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FOSTERING MUTUAL RESPECT AND COOPERATION BETWEEN STATE COURTS AND STATE LEGISLATURES: A SOUND ALTERNATIVE TO A TORT TUG OF WAR

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I. INTRODUCTION

Tort law has a direct impact on our lives every day. On the one hand, tort law may discourage conduct such as medical malpractice, and lead to the removal of defective products from the marketplace. On the other hand, unchecked and unbalanced tort law can limit the availability of necessary medical services, discourage innovation, lead to the removal of useful and safe products and devices from the marketplace, and increase costs to consumers.[1]

Given the overarching importance of liability law, the question of who should create or make that law – legislatures or the courts – is a critical one. Though the vast majority of tort law has been and will continue to be decided by state courts, legislatures also have a role to play in the development of tort law. No one branch of government should have a tort law "monopoly." Courts and legislatures can and should work together.

Unfortunately, that is not happening in some states. Rather, some state courts are overturning state "tort reform" legislation almost before the ink on the law has dried.[2] Plaintiffs' bar scholars have hailed this activity as one of the most significant occurrences in tort law from the plaintiffs' perspective in the past fifty years.[3] One such scholar has labeled this development the "revival of state constitutionalism."[4] There has, in fact, been no "*revival*" — there is *no* historical evidence that state courts have *ever* used state constitutions in the manner in which they are currently being used to nullify state tort reforms.

Regardless of one's personal opinion about tort reform legislation, these state court decisions violate the fundamental separation of powers principle and show a lack of respect for legislative lawmaking. Government works best when there is mutual respect and cooperation between the legislative and judicial

1 *See generally* WALTER OLSON, THE LITIGATION EXPLOSION (1991).

2 *See, e.g.*, State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

3 *See* Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, TRIAL, July 1996, at 51.

4 *Id.*

branches.[5]

This article will provide a brief history of legislative efforts to enact liability reforms over the past twenty-five years. It will then discuss the recent phenomenon of some state courts nullifying legislative decision-making and limiting legislative independence in liability law, and expose the serious threat these decisions pose to balanced government and the separation of powers. Next, the article will explain that, as a matter of history and sound public policy, state legislatures can and should be allowed to participate in the development of tort law. Finally, this article will discuss a sound and workable model that has developed in Virginia to avoid the tort tug of war between courts and legislatures that currently exists in other states.

II. BACKGROUND: THE BEGINNING OF THE TORT REFORM MOVEMENT

A. *Dramatic Expansion in Liability Law by Some Courts in the 1970's*

"Tort reform" efforts in the states began in the 1970's in response to judicial decisions that dramatically expanded liability law in a number of areas. For example, in the area of products liability, some courts went beyond imposing so-called "strict liability" and, without careful thought to overall public policy considerations, created absolute liability.[6] Under this expanded notion of liability, manufacturers would face liability for their failure to warn even when it had been impossible to discover a risk, or for a design when there was no feasible alternative way for the product to be made.[7]

Other courts greatly expanded traditional notions regarding the availability of punitive damages, which had once been limited to a small class of torts involving intentional wrongs such as assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property such as trespass and conversion or destruction of property.[8] After being broadened by the courts, the punitive damages concept was applied to products liability matters without careful regard of the fact that in many of these new cases

5 As United States Supreme Court Justice Jackson noted so eloquently many years ago: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

6 *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

7 *See* Victor E. Schwartz, *The Death of "Super-Strict Liability:" Common Sense Returns to Tort Law*, 27 GONZ. L. REV. 179 (1992).

8 *See* Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild:" Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (2000); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform — State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U.L. REV. 1365 (1993).

there was often one defendant whom numerous potential plaintiffs could seek to punish multiple times for essentially the same conduct.[9] Still other state courts retroactively changed the standard for when punitive damages could be imposed, using vague phrases such as "gross negligence" as the standard for imposing punishment.[10] These looser standards could and often did lead to severe economic punishment, as they gave potential defendants little "notice" of what was expected of them in terms of behavioral norms.[11]

In all of these instances, the courts focused simply on an injured person and a perceived "deep pocket," generally an out-of-state corporate defendant.[12] What the courts did not see was that these expanded notions of liability could – and did – chill the introduction of new products, cause effective products to be removed from the marketplace, and create issues regarding insurance availability and affordability for small and medium-sized businesses.[13]

B. State Legislatures "Retrieve" Their Power to Make Tort Law

Spurred to action by these judicial initiatives, beginning in the late 1970's, a number of state legislatures began to "retrieve" their historical right to make tort law rules. Most state courts respected what their legislatures had done, viewing these actions as appropriate legislative prerogatives and policy choices.

