

Roundtable: Tort Law in the Federal System: An Exchange on Constitutional and Policy Considerations

PROFESSOR BAKER: My point was to focus on the inadequacy of what had been offered in Congress, and to point out and lead us to the real problem as being choice of law.

Professor Eid says I punt on this question. It is not that I punt; I take my model really from the Constitutional Convention. If there is ever going to agreement, first of all we must agree on the fundamental principle because we all know the devil is in the detail. But if you fight on the detail first, you will not get and lock-in on a principle. If we can lock-in on certain principles, then we can get into the detail.

There is an essential difference in choice of law because, as I point out in my paper, choice of law does not come out of a common law mindset. It comes out of a civil law mindset, a law of nations mindset, and almost no law school, except ours, teaches anything about this except in conflicts classes and in comparative law to some extent. Yet, we are now in a world where these disciplines are absolutely critical in dealing with internet and other globalization issues.

Choice of law is important, and ultimately you have to confront the substantive law question. I do not deny that. I structured this deliberately to avoid the question because as far as I went, it is difficult enough. Part of the reason you have to punt is because federalism is like a Rubik's Cube. You change one thing and it affects something else. You have to understand the structure as a whole and that is what I am trying to do. I want people to understand the structure as a whole, which is vertical federalism, horizontal federalism, and separation of powers. Read *The Federalist* 39,¹ which discusses the republican form of America.²

¹ THE FEDERALIST NO. 39 (James Madison) (Modern Library College ed., 1937).

² *Id.* at 245. Madison wrote:

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and State governments; and in its express guaranty of the republican form to each of the latter.

Id.

The fact of the matter is we do have a new kind of common law in this country, not the sacred common law from England. It is the kind of homogenization and harmonization that comes about through a common culture. Often, academics complain that the United States is too homogenized. Indeed, if you understand the federalist design, it is deliberate. They understood that you had to work it so that the will of the people, despite different authority from jurisdiction to jurisdiction, would over time produce a common approach to things.

The fundamental issue between Richard Willard and me on this point is not that we do not need a common law, or a uniform law. We do, especially in commercial law. The difference is whether it is going to be top down from Congress or whether it is going to take longer and be generated bottom up from the States. And the point about going to choice of law is to stop the outlaw Jesse Jameses of the world, and to realize that in a choice of law regime, over time you will generate the kind of uniformity in homogenization that Richard desires.

As for Ted Olson, we actually agree on a lot of things, but I do not know that he would be willing to stand up in front of any court and say that his client is not concerned with justice. I think that the problem is that the argument embraced by the corporate mindset is purely about cost benefit. Cost benefit arguments may be rational, but governance is never purely rational, and certainly juries are not purely rational. Tort law, whether it should be or should not be, is being "remoralized."

Although tort lawyers may not be opposed to corporations, they know how to use the tort system rhetorically to vindicate the notion of justice. The failure of corporate defense often is that it presents only a cost benefit analysis instead of embracing an argument for justice, which could be grounded in the Constitution. Instead, it seems to me that corporate interests often ignore some very good constitutional arguments for their position and they abandon the field to a distortion of the Constitution by trial lawyers.

MR. OLSON: The question leads me to conclude that I may have been a little too ironic in trying to make my point. Let me make my thesis clear. What I meant to say was this: it is problematic when message lawsuits, punitive damage lawsuits, class action lawsuits, and other departures from the traditional compensatory tort system are brought to cause changes in behavior outside the state in which a case is pending. The only way to respond to such abuses is to protect interstate commerce from the parochial concerns, impacts, and disruptions that could be caused by the decisions of individual states.

There were several references to the Florida election controversy. The Florida Supreme Court's decisions, in fact, implicated federalist principles. Some people argued that this was Florida's election, and the United States Supreme Court should not get involved. That argument ignored the fact that a presidential election was at stake, and the Florida courts were attempting to change the outcome of an election that affected all of the states. There is a difference between states acting to protect their own state interests, and conduct within one state that will effect the rights of citizens of many states. In this case, an election for citizens everywhere was at stake, just as interstate commerce is at stake, in some cases. In situations like this it is entirely appropriate and entirely consistent with concepts of federalism for the federal government to become involved through the Legislature or the United States Supreme Court.

