

The Tort Reform Debate: A View from Colorado

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Today I would like to start out with a quiz. What is the best thing about my home state of Colorado? (a) the Rocky Mountains; (b) the recreational opportunities provided by the Rocky Mountains; (c) the Broncos; or (d) the state's tort regime? Now of course, all of these answers are correct, so it is unfair for me to ask you to choose among them. But for purposes of our panel today, (d) is—as we say in the legal exam world—the *most* correct answer.

Colorado has been very active on the tort reform front. For example, the state has abolished joint and several liability in most cases,¹ and has capped punitive damages at the amount of actual damages unless there has been a special showing of egregious behavior during the pendency of the litigation, in which case the cap rises to three times the amount of actual damages.² Thus far, the Colorado Supreme Court has not abrogated these legislative reforms.

Certainly there are many states that have not adopted tort reform measures. From a federalism perspective, however, that is fine. To illustrate the point, let's assume you are in the midst of planning your next vacation, and you are considering going to Colorado. If you go skiing in Colorado and get injured on the slopes, it is unlikely that you will be able to recover against the ski area under Colorado law.³ Similarly, if you come to the state to attend a Colorado Rockies baseball game and get hit in the head with a foul ball, you

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¹ See COLO. REV. STAT. ANN. §§ 13-21-111.5(1), (4) (1997) (providing that “[i]n an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant,” except that “[j]oint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act”).

² See COLO. REV. STAT. ANN. §§ 13-21-102(1)(a), (3) (1997).

³ See, e.g., COLO. REV. STAT. ANN. § 33-44-112 (1998) (stating “no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing”); § 33-44-103(3.5) (defining “inherent danger” to include, *inter alia*, collisions with natural objects, man-made objects, or other skiers, “variations in steepness or terrain,” and “the failure of skiers to ski within their own abilities”).

will find it difficult to sustain a suit against the owner of the team.⁴ If for some reason you decide you would prefer a more generous tort recovery system, you might choose to forego that Colorado vacation and travel somewhere else instead. That is the joy of federalism. Federalism creates competition and diversity among the states; people, in turn, can vote with their feet.⁵ The point is, Colorado's tort system may not be the "best" in some abstract sense, but it is the best for Colorado.

Although the benefits of federalism are numerous, we also need to be wary of state laws that have "spillover effects"—that is, where one state's law has an undesirable and impermissible impact on its neighbors.⁶ In my view, the question of tort reform (and the question before this panel) must be the following: How can we preserve the benefits of federalism, while controlling these spillover effects?

Controlling spillover effects may require federal legislation. There are three approaches to such legislation swirling around this panel discussion.

The first, as Mr. Willard discussed briefly,⁷ is federal substantive tort law—that is, federal law that changes state tort liability (as opposed to procedural) law through the Supremacy Clause.⁸ For example, Congress passed sweeping product liability legislation in 1996, which, among other things, would have established a national ceiling on punitive damages, set a uniform standard under which such damages could be awarded, and eliminated joint and several liability for noneconomic damages.⁹ President Clinton vetoed the legislation, citing federalism concerns.¹⁰ Since that time, tort reformers have changed their strategy, turning their focus from sweeping,

⁴ See, e.g., COLO. REV. STAT. ANN. § 13-21-120(4)(a) (1997) (spectators are "presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary. These risks include, but are not limited to, injuries which result from being struck by a baseball or a baseball bat").

⁵ For a more extensive discussion of the benefits of federalism, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987).

⁶ For an in-depth consideration of spillover effects, see Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994).

⁷ Richard Willard, *Comment*, 31 SETON HALL L. REV. 750, 753-54 (2001).

⁸ U.S. CONST., art. VI, cl. 2.

⁹ The Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. §§ 108, 110 (1996). For a discussion of the history of this legislation, see Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support its Enactment Now*, 64 TENN. L. REV. 595 (1997).

¹⁰ Message on Returning Without Approval to the House of Representatives the Common Sense Product Liability Legal Reform Act of 1996, 32 WKLY COMP. PRES. DOC. 780 (May 6, 1996).

cross-industry bills such as the 1996 legislation, to more modest, industry- or issue-specific reform.¹¹

I am cautious about substantive federal tort reform for several reasons. First, federal substantive tort legislation imposes a uniform, blanket solution on all the states, and thus necessarily sacrifices the competition and diversity among states that federalism is designed to protect. Many of the substantive proposals in Congress represent significant and important efforts at reform, and I do not mean to suggest otherwise. My complaint with federal substantive tort reform is with the scope of its coverage, not its content.

Secondly, federal substantive tort legislation raises the “genie problem.” Once you go down the tort reform road at the federal level, you let the genie out of the bottle and there is no putting it back. In other words, federal substantive tort reform raises the specter that state tort law will be swallowed up by federal regulation just as other areas of law—environmental and criminal law, for example¹²—have been.

In my view, the current tort reform debate does not fully appreciate the genie problem. Indeed, the debate oftentimes assumes that tort reform is only a one-way ratchet; that is, that tort reform is going to cut back, not expand, liability.¹³ Historically, however, tort reform has not had this meaning at all.

