

29. Tort Reform

Congress should

- respect the Constitution and the laboratory of tort law provided by the 50 states,
- reject “Auto Choice” legislation, and
- enact class action reform.

Tort law is about as popular as the Internal Revenue Service these days: almost no one likes it, and just about everyone believes it needs to be “fixed.” Too often, today’s tort law assigns liability without fault, without causation, even without real damages. Most people agree that modern tort law discourages personal responsibility, yet encouraging responsible behavior was traditionally one of tort law’s principal aims. As individuals are able to shift the costs of their behavior to others, we have seen an explosion of litigation, boundless punitive damage awards, and unjustified class actions. The result is increased costs for everything and everybody.

That, in a nutshell, is the problem. In this chapter, we examine a few steps that Congress should take to fix tort law. At the outset, however, a threshold test must be passed before the federal government may legitimately intercede. Congress may not act without constitutional authority. Because tort law is traditionally and constitutionally reserved to the states, the federal role in tort reform is indeed limited.

Tort Reform and the Contract with America

Federal tort reform since 1994 has fallen far short of the ambitious ideals announced in the GOP’s Contract with America. Congress did little more than set a time limit for lawsuits against small airplane manufacturers (covering aged products) and enact, over President Clinton’s veto, the Private Securities Litigation Reform Act of 1995, which shields companies from some shareholder suits. Many other reforms have failed, including

the most recent federal proposal sponsored by Sens. Slade Gorton (R-Wash.) and Jay Rockefeller (D-W.Va.), which died in the Senate.

Fairly broad in its scope, the Gorton-Rockefeller proposal would have implemented these changes, among others: (1) State courts would have to try a case under federal rules if the plaintiff alleged injuries from a defective or unreasonably dangerous product. (2) Standards for granting punitive damages would be federalized and capped at \$250,000, but only for “small businesses.” (3) A nationwide time limit would be imposed for lawsuits involving workplace injuries from old machinery. (4) A new federal “contributory negligence” defense would be available if the victim of a defective-product injury was under the influence of drugs or alcohol. (5) National rules would determine if and when retailers and wholesalers were liable for production defects. (6) If a victim negligently misused or altered a product, damages would be reduced in proportion to the victim’s fault.

Some senators have questioned whether the 106th Congress should resuscitate the Gorton-Rockefeller proposal. The answer is a resounding no. Federal tort reform of the kind proposed in 1996 and 1998 is plainly incompatible with American freedoms and the rule of law for the following reasons: (1) The power to enact tort law reform inheres in the 50 states that compose the union. (2) Although some reforms have been clumsy, a state reform movement is already under way. (3) Much of the contemplated tort reform, even if it were constitutional, would be destructive of the nature of tort law.

The Power to Enact Tort Law Reform Inheres in the 50 States

It simply cannot be repeated often enough: Our federal government is one of limited and enumerated powers. The making of tort law is not one of those powers. Thus, Congress must defer to state and local government.

The Constitution provides that Congress can “regulate Commerce . . . among the several States.” Yet that power, conceived when the states were erecting protectionist barriers to the free flow of interstate commerce, authorizes Congress primarily to remove such barriers. Over the last 65 years, of course, courts have read the Commerce Clause far more broadly and have upheld federal regulation of virtually all private activity. In so doing, the courts have allowed Congress to turn the commerce power on its head; instead of striking down state barriers, Congress has erected federal barriers and prevented the states from serving as laboratories of competitive tort regimes.

To be sure, rules of tort liability often “affect” interstate commerce. But that is not enough to justify federal intervention unless the free flow of trade among the states is impeded by such rules. In 1995 the Supreme Court took a small step toward reaffirming that principle. In *United States v. Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which banned guns within 1,000 feet of a school, exceeded Congress’s authority under the Commerce Clause. Conceivably, the *Lopez* case heralded the start of a return to a proper reading of the Commerce Clause. Time will tell. Even after *Lopez*, Congress could attempt to federalize tort law, and the Supreme Court could acquiesce. But legislators who are sensitive to the proper limits of their constitutional powers should not usurp state authority simply because the Supreme Court, as presently constituted, might let them get away with it.

