



Lessons from History: State Constitutions, American Tort Law, and the Medical Malpractice Crisis

John Fabian Witt

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Printed in the United States of America.

ISBN 0-9741239-4-3

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Acknowledgments

Many thanks to Bill Sage and Cathy Sharkey for their valuable comments on earlier drafts of this paper, and to Kevin Meier for research assistance. The opinions stated in the paper are the author's and not necessarily those of The Pew Charitable Trusts.



Executive Summary

Background:

State constitutional law has become a battle ground in the movement to reform the law of torts, particularly medical malpractice.

- In the past 20 years, dozens of tort reform statutes—including but not limited to measures capping damages—have been struck down by state courts as impermissible under state constitutions.
- At least 26 such decisions have affected legislation dealing specifically with medical malpractice.

Goals:

This report pushes past the myths that have grown up around the state constitutional law of tort reform to analyze the place of state constitutions, constitutional amendments, and constitutional litigation in American tort law. Commentators on all sides have treated the “constitutionalization” of tort as a new phenomenon in American law. In fact, American tort law has developed in the shadow of state (and occasionally federal) constitutional law.

Beginning in the nineteenth century:

- Wrongful death statutes gave rise to a generation of constitutional amendments and constitutional litigation.
- Employers challenged the constitutionality of statutes that expanded their liability for workplace accidents.
- Railroads challenged the constitutionality of statutes that made them liable for fires caused by engine sparks and for cattle killed on the tracks.
- Businesses challenged workmen’s compensation statutes as unconstitutional takings of their property.

Using historical narratives—not legal-doctrinal or statistical analysis—the report explains the role of state constitutions in the development of American tort law in order to draw lessons for how lawyers, legislators, and judges ought to think about constitutional law and state constitutional amendments today.

Conclusions:

- State constitutional law has long shaped American tort law. Therefore, supporters of modern tort reform efforts should not regard the latest generation of constitutional decisions as an unprecedented threat to basic constitutional principles like separation of powers and popular sovereignty.
- Those who would use state constitutional litigation to ward off tort reform legislation should do so cautiously, however. State courts have too often used general provisions of state constitutions—such as due process and equal protection clauses—to interfere with public policy innovations in tort law that over time have become widely respected.
- A new, potentially beneficial development in the American constitutional law of torts is amending state constitutions to modify or repeal provisions from previous eras establishing specific state constitutional mandates for tort law. This latest round of constitutional amendments is novel because it seeks to return discretion and policy-making authority to state legislatures. It may also be sensible; the political stakeholders on both sides have roughly equivalent resources and sophistication, and therefore can engage fairly in debate.

Introduction

Judging by the heated rhetoric, one could be forgiven for thinking that tort law represents a new threat to the American constitutional order. Court decisions striking down tort reform statutes on state constitutional grounds, say defense-side commentators, constitute a new kind of “judicial nullification” of legislatures’ legitimate public policy choices (Schwartz and Lorber 2001: 917). Such decisions are “state ‘constitutionalism’ run wild,” exhibiting a “fundamental disrespect” for the separation of powers (Schwartz and Lorber 2001: 919; Schwartz 2001: 692). They exhibit “Lochner Era” theories of the judicial role that were “repudiated in 1937.” The result is described fantastically as “perhaps the most severe crisis of legitimacy of law and legal institutions that we have faced since Dred Scott” (Priest 2001: 683; Presser 2001: 649).

On the plaintiffs’ side, the American Trial Lawyers’ Association has initiated a constitutional litigation program designed to fend off a new tort reform campaign that threatens to result in the “restriction of constitutional rights” (Peck 2001a: 677). Putative

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tort reformers, plaintiffs’ advocates say, want “nothing less than the elevation of the designs of today’s transient legislature over the words and intent of those who framed each state’s organic law.” On this view, when courts strike down tort reform legislation, they are thus upholding and even “reviving” the traditional principles of American constitutional law (Peck 2001b: 26). Indeed, some on the plaintiffs’ side even argue that state constitutional decisions striking down tort reform legislation are evidence of the capture of state legislatures by defense interests,

leaving courts to protect majority will (Abel 1999).

Virtually everyone, however, apparently agrees that the introduction of state constitutional analysis to American tort law is a novel phenomenon. Even those who style themselves centrists see state constitutionalism as a newly important development. Commenting on the most recent effort to reform the nation’s tort laws—an effort that began with the first medical malpractice crisis in the mid-1970s—one such observer has called the disputes over whether such reforms are constitutional a “battle, with roots” merely some “twenty-five years deep” (Werber 2001: 1047).

Tort law and the law of state constitutions have developed hand-in-glove over the past one hundred and twenty-five years. For almost as long as there has been a field called ‘tort law,’ American lawyers have been arguing about the constitutional limits of legislated tort reform.

This widespread impression of novelty is wrong. American tort law and the law of American state constitutions have developed hand-in-glove over the past one hundred and twenty-five years. For almost as long as there has been a field called “tort law,” American lawyers have been arguing about the constitutional limits of legislated tort reform. Tort law emerged between the 1850s and the 1880s (Witt 2004). From the 1870s onward, state constitutions powerfully influenced its development. Moreover, tort law and state constitutions have had reciprocal effects, for even as constitutions shaped the law of torts, legislation in the torts area helped to construct basic principles of state constitutional law. Indeed, in the first 15 years of the twentieth century, state constitutional cases involving the law of accidents generated politi-

cal controversies that contemporaries saw—rather more realistically than some defense lawyers today—as the lowest moment in the history of American courts since the Dred Scott case.

The current generation of state constitutional decisions reviewing tort reform legislation is merely the latest act in a sustained drama involving state (and occasionally federal) constitutions, on one hand, and tort law, on the other. This history, however, does not necessarily lend legitimacy to contemporary judicial policing of tort legislation by providing it with historical antecedents. Constitutional forays into the making of American tort law have led state courts to some of their most ill-fated decisions. In particular, interventions to block the enactment of workmen’s compensation statutes at the opening of the

The American constitutional law of torts, in short, is a cautionary tale for all involved. ... Under the guise of judicial review, state courts have all too often interfered with experiments in public policy that over time have come to be widely respected.

twentieth century produced political attacks on the legitimacy of judicial review that almost stripped state courts of their constitutional oversight power. The American constitutional law of torts, in short, is a cautionary tale for all involved. Supporters of modern tort reform efforts have little occasion for seeing judicial activity as an unprecedented threat to basic constitutional principles like separation of powers and popular sovereignty. But those who would use state constitutional litigation to ward off legislated tort reform should be wary, too. Under the guise of judicial review, state courts have all too often interfered with experiments in public policy that over time have come to be widely respected.

By contrast, a productive development in the American constitutional law of torts is the consideration—in Pennsylvania and elsewhere—of a new generation of state constitutional amendments seeking to restore legislative discretion. History has been dominated by targeted state constitutional amendments that have established specific mandates for

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tort law. Some have been plaintiff-friendly, limiting legislatures’ ability to cap or otherwise obstruct tort recoveries. Others have been defendant-friendly, enforcing caps or other restrictions on tort recovery directly through state constitutions. What is new about the latest round of constitutional amendments in the tort area is that they seek to return policy-making authority to the state legislative realm.

This approach holds great promise for the future of tort policy generally, and medical malpractice policy in particular. State legislatures have been central to the development of tort law since the 1840s, and the new generation

of constitutional amendments would reinvigorate the search for public policy solutions by democratically accountable legislatures. By contrast, the history of judicial review under state and federal constitutions has all too often been an ugly chapter in the history of American tort law.

State Constitutions—and Why They Matter to Medical Malpractice Reform

For much of the twentieth century, state constitutions were a backwater in American law. As one widely commented-on survey found, in the late 1980s only one in two Americans even knew their state has a constitution (Kincaid 1988). Experts in state constitutional law regularly bemoan the paucity of attention paid to their field by the legal

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profession generally (e.g., Williams 1999; Hershkoff 1993). Though the earliest state constitutions predate the much-revered federal constitution by more than twenty years, they remained largely ignored by lawyers and lay-people alike for much of the last century.

Yet state constitutions are critically important documents in our system of governance. The Supremacy Clause of the U.S. Constitution provides that federal law is supreme—a mere federal regulation trumps state law, even state constitutional law. But the U.S. Constitution, as political scientist Donald Lutz has noted, is an “incomplete text” (Lutz 1988). It enumerates certain areas of authority for the federal

government, but outside those areas it takes for granted that power will be left in the hands of the states. As long as they create a “republican form of government,”¹ and otherwise comply with federal law (including the federal constitution), states in turn have wide discretion to establish internal systems of governance. State constitutions, in Lutz’s formulation, “complete” the text of American constitutionalism.

¹U.S. Const. art. 4, § 4.

State constitutions not only complete American constitutionalism, they sometimes threaten to overwhelm it. The most remarkable distinctions between state constitutions and the more familiar federal constitution are the length and detail of many state consti-

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tutions and the regularity with which state constitutions are revised, amended, and even redrafted. Americans have held over 230 constitutional conventions, and have adopted no fewer than 146 constitutions. State constitutions cover an enormously wide range of topics, from freedom of speech and the death penalty to “ski trails and highway routes, public holidays and motor vehicle revenues” (Tarr 1998: 2). They average three times the length of the federal constitution. The fifty state constitutions currently in force contain on average 120 amendments each, for a total of more than 5,900 adopted amendments (out of some 9,500 proposed) (Tarr 1998: 24). Compared to the veritable orgy of constitutional drafting and redrafting in the nineteenth century,

state constitution-making has slowed (e.g., Henretta 1991). Yet in the twentieth century, eighteen states ratified entirely new constitutions. Ten states did so after 1960 (Tarr 1998; Grad 1968). Taking just the seven years from 1986 to 1993, there were no fewer than fifty-two amendments to state declarations of rights alone (Tarr 1998: 13).