The involvement of state legislatures in deciding tort law continued to increase through the 1980's, as more tort reform initiatives were passed.[14]

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9 In 1967, a California appellate court held for the first time that punitive damages were recoverable in a strict products liability action. *See generally* Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (1967). As the esteemed jurist Judge Henry Friendly observed the same year in a related matter, courts operating under such a regime faced "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2nd Cir. 1967). *See also* Victor E. Schwartz, Mark A. Behrens & Lori Bean, *Multiple Imposition of Punitive Damages: The Case for Reform*, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

10 *See generally* Buzzard v. Farmers Ins. Co., Inc., 824 P.2d 1105 (Okla. 1991); Wisker v. Hart, 766 P.2d 168 (Kan. 1988). *See also* Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263, 271 (1993).

11 *See generally* Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919 (1989); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982). *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

12 *See* Dick Thornburgh, *No End in Sight as Punitive Damages Go Up, Up, Up*, WALL ST. J., Mar. 13, 2000, at A47.

13 *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

14 For example, *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982), and *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986), which both effectively created an absolute liability scheme, were overruled by legislation so as to require proof of defect. *See* N.J. REV. STAT. § 2A:58C-3(3) (1999); LA. REV. STAT. ANN. § 2800.56(1) (West 1999). A Maryland case which held a handgun manufacturer strictly liable for personal injuries resulting from a properly functioning "Saturday Night Special," Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985), was similarly overruled by legislation. *See* MD. ANN. CODE art. 27, § 36-I(h) (1999).

Unfortunately, at the same time, the issues involved became politicized. Target defendant groups, such as physicians, engineers and architects, and product manufacturers and sellers, lined up on one side. The plaintiffs' bar, professional "consumer" groups, and sometimes state and national bar associations lined up on the other.

III. JUDICIAL NULLIFICATION OF STATE TORT LAW

In response to the enactment of tort reform legislation in various states, the Association of Trial Lawyers of America ("ATLA") – the primary advocacy organization of the contingency fee personal injury bar – has launched a nationwide effort to persuade state courts to nullify state tort reform legislation.[15] These attempts to overturn state legislative tort policy decisions generally rely on obscure provisions of state constitutions, such as "right to remedy" and "open courts" provisions, that have little historical explanation and no counterpart in the United States Constitution.[16] This, in turn, allows trial lawyers to offer their own explanations to "fill in the gaps" in the historical record.[17] Indeed, former ATLA President Mark Mandell has bragged that a brief written by ATLA and argued by Harvard Law Professor Laurence Tribe resulted in an Indiana health care liability statute being overturned based on a state constitutional provision "that was previously regarded as toothless."[18]

By relying upon state constitutional provisions, plaintiffs' lawyers are able to preclude any appeal to the United States Supreme Court. This end-run around possible Supreme Court review is a critical component of ATLA's judicial nullification strategy. The plaintiffs' bar knows that the United States Supreme Court, in constitutional challenges under the Fourteenth Amendment, has made clear distinctions between situations in which a legislature violated a person's fundamental rights, and situations in which a legislature made an economic policy decision.[19] With the exception of a highly discredited period in the Court's history known as "the *Lochner* era,"[20] which began shortly after the turn of the Twentieth

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15 *See Constitutional Challenges: An Antidote to Tort 'Reform,'* ATLA ADVOCATE, Nov. 1999, at 1.

16 *See* Ned Miltenberg, *The Revolutionary "Right to a Remedy,"* TRIAL, Mar. 1998, at 48 (ATLA's associate general counsel stating that "[r]ecent research into the historical origins of state constitutional right-to-a-remedy guarantees reveals that these little-known provisions can become potent weapons against tort 'reform' statutes").

17 *See* Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at S34.

18 *Two More State Supreme Courts Strike Down Tort Reforms*, LIAB. WK., July 19, 1999, at 7.

19 *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (Price-Anderson Act, which preempted state tort law in order to promote the nuclear power industry, does not violate the Due Process or Equal Protection Clauses of the United States Constitution).

20 In Lochner v. New York, 198 U.S. 45 (1905), the Court invalidated a New York law limiting the number of hours bakers could work. In his dissent, Justice Holmes argued that courts should respect

Century and ended around the mid-1930's, the Court has shown deference to legislative policy judgments, even where the Justices might not have personally agreed with the legislature's action.[21]

Fortunately, most state courts have followed the lead of the United States Supreme Court and have rejected invitations to issue decisions that ignore the legislative role in developing liability law. By almost a two-to-one margin, state supreme courts across the country have sustained rational state legislative efforts to formulate state liability law.[22]

For example, earlier this year, the Idaho Supreme Court in *Kirkland v. Blaine County Medical Center*,[23] held that Idaho's $400,000 cap on noneconomic damages in personal injury and wrongful death actions[24] did not violate the right to jury trial, the Idaho Constitution's prohibition against "special legislation," or the separation of powers doctrine.[25] Similarly, in *Mizrahi v. North Miami Medical Center, Ltd.*,[26] the Florida Supreme Court upheld the constitutionality of a provision in Florida's wrongful death act which precludes adult children from recovering nonpecuniary damages in an action for a parent's death due to medical malpractice. The exception was created to promote access to affordable health care by controlling health care costs. The court accepted the legislature's policy decision, and held that the law satisfied the equal protection guarantees in both the Florida and United States Constitutions.

