Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance

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JUDICIAL NULLIFICATION OF CIVIL JUSTICE REFORM VIOLATES THE FUNDAMENTAL FEDERAL CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS: HOW TO RESTORE THE RIGHT BALANCE

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I. HISTORY AND LOGIC PROVIDE A ROLE FOR BOTH LEGISLATURES AND COURTS TO DEVELOP TORT LAW

Our founding fathers outlined a system of government that allowed our Republic to gain strength and prosperity for over two hundred and forty years. A fundamental constitutional principle of our form of government at both the state and federal levels has been a balance of power among the three branches of government—legislature, executive branch, and the judiciary. It is not rocket science, but a high school civics lesson showing that the legislative branch makes or creates law, the executive branch enforces the law, and courts interpret the law. The government works best when each branch respects the role of the others.

Unfortunately, that mutual respect has broken down in the past decade in the area of civil justice. A number of courts, scrapping fundamentals of our democracy, have chosen to nullify the reasonable exercise of legislative public policymaking in the area of civil justice reform. In over ninety decisions, a minority of state supreme courts, often by a slim majority decision, has substituted the jurists' own views of public policy for those of the legislatures. As this article will show, there is no doubt that the Supreme Court of the United States would follow the majority of state courts and judges in providing

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the appropriate respect to the legislature in formulating public policy. As shown by a number of state supreme court decisions, there is hope that this trend may abate and that proper deference will be given by state courts to the proper exercise of state legislative power. Unfortunately, this is not a certainty.

It is our hope that through this article and through other forums, judges will maintain the appropriate respect for their sister branches of government in the area of civil justice reform. If judges do not, the authors believe that those judges' decisions will ultimately collide with the Constitution of the United States and that the Supreme Court of the United States will preserve a fundamental principle of government: the separation of powers.

A. A Page of History: How Judges Entered the Business of Making Tort Law

1. The Reception Statutes: Legislators Delegated Power to the Courts and They Made "Law"

For over two hundred years, courts have developed tort law. Their right to develop that law did not, however, come from any inherent power of judges. To the contrary, that right was delegated to judges by legislatures at the time the American colonies of England became the United States of America. The power was given to judges through "reception statutes."[1] These statutes, now an arcane part of history, "received" the common law of England at the time each colony became a state.[2] The state then delegated to courts the power to develop common law.[3] Finally, and for practical purposes of the year 2001, it is important to remember that the legislature reserved the power to retrieve lawmaking in the area of tort law, as well as many other areas of the then common law.[4]

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1. *See* Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 363 (1983) (recognizing that "reception statutes were the mechanism for transferring the common law of England to the new United States").

2. For a listing of statutes, see Victor E. Schwartz et al. *Who Should Decide America's Tort Law?—The Battle Between Legislatures and Courts* (monograph, Washington Legal Foundation, Mar. 1997).

3. *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 648-49 (1987).

4. *See* 5 ILL. COMP. STAT. ANN. 50/1 (West 1993 & Supp. 2001) (establishing that the Illinois General Assembly could repeal any part of the English common law); *see also* City of Sterling v. Speroni, 84 N.E.2d 667, 671 (Ill. App. Ct. 1949) (noting that the common law is in force until repealed by statute).

When colonies became states, their legislative plate was full. The legislature first enacted criminal codes, but left tort law, property law, commercial law and other key areas of civil law to the courts. Over time, however, the legislature retrieved its right to make law in most of these areas. Perhaps the most well known example is contract law. In the late 1800s, most states passed the Uniform Sales Act, which placed under legislative control contract principles, with some substantial modification. It is important to note that the legislature did not simply enact the common law as it had been developed by courts. Almost a century later, the legislatures in at least forty-nine states revisited the principles of the Uniform Sales Act and enacted the Uniform Commercial Code. Once again, the legislature deemed it sound public policy to make modifications. In both situations, courts respected what their sister branch, the legislature, had done.

The same process occurred in the area of property law and other portions of the common law of the late 1800s. Courts respected legislative judgments and did not attempt to nullify them or take the view that they as judges knew better than the legislature with respect to public policy judgments in these key legal areas.

In general, courts took the same attitude when legislatures engaged in civil justice reform or modified tort law. Perhaps the most dramatic example of this was the advent of workers' compensation statutes, which made fundamental changes in the common law of torts. The statutes took away a worker's right to sue his or her employer and have a trial by jury when workers were injured on the job. Workers' compensation statutes ended the possibility of both pain and suffering damages and punitive damages. Additionally, the statutes limited the amount of economic damages that might be recovered to a percentage of loss of actual wages and health costs.[5] The statutes provided the worker with a no-fault based recovery against his employer, but that recovery was substantially less than the amount the worker would have received in a common law suit.

Legislatures entered tort law in other areas. They modified the common law of wrongful death and eliminated certain torts (such as breach of promise) because they did not seem appropriate for new and modern times.[6] Once again,

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5. *See* ARTHUR LARSON, WORKERS' COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH (Desk ed. 1991).

6. *See* Rebecca Tushnet, *Rules of Engagement*, 107 YALE L.J. 2583, 2586 & n.13 (1998) (discussing history of legislative rejection of breach of promise); John Fabian Witt, *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*, 25 LAW & SOC. INQUIRY 717, 731-42 (2000) (discussing development of wrongful death statutes).

courts respected legislative judgments and did not substitute their own judgments for that of their co-equal branch of government—the legislature.[7]

For the most part, however, legislatures left the development of the law of torts to judges. Most judges took this responsibility of developing the law in a conservative and thoughtful manner. They developed the law slowly and incrementally, giving both potential plaintiffs and potential defendants adequate notice of the changes that were to be made. Perhaps the greatest example of a lawmaker who created laws slowly and carefully was Justice Benjamin Cardozo. His opinions show careful, articulated, reasoned predicates for his creative changes in the law.[8]

Perhaps the best demonstration of how tort law developed incrementally is the change from the old contributory negligence defense to comparative negligence. In the late 1800s, the contributory negligence defense stood as an absolute doctrine. If the plaintiff's fault, however slight, contributed to the accident, he or she lost the case.[9] Through the next century, courts began limiting the contributory negligence defense through a variety of doctrines.[10] For example, some courts held that if it were shown that the defendant had a last clear chance to avoid the accident, the defense did not apply.[11] Some states held that if the defendant acted in a reckless manner, the defense did not apply.[12] Finally, in the mid-1970s, some courts noted that, as a practical matter, juries were ignoring the contributory negligence defense and were substituting their own system of comparative negligence. The juries were not holding plaintiffs who were at fault totally responsible for a harm; they were apportioning damages between plaintiff and defendant.[13]

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7. *See, e.g.*, Moushon v. Nat'l Garages, Inc., 137 N.E.2d 842, 845 (Ill. 1956) (upholding as constitutional limitations on recovery provided in state Workmen's Compensation Act).

8. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.). Prior to this case, New York courts had eroded the privity rule against manufacturers of blatantly dangerous products. Judge Cardozo showed that other products, such as automobiles, could be just as dangerous if they were negligently made. In *MacPherson*, Judge Cardozo traced the foundations and development of the law of privity in negligence actions and removed the privity barrier in negligence cases. This landmark decision marked the beginning of the modern negligence law of products liability.

9. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994 & Supp. 2000).

10. *See id.*

11. *See id.* at 151-65 (discussing "last clear chance" doctrine and collecting cases).

12. *See id.* at 111-29 (discussing limitation and collecting cases).

13. For this practical fact, a few courts abandoned the contributory negligence defense in favor of comparative fault. The overwhelming majority of states made the change legislatively. *See*

2. A Trend Toward Active Judicial Lawmaking

Beginning in the 1960s, some judges put aside Judge Cardozo's tradition of incremental change and took on a clear legislative role. These judges made quick and unprecedented changes in the law of torts. For example, after an incremental development of strict product liability law, some courts (such as the Supreme Court of New Jersey and the Supreme Court of Louisiana) went beyond strict liability and held defendants absolutely liable: they were liable even though they may not have known or could not have known of a risk,[14] or even if they designed a product as carefully as possible and could not have designed a product to have avoided a particular injury. [15] Such a radical change in the law was certainly more appropriate to have been made by a legislature.