It should hardly be surprising that these detailed documents bear significantly on modern debates over tort reform, including medical malpractice. Beginning in the mid-

1970s, liability insurers, product manufacturers, and other repeat-play tort defendants began a concerted effort to enact laws that would limit tort liability in a system of personal

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injury litigation that they contended had run amok. Typical tort reform legislation included limitations on punitive damages awards (25 states) and caps on damages for pain and suffering (23 states). Other reforms included limitations on plaintiffs' attorney fees; statutes of repose that protect manufacturers and others from suits for injuries caused by older products; and restrictions on the common law joint-and-several liability rule, which often allowed a plaintiff to recover the full extent of her damages from a single defendant. In all, 48 state legislatures enacted tort reform legislation of one sort or another (Franklin and Rabin 2001: 788).

Many of these reforms either included or were directly targeted at medical malpractice.

Indeed, the legislation that touched off the modern tort reform movement was California's 1975 Medical Injury Compensation Reform Act (MICRA) limiting pain and suffering damages in tort cases against health care providers to \$250,000.² The most recent tort reform efforts include similar caps on pain and suffering in medical malpractice cases, including a state constitutional amendment adopted in Texas in September 2003 (Proposition 12).

²Cal. Civ. Code § 3333.2 (West 2003).

As state tort reform efforts picked up in the 1970s, however, a parallel development got underway in state constitutional law. Plaintiffs challenged statutes that capped punitive damages, limited pain and suffering damages, and shortened statutes of limitations on the grounds that they violated state constitutional guarantees. For over two decades, state courts have been asked to decide whether this generation of reforms to the law of torts are within the power of the legislature to grant.

The results of constitutional challenges to tort reform statutes have been mixed.

The results of constitutional challenges to tort reform statutes have been mixed. Courts have upheld tort reform legislation in at least 139 cases decided since the beginning of 1983 (Schwartz and Lorber 2001). During the same time period, courts struck down tort reform statutes as violations of state constitutions in at least 83 cases (Schwartz and Lorber 2001). 26

of these decisions overturned malpractice-specific statutes capping non-economic damages, capping total damage awards, shortening statutes of limitations and statutes of repose, and requiring pretrial mediation of claims or certification of a claim's merit. Most (though not all) of the remaining 57 decisions struck down provisions that enacted similar reforms for a wider class of tort claims, including but not limited to medical malpractice.

State Constitutional Decisions Striking Down Medical Malpractice Reform Laws, 1983-2001

Legislative Provision at Issue	Jurisdiction(s)	State Constitutional Provisions at Issue
Limits on Total Damages Available in Medical Malpractice Cases	Alabama, 1995 (\$1 million); Kansas, 1988 (\$1 million); South Dakota, 1996 (\$1 million); Texas, 1988 (\$500,000)	right to trial by jury; guarantee of due process; open courts guarantee
Limits on Noneconomic Damages	Alabama, 1991 (\$250,000); Ohio, 1991 (\$200,000); Wisconsin (\$1 million)	right to trial by jury; guarantee of equal protection of the laws; guarantee of due process
Shortened Statutes of Limitations and/or Repose	Arizona, 1984; Colorado, 1984; Kentucky, 1990; Missouri, 1986; Ohio, 1999; Ohio, 1987; Ohio, 1986; Ohio, 1983; Texas, 1984; Utah, 1993; Wisconsin, 1987	right to a remedy for injuries; guarantee of equal protection and/or uniformity of the laws; open courts guarantee; limitation of legislation to one-subject per bill; guarantee of due process; guarantee of privileges and immunities
Mandatory Pretrial Mediation and/or Screening	Illinois, 1986; Rhode Island, 1983; Wyoming, 1988	separation of powers; guarantee of equal protection of the laws
Certification of Merit Requirements	Ohio, 1999	limitation of legislation to one subject per bill; separation of powers
Periodic Payment of Judgments	Ohio, 1994	right to trial by jury; due process guarantee
Abolition of the Collateral Source Rule	Kansas, 1987	guarantee of equal protection of the law
Heightened Pleading Requirements	Ohio, 1994	separation of powers

(Source: Schwartz and Lorber 2001.)

Not surprisingly, these cases have generated praise from plaintiffs' advocates and bitter opposition from defendants' interests. What neither side has realized is just how deeply these debates run in the history of American law.

“Tort Reform” That Expands Liability: The Wrongful Death Statutes

For much of the nineteenth century, “tort reform” meant legislation that expanded liability rather than contracted it. The first examples of this trend were wrongful death statutes enacted beginning in 1847. At common law, tort actions were often said to expire

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with the plaintiff. A victim’s estate had no survival action against a tortfeasor, nor did the victim’s dependents have a wrongful death action (Malone 1965; Witt 2000). After Lord Campbell’s Act authorized actions for wrongful death by dependents in Great Britain in 1846, American states quickly followed, enacting statutes that typically provided for the recovery of damages in cases of death “caused by wrongful act, neglect, or default,” where the “act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages.”³ The result was a dramatic expansion in tort liability and a

significant redistribution of entitlements from tortfeasors to the families of victims. Where once damages had been generally unavailable in death cases, defendants now confronted the prospect of substantial awards.

What is remarkable about the wrongful death statutes is how little constitutional litigation they generated in the early years. As the leading nineteenth-century authority on wrongful death observed, “[t]he constitutionality of the various acts which give a remedy

³An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default, 1847 N.Y. Laws chap. 450, § 1, at 575.

in case of death has rarely been questioned” (Tiffany 1983: 28). There are therefore virtually no reported mid-nineteenth-century cases recording arguments by defendants that the wrongful death statutes impermissibly reallocated rights from defendants to plaintiffs. In

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the one reported case indicating that such a point had been raised, the court gave the argument such short shrift that defendants no doubt shrank from making it again: “As to the constitutional competency of the legislature to pass the act, there cannot be a shadow of doubt: neither a corporation nor a citizen can have a vested right to do wrong; to take human life intentionally or negligently.”⁴ At least in part, this may have been because most state wrongful death legislation

was general in its application, applying across the board to all tort claims rather than singling out some class of defendants. But even legislation in New England in the 1850s that authorized wrongful death actions only against common carriers produced no reported mid-century cases on the question whether such statutes impermissibly singled out some class of actors for special burdens.⁵

Regular constitutional challenges to state tort legislation began to appear in the mid-1870s. In 1874, for example, the Georgia Supreme Court upheld the wrongful death provisions of the state’s new employers’ liability law against a challenge that it unconsti-

⁴South-Western R.R. v. Paulk, 24 Ga. 356 (1858).

⁵1853 Conn. Pub. Acts chap. 74 § 8, at 135; 1855 Maine Acts, chap. 161 § 1, at 160; 1840 Mass. Acts, chap. 80, at 224; 1850 N.H. Laws, chap. 953, § 7, at 928; 1855 R.I. Acts 13 § 8, at 15; see also An Act Concerning Passenger Carriers, 1840 Mass. Acts chap. 80, at 224 (creating a quasi-criminal liability in cases of passengers killed by the negligence or carelessness of common carriers).

tionally singled out railroads.⁶ More typical of late nineteenth-century constitutional cases involving wrongful death were challenges to damages provisions. At least one wrongful death statute—in Missouri—opted not for a cap on damages but for a mandatory damages figure of \$5,000 in death cases. Missouri courts upheld the mandatory damages provision in 1885 notwithstanding constitutional arguments that it violated state and federal rights to a jury trial and to due process.⁷ More typically, however, mid-century wrongful death legislation authorized the recovery only of “pecuniary damages” and often set caps on those pecuniary damages, usually at \$3,000 or \$5,000.⁸ The interplay between these statutory provisions and state constitutional provisions relating to damages recoverable in tort produced a number of relatively minor, though locally significant, cases throughout the end of the nineteenth and beginning of the twentieth centuries.⁹

What is most significant about the late nineteenth century constitutional law of wrongful death, however, is not the constitutional decisions of state courts but rather the enactment of new state constitutional provisions expressly addressing torts issues. In particular, democratic dissatisfaction with statutory caps on damages in death cases produced a wave of state constitutional provisions and amendments. State courts, after all, are not the only makers of state constitutional law. The people of a state have the opportunity to

⁶Georgia RR & Banking Co. V. Oaks, 52 Ga. 410 (1874); see also Ballard v. Mississippi Cotton Oil Co., 34 So. 533 (Miss. 1903); Mobile, J. & K. C. RR, 46 So. 360 (Miss. 1908); Pensacola Electric Co. v. Soderlind, 53 So. 722 (Fla. 1910).

⁷Carroll v. Missouri Pac. Ry, 88 Mo. 239 (1885).

⁸States with damages caps under their wrongful death statutes included Colorado, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New York, Oregon, Wisconsin, and Wyoming. By the 1890s, caps in the District of Columbia, Indiana, Kansas, New Hampshire, Ohio, Oklahoma, Utah, Virginia, and West Virginia had been lifted to between \$7,000 and \$20,000 (Tiffany 1893, 175-76).

⁹March v. Walker, 48 Tex. 372 (1977); Richmond & D.R. Co. v. Freeman, 11 So. 800 (Ala. 1892); Wright v. Woods' Administrator, 27 S.W. 979 (Ky. 1894); Louisville & N.R. Co. V. Lansford, 102 F. 62 (1900); Brickman v. Southern Ry, 54 S.E. 553 (S.C. 1906); Hull v. Seaboard Air Line Ry, 57 S.E. 28 (1907).

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amend and redraft their constitutions, and in the late nineteenth century a number of states did just that to abolish and prohibit statutory limits on the damages recoverable in death cases.

Pennsylvania led the way, providing in its constitution of 1874 that the General Assembly could not “limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.”¹⁰ That same year, Arkansas adopted a similar bar on statutory limits on recoveries in cases of fatal and non-fatal injuries.¹¹ Wyoming (1889),¹² Kentucky (1890),¹³ and Arizona (1912)¹⁴ followed. Oklahoma made the availability of wrongful death actions in cases for which a plaintiff could

have recovered “had death not occurred” part of its constitution in 1907.¹⁵

And New York (1894),¹⁶ Utah (1896),¹⁷ and Ohio (1913)¹⁸ prohibited statutory damages maxima in death cases.