American tort law varies from one state to another. At worst, in states like New Jersey, individual carelessness is subsidized and corporations are forced to insure local consumers against injury. But the corporations that are robbed come from near and far; thus, there is no evidence that any state’s tort law discriminates against out-of-state firms, which would trigger federal authority under the Commerce Clause. Judges and juries who are biased in favor of in-state plaintiffs impose the costs of that bias on customers, employees, and shareholders of both in-state and out-of-state defendant companies.

Thus, in its attempt to federalize much of tort and products liability law, the Gorton-Rockefeller plan undermines the respect that many signers of the Contract with America professed for the division of powers between the federal and state governments.

A State Reform Movement Is Already Under Way

Because abusive state tort rules act much like a tax on productive activity, the more such rules are applied, the more productivity or wealth declines. Wealth can decline in many ways. For example, customers will pay more for products if the manufacturers of those products have to pay for injuries caused by negligent consumers. Physicians will avoid practicing in jurisdictions with unreasonable malpractice rules. And children and swimmers will find less enjoyment if playgrounds cannot be built or diving boards cannot be profitably installed at pools. Those costs produce powerful in-state lobbies for tort reform.

Since the so-called torts crisis of the mid-1980s, virtually all 50 states have enacted some form of tort reform. The changes have varied substan-

tially—from caps on punitive damages to the creation of “statutes of repose” (bars to suit for failures of old, used products) to the modification of “joint and several liability” (whereby multiple defendants are each held liable for the entirety of a plaintiff’s damages, irrespective of the extent of their culpability). Some state reforms have arguably been misguided—several have been declared by state supreme courts to violate state constitutions—but that is no justification for federal lawmakers to intervene. When voters realize that they will pay a price if their state persists in applying dysfunctional tort laws, state lawmakers will respond. The same types of incentives that dissuade states from imposing exorbitant taxes can operate to create a rational tort system.

Much Contemplated Tort Reform Would Be Destructive

In a free society, legal liability can arise under both contract and tort law. All legal obligations constrain our freedom to some extent, but those constraints are not the same in contract as in tort. Contract is concerned with an act that purposely exchanges some aspect of liberty for goods or services that are more highly valued. That is, we expressly obligate ourselves to do or pay something in return for a reciprocal promise from someone else. Tortfeasors, on the other hand, have no intention of incurring any obligations. A tort suit occurs after someone has suffered a loss, which he wishes to transfer to another party that does not consent to the transfer. Holding a contract debtor liable is philosophically easy: after all, the debtor agreed to be held liable when he made his pledge. On what grounds can we justify holding tortfeasors to obligations they did not voluntarily assume? Consider two very different answers to that question.

One approach to tort law—generally characterized as “corrective justice”—would hold the defendant liable if and only if he wrongfully caused the plaintiff’s injury. A second approach, all too often advocated in our nation’s law schools, views tort law either as a means of achieving a “fairer” distribution of economic resources—as defined, naturally, by the state—or as a means of punishing an unpopular defendant. Lamentably, if the goal is distributive or punitive, rather than corrective, a defendant could well be held liable without wrongfulness, without causation, even without damages.

Traditional state tort law typically reflected the corrective model. Current legislative reform, at both the state and federal levels, too often epitomizes the distributive-punitive model. For example, makers of implantable medical devices—such as heart valves, hip and knee joints, and pacemakers—

have legislators' favor these days, so they have been immunized under the federal Biomaterials Access Assurance Act from some state product liability rules. Tobacco manufacturers, by contrast, are federal pariahs "undeserving" of such protection. Our legislators seem to have rejected this basic principle: The arrangements that private parties make in ordering their affairs must not be transformed by special legislative enactments, heavily dependent on political power and government favoritism.