A similar dramatic change occurred in the law of punitive damages. Under the common law, punitive damages were awarded when a defendant engaged in clear, intentional, wrongful conduct.[16] Defendants who committed batteries, assaults,[17] or falsely imprisoned individuals[18] or intentionally

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id. app. B, at 517 (collecting state comparative fault statutes). When the change was made legislatively, courts respected the legislative judgment. *See, e.g.*, Jimenez v. Sears, Roebuck & Co., 904 P.2d 861, 870 (Ariz. 1995) (noting that legislative enactments abolishing joint and several liability and adopting comparative fault do not violate state constitution's prohibitions against limitations on damages; "[T]he legislature has a constitutional role . . . in tort law . . . and may regulate, so long as it does not abrogate.").

14. *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986) (stating manufacturer may be held liable as to products that were so dangerous that "[a] reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product"); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 549 (N.J. 1982) (finding asbestos manufacturer can be held liable for failing to warn about the dangers of asbestos—even though, at the time the product was marketed, no one knew or could have known of these dangers).

15. *See, e.g.*, O'Brien v. Muskin Corp., 463 A.2d 298, 306 (N.J. 1983) (holding manufacturer of above-ground swimming pool liable in diving accident even though there was no way to make an above-ground pool safe for diving; certain products, "including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others"); *accord* Kelley v. R.G. Indus. Inc., 497 A.2d 1143, 1159 (Md. 1985) (holding manufacturer of cheap handguns liable for gunshot injuries sustained during a robbery, even though the essential purpose of a handgun is to fire bullets).

16. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1006-07 (1999).

17. *See, e.g.*, Ward v. Blackwood, 41 Ark. 295 (1883); Lyon v. Hancock, 35 Cal. 372

trespassed on land of another,[19] deserved punishment. In the 1970s and 1980s, courts in some states extended punitive damages to cases of recklessness or even gross negligence.[20] Amorphous punitive damage "triggers" replaced common law rules that confined punishment to intentional wrongdoing. Moreover, the common law confined punitive damages to situations where there was one or perhaps a few plaintiffs and one defendant. Suddenly and without notice, punitive damages were applied in products liability cases where there were potentially hundreds of plaintiffs with the unfortunate result of defendants being repeatedly punished for the same wrongful conduct.[21]

When courts engaged in this new and dramatic lawmaking, legislatures stepped in and retrieved their appropriate role as lawmakers. For example, in New Jersey and Louisiana, legislatures abolished absolute liability and confined the defendant's responsibility to situations where it knew or could have known about a risk and where there was a viable alternative and safer way to make a product.[22] These courts followed the tradition of their states with respect to

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(1868); Corwin v. Walton, 18 Mo. 71 (1853); Trogden v. Terry, 90 S.E. 583 (N.C. 1916); Porter v. Seiler, 23 Pa. 424 (1854).

18. *See, e.g.*, Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893); Green v. S. Express Co., 41 Ga. 515 (1871); Schlencker v. Risley, 4 Ill. (1 Scam.) 483 (1842); Taber v. Hutson, 5 Ind. 322 (1854); Parsons v. Harper, 57 Va. (1 Gratt.) 64 (1860); Hamlin v. Spaulding, 27 Wis. 360 (1870).

19. *See, e.g.*, Dorsey v. Manlove, 14 Cal. 553 (1860); Treat v. Barber, 7 Conn. 274 (1828); Singer Mfg. Co. v. Holdfodt, 86 Ill. 455 (1877); Taylor v. Giger, 3 Ky. (Hard.) 586 (1808); Schindel v. Schindel, 12 Md. 108 (1858); Huling v. Henderson, 29 A. 276 (Pa. 1894); Bradshaw v. Buchanan, 50 Tex. 492 (1878).

20. *See, e.g.*, Wisker v. Hart, 766 P.2d 168 (Kan. 1988) (extending punitive damages to acts of "gross negligence").

21. *See* Victor E. Schwartz et al., Multiple Imposition of Punitive Damages: The Case for Reform, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

22. *See* LA. REV. STAT. ANN. §§ 9:2800.53 (defining the terms in Products Liability Act), .56 (making the existence of an alternative design at the time the product left the manufacturer's control a necessary element of unreasonably dangerous design claim), .59 (stating that a manufacturer will not be liable for a design defect if, at the time the product left his control, he did not know and could not have known of the design characteristic that caused damage or he did not know and could have known of an alternative design) (West 1999); N.J. STAT. ANN. § 2A:58C-3 (West 2000) (stating that a manufacture shall not be liable for design defect if when the product left control of the manufacturer there was not a "practical and technically feasible alternative design"); *see also* MD. CODE ANN., art. 27, § 36-I(h) (1996) (stating in response to the Maryland Supreme Court holding in *Kelley v. R.G. Indus. Inc.*, that a manufacturer may not be held strictly liable for injuries caused by its product if there was an intervening criminal act of a third party).

what they had done with respect to workers' compensation laws. Although individual judges may have disagreed with the public policy enunciated by the legislature and had shown that disagreement by their prior opinions, they respected legislative will. These judges respected the historical basis of the legislature's right to make tort law.

As this article will show, all of that was to change, at least in the minds of some judges in the late 1980s and throughout the 1990s into the next century.

B. Volume of Logic: Legislatures Are Competent to Develop Tort Law

Apart from history and the important role of reception statutes, logic and common sense suggests that legislatures are as equipped as courts to formulate our nation's tort law. In fact, on a general public policy basis, legislatures are better equipped to formulate such rules.

1. Narrow Issue vs. Broad Picture

Any person who has argued a case in a state appellate court knows how courts make law. Basically, they hear from two attorneys with opposing points of view focusing on a narrow issue. For example, an appellate court may consider whether a manufacturer's duty to warn about dangers connected with a product should continue after the product enters the marketplace. Basic constitutional structures, which provide that courts should only decide cases and controversies, clearly indicate that courts should focus on narrow issues and not engage in broad, sweeping formulations of law and public policy.

Legislatures create law from the opposite perspective. They are in a position to determine whether our tort system has become too narrow or overextended. For example, legislatures properly expanded the tort system to allow claims for wrongful death. They also are in a position to determine whether product liability laws have become so extreme in favoring plaintiffs that they deter innovation or keep products off the market. Legislatures can determine whether malpractice rules have become so strict as to affect whether doctors can, as a practical matter, engage in their profession in rural areas of a state. Legislatures can determine and balance whether permitting claims against very old products is necessary to help injured persons or whether that need is outweighed by adverse effects on commerce and unfairness in making manufacturers pay for products long after they have been made.

Legislatures are also in a position to determine whether the classic tort system has failed in an area; for example, with respect to automobiles. Some

states have made such a determination and have enacted so-called "no-fault" laws.[23] If legislatures are truly acting within the framework of fundamental principles of the balance of powers, courts have been and are properly in the role of focusing on narrow issues. The legislature addresses the broader picture.

2. Amount and Sources of Input to Develop Picture

The legislature can develop the broader picture because of the input that is available to it. The hearing process can help a legislature determine, for example, whether malpractice laws are a deterrent for doctors to practice in rural areas of a state.[24] Legislatures not only can examine witnesses but also call for additional information and, if they are not satisfied, they can call back the witnesses, and examine them further.

Many Americans have seen the legislative process at work—hearings are often shown on television—but relatively few people have witnessed how appellate courts make law. The picture is very different in a state supreme court. Basically, judges in robes—numbering five, seven or nine—hear from two lawyers before a podium. The arguments presented by the lawyers rarely exceed thirty minutes per lawyer. The judges can ask questions and, on occasion, ask

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23. *See, e.g.*, COLO. REV. STAT ANN. §§ 4-701 to -723 (West 2000); FLA. STAT. ANN. §§ 627.730 to 627.7405 (West 1986 & Supp. 2000); HAW. REV. STAT. §§ 431:10C-103 to -408 (1998 & Supp. 2000); KAN. STAT. ANN. §§ 40-3101 to -3121 (2000); KY. REV. STAT. ANN. §§ 304.39-010 to -340 (Michie/Bobbs-Merrill 2001); MASS. GEN. LAWS ANN. ch. 90, § 34A (West 1995); MICH. COMP. LAWS ANN. §§ 500.3101 to .3179 (West 1994 & Supp. 20001); MINN. STAT. ANN. §§ 65B.41 to .71 (West 1996 & Supp. 2001); N.J. STAT. ANN. §§ 39:6A-1 to -35 (West 1990 & Supp. 2001); N.Y. INS. LAW §§ 5101-5108 (McKinney 2000 & Supp. 2001); N.D. CENT. CODE §§ 26.1-41-01 to -19 (1995 & Supp. 1999); 75 PA. CONS. STAT. ANN. §§ 1701-1725 (West 1996 & Supp. 2001); UTAH CODE ANN. §§ 31A-22-301 to -315 (1999 & Supp. 2001).