¹⁰Pa. Const. of 1874, art. III, § 21.

¹⁴Arizona Const., art. 2, § 31.

¹¹Ark. Const of 1874, § 32.

¹⁵Okla. Const. of 1907, art. 9, § 36.

¹²Wyo. Const. of 1889, art. 10, § 4.

¹⁶N.Y. Const. of 1894, art. I, § 18.

¹³Ky. Const of 1890, § 54. Kentucky’s 1890 constitution also constitutionalized the theretofore statutory wrongful death cause of action. See Ky. Const. Of 1890, § 241.

¹⁷Utah Const., art. XVI, § 5.

¹⁸Ohio Const., art. I, § 19a.

Indeed, late nineteenth and early twentieth century state constitution makers included an array of specific tort law provisions in their constitutions. Texas's 1876 constitution provided that those who committed homicides by "wilful act and gross neglect" were liable for exemplary damages to the decedent's survivors.¹⁹ Colorado's 1876 constitution barred employers from requiring their employees to waive their tort rights against the employer as a condition of employment.²⁰ Wyoming's 1889 constitution did the same,²¹ and also provided for tort actions on behalf of miners injured or killed when their employers violated other constitutional rules regarding mines and mining.²² Mississippi's infamous 1890 Jim Crow constitution mandated exceptions to employers' common law defenses in liability cases; established the availability of wrongful death actions; and prohibited waivers of tort liability as a condition of employment.²³ Oklahoma's 1907 constitution provided that the defenses of contributory negligence and assumption of the risk were "in all cases whatsoever" a "question of fact" and therefore "at all times" to be "left to the jury."²⁴

Still, state constitutional challenges to the wrongful death statutes continued through the turn of the twentieth century. Many complaints were lodged about disparate treatment of outsiders, such as state statutes that authorized wrongful death actions only by state residents suing as administrators of the decedent's estate,²⁵ or that distinguished

¹⁹Tex. Const. of 1876, art. XVI, § 26.

²⁰Colo. Const. of 1876, art. 15, § 15.

²¹Wyo. Const. of 1889, art. 19, § 7.

²²Wyo. Const. Of 1889, art. 9, § 4.

²³Miss. Const, art. 7, § 193.

²⁴Okla. Const. of 1907, art. 23, § 6.

²⁵Maysville Street RR & Transfer Co. V. Marvin, 59 F. 91 (6th Cir. 1893) (upholding a Kentucky statute authorizing wrongful death actions only by resident administrators against challenge under the Privileges and Immunities Clause of the U.S. Constitution, art. IV, § 2)

between injuries to citizens of the state and non-citizens.²⁶ Several state statutes were said to impinge on Congress's authority to regulate interstate commerce.²⁷ If challenges to sub-

If challenges to substance failed, they were brought to form. ... Both plaintiffs and defendants quickly mastered constitutional attacks.

stance failed, they were brought to form. One suit alleged that the statute in question impermissibly failed to express its purpose in its title.²⁸ Both plaintiffs and defendants quickly mastered constitutional attacks. When Missouri's legislature eliminated the mandatory damages provision of its early wrongful death scheme and gave juries discretion to award damages ranging from \$2,000 to \$10,000, defendants unsuccessfully challenged the legislation as an abdication of the legislature's responsibility to fix penalties.²⁹

Even today, the courts may not have disengaged fully from nineteenth century tort reform. It was not until 1980 that the United States Supreme Court settled the constitutionality of state wrongful death statutes that conferred greater benefits on widows than on widowers,

²⁶Baltimore & Ohio RR v. Chambers, 207 U.S. 142 (1907) (upholding an Ohio wrongful death provision distinguishing between state resident decedents and non-state-resident decedents on the ground that the provision does not distinguish between citizen and non-citizen parties), affirming on other grounds Baltimore & Ohio RR. v. Chambers, 76 N.E. 91 (Ohio 1905) (holding that the Ohio wrongful death provision did not violate the Privileges and Immunities Clause of the U.S. Constitution, art. IV, § 2 on the ground that the constitutional provision "applies only to fundamental and universal rights, not to special privileges"); Schell v. Youngstown Iron Sheet & Tube Co., 16 Ohio C.D. 209, 26 Ohio C.C. 209, 4 Ohio C.C.(N.S.) 172 (Ohio Cir. 1904) (interpreting the Ohio wrongful death provision so as to avoid conflict with the Privileges and Immunities Clause of the U.S. Constitution, art. IV, § 2).

²⁷Southern Ry. v. King, 217 U.S. 524 (1910), affirming Southern Ry. v. King, 160 F. 332 (5th Cir. 1908).

²⁸See Croft v. Southern Cotton Oil Co., 65 S.E. 216 (1909).

²⁹Young v. St. Louis, I.M., & S. Ry, 127 S.W. 19 (Mo. 1910).

ruling that such gendered asymmetries discriminated impermissibly on the basis of sex.³⁰

The fundamental lesson of the constitutional law of the wrongful death statutes is that when the people of a state decide to enshrine in their constitution some rule to limit the legislature's authority over the law of torts, they are capable of doing so expressly.

that when the people of a state decide to enshrine in their constitution some rule to limit the legislature's authority over the law of torts, they are capable of doing so expressly. There was no need for courts to interpret vague, open-ended constitutional language to determine whether a damages cap for wrongful death cases was constitutional,³¹ or whether a special statute of limitations time for railroad injuries was permissible, for the drafters of late nineteenth-century constitutions specified with precision the limits on the legislature in the torts area. For example, the Pennsylvania constitution of 1874 suggested a remarkably sophisticated and highly promising approach to the state constitutional law of torts.

In addition to prohibiting limits on the amount recoverable in death cases, it prevented the General Assembly from setting different

³⁰See *Wengler v. Druggists' Mutual Ins. Co.*, 446 U.S. 142 (1980) (striking down disparity in workers' compensation statute that made it more difficult for widowers to claim benefits than for widows).

³¹See *Pennsylvania R.R. v. Bowers*, 16 A. 836 (Pa. 1889) (striking down statutory damages cap of \$5,000 under the constitutional provision barring legislated limits on damages in death cases); *Palmer v. Philadelphia, B. & W. R. Co.*, 66 A. 1127 (Pa. 1907) (upholding statutory rule barring recovery of punitive damages by plaintiffs in wrongful death actions notwithstanding constitutional provision barring legislated limits on damages in death cases); *Utah Savings & Trust Co. v. Diamond Coal & Coke Co.*, 73 P. 524 (Utah 1903) (striking down statutory damages cap of \$5,000 under Wyoming law);

statutes of limitations periods for suits “brought against corporations,” on one hand, and for suits brought “against natural persons,” on the other.³² The dual concerns, evidently, were that powerful corporations might capture the Assembly to advance their own interests, or conversely that popular anti-corporation ideas would lead to discrimination against the use of a legal form that the constitution-makers wanted to encourage. To counter these prospects, state constitutional drafters included clear, specific language expressing their intent. As we shall see, however, subsequent courts all too often forgot this lesson from the early constitutional history of tort law.

³²Pa. Const. of 1874, art. III, § 21.

Tort and Corporate Accountability: Railroad Liability Legislation

In the late nineteenth century, constitutional challenges to legislation grew commonplace in American legal culture. Historians disagree on why the number of constitutional challenges to reform legislation seems to have risen sharply during this period. But

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whatever the reason, judicial review of reform legislation became increasingly significant, and tort lawyers quickly learned to make constitutional challenges to legislation part of their litigation strategies (Forbath 1991; Urofsky 1985).

Two kinds of tort reform legislation took center stage in the constitutional drama: legislation regarding railroad injuries and legislation amending the law of employer liability. In some of these cases, courts disregarded the lesson of the wrongful death challenges by striking down reform legislation under vague and open-ended constitutional provisions. But most courts resisted this temptation, upholding the overwhelming majority of challenged tort reform statutes. The railroad injury cases in particular became a

forum in which courts articulated an important principle of American constitutional law. Legislatures were generally free, these courts said, to allocate and reallocate the risk of accidents on railroads and in employment, but they could only allocate the costs of accidents among parties who plausibly caused them. Tort reform, in other words, could not constitutionally become a vehicle for the redistribution of property from one class to another. The way courts policed this line was to require that legislatures not place accident

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***The Constitutional Causation Requirement:
Limits on Redistribution of Wealth***

Spark Fire Statutes: The first line of railroad injury cases arose out of statutes making railroads strictly liable, regardless of negligence, for any injury done to buildings or other property of others by fire communicated by sparks from railroad engines. Massachusetts had enacted the first such spark fire statute in 1840.³³ Similar statutes followed quickly in Maine and New Hampshire, and over the course of the next several decades legislatures across the country enacted legislation substantially reproducing the original 1840 Massachusetts law.³⁴ Railroads,

however, claimed that making them strictly liable, even where they had exercised due care to prevent fires, constituted a taking without compensation and without a public purpose. Damages payments from railroads to property owners, they argued, were the kind of ille-

³³Mass. Gen. Laws ch. 85, § 1 (1840); see also *Lyman v. Boston & Worcester RR*, 58 Mass. (4 Cush.) 288 (1849). The strict liability approach was only one approach to the general problem. In 1837 Massachusetts had enacted legislation making railroads liable for injuries to buildings or other property “unless the said corporation shall show that they have used all due caution and diligence.” Mass. Gen. Laws ch. 226 (1837). Vermont enacted similar legislation a few years later. See *Railroad Co. v. Richardson*, 91 U.S. 454, 456, 472 (1875). In Connecticut, the legislature made communication of a fire from a railway locomotive prima facie evidence of negligence. Conn. Stat. ch. 26 (1840).