For example, in a 1962 *Harvard Law Review* article, Robert Keeton applauded the “impressive evidence of continuing reform of tort law” by the courts, including, in product liability cases, the abolition of the privity requirement between plaintiff and defendant and the move from negligence to strict liability.¹⁴ In other words, “tort reform” has been, and can be again,¹⁵ a

¹¹ See Louis Jackson, *Less is More on Tort Reform*, NAT'L J., May 13, 2000, available at 2000 WL 6437276 (discussing issue-specific initiatives including proposals to shield corporations from Y2K liability, cap punitive damages against small businesses, and insulate rental car companies from vicarious liability).

¹² Of course, these are two areas in which the Supreme Court has scaled back Congress' authority in recent years. See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 684 (2001). In *Solid Waste Agency*, the Court held that a local agency could build a waste disposal facility despite the fact that the Army Corps of Engineers had deemed the site as a habitat for migratory birds: “Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.” See also *United States v. Lopez*, 514 U.S. 549 (1995) (holding that regulation of the possession of a weapon within 100 feet of a school was outside Congress' power under the Commerce Clause).

¹³ See, e.g., Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with “New Style” Litigation*, 27 WM. MITCHELL L. REV. 237, 238 (2000) (defining “traditional” tort reform measures to include “attempts to address the problem of excessive punitive damages awards and arbitrary noneconomic damages awards, laws providing for the fair apportionment of liability, and curbs on ‘long-tail’ liability for old products and services, among other reforms”).

¹⁴ Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 485 & nn. 59-60 (1962).

two-way ratchet that expands and contracts liability. If you set aside federalism for one type of reform, you do so for the other as well.

Finally, I have some constitutional concerns about federal substantive tort law. The United States Supreme Court is in the midst of a federalism revival. In several recent decisions it has scaled back Congress' power to legislate in areas traditionally governed by state law. How would federal substantive tort law fare under the Court's "New Federalism" decisions? The standard defense of federal substantive tort reform, at least in the product liability arena, is that the products travel through interstate commerce.¹⁶ So did the weapon at issue in *United States v. Lopez*,¹⁷ but that was not enough to save the Gun-Free School Zones Act.

There are numerous arguments on the other side, of course.¹⁸ I raise the issue because I do believe it is another factor complicating the move toward federal substantive tort reform.

The second proposal on the table is the idea of loosening the diversity requirements needed to bring a case in federal court. For example, legislation currently pending in Congress would, in class action cases, change the federal diversity rule from requiring complete diversity (i.e., diversity exists when no plaintiff comes from any defendant's state) to minimal diversity (i.e., diversity exists if a single plaintiff comes from a state other than any defendant's state).¹⁹ As a result of the change, much of the class action litigation that now must be brought in state court could be brought or removed to federal court.²⁰

This sort of reform does not raise the same federalism concerns as substantive federal tort reform, as it preserves the diversity of state substantive law. It is not without its shortcomings, however. The goal of such legislation is to keep class actions out of state court, but why? Prominent advocates of the proposal suggest that "[s]tate courts often express bias against out-of-state corporate defendants and fail to apply class action certification standards as rigorously as federal courts do."²¹ If this is true, state courts are not going it

¹⁵ Most recently, tort reform has occupied the national stage in the proposed patients' bill of rights. See Patients' Bill of Rights Act of 2001, H.R. 2315, 107th Cong. (2001).

¹⁶ See, e.g., Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269, 278-79 (1999); Victor A. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support its Enactment Now*, 64 TENN. L. REV. 595, 606-607 (1997).

¹⁷ 514 U.S. 549 (1995).

¹⁸ See *supra* note 16.

¹⁹ See The Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. §§ 3-4 (1999); The Class Action Fairness Act of 1999, S. 353, 106th Cong. §§ 3-4 (1999).

²⁰ For an argument advocating such a change in diversity jurisdiction rules in the class action context, see Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483 (2000).

²¹ *Id.* at 484.

alone: they have the assistance of juries. Indeed, jury verdicts vary dramatically from state to state and within states.²² Loosening the diversity requirements will do nothing to change that phenomenon. Litigants will still seek favorable jury pools, simply shifting forum-shopping from state to federal court.

Finally, I want to address Professor Baker's proposal to use conflict of laws principles to control spillover effects.²³ The proposal is a good one for two reasons: first, it appears to be on firm constitutional footing with the Full Faith and Credit Clause;²⁴ and secondly, it attempts to preserve the competitive nature and diversity of state law.

My problem with Professor Baker's proposal, however, is that it fails to propose a specific conflict of laws principle. He simply suggests that he would like a rule, any rule, perhaps.²⁵ I like rules too, but not all rules. I am somewhat suspect of the kind of rule that Congress would propose, and until I see that rule, I choose to reserve judgment. Congress could pass a procedural conflicts of laws rule that had pernicious substantive effects. It could choose, for example, a rule in which the court is to apply the law that is most favorable to the plaintiff, or to the defendant. Either of these options would, of course, be a bad rule. I would hope that Professor Baker will tell us what kind of a conflict rule he would advocate.

²² See Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 516 (2000).

²³ John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 SETON HALL L. REV. 698, 716-33 (2001).

²⁴ U.S. CONST. art. IV, § 1.

²⁵ Baker, *supra* note 23.