24. Indeed, surveys in West Virginia show that precise impact. The West Virginia State Medical Association has reported that forty-one of the state's fifty-five counties were wholly or partially designated Health Professional Shortage Areas and all but five counties are designated as medically underserved. *See* W. VA. STATE MED. ASSN., WHEN IS THE BEST TIME TO DEAL WITH A DOCTOR SHORTAGE IN WEST VIRGINIA? (2001) (citing United States Department of Health and Human Services). Despite this, a recent survey of West Virginia doctors showed that 44% are considering moving their practices out of state and another 32.4% are considering retirement. *Id.* High tort costs, frivolous lawsuits, and the resulting skyrocketing medical malpractice premiums are reasons cited for this potential health care crisis. *Id.* (stating that on average, one out of every two doctors in West Virginia gets sued—about 2.5 times more frequently than doctors in Ohio—and that from 1995 to 1999 more than 85% of suits against West Virginia doctors were either dismissed as meritless or resolved in favor of the doctor).

for additional briefing on a specific issue, but their input is limited by a very traditional structure. They are courts, not legislatures. They are not in a position to develop broad public policy determinations.

3. Public Light

As has been suggested, when courts make law, they are shielded from public light. One afternoon, the Supreme Judicial Court of Massachusetts, in *Simmons v. Monarch Machine Tool Co.*, determined that manufacturers should be absolutely liable in that state.[25] The court pronounced that there would no longer be defenses based on whether the manufacturer knew or could have known about a particular risk.[26] If the Massachusetts legislature had made such a determination, it would have generated front-page stories in the *Boston Globe* and other newspapers around the state. Not one word appeared about these decisions in any media outlet. This is true of most state court public policy decisions in the area of tort law.

By way of contrast, when legislatures make law, public scrutiny is intense. If the hearings are important enough, they will be reported on both radio and television stations. When the legislature enters the arena of tort law, reporters cover the issue minute-by-minute; newspapers not only report the progress of the legislation, but editorials are written about it, pro and con.

Public scrutiny acts as a corrective against excesses, either for plaintiffs or against them. It is present when legislators make law; it is absent when courts do so.

4. Path to Correct

If a legislature makes a mistake, there is an immediate and forceful path to change course—the electorate of the state. If a member of a state legislature has voted to support a statute of repose that might limit a person's right to sue a manufacturer after a prescribed period and this statute has an adverse impact on the citizenry, the constituents of the state will know about it and will make their voices heard in the election booth.

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25. 596 N.E.2d 318 (Mass. 1992); *see* Victor E. Schwartz, *Absolute Product Liability in an Afternoon*, 20 THE STATE FACTOR, No. 3 (Am. Legis. Exch. Council Mar. 1994) (discussing *Simmons*).

26. *See Simmons*, 596 N.E.2d at 320 n.3 (holding that people who sell products will be held liable "[r]egardless of the knowledge of risks that [they] actually had or reasonably should have had when the sale took place; the state-of-the-art is irrelevant, as is the culpability of the defendant").

By way of contrast, when courts make law, it is rarely reported. That in itself is an impediment to correction—most people do not know what the court has done. Assuming that they do know and they are unhappy about it, it is very difficult to correct the law within the judicial system, especially when the judiciary claims exclusive control over the development of tort law, as has been suggested by courts in some jurisdictions.[27]

5. Prospective vs. Retroactive Rulemaking

One of the mysteries that law students uncover in the first year of law school is that when courts make law, the rules are retroactive. Under the guise that the court is always "discovering" the common law, courts make rules and apply them to facts that have occurred long before the court's decision is rendered. For example, if a court (such as the Supreme Judicial Court of Massachusetts) decides that a manufacturer is liable, regardless of whether it knew or could have known about a particular risk, liability is applied retroactively. The company that insured that manufacturer also will bear that cost, even if the law was based on "fault" at the time the insurance contract was signed.

By way of contrast, when legislatures make law, their rules are generally prospective in nature. They will apply to new cases, not old ones. They will allow the citizenry to know about the new rules and act in accordance with the public policy announced in those rules.

In sum, when one looks at how courts and legislatures make law, the legislative branch of government is certainly competent and perhaps better able to determine the scope of tort law in a particular state.

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27. *See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1081 (Ill. 1997) (overturning section of statute due to its interference with judiciary's right to limit excessive awards of damages); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1085-86 (Ohio 1999) (suggesting Ohio tort law is the sole province of the judiciary).

II. THE DECLINE OF MUTUAL RESPECT BETWEEN SOME STATE COURTS AND STATE LEGISLATURES

A. The Constitution of the United States: Why Is It "Inferior"?

Unfortunately, there has been a decline in the respect that state courts give to their sister branch, the state legislature. In over ninety decisions, some state high and lower courts have invalidated civil justice reform measures. While some of the decisions are well reasoned and careful in their tone, many are not. These decisions simply substitute the public policy view of a judge for that of a legislature. This process has been termed "judicial nullification."

The path toward judicial nullification of legislative civil justice reform has been through state constitutions. These documents, which are often several hundred pages in length, contain very elastic provisions that allow extreme latitude for courts to overturn a legislature's will. Fortunately, most state courts have respected a fundamental principle that transcends every portion of a state constitution—the separation of powers. Of concern, however, is that a number of courts have not.

It is curious that none of the decisions that have nullified state law have used the constitution that most lawyers, students and citizens know about—the Constitution of the United States. Why?

In a seminar conducted at an annual Association of Trial Lawyers of America (ATLA) meeting in California, a speaker educating his fellow personal injury lawyers about how to nullify state tort reform was very blunt. He indicated that the Federal Constitution is *inferior*—that "most state constitutions are far superior to the federal constitution."[28] This might appear shocking to constitutional scholars and might have shocked the founding fathers of our nation. Why is the Constitution of the United States *inferior* when it comes to evaluating civil justice reform?

The answer is twofold. First, the Supreme Court of the United States has interpreted the Constitution with a fundamental respect for separation of powers. Apart from a brief period in the 1930s—the so-called *Lochner* era, where the court was criticized for substituting its own view of public policy

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28. Ned Miltenberg, Constitutional Challenges to Tort Reform, Learn How to Develop Substantive and Procedural Challenges to Tort Reform Legislation, Address Before the Annual Meeting Session of Association of Trial Lawyers of America (1999) (copy of transcript on file with author). He also opined that "many state courts are better than the United States Supreme Court." *Id.*

(against the New Deal) for that of the legislature[29]—one finds that in interpreting the Constitution of the United States, the Supreme Court is unlikely to strike down laws that have a sound basis in public policy.

Most tort reform has a sound basis in public policy. For example, legislative decisions to limit and provide guidance in the area of punitive damages represent a policy of assuring that penalties are known and understood.[30] This policy has received very strong endorsement from the Supreme Court of the United States. For that reason, it is clear that the Supreme Court would not hold unconstitutional a state law that limited punitive damages.[31] From the perspective of personal injury lawyers, the

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29. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (striking down a New York law that limited the number of hours that bakery workers could work as an abridgement of the liberty to contract); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 to 8-7 (2d ed. 1987) (discussing how strict scrutiny was applied by the *Lochner* Court in overturning economic regulations under Due Process Clause). In the late 1930s, the standard of review for evaluating economic legislation changed to rational basis scrutiny. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 (1938) (noting that facts supporting legislative judgment are to be presumed, and legislation on economic regulations is to be held valid unless it lacks a rational basis).