³⁴E.g., 1887 Missouri Laws 101; Iowa Code of 1873, § 1289; 1881 Conn. Laws ch. 92; S.C. Code of 1902, § 2135; 1907 Ark. Acts 336; 1907 S.D. Laws ch. 215; 1911 Ind. Acts 186.

gitimate redistributive transfers of property from *A* to *B* that had been proscribed going as far back as Justice Samuel Chase’s opinion in the 1798 case of *Calder v. Bull*.³⁵

Railroads pursued this contention in litigation from the mid-nineteenth century on into the early twentieth century, but lost their constitutional claims in every case.³⁶ As the courts recognized, nineteenth-century tort law had struggled to allocate the costs of accidents between non-negligent injurers and faultless victims (Witt 2004: 43-70). In the fire statute cases, courts upheld legislative endorsement of strict liability instead of negligence. Such statutes, the Connecticut Supreme Court reasoned in 1886, represented merely “a new application” of the common law principle that as between two innocent parties, it was permissible to place a loss “on the one who caused the loss.”³⁷ The Iowa Supreme Court explained in 1875 that legislation making a railroad strictly liable for property damages in fires communicated from the railroad’s locomotive applied one of two reasonable interpretations of the common law principle *sic utere tuo ut alienum non laedas*: use your own property so as not to injure that of others. Such statutes “simply recognize[d]” that “sometimes, notwithstanding the exercise of the highest care and diligence,” a railroad locomotive “will emit sparks and cause destructive conflagrations.” “[W]hen this occurs loss must fall upon one of two innocent parties,” and though at common law “that loss has been borne by the owner of the property injured,” the legislature was free to prescribe that

³⁵3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

³⁶*St. Louis & S.F. Ry Co. v. Mathews*, 165 U.S. 1 (1897); *Rodemacher v. Mil. & St. P. Ry Co.*, 41 Iowa 297 (1875); *Grissell v. Housatonic R. Co.*, 54 A. 447 (Conn. 1886); *Brown v. Carolina Midland Ry Co.*, 46 S.E. 283 (S.C. 1903); *St. Louis & S.F. Ry. Co. v. Shore*, 117 S.W. 515 (Ark. 1909); *Jensen v. South Dakota Ry Co.*, 127 N.W. 650 (S.D. 1910); *Pittsburgh, C, C & St. L. Ry. Co. v. Home Ins. Co.*, 108 N.E. 525, 527 (Ind. 1915); *Pittsburgh, C, C & St. L. Ry. Co. v. Chappell*, 106 N.E. 403, 405 (Ind. 1914); see also *Lyman v. Boston & Worcester RR*, 58 Mass. (4 Cush.) 288 (1849) (upholding judgment for the plaintiff in an action under a strict liability fire statute without reaching constitutional question).

³⁷*Grissell v. Housatonic RR Co.*, 9 A. 137, 139 (Conn. 1886).

“hereafter it shall be borne by the owner of the property causing the injury.”³⁸

The spark fire statutes eventually reached the United States Supreme Court in *St. Louis & San Francisco Railway Company v. Mathews* (1897),³⁹ and were upheld there as well. In an opinion by Justice Horace Gray, the Court described the statutes as raising a deep problem for tort law: how to allocate accident costs between equally faultless actors. “[R]educed to the last analysis,” the argument of the railways was that the state had “authorized” them to propel railroad cars by steam and fire, and that as they were therefore “pursuing a lawful business, they are only liable for negligence in its operation.” But as Gray observed, precisely the same arguments were available to the other side: “To this the citizen answers: ‘I also own my land lawfully. I have the right to grow my crops and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery.’” In fact, Gray continued, the plaintiff landowner had just as powerful a takings argument as the railroad:

[T]he state, which owes my protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The state has no right to take or damage my property without just compensation.

To allow the state to impose the costs of such fires on the landowner would be to allow the state to do “indirectly through the charters granted to railroads what the state cannot do directly.” In such cases, he ruled, “it is perfectly competent for the state to require the company” that set the fire to pay the ensuing damages.⁴⁰ Gray’s approach was

³⁸Rodemacher v. Mil. & St. P. Ry Co., 41 Iowa 297 (1875).

³⁹St. Louis & S.F. Ry v. Mathews, 165 U.S. 1 (1897).

⁴⁰Mathews, 165 U.S. at 19.

unanimously adopted by state courts; by 1914 and 1915, courts were remarking on the “harmonious concurrence” of authority with which the fire statutes had been “uniformly sustained.”⁴¹

At the heart of the fire statute cases lay the intuition that the railroads “caused” the injuries at issue. As a matter of logic, of course, late nineteenth-century railroad fires presented a range of causal stories. In many cases, neighboring property owners had

The fire statute cases held that, although causation questions in individual cases were often vexed, legislatures could reasonably describe railroads as causing the injuries, if only in the aggregate.

engaged in behavior that contributed significantly to their own injuries: building structures near the tracks, allowing the accumulation of flammable debris, or (in the most famous example) storing flammable flax close to the tracks.⁴² The fire statute cases held that, although causation questions in individual cases were often vexed, legislatures could reasonably describe railroads as causing the injuries, if only in the aggregate. They—not the property owners—“set in motion,” as Justice Gray put it, the “dangerous machinery” of the railway locomotive.⁴³

The legal principle that emerged from the spark fire cases might be termed a “constitutional causation requirement.” Legislatures

⁴¹Pittsburgh, C, C & St. L. Ry. Co. v. Home Ins. Co., 108 N.E. 525, 527 (Ind. 1915); Pittsburgh, C, C & St. L. Ry. Co. v. Chappell, 106 N.E. 403, 405 (Ind. 1914).

⁴²See LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry, 232 U.S. 340 (1914); see also Grady 1988; Goldberg 2002.

⁴³Matthews, 165 U.S. at 19.

were generally vested with the discretion to allocate the costs of accidents among the causally responsible parties. But courts made clear that allocating accident costs without regard to causation ran afoul of constitutional limits on the redistribution of property. Liability without causation, in short, was what lawyers today would call a taking. Illinois, for example, had in 1855 enacted a statute making railroad companies liable for the expenses of coroners' inquests and burials for "all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars or otherwise."⁴⁴ In *Ohio & Mississippi Railway Company v. Lackey*, the Illinois state supreme court struck down the statute as an impermissible attempt to reallocate costs "no matter how caused," "even if by the [decendent's] own hand."

The Illinois statute made railroads liable even in cases in which the death would have happened whether the decedent was a railroad passenger or not. It was thus a statute providing for liability without causation. As a result, where the decedent was a person of means, the statute effectively reallocated costs to the railroads that properly lay with the estate of the decedent. Where the decedent was poor, the statute placed on the railroads costs that were "properly a public burden . . . which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation." The Illinois statute, in other words, created an unconstitutional class transfer of resources from railroads to wealthy railroad passengers, or alternatively (and for the court more troubling) a transfer of resources from the railroads to the public at large.⁴⁵

Animal injury (stock) statutes. The *Lackey* case quickly became a point of reference for another series of late nineteenth-century constitutional tort reform decisions.

⁴⁴1855 Ill. Laws 170.

⁴⁵*Ohio & Miss. Ry. Co. v. Lackey*, 78 Ill. 55 (1875).

Unlike the decisions upholding spark fire statutes, however, this second strand of decisions struck down statutes making railroads liable for injuries to animals run over by engines or cars.⁴⁶ The key distinction between the stock statutes and the fire statutes was that the stock statutes sought to charge railroads with liability in cases in which courts perceived questions of causation to be considerably more difficult. In Washington state, the Supreme Court complained that the state’s statute would hold a railroad liable even where “the owners of animals, hitched to a vehicle, with gross negligence drove them along a highway in front of a passing train.”⁴⁷ In Colorado, courts observed that railroad company defendants were “precluded from showing the contributory negligence, or even design, of a plaintiff in causing the injury”; indeed, the Colorado statute failed to relieve railroads of liability when the owner engaged in “wanton and intentional acts in subjecting his animals to injury or destruction.”⁴⁸ And in Montana, the state supreme court, quoting *Lackey*, held that the legislature could not constitutionally impose costs on a railroad that the railroad had not caused.⁴⁹

Why did state courts uniformly decide that the stock statutes were unconstitutional?⁵⁰ In the courts’ view, the stock statutes raised important questions as to “individual rights of property” and the extent of “legislative power over such property,” including

⁴⁶E.g., *Ziegler v. South & North Ala. RR Co.*, 58 Ala. 594 (1877); *Jensen v. Union Pac. Ry Co.*, 21 P. 994 (Utah 1889); *Wadsworth v. Union Pac. Ry. Co.*, 33 P. 515 (Colo. 1893); *Schenck v. Union Pac. Ry Co.*, 40 P. 840 (Wyo. 1895).

⁴⁷*Oregon Ry & Navigation Co. v. Smalley*, 1 Wash. 206, 210 (1890).

⁴⁸*Denver & R.G. Ry Co. v. Outcalt*, 31 P. 177, 180 (Colo. App. 1892)

⁴⁹*Bielenberg v. Montana Union Ry Co.*, 20 P. 314, 315 (Mont. 1889).

⁵⁰See the cases cited above. A number of state courts in the South upheld the statutes by reinterpreting them as merely shifting the burden of proof on negligence to the railroads. See *Payne*, 33 Ark. 816; *Tilley*, 49 Ark.

“whether the title to the same can be divested without the assent of the owner.”⁵¹ To be sure, courts conceded that owners of private property held such property “under the implied liability that . . . use of it shall not be injurious to others”;⁵² this was the lesson of *sic utere* taught by the spark fire statute cases. Moreover, legislatures could effectively accomplish the same end by imposing a duty to fence on the railroad and then making the railroad liable for injuries caused by the railroad’s failure to fence; in such cases, the railroad’s failure to satisfy a legal duty was the legal cause of the injury.⁵³ But absent evidence that a particular use of property is injurious, statutes making property owners liable for others’ injuries violated the rule that “private property cannot be taken for strictly private purposes at all, nor for public purposes without compensation.”⁵⁴ Such statutes presented “a case of great injustice”⁵⁵ and improperly took “from the defendant company the right of way over its track, . . . confer[ring] it upon the cattle and horses of the country.”⁵⁶ The statutes, in other words, were instances of “class legislation,” transferring the property of *A* to *B* without *A*’s consent.⁵⁷

In retrospect, courts decided the stock statute cases wrongly. The stock statutes can reasonably be interpreted as legislative determinations that in the aggregate railroads tended to be the primary causal forces in cattle deaths on the tracks, and that the admin-

⁵¹*Atchison & Nebraska RR Co. v. Baty*, 6 Neb. 37, 40 (1877).

