

Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law

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History and public policy establish something all of us know by common sense: that legislatures serve an important role in formulating all of our law, including commercial law, property law, and tort law. Courts also have had a role in formulating law. It is interesting, however, to remember just how courts began to develop the common law. When the colonies became states, they needed to have in place a great deal of “law,” but they did not have time to enact it. So, state legislatures gave power to the courts to make law through “reception statutes.”¹ In drafting the reception statutes, however, the legislatures wisely recognized there might come a time when they would want to take that power back, and sometimes they did.² Thus, the legislatures were able to pass the Uniform Sales Act,

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¹ 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). Reception statutes were used, at the inception of the United States, as a vehicle for creating tort law:

In the debate about who should decide state tort law—legislatures or courts—a fundamental part of legal history has been largely overlooked. State legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of state legislatures was to “receive” the Common Law of England as of a certain date and have that provide a basis for a state’s tort law. In the same piece of legislation, called a “reception statute,” state legislators delegated to state courts the authority to develop the English Common Law in accordance with the “public policy” of the state. These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries.

Id. at 746-47. See also *Cashman v. Hedberg*, 10 N.W.2d 388 (Minn. 1943) (repealing laws which had earlier been received from Wisconsin, in favor of Minnesota’s own laws); *Drake v. Rogers*, 13 Ohio St. 21 (1861) (repealing reception statute).

² See, e.g., *City of Sterling v. Speroni*, 84 N.E. 2d 667, 671 (Ill. App. 1949) (noting that “the common law . . . [is] in force in Illinois until changed by statute”).

amend the Commercial Code, and draft property codes. But, for some reason, when state legislatures tried to take back the power to make tort law, all heck broke loose, and some court systems felt that they were the exclusive body to make that law.

That was the heart of the argument made by Mr. Peck when he spoke about the Ohio legislature's effort to enact tort reform legislation.³ Mr. Peck suggested that courts are more deliberative bodies and that legislatures act "in haste." I disagree with his account that Ohio's tort reform bill⁴ was hastily passed and politically motivated. I was present during one of many hearings on that bill; the hearing took about seven hours. The legislature heard from many witnesses. My friend, Ralph Nader, was out there. He showed up an hour late, yet his team was permitted an extra hour to testify. Mr. Nader surprised the legislators and brought with him a paraplegic who shared some very moving testimony. He was given the extra hour. This gentlemen strongly suggested any change in the tort system would be bad for society. In short, the legislature heard from a lot of people, with diverse interests.

I have also argued cases before the appellate courts and witnessed how they make law. I am usually permitted about twenty minutes of oral argument, during which I have been able to answer a few questions, and my opponent had the same, short opportunity. Then "Bing!" it's over. After that brief exchange, the court makes law. I ask you: "Which body had more resources with which to make brand new law?" Clearly, the legislature.

The legislature has the ability to hear from everybody—plaintiffs' lawyers, health care professionals, defense lawyers, consumer groups, unions, and large and small businesses. We have all been there and seen it. And, ultimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are but a few reasons why, over the years, legislators have received some due deference from courts.

But my friends at the Association of Trial Lawyers of America, and many are friends, had a vision a few years ago regarding the use of federal and state constitutions at trial. First, if I say to you, "constitution," what do you think of? You envision a document that is neatly encased in the Federal Archives—the Constitution of the United States of America—right? You don't think of a document that is the size of a city phone directory. That is what many state constitutions look like. If you carefully

³ Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672 (2001).

⁴ Am. Sub. H.B. No. 350, 1996 Ohio Legis. Serv. 244 (Banks-Baldwin).

searched through a state constitution, you could find a provision to hold almost any law unconstitutional. There are provisions in state constitutions that are so expansive that anyone who wants to do what he or she wants to do can find everything unconstitutional. For example, the “single subject rule”: what is or is not a “single subject”? The reason for the provision is to prevent logrolling, sneaking totally new subjects into a bill. But the single subject rule has been used by courts to nullify tort reforms that were open, obvious, and non-logrolled.⁵ The single subject rule can nail almost any law if it is given an absolutist interpretation.

A very important thing to realize is that the Constitution of the United States has a history, and it is not interpreted in an absolutist way. For example, even one of the most important provisions of the Constitution—the First Amendment—has limits: all speech is not protected; but most speech receives constitutional protection. Virtually all provisions of the Constitution of the United States have been interpreted by balancing values. What has happened is that state constitutional provisions have been given an absolutist construction by some judges, without deference to a rule of reason or rationale that the legislature thought about.

At an ATLA symposium a couple of years ago, ATLA members were told to never, never, never use the Constitution of the United States.⁶ You know why? Because of the ATLA speaker’s belief that the laws would be upheld over the Constitution of the United States.⁷ Because principles like due process and equal protection have a long history. But there is a second, very powerful, reason the ATLA speaker directed his flock to state constitutions. If, perchance, there was an ATLA victory under the Constitution of the United States, I would then have an opportunity to petition the Supreme Court of the United States and ask it to tell the state supreme court “you got it wrong.” The genius of ATLA, however, was to figure out a checkmate procedure. ATLA advised its members that by using only a state constitution, the final decision would be rendered by that

⁵ See, e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (overturning Ohio’s comprehensive tort reform statute on ground it violated “single subject” rule of state constitution); *Florida Consumer Action Network v. Bush*, Case No. 99-6689 (Leon Cty. Cir. Ct. Feb. 9, 2001) (granting summary judgment on ground Florida civil justice reform statute violated “single subject” rule), available at The Academy of Florida Trial Lawyers, <http://www.aftl.org> (last visited May 30, 2001).