MR. WILLARD: I would like to clarify my statement. I am not skeptical about federalism, I am skeptical about an exaggerated and romanticized view of federalism. There is a big difference between federalism and states' rights. As Mr. Olson pointed out, federalism involves faithfulness to the Constitution and to the Framers' views about how the Republic should function. It does not mean a romantic preference for states' rights in every situation. The Framers did not intend to give the states priority in every circumstance, and certainly not over interstate commerce. Thus, I am favorable towards federalism, but I think it should be properly interpreted.

AUDIENCE MEMBER: I would like to hear a reaction to the idea of choice of law in product liability actions. And, do you agree that if a manufacturing company is permitted to apply the law of its home state, that consumers could simply choose not to buy those particular products? As a hypothetical example, if an Alabama judge and an Alabama jury (I should quick picking on Alabama) applied a federal choice of law that goes up through the Alabama court system to the Alabama Supreme Court, the choice of law would not be much protection at all.

MR. BRYANT: If manufacturers moved to South Dakota or any other state, and if the choice of law was from where the manufacturer was headquartered, it would be difficult for consumers. This is because, as a practical matter, most people do not know where anything is manufactured. I also think it is silly to argue that if General Motors decided not to distribute their cars in a particular state, and it did not want to do business there, it could not come up with ironclad rules that would prevent long arm statutes from being used against it, even as a matter of due process. The reality is that General Motors wants to do business in every state, so that is just a red herring.

I do want to comment on Mr. Olson's clarification that lawsuits ought to be removed to federal court if they were instituted to send a message. I do not know how you can figure out which lawsuits are intended to send a message or not. Twenty individual lawsuits could have the same market impact, piece by piece, as one big lawsuit. Finally, in some cases federalism principles do not apply, unless the state laws violate federal constitutional rights to due process or some other federal constitutional rights. One idea underlying all the federalist principles is that the states may get it wrong. They may come up with a result, with which some of us disagree, but this does not mean we should just forget federalism.

AUDIENCE MEMBER: It makes perfect sense, for example, for Florida to impose full liability to the full extent of the law because Florida trial lawyers and Florida plaintiffs will get money belonging to out-of-state corporate defendants.

MR. OLSON: That was a point I made. You made it more eloquently than I did, but that was the point I was trying to make. There is a fundamental imbalance in class-action product liability suits. That is why I thought that Professor Baker's choice of law proposal, while a good one, would not go far enough, and why we need some federal legislation to limit tort liability.

AUDIENCE MEMBER: I have a question for Mr. Bryant. I work on tort reform, a lot of it at the federal level, and I often hear trial lawyers ask about states' rights and federal legislation. Frequently the answer was leave tort reform to the states, let the states experiment. But, as Professor Eid has suggested, I think very correctly, this is a two-way street.³ Under the same sort of logic that tort reform should be conducted at the State level, do you feel the same way about federal laws that affect patients' rights, for example, against the health maintenance organizations (HMOs)?

MR. BRYANT: I have no trouble with federal regulation of HMOs. In the HMO context, as I understand it, the big battle is over the Employee Retirement Income Security Program (ERISA), a federal law that has been interpreted to preempt certain state common law claims against the HMOs.⁴

³ See generally Allison H. Eid, *The Tort Reform Debate: A View from Colorado*, 31 SETON HALL L. REV. 740 (2001).

⁴ See, e.g., Karen A. Jordan, *Coverage Denials in ERISA Plans: Assessing the Federal Legislative Solution*, 65 MO. L. REV. 405, 407 (2000) ("although courts have narrowed the scope of preemption in recent years and have allowed some negligence claims to proceed against managed care plans, courts continue to hold that ERISA insulates managed care plans from liability arising from any aspect of a benefit determination"); see also Amy C. Fehn, Comment, *Are We Protected From HMO Negligence? An Examination of Ohio Law, ERISA Preemption, and Legislative Initiatives*, 30 AKRON L. REV. 501 (1997) (discussing cases which have interpreted ERISA to preempt state law, and discussing exceptions to the preemption rule).

I believe that the real argument, in terms of liability, is whether the federal law should be changed to either allow a federal cause of action or to let the states apply their own common laws. Given the existence of a federal law already in place, I have no trouble that federal action ought to be taken.

If there were no federal law, I would not favor federal causes of action against HMOs. I would let the HMOs be subject to the state tort law and let the HMOs try to convince individual states to immunize them. We can argue about whether that is right or wrong, or whether it violates a federal or state constitutional right, but I think you have to recognize that in the HMO debate, a federal statute already exists.