⁵²*Baty*, 6 Neb. at 42.

⁵³*Thorpe v. Rutland & Burlington RR Co.*, 27 Vt. 140 (1855); *Gorman v. Pacific RR*, 26 Mo. 441 (1858); *Indianapolis & Cincinnati RR Co. v. Kercheval*, 16 Ind. 84 (1861).

⁵⁴*Baty*, 6 Neb. at 44.

⁵⁵*Bielenberg*, 20 P. at 316.

⁵⁶*Cottrell v. Union Pac. Ry Co.*, 21 P. 416, ___ (Idaho 1889).

⁵⁷*Baty*, 6 Neb. at 46; *Outcalt*, 31 P. at 179.

istrative costs of exempting railroads in the exceptional cases outweighed the benefits of doing so. Moreover, under the stock statutes, railroad defendants' operations were necessary antecedents to any cattle death for which the railroads could be held liable. The stock statutes were therefore very different from the coroner's inquest and burial costs statute struck down in *Lackey*.

Notwithstanding these logical inconsistencies, the constitutional causation requirement ensured that legislative allocations of accident costs were not merely naked transfers. The same theme recurred in other tort reform cases of the era. Courts upheld statutes that made railroads strictly liable for injuries to railroad passengers absent gross negligence by the passenger. Under the "conditions which exist in and surround modern railroad transportation," Justice McKenna explained for the U.S. Supreme Court in the *Zernecke* case of 1902, railroads had vastly greater control over rail transportation than did passengers; in a world of imperfect fact-finding and fallible civil procedure, the strict liability statute fairly approximated cause-based liability and ensured that railroad liability would not be "avoided by excuses which do not exist, or the disproof of which might be impossible."⁵⁸

In *Bertholf v. O'Reilly*, decided by the New York Court of Appeals in 1878, landlord James O'Reilly appealed from a jury verdict awarding damages under the New York Civil Damages Act to the owner of a horse killed by the owner's own drunken son. O'Reilly contended that the statute, which made lessors who knew that intoxicating liquor were being sold on the leased premises liable for damages caused by the act of a person intoxicated by liquors acquired on the lessor's property, "invades the legal protection guaranteed to every property owner, that his property shall not be taken against his will for pri-

⁵⁸Chicago, Rock Island & Pac. Ry Co. v. Zernecke, 183 U.S. 582, 588 (1902), affirming 82 N.W. 26 (Neb. 1900).

vate use.” The New York Court of Appeals, however, upheld the statute as satisfying the causation requirement inherent in the *sic utere* maxim. “We do not mean that the Legislature may impose upon one man liability for an injury suffered by another, with which he had no connection.” But here the legislature had merely allowed “a recovery to be had against those whose acts contributed, although remotely, to produce it.” The statute was therefore “an extension,” albeit a far-reaching one, “of the principle expressed in the maxim.”⁵⁹

Employers’ Liability Legislation: The Vindication of Legislative Discretion

The railroad liability cases suggest the beginnings of a comprehensive theory of the constitutional law of torts. Absent some express constitutional provision such as a bar on legislative limits on damages, legislatures were generally free to allocate accident costs among the parties reasonably described as causing the accident in question, even where those parties were themselves without fault.

The wave of employers’ liability legislation enacted in the second half of the nineteenth century and the first decade of the twentieth sorely tested the constitutional settlement that seemed to have been achieved in the railroad cases. In all, some 25 states enacted employers’ liability legislation by 1911. Employers’ liability legislation typically amended or abolished employers’ defenses in tort cases brought by their employees. Some statutes narrowed the fellow servant rule, which barred employees from recovering damages for injuries caused by the negligence of a coworker, by carving out exceptions for injuries caused by a superior, or by an employee in a different department (Friedman and Ladinsky 1988). Other statutes abolished the fellow servant rule altogether, or limited employers’ ability to defend themselves based on the injured employee’s “assumption of

⁵⁹Bertholf v. O’Reilly, 74 N.Y. 509, 524 (1878).

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the risk” or contributory negligence.⁶⁰

No other kind of tort reform legislation before or since generated as many constitutional challenges as the employers’ liability laws. The case law reveals well in excess of one hundred reported appellate decisions. For the most part, constitutional attacks on employers’ liability legislation failed. Such legislation, courts held again and again, fell within the legislature’s discretion to make reasonable rules for the pursuit of the public welfare.

There were, to be sure, important outlier opinions striking down employers’ liability legislation. Statutes making employers liable for

injuries caused by the negligence of a superior employee, for example, were held unconstitutional on equal protection grounds for impermissibly distinguishing among injured employees,⁶¹ or for applying only to (and thus impermissibly discriminating against) a limited class of employers such as corporations⁶² or common carriers.⁶³ Some courts used similar rationales to strike down legislation amending the assumption of risk doctrine for

⁶⁰E.g., The Federal Employers’ Liability Act, 35 Stat. 65 (1908).

⁶¹Kane v. Erie R. Co., 128 F. 474 (N.D. Ohio 1904), reversed by Kane v. Erie R. Co., 133 F. 681 (6th Cir. 1904); Froelich v. Toledo & Ohio Cent. Ry, 13 Ohio Dec. 107 (Common Pleas 1902), aff’d on other grounds by 24 Ohio C.C. 359 (Cir. Ct 1903); Maltby v. Lake Shore & Mich. So. Ry, 13 Ohio Dec. 280 (Common Pleas 1902);

⁶²Bedford Quarries Co. V. Bough, 80 N.E. 529 (Ind. 1907).

⁶³Chicago, M. & St. P. Ry, 178 F. 619 (8th Cir. 1910).

Employers' liability legislation typically amended or abolished employers' defenses in tort cases brought by their employees. ... No other kind of tort reform legislation before or since generated as many constitutional challenges.

employees of corporations but not for employees of partnerships and natural persons.⁶⁴ A few courts struck down employers' liability laws under other state constitutional provisions,⁶⁵ including a constitutional ban on unfavorable treatment of in-state railroads,⁶⁶ single-subject and clear-title requirements,⁶⁷ procedural requirements relating to the keeping of the legislative journal,⁶⁸ and prohibitions on the delegation of legislative functions to state administrative agencies.⁶⁹ Courts also struggled with the constitutionality of legislation making unenforceable the contractual waiver of employees' tort claims against their employers. Though

most courts ultimately settled on the conclusion that statutes banning waivers were permissible,⁷⁰ a number of courts (especially in early cases) held otherwise (Beers 1898;

⁶⁴Ballard v. Mississippi Cotton Oil Co., 34 So. 533 (Miss. 1903).

⁶⁵E.g., Atchison, T. & S.F. Ry v. Sowers, 99 S.W. 190 (Tex. Civ. App. 1907) (striking down a provision in New Mexico territorial law purporting to prohibit suits outside the territorial courts for personal injuries received in the territory as in violation of the Full Faith and Credit Clause of the U.S. Constitution, art. 4, § 1).

⁶⁶Crisswell v. Montana Cent. Ry, 44 P. 525 (Mont. 1896).

⁶⁷Mitchell v. Colorado Milling & Elevator Co., 55 P. 736, 739 (Colo. App. 1898);

⁶⁸Rio Grande Sampling Co. v. Catlin, 94 P. 323 (Colo. 1907); see also Portland Gold Mining Co. v. Duke, 164 F. 180 (8th Cir. 1908).

⁶⁹Schaezlein v. Cabaniss, 67 P. 755 (Cal. 1902).

⁷⁰E.g., Chicago, B. & Q. RR v. McGuire, 219 U.S. 549 (1911).

McCurdy 1998).⁷¹

Yet cases in which courts upheld employers' liability reforms against state constitutional challenges far predominated. Equal protection challenges to employers' liability statutes were the most common. Legislation singling out certain industries such as railroading for special rules, for example, was consistently upheld on the grounds that the legislature could reasonably distinguish between industries on the basis of their dangerousness.⁷² On the other hand, courts often put teeth into their interpretations by construing the statutes to apply only to those industries as to which a legislative determination of dangerousness could be upheld.⁷³ Courts also rejected defendants' arguments that legislatures were barred by contract clauses in state constitutions from altering corporate liability for employee injuries.⁷⁴ And courts typically upheld safety regulations that allowed victims to sue when injuries resulted from an employer's failure to comply with the regulations.⁷⁵

The employers' liability cases made clear that as a matter of state and federal con-

⁷¹E.g., *Hoxie v. New York, N.H. & H. RR*, 73 A. 754 (Conn. 1909); *Shaver v. Pennsylvania Co.*, 71 F. 931 (N.D. Ohio 1896); *Caldwell v. Baltimore & Ohio Ry*, 14 Ohio Dec. 375 (Common Pleas 1904); *Cox v. Pittsburgh, C., C. & St. L. Ry*, 2 Ohio Dec. 594 (Common Pleas 1895).

⁷²See, e.g., *Missouri Pac. Ry v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U.S. 210, 211 (1888); *Chicago, K & W R Co. v. Pontius*, 157 U.S. 209, 211 (1895); *Tullis v. Lake Erie & Western RR Co.*, 175 U.S. 348, 351 (1899); *Minnesota Iron Co. v. Kline*, 199 U.S. 593, 597-98 (1905); *Ditberner v. Chicago, M. & St. P. Ry*, 2 N.W. 69 (Wis. 1879); *Georgia R.R. v. Ivey*, 73 Ga. 499 (1884); *Atchison, T. & S.F. R.R. v. Koehler*, 15 P. 567 (Kan. 1887).