⁶ Comments of Ned Miltenberg, *Constitutional Challenges to Tort Reform, Learn How to Develop Substantive and Procedural Challenges to Tort Reform Legislation*, Annual Meeting Session of Association of Trial Lawyers of America (1999). He also opined that “many state courts are better than the U.S. Supreme Court.”

⁷ For a discussion of more than a century of congressional enactments changing state liability law, and the numerous decisions consistently holding those statutes constitutional see Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999).

state's supreme court. An apparent perfect endgame. On the surface, at least, there is no "federal" issue to appeal to the Supreme Court of the United States because the Federal Constitution was not the basis for the state supreme court's decision.

Many state supreme courts have continued the tradition of saying that not everything in a state constitution is absolutist, and that absolutist jurisprudence is not the law.⁸ They defer to their sisters and brothers in the legislature. But sometimes that deference is quite selective. For example, Arizona Justice Feldman, whom I greatly respect, has upheld a law introducing comparative negligence into his state. It modified the traditional contributory negligence rule and helped plaintiffs. There was an Arizona constitutional provision that suggested that the doctrine of contributory negligence should never be changed. But Justice Feldman, with many references to the need to defer to the legislature when there was a rational basis for its action, upheld the new law.⁹ Several years later, however, a statute of repose as applied to products liability was under consideration. The rational basis for the statute was to encourage innovation. Innovation would be discouraged if manufacturers knew that they could be held liable for harms caused by their products decades after they were made. Justice Feldman held the statute of repose unconstitutional.¹⁰ I kept looking for a reference to "due deference." It was not there. I thought "What happened to that?" It just disappeared.

Tort reforms have a rational basis. The majority of our judges respect this fact. A minority do not. To witness a divided court that did not show respect for rationales that support tort reform, one should look at the Ohio decision in *State ex rel Ohio Academy of Trial Lawyers v. Sheward*.¹¹ It was an amazing case. First, nobody was injured; there was no true case or controversy. Nevertheless, the Ohio Academy of Trial Lawyers, who challenged the tort reform statute, basically said "If this becomes law, we're going to lose members, and suffer economically." Does that sound like a real injury? Four judges said yes; three said no. Responding to this decision, the *Harvard Law Review* wrote:

In its invalidation of [House Bill] 350, the court promulgated a "guilt by association" doctrine that will permit the court to strike down otherwise constitutional statutory provisions in bulk for merely gathering under a title with provisions branded unconstitutional. The

⁸ See, e.g., *McDougall v. Schanz*, 597 N.W.2d 148, 158 (Mich. 1999) (deferring to legislative judgment on expert witness qualifications); *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (upholding cap on damages in medical malpractice cases).

⁹ See *Bryant v. Cont'l Conveyor & Equip. Co.*, 751 P.2d 509 (Ariz. 1988).

¹⁰ See *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625 (Ariz. 1995).

¹¹ 715 N.E.2d 1062 (Ohio 1999).

court also . . . usurp[ed] the General Assembly's constitutional prerogative to self-police against logrolling. Not only did *Sheward* drive a deeper wedge between the Ohio judiciary and its legislature, but, in its efforts to preserve its common law power to formulate tort law, the *Sheward* majority may have undermined the Ohio Supreme Court's valued position as a defender of the constitution.¹²

As the *Harvard Law Review* illustrates, judges may inadvertently create disrespect for their vital branch of government by holding tort reform unconstitutional. For example, in Kentucky, the legislature decided to raise the burden of proof in punitive damages to make it a little bit more like the criminal law.¹³ The legislature proposed to move from a "preponderance of the evidence," which requires a fifty-one percent standard of proof, to a standard of clear and convincing evidence. The Supreme Court of the United States had praised such a change.¹⁴ Under an obscure doctrine, the Jural Rights Provision of the Kentucky Constitution, the Supreme Court of Kentucky held this provision unconstitutional.¹⁵

As we look to the future, we need to focus on the fundamental disrespect for the separation of powers doctrine that occurs when majorities of some state supreme courts nullify legislative action that has a clear, coherent and rational basis. This occurred when majorities of the State Supreme Courts of Illinois and Ohio struck down entire tort reform laws without careful analysis of the laws they were nullifying. If the Supreme Court of the United States showed similar disrespect for rational acts of Congress, editorials throughout the nation would cry out "This is wrong!"

¹² Case Comment, *State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 HARV. L. REV. 804, 809 (2000).

¹³ See *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). The Supreme Court of Kentucky described the legislation:

In general, the intent of the Legislature was to redefine the circumstances in which punitive damages were recoverable, and to that end a new legal standard was established. Departing from the traditional common law standard which permitted a jury to impose punitive damages upon a finding of gross negligence as measured by an objective standard, the new statutory standard . . . requires a determination that the defendant acted with "flagrant indifference to the rights of the plaintiff, and with a subjective awareness that such conduct will result in human death or bodily harm." It also requires proof by clear and convincing evidence.

Id. at 261.

¹⁴ See *Williams v. Wilson*, 972 S.W.2d 260, 272-75 (1998) (Cooper, J., dissenting); *Pac. Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 22 n.11 (1991) ("There is much to be said in favor of a State's requiring, as many do, a standard of 'clear and convincing evidence . . .'" (citation omitted)).

¹⁵ Dissenting Judge Cooper traced the history of the "Jural Rights" provision of the Kentucky Constitution and demonstrated that it was totally inapplicable to the legislation before the Court. *Williams*, 972 S.W.2d at 212-76 (Cooper, J., dissenting).

But judicial nullification by state supreme court action has been under the media radar, and has escaped public scrutiny. It is time for thoughtful scholars, the media, and most importantly, the American public—the voters—to say “no” to judicial nullification of rational laws.