30. The chilling effect of unpredictable punitive damages awards has been repeatedly documented. A Conference Board study of corporate executives found that fear of liability suits had prompted 36% of the firms to discontinue a product and 30% to decide against introducing a new product. *See* S. REP. NO. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997). In many cases, the threat of punitive damages may be abused as a "wild card" to force higher settlements. As Yale law professor George Priest has observed: "[T]he availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement . . . ." George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996); *see also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried"); Steven Hayward, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings*, PAC. RESEARCH INST. PUBLIC POL'Y, Feb. 1996, at 8 (arguing that unpredictability of punitive damages awards and relative probability of punitive damages award at trial tips balance in settlement negotiations in favor of litigants with weak or frivolous cases). Furthermore, in some states, punitive damages are not insurable; a business that does not self-insure can be subject to unwarranted pressure to settle for compensatory damages, which are insurable.

31. *See, e.g.*, BMW of N. Am. v. Gore, 517 U.S. 559, 574 (1996) (establishing three guideposts to determine when a punitive award is excessive and violates due process); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (noting punitive damages have "run wild" in United States); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[J]uries assess punitive

second reason why the Constitution of the United States is *inferior* is if the highest court in a state holds a tort reform statute unconstitutional under the Constitution of the United States, that ruling is appealable to the Supreme Court of the United States. We strongly believe that the Supreme Court of the United States would likely uphold such a law. We also believe that the leaders of the wealthy personal injury bar have reached the same conclusion. Thus, it is totally understandable why the Constitution would be considered *inferior* from their perspective. By utilizing state constitutions, the personal injury bar and courts that rely on provisions in those constitutions effectively eliminate a defendant's right to challenge the decision of the state supreme court. There is no immediate basis to find a "federal issue" in a state court's interpretation of a state constitutional provision. All of this has been well thought out by the wealthy personal injury bar, which, probably meaning no disrespect, has said that state courts are "far superior to the Federal Constitution" in the context of evaluating civil justice reform.

B. State "Constitutionalism" Run Wild—The Purging of Tort Reform

As previously discussed, state constitutions are usually lengthy, prolix, and filled with open-ended provisions. These provisions are malleable and provide an opportunity for a judge who perceives the judiciary to be the dominant branch of government to easily forget the appropriate powers of its co-equal branch, the legislature. For example, a number of state constitutions have so-called "open courts" provisions. As a practical matter, they are intended to provide citizens of a state with justice and reasonable access to the courts. Open court provisions, however, can be stretched to suggest that *any* time a legislature in *any* way limits any person's rights to sue, it is violative of the "open courts" provision.[32] There is no state constitutional history that suggests this

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damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

32. *See, e.g.*, Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983) (holding statute of repose regarding improvements to real property violated open courts provision of state constitution); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (statute setting $450,000 limit on noneconomic damages awards violated access to courts provision of state constitution); Owens-Corning Fiberglass Corp. v. Corcoran, 679 So. 2d 291 (Fla. Dist. Ct. App. 1996) (holding application of former statute of repose to latent asbestos injury violated access to courts provision of state constitution); Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999) (finding two-year occurrence-based statute of limitations as applied to plaintiff was an unconstitutional violation of the privileges and immunities clause and the open courts provision of the Indiana Constitution); Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999) (holding same); Harris v.

extreme result. Respect for fundamental principles of separation of powers abhors such an interpretation. Nevertheless, in the area of civil justice reform and judicial nullification of legislative efforts to improve our system of justice, such interpretations have grown like weeds in some jurisdictions.

1. Few Specifics

(a) Judicial Nullification when There Is No Real Case Before a Court

The Supreme Court of Ohio's 4-3 decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*[33] is perhaps the most extreme example of state constitutionalism run wild.[34] After many days of hearings and two years of study, the Ohio legislature enacted a broad civil justice reform measure, H.B. No. 350. The bill contained many provisions that were intended to improve the civil justice system of Ohio. Some provisions were controversial, but they were carefully considered by the legislature through intense hearings where so-called

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Raymond, 715 N.E.2d 388 (Ind. 1999) (holding same); McCollum v. Sisters of Charity of Nazareth Health Corp., 799 S.W.2d 15 (Ky. 1990) (holding five-year statute of repose for health care liability actions violated open courts provision of state constitution); Perkins v. N.E. Log Homes, 808 S.W.2d 809 (Ky. 1991) (holding that seven-year statute of repose for improvements to real property violated state constitutional prohibition against "special legislation" and, according to the court, any remedial legislation would violate provisions in the state constitution providing for open courts and limits on the power of the legislature); Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (finding statute of limitations for health care liability actions violated access to courts provision of state constitution insofar as the statute applied to minors); Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994) (holding statute providing offset of collateral source benefits received by plaintiff violated right to jury trial, due process, equal protection, right to open courts, and right to meaningful recovery provisions of state constitution); Samuels v. Coil Bar Corp., 579 N.E.2d 558 (Ohio 1991) (finding same as applied to wrongful death actions); Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984) (holding that six-year statute of repose for improvements to real property violated open courts provision of state constitution). Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) (holding $500,000 aggregate limit on damages in health care liability actions violated open courts provision of state constitution); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (holding two-year statute of limitations for medical malpractice actions violated open courts provision of state constitution); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (finding predecessor statute violated due process guarantee set forth in open courts provision of state constitution).

33. 715 N.E.2d 1062 (Ohio 1999).

34. *See* Recent Cases, *State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*—State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999), 113 HARV. L. REV. 804 (2000) [hereinafter "*State Tort Reform*"].

"victim" groups—labor groups, Ralph Nader, and personal injury lawyers—had ample opportunity to show that the Ohio tort system met the needs of all citizens. On the other hand, the legislature heard from medical care providers, small and large businesses, academics, and others who tried to show that Ohio's tort system needed change.

In some ways, H.B. No. 350 limited a person's right to sue. A constitutional argument could have arisen if an individual's claim was adversely affected by a specific provision in the bill itself. Members of the personal injury bar, the Ohio Trial Lawyers Association, decided that they did not wish to wait until such a real case occurred. Instead, they sought what amounted to a declaratory judgment on the constitutionality of the *entire* bill.

Members of the personal injury bar themselves had grave doubts as to whether they could succeed on their mission, but they proceeded anyway. They alleged that if the bill was to be sustained as the law of Ohio, their membership could decline because they no longer would be able to prosper as plaintiffs' lawyers.[35] Laws in other states such as Virginia that are very similar in content to the law set forth in H.B. No. 350 have been in place for years.[36] There has been no proof of poverty among the Virginia personal injury bar. Similarly, we believe that plaintiffs' lawyers would have continued to thrive in Ohio if H.B. No. 350 were law. Nevertheless, with both hype and hope, the Ohio Trial Lawyers Association filed suit.

In a sharply divided 4-3 decision, the Supreme Court of Ohio held that it could decide whether H.B. No. 350 was constitutional. The slim majority of the court ignored the fundamental "case or controversy" requirement. There was no real controversy before the court; no one was injured.

After deciding that the personal injury bar had standing to challenge H.B. No. 350,[37] the court held that the bill violated the so-called "single subject rule" of the Ohio State Constitution.[38] The subject of the bill was civil justice reform, but words like "single subject," much like other elastic provisions of state constitutions, can be expanded or contracted depending on the subjective will of the court. The purpose of the single subject rule was to prevent legislative logrolling—where legislatures "snuck" some irrelevant subject into a bill. Logrolling never occurred with H.B. No. 350. It focused on one subject, civil justice reform, and it passed in open daylight.

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35. *Sheward*, 715 N.E.2d at 1084.
36. *See, e.g.*, VA. CODE ANN. § 8.01-581.15 (Michie 2000).
37. *Sheward*, 715 N.E.2d at 1084.
38. *Id.* at 1098.

In our view, the majority of the court disagreed with the public policy that supported H.B. No. 350 and, for that reason, decided that it contained more than one subject.

The court also held that the legislature's attempts to limit damages in tort law violated the "separation of powers" provision of the state constitution.[39] In words that would appear to reach the level of fantasy in the minds of constitutional scholars, the court arrogated to itself the power to make law.

The decision was greeted with editorial disfavor throughout Ohio,[40] but newspaper editors may not scrutinize judicial decisions as closely as legal scholars. The *Harvard Law Review* did conduct such careful scrutiny. It observed:

> In its invalidation of H.B. No. 350, the [Ohio Supreme C]ourt promulgated a "guilt by association" doctrine that will permit the court to strike down otherwise constitutional statutory provisions in bulk merely for gathering under a title with provisions previously branded unconstitutional. The court also wielded the state constitution's one-subject rule against the tort reform bill, thereby usurping the General Assembly's constitutional prerogative to self-police against logrolling. Not only did *Sheward* drive a deeper wedge between the Ohio judiciary and its legislature, but, in its efforts to preserve its common law power to formulate tort law, the *Sheward* majority may have undermined the

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39. *Id.* at 1097.

