

The Constitutionality of State Tort Reform Legislation and *Lochner*

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Stephen Presser begins his interesting paper with the observation that the invalidation of state tort reform legislation represents a severe crisis of the legitimacy of law and legal institutions.¹ In fact, he states it was *the most* severe crisis of legitimacy of law and legal institutions in our nation's history.² Professor Presser claims that this crisis began in 1937 with the legal movement known as Realism.³

I take an opposite view. The invalidation of state tort reform legislation is not the result of Realism, but of the absence of Realism. The approach that several state supreme courts have taken in recent years toward the evaluation of modern tort reform is exactly the form of *Lochner* Era analysis⁴ that was repudiated in 1937 on the basis of Realist critique.⁵

I believe that this is the reason that the form of economic analysis that I and many others have conducted showing the benefits to consumers of modern tort reform⁶ has had no effect on the constitutional debate. The repudiation of the *Lochner* analysis in 1937 was not the consequence of studies that showed that state economic regulation actually benefited the citizenry. It was not the result of economic analysis demonstrating that the minimum wage actually improved welfare (which we know it does not), or that limits on the number of hours that people worked actually improved

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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, 649 (2001).

² *Id.*

³ *Id.* at 651.

⁴ See *Lochner v. People of New York*, 198 U.S. 45 (1905).

⁵ See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding a state law that required a minimum wage for women workers); *United States v. Carolene Prods., Co.*, 304 U.S. 144 (1938) (upholding government regulations that are supported by a rational basis); see also BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

⁶ See, e.g., G.L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); G.L. Priest, *Modern Tort Law and its Reform*, 22 VAL. U. L. REV. 1 (1987); G.L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSP. 31 (1991).

health and well-being (equally suspect). Indeed, when we consider how irrelevant those economic arguments were to the revolution in 1937, we can see some of the reasons that conservative economic analysis today has not been very influential with regard to the constitutional debate over tort reform.

Instead, the repudiation of *Lochner* and of the *Lochner* approach, resulted from the conclusion that ineluctable principles such as freedom of contract or the preservation of individual liberty were unrealistic as values against which all state economic legislation should be measured. Once the myth was debunked that the principles of liberty and freedom of contract could control all economic legislation, then the grounds on which courts could invalidate properly enacted legislation were far more limited than had been earlier imagined.

Today, the United States labors under a similar myth regarding the common law. There is a long and venerable intellectual tradition of regarding the common law as in some way sacred, as autonomous and independent of legislation, not simply in terms of content but in an almost religious sense. Many regard the common law as somehow sacred in contradistinction to political legislation regarded as profane.

The myth of the sacred common law has historical roots. It is surely the approach of Blackstone, to whom Professor Presser refers in his paper.⁷ This myth was bolstered forcefully by philosophers, such as Hayek, who contrasted the common law to redistributive legislation.⁸ The same myth has received modern support from the law and economics school led by Richard Posner.⁹ Judge Posner describes the common law as magically efficient—in contrast to legislation, which is messy, undisciplined, and controlled by special interests. In a slightly different way, Richard Epstein (Judge Posner's distinguished colleague), takes a similar approach. Epstein believes that there is something mystical about the simplicity of the common law and of common law principles that makes those principles superior to legislative standards and legislative values.¹⁰

As with all myths and visions of the sacred, however, no one can precisely explain why the common law possesses these features. Perhaps because the common law developed incrementally, case by case, over hundreds of years, seemingly without regard to specific ends; perhaps because its principles have been formulated in general terms—Hayek's view. These features of the common law myth are not exactly reasons, but

⁷ Presser, *supra* note 1, at 649.

⁸ See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1978).

⁹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

¹⁰ See generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

do serve to some as justifications for regarding the common law as sacred. They do not qualify as reasons because none of them leads ineluctably toward greater rationality in public policy. For example, the incremental and case-by-case method of development might lead to irrationality and incoherence, rather than the opposite. Similarly, that the common law was developed without specific ends might suggest that, at heart, it is purposeless. That it developed over hundreds of years might only mean that it is anachronistic. And the fact that it can be described in general principles is true only at a very high level of abstraction, not at the case level where the rule might be confined to the relevant facts.

