applies with greater effect and urgency to the issues discussed at today’s symposium.

One further observation. I must agree with Professor Presser’s paper when he writes that a Republic “is a society which is committed to the notion that the Rule of Law governs, that arbitrary actions on the part of government officials are not tolerated, and that representatives are supposed to act in the interests of all the people, and not simply to favor particular constituents.”⁶¹ I submit that when some try to use the legislative process to influence the legal process to favor politically powerful interests, as tort restrictionist laws do, we are in danger of no longer being a Republic. It was suggested that state courts striking down state tort restrictionist laws may be running afoul of the Guarantee Clause, the clause that guarantees every

⁵⁹ THE FEDERALIST NO. 81, at 484 (Alexander Hamilton) (Modern Library College ed., 1937).

⁶⁰ *Plaut*, 514 U.S. at 218 (citation omitted).

⁶¹ See Presser, *supra* note 1, at 652.

state a republican form of government.⁶² Such an issue is probably a political question and nonjusticiable.⁶³ If a court could entertain it, I suggest it cuts in favor of my argument; it is the legislative branch that enacts tort restrictionist laws that places the republican form of government in danger.

⁶² *See id.* at 665.

⁶³ *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).