40. *See, e.g.*, Editorial, *Ohio Supreme Court: Tort Retorts: A Petty, Insulting Ruling*, CINCINNATI ENQUIRER, Aug. 22, 1999, at D2 ("[L]ong established standards were ignored to bypass lower courts. And the majority opinion is an insult to the General Assembly."); Editorial, *Role Reversal: High Court Again Tries Hand at Lawmaking*, COLUMBUS DISPATCH, Aug. 18, 1999, at 10A ("The court . . . has turned into a legislative bulldozer, upending whatever law conflicts with the ideological bent of the majority, legal and constitutional principles be damned."); Thomas Suddes, *Tort Reform Law Is Right—For Wrong Reasons*, THE PLAIN DEALER, Aug. 18, 1999, at 11B (condensing the decision's 148-page "outburst" into a two-word warning to the legislature: "Back off"); Editorial, *Tort Retort: Legal Reformers Fight Back: Stick a Warning Label on Ohio's Supreme Court*, CINCINNATI ENQUIRER, Sept. 28, 1999, at A8 ("Trial lawyers were the actual plaintiffs against H.B. No. 350, claiming it hurt their earning power. The court majority went out of its way to accommodate them, taking the unusual step of letting the case bypass the lower courts. Which shows exactly whose interests were really being served—and who really got their money's worth.").

> Ohio Supreme Court's valued position as defender of the state's constitution.[41]

Although the majority of the Ohio Supreme Court nullified fundamental principles of constitutional law, including the need to have a true case or controversy and fundamental respect for separation of powers, the defendant, which was the State of Ohio, did not choose to appeal or assert its rights before the Supreme Court of the United States. The state officials assumed that there were no federal grounds to appeal the decision since it was rendered under the state's constitution.

Judicial nullification also has occurred with very specific civil justice reform provisions. This process occurred when the Kansas legislature attempted to reform the collateral source rule.[42]

(b) The "Collateral Source Rule": Nullifying Reform of the Collateral Source

The collateral source rule states that a defendant may not show that the plaintiff had already been paid for his injuries by a source other than the defendant, a source that was "collateral" to it. The public policy behind the rule is that a defendant should not benefit from the fact that someone else had already compensated the plaintiff for his or her economic losses. The collateral source rule is predicated on the assumption that a defendant has engaged in very serious wrongdoing. Otherwise, why should a plaintiff be able to receive compensation that is twice the amount of its actual losses?

The policy behind the collateral source rule is a debatable one. Some believe that it is appropriate for a jury to make a determination if its principles should apply, i.e., let the jury know that the plaintiff has already been paid, and allow it to determine whether a defendant's conduct is so heinous that the plaintiff should get a double recovery and whether the defendant should benefit from the fact that the plaintiff had received such a payment.[43]

In light of this background, it is rather astonishing that the Supreme Court of Kansas found that a reform of this type violated the Kansas

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41. *See State Tort Reform*, *supra* note 34, at 809.

42. *See* Thompson v. KFB Ins. Co., 850 P.2d 773 (Kan. 1993); Farley v. Engelken, 740 P.2d 1058 (Kan. 1987); Wentling v. Med. Anesthesia Servs., 701 P.2d 939 (Kan. 1985).

43. *See Refining the Collateral Source Rule*, *in* TORT REFORM RECORD (American Tort Reform Association June 2000).

Constitution not once, but three times![44] In effect, the approach taken by the Kansas legislature respected the jury and allowed it to consider facts that it otherwise did not know. In the world of state constitutionalism run wild and judicial nullification, the decisions were not surprising.

(c) Nullifying a Punitive Damage Reform Intended to Protect a Defendant's Constitutional Rights

Punitive damages entered the law of England to punish intentional wrongdoers. Punitive damages were intended to supplement the criminal law. Criminal law enforcement was busy with arsonists and other serious felons and often did not have time to extend its grasp to people who committed assaults and batteries in bar fights and other melees that occur among mankind.

For almost two centuries, punitive damages were limited to intentional wrongful conduct. As has been indicated in this article, some courts expanded punitive damages to cover conduct that was less serious.[45] In describing that conduct, courts used language that was blurred in content and ambiguous in nature. Unfairness was clear where standards of punishment were not.

To address this unfairness, the Kentucky legislature, for example, created a clear standard as to when punitive damages could be awarded that was close to that of the common law—intentional, purposeful wrongdoing. It also recognized the clear criminal nature of punitive damages and raised the burden of proof in such cases to "clear and convincing," above the more typical civil burden of a mere preponderance of evidence.[46]

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44. In 1976, the Kansas Legislature enacted a statute providing for the admissibility of collateral source payments in medical malpractice cases. KAN. STAT. ANN. § 60-471(a) (1976). In *Wentling v. Medical Anesthesia Services*, 701 P.2d 939 (Kan. 1985), the Kansas Supreme Court ruled that the statute violated the equal protection provisions of the Kansas and Federal Constitutions. In 1985, the statute was repealed. *See* 1885 KAN. SESS. LAWS ch. 197, § 5. In 1986, the Legislature tried again and enacted KAN. STAT. ANN. section 60-3403 (1986). In *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987), the Kansas Supreme Court ruled the statute unconstitutional. In 1988, the statute was repealed. *See* 1988 KAN. SESS. LAWS ch. 222, § 8. In 1988, the Legislature enacted KAN. STAT. ANN. sections 60-3801 et seq., again overriding the collateral source rule. In *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993), the Kansas Supreme Court again ruled the legislature's action unconstitutional under both the Kansas and United States Constitutions.

45. *See supra* notes 17-22, and accompanying text.

46. *See* KAN. STAT. ANN. § 411.184. The General Assembly could have chosen to have punitive damages allowed only if there was proof beyond a reasonable doubt. In Colorado, this has been done and upheld as constitutional. *See* COLO. REV. STAT. § 13-25-127(2) (1987);

The legislature did not choose to go further to cabin punitive damages and place a limit on the amount. These modest reforms were intended to protect the rights of defendants. Nevertheless, a majority of the Supreme Court of Kentucky nullified the legislature's work and held in *Williams v. Wilson*[47] that the reforms violated the "jural rights" doctrine of the Kentucky Constitution.[48] In an articulate dissent, Judge Cooper showed the history of the jural rights doctrine.[49] He made it absolutely clear that it was never intended to strike down such a legislative judgment.

There was a further irony in the Supreme Court of Kentucky's decision. The Supreme Court of the United States had heralded the idea of raising the burden of proof to "clear and convincing" as a way of reforming punitive damage law and keeping punitive damages themselves from running wild.[50] *Williams v. Wilson* is just one example of how courts have allowed state constitutionalism to run wild and how courts have acted as super legislatures in nullifying even modest civil justice reforms.

While the Supreme Court of the United States has never directly addressed the issue of whether legislatures are empowered to set limits on punitive damage awards, the overwhelming majority of the Court observed in the recent case of *Cooper Industries, Inc. v. Leatherman Tool Corp.* that: "As in the criminal sentencing context, [state] legislatures enjoy broad discretion in authorizing and limiting permissible punitive damage awards."[51]

The Court then cited with favor state legislative limits on punitive damage awards in Alabama, Alaska, North Carolina and Ohio.[52] The Court apparently did not realize that the Ohio Supreme Court had nullified the very law it cited with favor.

Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

47. 972 S.W.2d 260 (Ky. 1998).

48. *Id.* at 269.

49. *Id.* at 272-75 (Cooper, J., dissenting) (discussing majority finding that "any act of the legislature abolishing any right created by judicial decision violates the 'jural rights' doctrine and is, therefore, unconstitutional. (!) As if that were not expansive enough, the majority of this Court today declares that any act of the legislature which 'impairs,' though does not 'abolish,' a common law right, is also unconstitutional . . . . [T]his Court has now assumed for itself the sole power to make any meaningful changes in the area of tort law." (citations omitted)).

50. *See* Pac. Mut. Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991) ("There is much to be said in favor of a State's requiring, as many do . . . a standard of clear and convincing evidence . . . .").