Congress Should Reject "Auto Choice" Legislation

One current proposal, called "Auto Choice," is a particularly noxious example of tort reform. Auto Choice would replace state law with a federal "no-fault" regime under which drivers injured in automobile accidents would generally collect from their own insurers, not from culpable drivers or their insurers. Here, in brief, is the idea: When a driver purchases car insurance, he can elect coverage that would limit his own recovery, and also the recovery of anyone he injures, to "economic losses" (i.e., out-of-pocket costs and lost wages). That limit binds other parties in an accident even if they have not themselves elected no-fault. Any driver with "full insurance," negligently injured by a driver with no-fault, could recover noneconomic losses (e.g., pain and suffering) only from his own insurer.

Under Auto Choice, the election of no-fault coverage by a careless driver denies an accident victim his right to recover full damages from the party at fault. A person with serious losses will have to purchase and pay for his own insurance against pain and suffering. He will no longer be able to recover those losses from the person who injured him. Whether at the state or the federal level, Auto Choice is quite simply a bad idea that violates rights to which we have been entitled for centuries under the common law.

The principal motivation for Auto Choice legislation has been out-of-control litigation costs, which are a major factor in the sharp rise of insurance premiums. But there are ways of lowering insurance premiums without trampling on the rights of tort victims. States can more vigorously prosecute uninsured drivers, eliminate duplicative elements of compulsory auto coverage (like medical coverage), encourage arbitration or other alternative ways of resolving disputes, and abolish "assigned risk pools" (state-insured programs for drivers considered too risky to obtain private coverage) through which careful drivers subsidize the insurance costs of careless drivers. Those are choices for states to make, however, not the federal government.

Federal Intervention Is Justified to Reform Class Actions

One area of tort reform in which the federal government can play a legitimate role is class actions. Some state courts have been willing to certify national plaintiffs' classes of unmanageable size, divergent interests, and varying injuries. That abuse of the certification process has engendered what one commentator has termed "the 90's form of greenmail": defendants settle by offering large sums to class attorneys but often nothing to the plaintiffs themselves, thus escaping substantial litigation costs should the suit go to trial.

The recent claim in a Florida state court brought by a national class of 60,000 airline flight attendants for damages due to secondhand smoke is a case in point. To avoid litigation, tobacco companies agreed to disgorge roughly \$349 million, of which \$300 million went for further research, \$3 million paid expenses, and the rest lined the pockets of the class attorneys. The plaintiffs received nothing!

Plaintiffs' lawyers have learned which states offer such "drive-by" class certification. Federal legislation to remove nationwide class actions from state courts would go a long way toward resolving the problem. Of late, federal courts have sensibly applied the more rigorous certification requirements in the Federal Rules of Civil Procedure.

Conclusion

With the exception of class action reform, the federal government is not empowered to entangle itself in tort and products liability law. That is not to suggest that reform is unnecessary. Modern tort theories would have every "victim" compensated by corporate America, and those theories have penetrated deeply into the psyches of many judges and jurors. As a result, the cost of insurance and of goods and services now includes a "tort premium" that far exceeds the costs of individual or corporate misbehavior. And those who produce the goods and services that make the American economy strong have come to believe that no matter what they do, no matter how responsibly they behave, they are going to be held liable for the negligence of others.

Those problems are indeed real. But no matter how real the problem, if there is no constitutional authority, Congress may not intercede. To be blunt, the federal government may not enact legislation to reform laws covering matters that under our system of dual sovereignty are reserved to the states.

Suggested Readings

Epstein, Richard A. "The Unintended Revolution in Products Liability Law." *Cardozo Law Review* 10 (1989).

Krauss, Michael I. "Tort Law and Freedom." Cato Institute Policy Analysis, forthcoming.

Niskanen, William A. "Do Not Federalize Tort Law: A Friendly Response to Senator Abraham." *Regulation* 18, no. 4 (1995).

Priest, George. "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law." *Journal of Legal Studies* 14 (1985).

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