

Roundtable: Does Tort Reform Threaten Judicial Independence?

PROFESSOR PRESSER: Victor Schwartz is not only a great lawyer but a great scholar. He just solved the case for me. We have pending before us the question of how to word a jury instruction to explain clear and convincing evidence, and I have been trying to find some answer to it. I like his suggestion of eighty-three percent—what could be better than that?

AUDIENCE MEMBER: To Robert Peck: Do state constitutions create static definitions of torts and causes of action, or is our understanding of these concepts elastic?

MR. PECK: You are not looking at the issue correctly. We are not talking about whether state constitutions caused torts to exist or whether they always existed. But there are certainly some static rules within the federal and state constitutions. The exclusive jurisdiction over those rules belongs to the Supreme Court. Some things have not changed. For example, the jury's function is no different today than it was when the Seventh Amendment was added to the Constitution. So, yes, certain parts are static and unchangeable unless the Constitution is altered.

MR. SCHWARTZ: I would not necessarily agree with that, in the context of some state constitutions. If you look at Illinois, it is impossible to conclude that the Illinois Supreme Court, when it reached its decision in *Best v. Taylor Machine Works*,¹ interpreted the common law as it would have been understood when the reception statute was passed. So I think you are absolutely right in proposing that there are some elastic provisions in state constitutions.

PROFESSOR PRESSER: I question why it is common for courts to alter the common law over time because of new problems and new issues that appear, but legislatures are not as free to respond to new problems and new issues by participating in the development of tort law?

PROFESSOR PRIEST: Legislatures are just as free to respond to new problems. As an obvious example, workers' compensation is a form of legislative displacement of common law rules that has been widely accepted. Every court decision that upheld a workers' compensation statute (most in the early years of the twentieth century), upheld it on the ground that the statute provided a benefit to injured workers in return for

¹ 689 N.E.2d 1057 (Ill. 1997).

their giving up their right to trial by jury. Another similar example of an accepted legislative displacement of tort law is the United States Supreme Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,² which upheld the validity of the Price Anderson Act. In that opinion, Chief Justice Burger validated Congress' enactment of legislation that enforced a \$560 million cap on damages and required a waiver of defenses by indemnitors in the event of a nuclear catastrophe.³ The Court noted that this was an appropriate way to promote nuclear development, while compensating victims for a possible nuclear accident, and shielding the government from excess liability. Thus, the Court held that no due process rights were violated.

My earlier point was that, in the period prior to the second New Deal, there was extensive examination in the academy and debate in the popular press and among lawyers, as to what the appropriate standards were upon which courts might invalidate legislative displacement of common law rules. As is well known, it was questioned whether the principles of constitutional interpretation that had been dominant during what we now call the *Lochner* Era were really defensible, and whether one could find sufficient support in the Constitution to sustain the broad reach given to the principles of freedom of contract and individual liberty. Over a long period of time and after a substantial debate, those basic ideas were delegitimized. It came to be seen that there was a range of activity that state legislatures had undertaken, which was endorsed by conservatives and liberals alike, that was basically inconsistent with the notion of a Constitution frozen in time on a foundation of contract and liberty.

Some today view the common law as impervious to such a debate because of its venerable age and because of the way it developed. Some judicial decisions reflect a belief that the common law exists autonomously and independent of the activities of legislatures on a day-in and day-out basis in a wide range of areas.

² 438 U.S. 59 (1978).

³ *Id.* at 93. The Court explained the validity of the provision:

The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act.

Id.

In my opinion, this view is no different from how many a century ago viewed the federal Constitution: the *Lochner* view. The *Lochner* view, as we know, was de-legitimized—undercut—leading to the “switch in time,” the dramatic shift in constitutional jurisprudence characteristic of the New Deal. I believe that the various state supreme court decisions that have held modern tort reform unconstitutional must be subjected today to the same form of anti-*Lochner* analysis. The weakness and vulnerability characteristic of *Lochner* Era jurisprudence are the exact weakness and vulnerability of the decisions (which Mr. Peck defends) of the supreme courts of Ohio and Illinois. In these decisions, courts struck down tort reform legislation under abstract principles, such as the right of trial by jury, access to the courts, and the like, similar to the principles invoked to strike down state reform legislation during the *Lochner* Era.

MR. SCHWARTZ: I want to comment on something that Mr. Peck said earlier, because it is a commonly accepted fallacy that if you change tort law you have to give a plaintiff some other goody. In other words, if you take away his Hershey bar, you’ve got to give him an M&M. That is not really how the law should work.

Mark Behrens wrote (in an *amicus curiae* brief where the majority of the Virginia Supreme Court, in *Pulliam v. Coastal Emergency Services of Richmond, Inc.*,⁴ followed what he advocated) that the legislature, if it does in some way change tort law, does not have to give the plaintiff other alternative rights. Changes in tort law, however, can be a benefit for the society as a whole. *Pulliam*, for instance, helped to bring about more practice in rural areas of Virginia, which was meant to be achieved by legislation. The Supreme Court of Virginia did something in *Pulliam* that deserves careful thought. Justice Kinser noted in a concurring opinion that the restriction was a little bit too restrictive, and asked the state legislature to reconsider.⁵ He mentioned it in his opinion, and then the legislature went back and raised it. That is the kind of cooperation between branches of government I submit we ought to see more of.⁶

⁴ 509 S.E.2d 307 (Va. 1999).

⁵ *Id.* at 322-23 (Kinser, J., concurring). Justice Kinser wrote:

The General Assembly has the responsibility to protect the health, welfare, and safety of the citizens of this Commonwealth through appropriate legislation. However, the medical malpractice cap works the greatest hardship on those individuals who are the most severely injured by the negligence of health care providers. Nevertheless, I cannot be influenced by such concerns when deciding the constitutionality of a challenged statute. *I can only express my views with the hope that the General Assembly will adopt a more equitable method by which to ensure the availability of health care in this Commonwealth.*

Id. (emphasis added).

⁶ See Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between*

JUSTICE FELDMAN: Could the legislature abolish torts so that no one—no matter what wrong was done—could have a lawsuit for compensation. There would be no deterrence. Is that possible?

MR. SCHWARTZ: See, you and I agree there, because what bothers me is the absolutist view that open court means open to everything.

PROFESSOR PRESSER: I have a very quick comment. Professor Priest and I do not disagree about the non-sacred nature of the modern common law. Indeed, the irony is in the late eighteenth and early nineteenth century, when the common law was adopted by reception statutes, there were two things that were understood. One was that the common law did not give judges discretion, that they were supposed to follow rules that were laid down, rules that were understood, rules that Jefferson even embraced in huge parts of the common law. And second, that the common law could be changed by statute. Strangely enough, the modern understanding is that judges have total discretion under the common law, and you cannot amend it by statute. That is what is wrong with the tort system.

State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War, 103 W. VA. L. REV. 1 (2000).