51. 532 U.S. 424, 121 S. Ct. 1678 (2001).

52. *See id.* at --- n.6, 121 S. Ct. at 1684 n.6.

The Court also observed that state courts did not have unlimited power with respect to the imposition of punitive damage awards. In that regard, the Court observed that "Despite the broad discretion that States possess with respect to the imposition of . . . punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion."[53]

In that regard, legislative efforts to apply rational rules would appear to be supported by federal constitutional considerations, and the action of state courts in nullifying such cabins on punitive damage excess may themselves trespass on the Due Process Clause of the Fourteenth Amendment.

(d) Throwing Everything Out Even if Parts Were Constitutional

The most extreme example of judicial nullification is the Supreme Court of Ohio's decision in *Sheward*. The Supreme Court of Illinois provided a close second example in *Best v. Taylor Machine Works.*[54] In *Best*, a plaintiff's claim for pain and suffering damages was subject to a limit of $500,000.[55] While it was reviewing how that limit affected the plaintiff, the court decided to go beyond the precise issues of the case and examine the entire Civil Justice Reform Act of 1996. It not only struck down limits on pain and suffering damages[56] but also the new legislative rules regarding joint and several liability.[57] The Supreme Court of Illinois became the first court of final jurisdiction to strike down joint and several liability reform.[58] Even pro-plaintiff courts, such as the Supreme Court of Arizona, had respected legislative judgments in this area of law.[59] The hubris of the majority opinion is

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53. *Id.* at ---, 121 S. Ct. at 1684.
54. 689 N.E.2d 1057 (Ill. 1997).
55. *Id.* at 1060.
56. *Id.* at 1064.
57. *Id.* at 1064, 1103-04.
58. *See, e.g.*, Church v. Rawson Drug & Sundry Co., 842 P.2d 1355 (Ariz. Ct. App. 1992) (holding statute abolishing joint liability in tort actions held constitutional); Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988) (holding Fair Responsibility Act, which abolished joint liability for noneconomic damages, constitutional); Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990) (holding statutory limit on municipal joint liability not unconstitutional). Some state supreme courts have even abolished joint liability by judicial decision. *See, e.g.*, Brown v. Keill, 580 P.2d 867 (Kan. 1978); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).
59. *See* Jimenez v. Sears, Roebuck & Co., 904 P.2d 861 (Ariz. 1995).

demonstrated by the fact that juries believe, when they find somebody 30% at fault, that the defendant will only pay 30%. The jurors have no idea that by the operation of law, a defendant found 30% at fault will have to pay 100% of the damages. The Illinois legislature tried to make a jury's verdict confirm with the reality of how much a defendant had to pay. With rational and reasonable intent, the legislature believed that a person should only pay his or her fair share of an award.

But the Illinois court did not stop with holding joint and several liability reform unconstitutional. What made the *Best* decision almost the worst decision of the entire compilation of judicial nullification cases is that the court held unconstitutional the entire product liability section of the law, without undertaking any analysis of any of the fairness of the provisions in that portion of the statute.[60] Without any demonstration of its purpose or need, the court held that that portion was inextricably tied to the rest of the bill that had already been held unconstitutional.[61] It was pure *ipse dixit* logic—only true because a majority of the court said it was true.

The court knew that the legislature had changed in political composition and that it was unlikely that the legislature would enact the product liability law under its new political composition. To some observers, that was the reason for its decision to go beyond what most would deem appropriate and reasonable jurisdiction of a court of law.

2. Conscientious State Courts Still Show Respect for Legislative Policy Judgments

Fortunately, most courts in the United States still show respect for legislative policy judgments and the fundamental principle of separation of powers. For example, the Supreme Court of Michigan in *McDougall v. Schanz*[62] denied a challenge to a legislative enactment that was directed at eliminating junk science from the courtroom. The legislation created appropriate standards for the admissibility of scientific evidence.[63] The provision was challenged under the Michigan Constitution as "infringing" upon

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60. *See Best*, 689 N.E.2d at 1064, 1103-04.

61. *See id.* at 1104.

62. 597 N.W.2d 148, 158 (Mich. 1999) (finding statute establishing standards for qualification of expert reflects a careful legislative balancing of public policy considerations beyond the competence of the judiciary to reevaluate as justiciable issues).

63. MICH. COMP. LAWS § 600.2169 (2000); MICH. STAT. ANN. § 27A.2169 (Michie 2000).

the Michigan Supreme Court's "constitutional authority to enact rules governing practice and procedure."[64] Under the Michigan Constitution, procedural rules were to be left to the supreme court, while substantive lawmaking was to be left to the legislature.[65]

In a demonstration of both respect to the legislature and modesty in the expansion of its own power, the Supreme Court of Michigan appreciated that the admissibility of scientific evidence has fundamental substantive impact on each decision.[66] Appreciating this fact, the court curbed its appetite to substitute its own view for that of the legislature and upheld the legislation.

A state supreme court's respect for the separation of powers was perhaps best shown by the Supreme Court of Virginia.[67] The Virginia General Assembly became concerned about the effects of medical malpractice claims on insurance premiums and access to healthcare. The General Assembly ordered a study on the issue and, based on the results, found that "the increase in medical malpractice claims was directly affecting the premium cost for, and the availability of, medical malpractice insurance."[68] The General Assembly also found that "[w]ithout such insurance, health care providers could not be expected to continue providing medical care for the Commonwealth's citizens."[69] To alleviate these concerns, the General Assembly enacted a $750,000 cap on the total amount of coverable medical malpractice action against a healthcare provider.[70] The General Assembly increased the limit to $1 million in 1983.[71]

The $1 million cap on economic damages was one of the strictest civil justice reforms enacted in the United States. Most damage reforms have focused on punitive damages or damages for pain and suffering. It was understandable that the economic damage cap was challenged. It was challenged under the right to jury trial clause, the due process clause, and the "special legislation clause" of the Virginia Constitution—and, in a most unusual move by plaintiffs' counsel,

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64. *McDougall*, 597 N.W.2d at 154.
65. *See id.* at 154 ("[W]e must determine whether the statute addresses purely procedural matters or substantive law.").
66. *Id.* at 156-57.
67. *See* Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525 (Va. 1989).
68. *Id.* at 527.
69. *Id.*
70. 1976 Va. Acts, c. 611; VA. CODE ANN. § 8.01-581.15.
71. 1983 Va. Acts, c. 496.

the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[72]

The Supreme Court of Virginia first reviewed the need for and reasons that supported the damage limitation.[73] The court then indicated that because the statute applied "only *after* the jury has fulfilled its fact-finding function, [it] does not infringe upon a right to jury trial."[74] The court also noted that the jury trial guarantee "secure[d] no rights other than those that existed at common law,"[75] and observed that, "the common law never recognized a right to a full recovery in tort."[76] The court then looked at a provision of the Virginia Constitution[77] that was virtually identical to the "separation of powers" provision set forth in the Ohio Constitution and considered in the *Sheward* case, discussed above.[78] The Supreme Court of Virginia properly interpreted separation of powers, emphasizing the legislature's preeminent role in developing public policy for Virginia's citizens.

The court stated, "[c]learly, [the statute] was a proper exercise of legislative power. Indeed, were a court to ignore the legislatively-determined remedy and enter an award in excess of the permitted amount, the court would invade the province of the legislature."[79] The court also dispensed with arguments based on the Due Process Clauses of both the state and federal constitutions,[80] the "special legislation" clause of the Virginia Constitution,[81] and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[82] The court noted that economic regulations are "entitled to wide judicial deference" because they do not implicate fundamental rights.[83] Finally, the court noted that, "[t]he purpose of [the statutory limit]—to

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72. *See Etheridge*, 376 S.E.2d at 527. It should be noted that this challenge occurred in 1989, before the plaintiffs' bar determined that the Constitution of the United States was "no good" for the purposes of challenging civil justice reform.
73. *See id.*
74. *Id.* at 529.
75. *Id.*
76. *Id.*
77. VA. CONST. art. III, § 1.
78. *See supra* note 35 and accompanying text.
79. *Etheridge*, 376 S.E.2d. at 532.
80. U.S. CONST. amend. XIV, § 1; VA. CONST. art. I, § 11.
81. VA. CONST. art. I, §§ 4, 14.
82. U.S. CONST. amend. XIV, § 1.
83. *Etheridge*, 376 S.E.2d at 531.

maintain adequate health care services in this Commonwealth—bears a reasonable relation to the legislative cap—ensuring that health care providers can obtain affordable medical malpractice insurance."[84]

As indicated, this decision was rendered before the organized plaintiffs' bar had developed and refined its practice of using state constitutions to secure judicial nullification of civil justice reform. A decade later, after the organized plaintiffs' bar had refined that practice, a second attempt was made to challenge the cap in *Pulliam v. Coastal Emergency Services of Richmond, Inc*.[85] The newly refined plaintiffs' bar attack did not work; the court unanimously concluded that the legislation bore a "reasonable and substantial relation to the General Assembly's objective to protect the public's health, safety and welfare by insuring the availability of health care providers in the Commonwealth,"[86] and therefore represented an appropriate exercise of the legislature's ability to enact tort reform legislation. Unlike the Supreme Courts of Ohio, Kentucky and Illinois, the Supreme Court of Virginia respected the fundamental principle of the separation of powers. The court could not be enticed into substituting its own view of public policy for that of the legislature.