⁷³ See, e.g., *Lavallee v. St. Paul & D. Ry*, 45 N.W. 156 (Minn. 1890) (construing state employers' liability statute to apply only to for the benefit of those injured in the course of employment by those characteristic hazards of the industry that justified the legislature's discrimination). On the abandonment of judicial policing of legislative dangerousness determinations in *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922), see Witt 2004, 191-93.

⁷⁴*Dean v. Kansas City, St. L. & C. R.R.*, 97 S.W. 910 (Mo. 1906); *Ozan Lumber Co. V. Biddie*, 113 S.W. 796 (Ark. 1908); *Texas & N.O. R.R. v. Miller*, 128 S.W. 1165 (Tex. 1910); *Texas & N.O. R.R. v. Gross*, 128 S.W. 1173 (Tex. 1910).

⁷⁵E.g., *Missouri, K. & T. Ry v. McDuffey*, 109 S.W. 1104 (Tex. 1908).

stitutional law, legislatures were generally free to amend basic doctrines of the law of tort. Nothing in the common law of contributory negligence, fellow servants, or assumption of the risk made these doctrines constitutionally mandatory. In combination with the con-

The employers’ liability cases made clear that, as a matter of state and federal constitutional law, legislatures were generally free to amend basic doctrines of the law of tort.

temporaneous railroad liability cases arising under spark fire and stock injury statutes, the employer cases reinforced the constitutional authority of legislatures to amend the law of torts, as long as they did not impose redistributive financial burdens on parties with no causal relationship to the injury.

As with wrongful death and railroad injury to property, the last constitutional chapter of employer liability was written by the United States Supreme Court. State court decisions had established that, within the scope of their author-

ity, state legislatures had wide discretion to amend the law of employers’ liability. But the constitutional structure of American federalism placed limits on both the power of states to regulate interstate commerce and the power of Congress to regulate intrastate tort law. State employers’ liability statutes generally survived constitutional review against challenges that they invaded the regulatory domain of the federal government.⁷⁶ Federal courts reacted differently, however, when Congress in 1906 enacted the Federal Employers’ Liability Act (“FELA”), purporting to amend employers’ liability for injuries to “any”

⁷⁶See *Missouri, K. & T. Ry v. Nelson*, 87 S.W. 706, 707 (Tex. 1905) (upholding state employers’ liability statute as it applied to an injured railroad employee in interstate commerce).

The Supreme Court’s decision to overturn the Federal Employers’ Liability Act produced a swift and heated political reaction. President Theodore Roosevelt excoriated the Court for its opposition to what was in Roosevelt’s view a salutary response to what had become an epidemic of railroad employee accidents.

employee of a common carrier engaged in interstate commerce.⁷⁷ Some lower federal courts upheld the Act as within Congress’s Commerce Clause powers,⁷⁸ but others ruled that Congress had exceeded its power.⁷⁹ In 1908, the Supreme Court agreed with the latter group, striking down the Act for impermissibly altering employers’ liability to injured employees who were not themselves engaged in interstate commerce.⁸⁰

The Supreme Court’s decision produced a swift and heated political reaction. President Theodore Roosevelt excoriated the Court for its opposition to what was in Roosevelt’s view a salutary response to what had become an epidemic of railroad employee accidents (Roosevelt 1908). Within months, Congress re-enacted the FELA to comply with the Court-

imposed constitutional constraint by applying it only to employees who were injured while

⁷⁷34 Stat. 232 (1906).

⁷⁸E.g., *Plummer v. Northern Pac. Ry.*, 152 F. 206 (W.D. Wash. 1907); *Kelley v. Great Northern Ry.*, 152 F. 211 (D. Minn. 1907); *Snead v. Central of Georgia Ry.*, 151 F. 608 (S.D. Ga. 1907).

⁷⁹E.g., *Howard v. Illinois Cent. R.R.*, 148 F. 997 (Tenn. 1907).

⁸⁰*The First Employers’ Liability Cases*, 207 U.S. 463 (1908).

themselves engaged in interstate commerce.⁸¹ This compromise, however, did not quell controversy, but rather signaled an acceleration of constitutional debate over tort reform. For even more than the wrongful death and employers' liability statutes that preceded it, a new generation of work accident reform legislation promised not merely to amend but to wholly supersede the common law of employers' liability in tort.

⁸¹35 Stat. 65 (1908).

Replacing the Tort System: Workmen’s Compensation

The enactment of workmen’s compensation laws (as today’s gender-neutral workers’ compensation statutes were known) occasioned one of the nation’s great battles over

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judicial review of reform legislation. Following the passage of the first statute in 1910, several courts struck down the new compensation programs.⁸² The result was a political crisis for some of the nation’s leading state courts, the New York Court of Appeals chief among them.

In one sense, it is surprising that workmen’s compensation statutes produced such controversy. As one drafter of compensation legislation put it, the drafters “maimed and twisted” the legislation to meet constitutional requirements “so that it might commend itself to the judges” (Witt 2004: 137-38). In New York, drafters of the legislation provided injured employees with the

option to sue in tort or bring a compensation claim, at least in part because of constitutional concerns about whether the legislature could take away injured employees’ state constitutional rights to a jury trial and to uncapped damages in death cases (New York State Commission 1910: 46-48). Other state commissions limited compensation programs to railroading and coal mining,⁸³ to take advantage of the special leniency that courts in the

⁸²See *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911); *Cunningham v. Northwestern Improvement Co.*, 119 P. 554 (Mont. 1911).

⁸³See, e.g., 1910 N.Y. Laws ch. 674, § 215. Reformer Charles Richmond Henderson focused on just this point in arguing that the carefully drafted compensation programs ought to be upheld (Henderson 1908, 141). *W. R.R. Co.*, 175 U.S. 348, 351 (1899); *Minn. Iron Co. v. Kline*, 199 U.S. 593, 597-98 (1905).

employers' liability cases had seemed to show for legislation applicable to dangerous industries.⁸⁴ Some states recommended elective compensation statutes that gave employers

Workmen's compensation sought to substitute a socially rational system organized not so much around doing justice in individual cases—a goal that workmen's compensation reformers had come to think quixotic—but around creating social policy in the aggregate.

and employees the right to opt out of the new compensation system, out of fear that compulsory statutes would be overturned on due process or freedom of contract grounds (Witt 2004: 138).

In another sense, however, it is understandable that constitutional challenges for workmen's compensation legislation would be more significant than those faced by employers' liability laws. Workmen's compensation laws sought to substitute a socially rational system organized not so much around doing justice in individual cases—a goal that workmen's compensation reformers had come to think quixotic—but around creating social policy in the aggregate. Work accident cases would no longer get bogged down in litigating thorny issues of fault or arcane questions about superior servants or dif-

ferent departments. Instead, injured employees would be compensated for virtually all injuries arising out of and in the course of their work. Damages would not be at the discretion of a jury or designed to make the injured employee whole—as in the law of

⁸⁴See *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210, 211 (1888); *Chicago, K & W R.R. Co. v. Pontius*, 157 U.S. 209, 211 (1895); *Tullis v. Lake Erie & W. R.R. Co.*, 175 U.S. 348, 351 (1899); *Minn. Iron Co. v. Kline*, 199 U.S. 593, 597-98 (1905).

torts—but would instead be scheduled at one-half or two-thirds the injured employees lost wages, plus medical costs. The result would be a kind of rough justice. In some cases, employers would be required to compensate injuries for which few reasonable observers would consider them responsible. In other cases, injured employees would receive less

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than they would have under tort law. But in the aggregate these micro-injustices would wash one another out for a kind of systemic (if not individualized) justice. Whether a legislature could constitutionally sacrifice the pursuit of individualized justice in favor of the actuarial strategy of the workmen’s compensation statutes was not clear. As constitutional lawyer Ernst Freund warned, “the constitutional status of workmen’s compensation was one of uncertainty” if not downright “confusion” (Witt 2004: 151). In the first and most important constitutional challenge, the answer returned was in the negative. New York had been the first state to enact a wide-ranging compensation system in the summer of 1910. The New York legislation applied to a group of specifically enumerated

dangerous industries, and reserved to the injured employee the right to sue in tort in order to skirt the constitutional obstacle of jury trial rights under the New York constitution. Nonetheless, the New York Court of Appeals—the state’s highest court—struck the legisla

tion down the following year in the case of *Ives v. South Buffalo Railway*.⁸⁵ Notwithstanding the “attractive and desirable” “economic, philosophical, and moral theories”⁸⁶ embodied in the legislation, wrote Judge William E. Werner for the court, the compensation program required that employers compensate employees for injuries as to which the employee, rather than the employer, was responsible. This the due process tradition of the state and federal constitutions would not allow. Requiring compensation in such cases “is taking the property of *A* and giving it to *B*, and that cannot be done under our Constitutions.”⁸⁷

The *Ives* decision quickly produced a political firestorm. As one participant in the compensation movement described it, *Ives* “was severely criticized, as, perhaps, no deci-

**Theodore Roosevelt
saw the *Ives* decision as
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sion of a higher court has ever been criticized before,” by even some of the “most conservative lawyers and writers” (Witt 2004: 175). Observers commented on the “storm of protest” and the “outcry of surprise and indignation” that accompanied the court’s decision (Witt 2004: 175). Theodore Roosevelt saw the *Ives* decision as an outrageous misuse of judicial authority.

Roosevelt, who as governor of New York State 11 years earlier had been Werner’s political patron and had even appointed Werner to the Court of Appeals, now described the work of his one-time protégé as “a most flagrant and wanton abuse of a great power” (Witt

⁸⁵94 N.E. 431 (N.Y. 1911).

⁸⁶Id. at 436-37.

⁸⁷Id. at 440.