When dealing with a phenomenon approaching the sacred, however, reasons and explanations are of minor importance—examine any religious myth. The fact that the common law is accepted and endorsed very broadly without regard to a coherent explanation of its inherent values proves the point itself.

Ignoring Judge Posner and Professor Epstein, modern economic analysis has shown that the sacred traits of the common law are truly mythical. The common law is not efficient. Strict liability is not efficient. The expansion of liability is not efficient. Professors Fried and Rosenberg were correct when they argued that to promote efficiency, the expansion of liability ought to be limited.¹¹ I did not quite understand Professor Rosenberg's advocacy of strict liability as the appropriate direction for courts to take,¹² but I think it can be demonstrated that our modern tort system harms consumers, and it harms low income consumers most of all. Tort law has a regressive redistributive effect (as Professors Fried and Rosenberg pointed out),¹³ and is incomprehensible as a rational insurance regime.

Modern tort reform, notwithstanding Mr. Peck's description, represents an effort to change the law to benefit consumers. Corporate and insurance interests, as Professor Presser has described, are often viewed as villains. Corporations, in contrast, are consumer representatives, though I mean this in a slightly different sense than Professor Presser has suggested. Professor Presser emphasized the fact that many citizens are now investors in corporations and so may have some influence over corporate decisionmaking or some interest in corporate welfare.¹⁴ My point is that corporations and insurance companies are representatives of consumers in an entirely different way: Competition compels corporations and insurers to

¹¹ Charles Fried & David Rosenberg, *Presentation*, 31 SETON HALL L. REV. 625 (2001).

¹² *Id.* at 630.

¹³ This point has been well known at least since G.L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

¹⁴ Presser, *supra* note 1, at 653-54.

design manufactured products and insurance products to best meet consumer demands. Those corporations and insurers who most ably determine those demands and satisfy them most effectively receive the greatest consumer support.

This point is related to modern tort reform. The largely-judicial expansion of tort law has compelled manufacturers and insurers to provide products and services at costs greater than the benefits to consumers.¹⁵ Modern tort reform seeks to change tort law in order to reduce those excessive costs. Thus, tort reform is not an effort to plunder, but rather to reduce the costs incurred by consumers for investments that are of no value to them.

Nevertheless, arguments regarding the economic effects of modern tort law will never be sufficient to prevail in a battle with a common law regarded as sacred. Indeed, to simply argue economics with regard to tort reform is to see the issue as one of effect only and to ignore the sacred character of the common law. If state supreme court justices viewed the issues raised by modern tort reform legislation as involving economic effects, rather than involving the degradation of the common law, then the battle would be over. They do not, and the battle must continue.

What we need in the tort reform debate—to the contrary of Professor Presser—is not less Realism but more Realism. We must delegitimize the common law principles upon which the state supreme courts rely—the right to trial by jury; access to the courts; generalized due process—just as the Realists delegitimized the constitutional concepts of individual liberty and freedom of contract. This is not an impossible task. It is not purely an economic task. Indeed, the currency that is still given to the proposition of the general efficiency of the common law in some law and economic circles is more harmful than helpful because it confuses an essentially religious position—uniform efficiency—with careful economic analysis of effects.

The survival of the myth of the sacred common law is somewhat surprising because we have witnessed over the last century so many areas in which legislation at the state or federal level has preempted or displaced common law rules. Workers' compensation statutes are an obvious example. But virtually every form of legislation at the state and federal level since the New Deal represents an amendment of some duty or relationship previously established by the common law because, prior to the legislation, the common law controlled all economic relationships, surely not true today.

¹⁵ See generally Priest, *The Current Insurance Crisis and Modern Tort Law*, *supra* note 6.

The expansion of state and federal authority has been entirely at the expense of the common law and of the *Lochner*-like approach adopted by those state supreme courts that have invalidated modern tort reform legislation. Unlike Professor Presser, I do not believe that a federal solution to this problem is necessarily the appropriate answer, in part because Congress remains committed to the common law myth. State reform legislation, however, will never be ultimately successful until the myth of the sacred common law is destroyed.