In a concurring view, Virginia Supreme Court Justice Kinser indicated that she thought that the medical malpractice cap could work "hardship on those individuals who are the most severely injured by the negligence of health care providers,"[87] but she stated that she could not "be influenced by such concerns when deciding the constitutionality of a challenged statute."[88] Justice Kinser added that she "could only express [her] views with the hope that the General Assembly would adapt a more equitable method by which to ensure the availability of health care in this Commonwealth."[89]

The legislative body of Virginia, the General Assembly, responded to Justice Kinser's concern and amended the medical recoveries up to $1.5 million for acts of malpractice occurring after August 1, 1999, a 50% increase over the $1 million limit that had been enacted into law.[90]

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84. *Id.*
85. 509 S.E.2d 307 (Va. 1999).
86. *Id.* at 317.
87. *Id.* at 322 (Kinser, Jr., concurring).
88. *Id.*
89. *Id.* at 322-23.
90. 1999 Va. Acts, ch. 711. The General Assembly also provided for additional annual adjustments that will increase the $1.5 million by $50,000 on July 1, 2000, and on each July 1 thereafter, with final annual increases of $75,000 on January 1, 2007 and July 1, 2008. *See id.*

The approach taken by the concurring judge in the Supreme Court of Virginia goes beyond traditional law, but it has a salutary result. The judge utilized a concurring opinion to express a personal view that the sister branch of government would be sensitive to her well thought-out concerns. That is what legislatures do but, as we have shown, they do it on a much broader basis than courts. In Virginia and Michigan, the system worked as it should.

III. JUDICIAL NULLIFICATION OF STATE TORT REFORM VIOLATES FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION OF THE UNITED STATES

These extreme decisions violate the constitutional rights of those who would be protected by the civil justice reforms. To date, no one has attempted to appeal state supreme court judicial nullification decisions to the Supreme Court of the United States. Those adversely affected by the decisions have assumed, as we have in the past, that a path toward a successful appeal was blocked because the state constitution (as contrasted with the Federal Constitution) had been the basis of the decision.[91]

In light of the extreme nature of recent decisions nullifying civil justice reform, we believe that assumption deserves reconsideration. We begin by observing that careful documentation can show that some state courts have anointed unto themselves power that properly belongs in the legislative branch. For example, it has been demonstrated in clear, unequivocal scholarship that courts that have interpreted so-called "open courts" provisions of state constitutions to nullify civil justice reform have ignored the history and content of their own state constitutions.[92]

It is a fundamental principle of constitutional law that the Supreme Court of the United States and state supreme courts have the power of judicial review.[93] At the state level, however, a state supreme court's power is still

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91. *See* Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do to Stop It*, *in* BRIEFLY (National Legal Center for the Public Interest Nov. 1999).

92. *See* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1280 (1995) ("Since legislative tort reform efforts have intensified in recent years, the open courts clause has become an important weapon for litigants battling to restrain the legislature's power to modify common-law remedies.").

93. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) ("So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

bounded by fundamental principles in the Constitution of the United States.[94] This was made clear in one of the most famous cases to reach the Supreme Court, *Bush v. Gore*.[95] Seven justices on the Court agreed that a state supreme court cannot arrogate to itself power that violates the equal protection rights of citizens, even if such citizen is a candidate for president of the United States.

The path to a viable federal constitutional challenge of such judicial nullification decisions must begin with a demonstration that the state supreme court in question did not follow its own rules of law.[96] State supreme court opinions nullifying judicial reform have utilized clauses of state constitutions for their own subjective purposes and have ignored the history and meaning of those provisions. Left unchecked, such action by state courts always triumphs over state legislatures and, without a federal constitutional remedy, leaves those whose rights have been violated without a remedy.

While arguments showing that state supreme court decisions violate specific provisions of the Federal Constitution await future litigation battles, it is imperative that those seeking to protect the viability of civil justice reform raise federal constitutional grounds at the very earliest time of challenge. Arguments that may be worthy of consideration include those under the "Guarantee Clause" of the United States Constitution,[97] the First Amendment right "to petition the Government for a redress of grievances," basic due process[98] and equal protection principles.[99]

A. Article IV, § 4—The "Guarantee Clause"

This provision of the United States Constitution guarantees a republican form of government. It provides:

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94. "[T]here are certain parts of the State constitutions which are so interwoven with the federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other." THE FEDERALIST No. 43 (James Madison).

95. 531 U.S. 98 (2000).

96. *See id.* at 114 (Rehnquist, C.J., concurring):

> In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

Id. (citation omitted)

97. U.S. CONST. art. IV, § 4.

98. U.S. CONST. amend. XIV, § 1.

99. *Id.*

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.[100]

There have not been many cases construing the so-called "Guarantee Clause," and considering whether it could be applied to protect the rights of citizens who would benefit from state legislation. Some Supreme Court cases have suggested that the question of whether a state government is "republican" is a political one and, for that reason, the Guarantee Clause may not be relied upon to enforce individual rights.[101] Nevertheless, in *New York v. United States*,[102] the Supreme Court clearly indicated that the line of cases suggesting that Article IV's reach was not justifiable because it was a "political question" went too far.[103] The Court opened the possibility that Article IV § 4 may be

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100. U.S. CONST. art. IV, § 4.

101. *See* City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980) (challenging the preclearance requirements of the Voting Rights Act); Baker v. Carr, 369 U.S. 186, 218-29 (1962) (challenging apportionment of state legislative districts); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 139-51 (1912) (challenging the initiative and referendum provisions of the Oregon Constitution); Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding no violation by Rhode Island charter government in declaring martial law for a brief period of time).

102. 505 U.S. 144 (1992).

103. *Id*. at 184-85. The Court explained that the view that the Guaranty Clause implicates only nonjusticiable political questions "metamorphed" from a limited holding in *Luther* "into the sweeping assertion that 'violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'" *Id*. at 184 (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion)). The Court said that "in a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestions that the claims were not justiciable. *Id.* at 184-85 (citing Attorney Gen. of Mich. *ex. rel*. Kies v. Lowery, 199 U.S. 233, 239 (1905)); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); Plessy v. Ferguson, 163 U.S. 537, 563-64 (1896) (Harlan, J., dissenting) (stating racial segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government"); Duncan v. McCall, 139 U.S. 449, 461-62 (1891); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175-76 (1875). The Court in *New York* also explained that more recently the Court's jurisprudence indicated that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. *New York*, 505 U.S. at 185 (quoting Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable.")).

used to enforce rights and leading constitutional scholars have echoed this view.[104]

The Supreme Court of the United States has been willing to breathe life into constitutional clauses when there have been extreme examples of state supreme courts arrogating to themselves powers that belong to other branches of government.[105] If the term "republican government" is given substantive content, it would envision the separation of powers without total dominance of one branch over the other.[106] Statements and actions by state supreme courts in nullifying reasonable legislative judicial reforms demonstrate that these courts view themselves as the exclusive branch of government and deny to their sister branch the right to address problems in the civil justice system.

While cases can be marshaled to suggest that the Guarantee Clause was directed primarily toward other purposes, the plain meaning of the words are a hallmark of constitutional law. This is not the place to detail and develop such arguments. Future actions of arrogance by state courts could provide the necessary predicates for viable arguments suggesting that the overreach by such courts has denied the fundamentals of a republican form of government.