2004: 176). The Dred Scott case from half a century before was “worse in degree, but not in kind,” Roosevelt thundered, and the kinds of judges who made such decisions had “no right to sit on the bench” (Witt 2004: 176). Foreshadowing the arguments that would be made in 1937 by his distant cousin, Franklin Delano Roosevelt, the first Roosevelt president derided the judges of the New York Court of Appeals as “six . . . elderly men” (Witt 2004: 185). Most importantly, the *Ives* decision became a motivating force in Roosevelt’s campaign for the recall of judicial decisions by popular referendum. Adopted in Colorado in 1912, and initially part of the 1911 state constitution submitted with Arizona’s application for admission to the Union, recall was a mechanism by which voters could “correct” the courts’ constitutional interpretations. Despite criticism as a grave threat to judicial independence and the rule of law, popular recall of judicial decisions became one of the central planks of Roosevelt’s 1912 Progressive Party campaign for the presidency (Witt 2004: 176; Ross 1994).

The *Ives* case reshaped the trajectory of the American workmen’s compensation movement. In 1910 and early 1911, the momentum in the political movement for compensation statutes was toward statutes that made compensation a supplement to rather than a substitute for an injured employee’s tort claim. The English legislation of the late nineteenth century on which many of the early American statutes were based had adopted this approach, as had the New York statute struck down in *Ives* as well as an early Montana statute and federal bills proposing workmen’s compensation for interstate railroads (Witt 2004: 181-82). Early compensation statutes also favored compulsory programs over elective systems into which employers could opt at their pleasure. After *Ives*, both of these features seemed to be precluded. Compulsory statutes seemingly interfered with employers’ and employees’ freedom of contract. Statutes that supplemented employers’ liability in tort with compensation claims appeared to redistribute wealth from employers to injured

employees, with nothing received by the employer in return. States thus restructured their compensation systems, adopting elective statutes and framing those statutes as substitutes for the law of employers' liability rather than supplements to it. This offered employers

Unlike the English workmen's compensation system (which has never faced judicial review under a written constitution), American compensation laws are quid pro quo statutes ... that take away injured employees' tort actions against their employers in return for the guaranteed insurance benefit.

immunity from tort claims in return for the employers' voluntary agreement to provide employees with compensation benefits (Witt 2004; 181-83).

Constitutional law thus had a powerful constitutive role in the making of modern workers' compensation. Unlike the English workmen's compensation system (which has never faced judicial review under a written constitution), American compensation laws are quid pro quo statutes. American workers' compensation takes away injured employees' tort actions against their employers in return for the guaranteed insurance benefit of compensation payments.

As with the stock statutes, however, it seems clear that courts got it basically wrong when they struck down workmen's compensa-

tion laws. They had forgotten the lessons of the wrongful death cases. State constitution-makers were perfectly capable of writing specific tort reform prohibitions into their constitutions when they saw fit to do so. No state constitution expressly barred legislatures from adopting an aggregate rather than individualized approach to work accident cases. To

the contrary, strong democratic majorities made clear the dubious legitimacy of early decisions like *Ives*. A number of states around the country adopted constitutional amendments expressly authorizing compensation legislation, either to reverse adverse state court decisions (as in New York),⁸⁸ or to ward off future challenges (Witt 2004: 180).⁸⁹ State courts also got the message in other ways. In 1913, for example, New York voters defeated Judge Werner in his campaign for Chief Judge of the New York Court of Appeals (Witt 2004). After that, not a single state supreme court held a workmen's compensation statute unconstitutional. Predictably, the action shifted to federal court. The U.S. Supreme Court upheld workmen's compensation programs in a trio of cases decided in 1917,⁹⁰ and in 1919 made clear that even statutes like the one that had been struck down in *Ives*—statutes that supplemented rather than substituted for the employer's tort liability—were constitutionally permissible.⁹¹

In sum, the workmen's compensation experience shows how many of the nation's courts put their institutional reputations at risk by extending constitutional law into the complicated and hotly contested arena of industrial accidents. When current commentators suggest (rather improbably) that state constitutional decisions in the tort reform area have caused a "crisis of legitimacy of law and legal institutions" greater than any "since *Dred Scott*" (Presser 2001: 649), they have forgotten workmen's compensation, a crisis that presaged both the New Deal constitutional revolution of 1937 and the present day tort reform debate.

⁸⁸N.Y. Const. of 1894, art. I, § 19 (amendment submitted to the people of the state and adopted by them in November 1913).

⁸⁹Amendments were ratified in California, Ohio, Vermont, and Wyoming (Witt 2004, 180).

⁹⁰See *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

⁹¹*Arizona Copper v. Hammer*, 250 U.S. 400 (1919).



The Politics of Tort Reform: Automobile No-Fault and the Reconstitutionalization of Tort Law

The great irony of the workmen's compensation cases is that the proliferation of compensation statutes to replace tort liability gave rise to forces that served to entrench the status quo in other fields of tort law. Courts' opposition to workmen's compensation had brought state constitutional law into considerable disrepute. It had even occasioned

Once workmen's compensation programs were underway, the constitutional crisis safely in the past, those very programs contributed to the formation of new interest groups who had a vested interest in generating constitutional arguments against tort reform.

wholesale attacks on the practice of judicial review. But once workmen's compensation programs were underway, the constitutional crisis safely in the past, those very programs contributed to the formation of new interest groups who had a vested interest in generating constitutional arguments against tort reform.

Beginning with the workmen's compensation experience, constitutional arguments about tort reform have been the province of entrenched constituencies. The earliest interest groups to coalesce around the state compensation programs were made up of employers and (perhaps more importantly) liability insurers. Organizations like the National Association of Manufacturers had been involved in the workmen's compensation movement from its incep-

tion (Weinstein 1968). With the enactment of workmen's compensation laws, both employers and liability insurers developed strong incentives to control subsequent legislative amendments. On the claimants' side in turn, lobbying over workmen's compensation benefit rates in state legislatures called forth a new organized interest group. In 1946,

plaintiffs’-side workmen’s compensation lawyers came together to form the National Association of Claimants’ Compensation Attorneys. Twenty-five years later, the NACCA changed its name to the American Trial Lawyers’ Association, or ATLA. Workmen’s compensation systems, in short, had given rise to the modern plaintiffs’ bar. As Philippe Nonet

Workmen’s compensation had called into existence competing coalitions of chambers of commerce and liability insurers, plaintiffs’ lawyers and labor unions, making up a ‘special kind of adversary system—the permanent confrontation of organized interest groups.’

put it in a study of California, workmen’s compensation had called into existence competing coalitions of chambers of commerce and liability insurers, plaintiffs’ lawyers and labor unions, making up a “special kind of adversary system—the permanent confrontation of organized interest groups” (Witt 2004: 196).

Not all constitutional tort law since the workmen’s compensation crisis can be traced to competition between well-organized interest groups. In 1929, for example, the U.S. Supreme Court struck down a Georgia statute declaring the fact of an injury caused by the running of a railroad to create a presumption of negligence on the part of the railroad. The difficulty with the statute, the Court explained, was that it seemed not merely to shift the burden of proof

on the question of a railroad defendant’s negligence, but to require that the presumption itself be weighed as evidence.⁹² Similarly, in mid-twentieth century Ohio, state courts held a variety of tort statutes unconstitutional, typically for establishing arbitrary classifications that amounted to special interest legislation as opposed to legislation in the public

interest (Corboy et al. 1999: 203-08).

By the 1920s, however, organized interest groups of plaintiffs' lawyers and liability insurers had revived a host of constitutional arguments in connection with a proposed system of no-fault compensation for automobile accidents. As early as 1910, farsighted participants in the workmen's compensation debates understood that automobile accidents would likely be the next forum for debating the relative merits of tort law and administrative alternatives (Witt 2004: 194). By the end of the decade, automobile accident compensation systems were being widely discussed (Witt 2004: 195). In the early 1930s, these discussions came to fruition in the Columbia Plan for automobile injury compensation. The Columbia Plan would have abolished tort litigation and imposed limited, scheduled liability on motor vehicle owners for damages caused by the operation of their vehicles (Simon 1998; Witt 2004: 195).

But the Columbia Plan, like other less prominent automobile accident compensation proposals, quickly encountered the massive opposition of entrenched groups. Plaintiffs' lawyers, insurance lawyers, and the bar associations to which they belonged all "vociferously opposed" the Plan, which soon collapsed under the weight of what Fleming James called the "many vested interests in the status quo" (Witt 2004: 195).

⁹²See *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639, 641-42 (1929). The Court had previously upheld a Mississippi statute that made the fact of a railroad injury prima facie evidence of railroad negligence on the ground that the Mississippi statute created only a "temporary inference of fact that disappeared upon the introduction of opposing evidence." *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, 42-43 (1910).



Conclusion

What are the implications of this history for the current round of medical malpractice reforms? For one thing, the first generation of tort reform in the United States—the wrongful death statutes of the 1840s and 1850s—were subject to remarkably few constitutional challenges. Our oldest tradition in the area of tort reform is thus one of wide legislative discretion. A second lesson is that constitutional discourse is inseparable from tort reform. Since the 1870s, constitutional challenges to tort legislation have been extremely important in the development of our law of torts. Indeed, the rise of tort law as a field between the 1850s and the 1880s coincided with the emergence of a new culture in American law of constitutional litigation over reform legislation.

Another clear lesson from history is that constitutional challenges to legislated tort reform have not been the exclusive province of either defendants and the defense bar, on one side, or plaintiffs and the plaintiffs' bar, on the other. At different times and in different places, virtually all of the contending interest groups in the American tort debates have found themselves advancing constitutional arguments against amendments to the existing law of torts. In the late nineteenth and early twentieth centuries, when legislation in the accident law area tended to be liability-expanding rather than liability-contracting, constitutional challenges emerged most often from repeat-play defendants such as corporate employers. More recently, the plaintiffs' bar has led the way in bringing constitutional challenges to tort reform efforts. In 2001, ATLA created the Center for Constitutional Litigation, an outfit committed to bringing "lawsuits that challenge tort restrictionist laws," such as damages caps (American Trial Lawyers Association 2003). It should hardly be surprising if in the not-too-distant future, the political pendulum swings back once again such that defendants seek refuge in the very same constitutional rhetoric in which the American Trial Lawyers' Association seeks to drape itself today. Defendants, after all, pioneered the strategy.