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104. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118 (1980); TRIBE, *supra* note 29, § 5-20; WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287-289, 300 (1972); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-565 (1962); Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51 (1998).

105. *See* Bush v. Gore, 531 U.S. 98, 104, 110 (2000); *see also* THE FEDERALIST NO. 48 (James Madison) ("It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.").

106. *See* THE FEDERALIST No. 51 (James Madison) ("[S]eparate and distinct exercise of the different powers of government . . . to a certain extent is admitted on all hands to be essential to the preservation of liberty."). Madison argued that in order to preserve "the necessary partition of powers among the several departments," the structure of a government must be "so contriving . . . as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *Id.*; *see also* Vansickle v. Shanahan, 511 P.2d 223, 241 (Kan. 1973) (holding that "the doctrine of separation of powers is an inherent and integral element of the republican form of government, and separation of powers, as an element of the republican form of government, is expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States"); M. Bryan Schneider & Jody Sturtz Schaffer, *Constitutional Law*, 45 WAYNE L. REV. 557, 569 (1999) ("The second fundamental principle of a republican government is the doctrine of separation of powers among the executive, legislative, and judicial branches of government.").

B. Procedural Due Process

The Supreme Court of Ohio's decision in *Sheward* is an example of a court nullifying legislative action without any consideration of the rights of individuals who might benefit from the civil justice reform enacted in that state.[107] Apart from having no record, the history of the sections considered by the court in *Sheward* provided no meaningful background or support for the court's decisions. The court's makeshift arguments and manipulation of state constitutional provisions were an after thought to confirm a decision that had been already made, a decision to disrespect a sister branch of government.

The Supreme Court of the United States has recognized that judicial action can deprive parties of due process.[108] The Court also has recognized that judges cannot violate the interests of people who are not before the Court.[109] This occurred in the Ohio Supreme Court's decision in *Sheward*, where the court overturned civil justice reform legislation that implicated the interests of the small business community and health care providers, as well as others who would benefit from the legislation.[110] As the Supreme Court has acknowledged, procedural due process is not a "technical conception with a fixed content unrelated to time, place and circumstances."[111] The protections established by this clause would extend to completely *ad hoc* and subjective state constitutional law jurisprudence.

Due process rights involve private interests adversely affected by the government, including erroneous and improper deprivation of normal procedures.[112] In the context of civil justice reform, the judicial nullification decisions of the Supreme Courts of Illinois, Ohio, and Kentucky were rendered without regard to the interests of those who the legislation was intended to protect.

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107. *See supra* note 34 and accompanying text.
108. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).
109. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 626 (1997).
110. *See supra* note 34 and accompanying text.
111. Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961).
112. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-34 (1982); Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976).

1. Punitive Damage Reform Intended to Protect the Rights of Defendants—A Strong Case

The Supreme Court of the United States has indicated that both procedural[113] and substantive due process protections[114] are needed to protect defendants against punitive damages that have "run wild"[115] in this country. The Court has held in *Honda Motor Company v. Oberg* that appellate courts must be able to review punitive damage awards.[116] The Supreme Court held in *BMW v. Gore* that substantive due process requires that the amount of punitive damages must be tempered by considerations of how wrongful the conduct was, the ratio of punitive damages to actual damages, and consideration of what criminal fines would be for similar conduct.[117]

When state legislatures provide rules to assure both procedural and substantive fairness in the area of punitive damage awards, they are helping to protect due process considerations that have been embraced by the U.S. Supreme Court. When the Supreme Court of Kentucky nullified such protections, citing the jural rights provision of the state constitution, it gave no consideration to the due process rights of defendants the legislation was intended to protect.[118] As the dissenting judge in the Kentucky case argued, the history of the "jural rights" provision never supported such an expansion and inappropriate treatment with respect to rational and reasonable legislative action.[119]

Cases of this type provide an appropriate springboard for those adversely affected by such decisions to argue that state supreme court action in

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113. Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).
114. BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 562 (1996).
115. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).
116. *Oberg*, 512 U.S. at 434-35. The Court stated:

> A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common-law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.

Id.
117. *See Gore*, 517 U.S. at 575.
118. *See supra* note 47 and accompanying text.
119. *See supra* note 49 and accompanying text.

nullifying legislative attempts to provide defendants appropriate protection do themselves violate due process rights under the United States Constitution.

C. Equal Protection Principles

Americans have a deep-seated understanding that a fundamental right of citizenship is the right to vote and have representative electors, namely legislators, represent the points of view of the individual. That right cannot and should not be restricted or removed at the whim of the executive or judicial branches of government. Yet that is what in effect happens when a state supreme court nullifies economic legislation that has a rational basis simply because the court believes it "knows better" about what public policy should be. The rights of the state's residents to have their voices heard and wishes implemented by their chosen and elected representatives are chilled, while similar rights of the residents of other states are preserved.

While it would require clear coherent proof to establish that a state supreme court trespassed upon such privileges, decisions rendered by the Supreme Court of Ohio and the Supreme Court of Illinois approach that level. As has been shown, the courts in these jurisdictions have claimed the *exclusive* right to determine whether damages in ordinary civil actions should have limits, and what those limits should be.[120] There is nothing in the history of state constitutional provisions that support such an extensive arrogation of power to the judicial branch at the expense of the clearly recognized power of the legislative branch.

Interestingly, the United States Supreme Court has not ruled on the question of whether a state must provide for the election, rather than the appointment, of officers performing "legislative" as opposed to "administrative" functions.[121] The difficulty of drawing any such functional line has led *lower* courts to hold that a state has no such federal constitutional duty.[122] There is an opportunity, therefore, to develop and present an argument that a state

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120. *See supra* notes 33, 41, 51-60 and accompanying text.

121. *See* Sailors v. Bd. of Educ., 387 U.S. 105, 109-10 (1967) (leaving open question of whether state must guarantee election of legislators).

122. *See* TRIBE, *supra* note 29, at 1460 n.1 (citing Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)); People *ex rel*. Younger v. El Dorado, 487 P.2d 1193 (Cal. 1971). The Court has made clear, however, that "once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) (invalidating state poll tax).

court's judicial nullification decision has impermissibly encroached on the franchise of that state residents in violation of equal protection principles.

D. The First Amendment Right to Petition for Grievances

The First Amendment to the Constitution of the United States guarantees that no law should be made that would prohibit the right of citizens to "petition the Government for a redress of grievances."[123] Excessive liability and standardless rules for both determining when and how damages are awarded have led citizens to petition their state legislatures to enact legislation that provides reasonable rules as to when and how liability may be imposed.

The Supreme Court of Ohio's interpretation of its separation of powers doctrine and arrogation to itself of the exclusive right to determine and make law may be argued to infringe on the federal constitutional right to assemble and petition for such laws to be enacted. While this argument will need careful and thoughtful development to meet the egregious nature of specific state supreme court decisions, the First Amendment right to petition the government is a potential arsenal to protect state legislative attempts to protect the right of individuals to have a fair system of civil justice, and to preclude state supreme courts from nullifying such worthwhile efforts.

IV. CONCLUSION

The battle against judicial nullification of civil justice reforms has just begun. Those who have sought to nullify reasonable civil justice reform have studied and planned their means of attack for over a decade. In a clear and almost boastful way, they have sought to entice state supreme courts to utilize virtually unknown malleable provisions of state constitutions to undo reasonable legislative choice. On occasion, the provisions in the state constitutions sometimes have had a legislative history, but on more than one occasion, state supreme courts have chosen to ignore that history in order to reach a pre-ordained result.

The fight against judicial nullification begins with public awareness of the problem. If the Supreme Court of the United States acted in the same arrogant manner as some state supreme courts in the area of judicial nullification, it would be headline-making news around the country. This did occur with respect to adverse publicity to the Supreme Court in the now

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123. U.S. CONST. amend. I.

discredited *Lochner* era, when the Supreme Court believed it knew better than the President and the Congress.

We have reached a point where this excessiveness by some state courts cannot be changed by public light or even judicial elections. Grounds need to be developed under the Federal Constitution to restore the fundamental balance of powers between courts and legislatures. Until that balance is restored, persons concerned with fundamental institutions of the state governments should not rest.

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The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

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