Ought, then, the law of torts to be constitutionalized at all? What is the function of state constitutional review of reform legislation? One aim, as the late John Hart Ely suggested for federal law, might be the protection of politically powerless groups who would otherwise be at the mercy of organized interests (Ely 1980; Ackerman 1986). Another aim, as state constitutional experts contend, might be to ensure that state legislatures enact legislation designed to achieve some “explicit public goal” set out by the people of the state in the state constitution (Hershkoff 1999: 1137, 1156). Yet if history is any guide, we can fairly say that often neither of these goals has been advanced very far when courts strike down well-considered tort reform legislation.

To be sure, courts will no doubt continue to enforce the specific, express tort law provisions that state constitution makers have regularly adopted since the late nineteenth century. Such Constitutional amendments continue to be enacted today. For example, Texas’s Proposition 12, a constitutional amendment approved on September 12, 2003, limits non-economic damages in medical malpractice cases (Robbins 2003: 6). Pennsylvania is currently considering a similar constitutional amendment (Kennedy 2003: 11). Moreover, perhaps courts also should apply a liberal version of the constitutional causation requirement laid down in the railroad liability cases to ensure that tort law does not impinge on constitutional takings limits.

But other amendments proposed in Pennsylvania suggest a different and perhaps more promising path: the removal of constitutional obstacles to tort law reform by state legislatures. By narrowing the scope of specific late nineteenth-century limits on legislative discretion, these Pennsylvania proposals would return to legislatures the power to experiment with policy alternatives in the law of torts. The history of the American constitutional law of tort teaches us that this approach may make good sense. Indeed, the emergence of powerful political constituencies on both sides of the tort reform debate sug-

gests that courts and constitution-makers ought not to worry that legislative tort reform will be dominated by one side or the other because of some defect in the political process.

Both sides of the tort reform debate make just that argument, of course. Defense interests contend that large damages awards encourage the corruption of state legislators and judges whose campaigns are bankrolled by plaintiffs' lawyer contributions (Galanter 1999: 564). Plaintiffs' interests point to the relative disorganization of diffuse classes such as consumers compared to the power of organized interests such as manufacturers, physicians, and insurance companies (Abel 1999: 536). The history of the tort reform debates over time, however, suggests that the process of reforming the law of torts has given rise to interest groups on all sides with considerable incentive and ability to redress any imbalance

The emergence of powerful political constituencies on both sides of the tort reform debate suggests that courts and constitution-makers ought not worry that tort reform will be dominated by one side or the other because of some defect in the political process.

that might arise. In this regard, it is a telling fact that plaintiffs' interests have managed for some two decades now to hold off federal tort reform efforts in areas like products liability, in addition to various state tort reform initiatives. Recent ballot initiatives and constitutional amendments calling for tort reform have been defeated by political coalitions of plaintiffs' interests in a number of states, including Arizona, California, Michigan, and Oregon (Middleton 2000; Slind-Flor 1996; Tort Revision 1994).

For all we know, the tables may turn again. If they do, we can expect the rhetoric of constitutional tort law to flip, as it has before, from plaintiffs' arguments to defendants' argu-

With the perspective of history, tort reform seems an arena of robust and healthy political competition, in which judicial interventions have all too often come to seem misguided.

ments. Courts would be well advised to avoid using judicial review too aggressively in this environment. With the perspective of history, tort reform seems an arena of robust and healthy political competition, in which judicial interventions have all too often come to seem misguided.

References

- Abel, Richard L. 1999. Questioning the Counter-Majoritarian Thesis: The Case of Torts, *DePaul Law Review* 49:533-558.
- Ackerman, Bruce. 1986. Beyond Carolene Products. *Harvard Law Review* 98:713-746.
- American Trial Lawyers Association. 2003. In the Courts. <http://www.atla.org/IntheCourts/IntheCourts.aspx> (visited October 30, 2003).
- Beers, George E. 1898. Contracts Exempting Employers from Liability for Negligence. *Yale Law Journal*. 7(352):355-60.
- Corboy, Philip H., Curt N. Rodin, and Susan J. Schwartz. 1999. Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators. *Loyola University of Chicago Law Journal* 30:183-246.
- Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.
- Forbath, William. 1991. *Law and the Shaping of the American Labor Movement*. Cambridge, MA: Harvard University Press.
- Franklin, Marc and Robert L. Rabin. 2001. *Tort Law and Alternatives*, 7th ed. New York: Foundation Press.
- Friedman, Lawrence M. and Jack Ladinsky. 1988. Social Change and the Law of Industrial Accidents in Lawrence M. Friedman & Harry N. Scheiber eds., *American Law and the Constitutional Order: Historical Perspectives* (enlarged ed.) Cambridge, MA: Harvard University Press.
- Galanter, Marc. 1999. Makers of Tort Law. *DePaul Law Review* 49:559-565.
- Goldberg, Victor P. March 28, 2002. The Coase Theorem and Some Puzzles on the Tort/Contract Boundary (unpublished manuscript).
- Grad, Frank P. 1968. The State Constitution: Its Function and Form for Our Time, *Virginia Law Review* 54:928-980.
- Grady, Mark F. 1988. Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer. *Journal of Legal Studies* 17(1):15-42.

-
- Henderson, Charles Richmond. 1908. *Industrial Insurance in the United States*. Chicago: University of Chicago Press.
- Henretta, James A. 1991. Foreword: Rethinking the State Constitutional Tradition, *Rutgers Law Journal* 22(4):819-839.
- Hershkoff, Helen. 1999. Positive Rights and State Constitutions: The Limits of Federal Rationality Review, *Harvard Law Review* 112:1131-1196.
- Hershkoff, Helen. 1993. State Constitutions: A National Perspective, *Widener Journal of Public Law* 3(7):8-9.
- Kennedy, John. 2003. Caps on Non-economic Damages Could Go Beyond Medical Liability. *Pennsylvania Law Weekly*, June 9, p. 11.
- Kincaid, John. 1988. The New Judicial Federalism. *Journal of State Government* 61(5):163.
- Lutz, Donald S. 1988. The American Constitution as an Incomplete Text. *Annals of the American Academy of Political and Social Science* 496:23-32.
- Malone, Wex S. 1965. The Genesis of Wrongful Death. *Stanford Law Review* 17:1043.
- McCurdy, Charles W. 1998. The “Liberty of Contract” Regime in American Law in Harry N. Scheiber ed., *The State and Freedom of Contract*. Stanford, CA: Stanford University Press.
- Middleton, Richard H. Jr. 2000. Beating Back Tort Reform. *National Law Journal* 22(50):A19.
- New York State Commission on Employers’ Liability. 1910. *Report to the Legislature of the State of New York By the Commission Appointed Under Chapter 518 of the Laws of 1909 to Inquire into the Question of Employers’ Liability and Other Matters: First Report, March 19*. J.B. Lyon Co.
- Peck, Robert S. 2001a. In Defense of Fundamental Principles. *Seton Hall Law Review* 31:672-682.
- _____. 2001b. Defending the American System of Justice. *Trial* 37(4):18.

-
- Presser, Stephen B. 2001. Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions. *Seton Hall Law Review* 31:649-665.
- Priest, George L. 2001. The Constitutionality of State Tort Reform Legislation and Lochner. *Seton Hall Law Review* 31: 683-687.
- Robbins, Mary Alice. 2003. Will Key Win on Caps Lead to More? *National Law Journal* 26 (4):6.
- Ross, William G. 1994. *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts*. Princeton, NJ: Princeton University Press.
- Roosevelt, Theodore. 1908. *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics, of Theodore Roosevelt, President of the United States*. New York: The Current Literature Publishing Co.
- Schwartz, Victor E. 2001. Judicial Nullification of Tort Reform. *Seton Hall Law Review* 31:688-693.
- Schwartz, Victor E. and Leah Lorber. 2001. Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers. *Rutgers Law Journal* 32:907.
- _____. 2001. Judicial Nullification of Civil Justice Reform Violates the Fundamental Constitutional Principle of Separation of Powers: How to Restore the Right Balance: Appendix 1: Tort Reform Laws Held Unconstitutional by State Courts after January 1983. *Rutgers Law Journal* 32:939.
- _____. 2001. Judicial Nullification of Civil Justice Reform Violates the Fundamental Constitutional Principle of Separation of Powers: How to Restore the Right Balance: Appendix 2: Tort Reform Laws Upheld as Constitutional by State Courts after January 1983. *Rutgers Law Journal* 32:952.
- Simon, Jonathan. 1998. Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919-1941. *Connecticut Insurance Law Journal* 4:521.
- Slind-Flor, Victoria. 1996. Tort Revision: "Lost Cause" in California? *National Law Journal* 18(32):B1.

-
- Tarr, G. Alan. 1998. *Understanding State Constitutions*. Princeton, NJ: Princeton University Press.
- Tiffany, Francis B. 1983. *Death By Wrongful Act: A Treatise on the Law Peculiar to Actions for Injuries Resulting in Death*. St. Paul: West Publishing.
- Tort Revision. 1994. Tort Revision Continues to Occupy Headlines, but its Progress Is Not Always Triumphant. *National Law Journal* December 26:C12.
- Urofsky, Melvin I. 1985. State Courts and Protective Legislation During the Progressive Era: A Reevaluation. *Journal of American History* 72(1):63.
- Weinstein, James. 1968. *The Corporate Ideal in the Liberal State, 1900-1918*. Boston: Beacon Press.
- Werber, Stephen J. 2001. Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates. *Rutgers Law Journal* 32(4):1045-1070.
- Williams, Robert F. 1999. *State Constitutional Law: Cases and Materials, 3d ed.* Charlottesville, VA: Lexis Law Publishing.
- Witt, John Fabian. 2004. *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law*. Cambridge, MA: Harvard University Press.
- _____. 2003. Speedy Fred Taylor and the Ironies of Enterprise Liability. *Columbia Law Review* 103:1-49.
- _____. 2000. From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family. *Law & Social Inquiry* 25:717.

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Design and Typography:

Ismael Valentín

Printing:

Columbia University Printing Services

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