On the other hand, a number of state courts have embraced ATLA's arguments.[27] For example, in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[28] the Supreme Court of Ohio narrowly overturned Ohio's 1996 civil justice reform statute. *Ohio Academy of Trial Lawyers* is remarkable for a number

economic legislation that is rationally related to a legitimate policy goal, writing:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because *I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*

Id. at 75 (Holmes, J., dissenting) (emphasis added).

21 *See* Victor E. Schwartz, Mark A. Behrens & Leavy Mathews III, *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999) (discussing a century of congressional enactments changing state liability law and the numerous decisions consistently holding those statutes constitutional).

22 *See* Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislators?* Critical Legal Issues: Working Paper Series (WASH. LEGAL FOUND. Feb. 1997).

23 4 P.3d 1115 (Idaho 2000).

24 *See* IDAHO CODE § 6-1603 (1999).

25 *See Kirkland*, 4 P.3d at 1120-21.

26 25 FLA. L. WEEKLY 302 (Fla. 2000).

27 *See* William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. TIMES, July 16, 1999, at A1.

28 715 N.E.2d 1062 (Ohio 1999).

of reasons.[29]

First, there was not a live case or controversy before the court. Rather, the Ohio Academy of Trial Lawyers ("OATL"), along with others, bypassed traditional jurisdictional procedures and notions of standing, and filed an *original action* with the Ohio Supreme Court. After so doing, OATL sought to secure a ruling blocking lower courts' implementation of the 1996 law.[30] Among the bases for OATL's claim was that the tort reform law would cut into its members' contingency fee recoveries, and make it harder for OATL to recruit new members and cause current OATL members to lose "dues-fees!"[31]

In order to justify permitting OATL to pursue the action despite obvious questions of standing, Justice Resnick, writing for a 4-3 majority, invented a new judicial doctrine.[32] Specifically, the majority concluded that OATL's challenge was a matter "of such a high order of public concern as to justify allowing this action as a public action."[33] Now, in Ohio, any public interest group can conceivably file a direct action with the Ohio Supreme Court to challenge the constitutionality of virtually any legislation that may affect its members. This aspect of the majority's opinion was heavily criticized by the dissenting members of the court, led by Justice Stratton, who noted that "[t]he majority's acceptance of this case means that we have created a whole new arena of jurisdiction – 'advisory opinions on the constitutionality of a statute challenged by a special interest group.'"[34]

Next, the majority rendered a holding with respect to the substance of the legislation that was equally shocking. The court totally up-ended the doctrine of separation of powers and the notion of mutual respect between the legislature and the courts. Without so much as a passing reference to the need to preserve legislative independence in creating liability law, the court broadly declared tort law to be within the exclusive domain of the judiciary.[35] After making this declaration, the majority went on to hold that Ohio's tort reform statute violated the "one-subject rule" of the Ohio Constitution, which prohibits unrelated subjects from being bundled together in a single statute.[36] Even though the statute was plainly focused on the "diverse, but single, subject of tort reform,"[37] that was not enough, in the opinion of the members of the court who were bent on overturning

29 *See generally* Comment, *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, 113 HARV. L. REV. 804 (2000) ("*Sheward* Comment").

30 *See Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1068-69.

31 *See id.* at 1084.

32 *See Sheward* Comment, *supra* note 29, at 805.

33 *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1084.

34 *Id.* at 1122 (Stratton, J., dissenting).

35 *See id.* at 1085-86.

36 *See id.* at 1097-1102.

37 *See id.* at 1126 (Stratton, J., dissenting).

the law, to pass muster under the "one-subject rule." They held that the tort reform statute focused on "laws pertaining to tort and other civil actions," and was therefore too broad to fit within Ohio's "one-subject rule."[38] In so holding, the court made no attempt to sever those portions that it deemed "unrelated" to tort reform.[39] Thus, by relying solely on the "one-subject rule" found in the Ohio Constitution, the Ohio Supreme Court was able to preclude any appeal to the United States Supreme Court.

Unfortunately, the Ohio Supreme Court was not the only state court to usurp a legislature's authority to contribute to the development of tort law. Soon after the *Ohio Academy of Trial Lawyers* case, the Kentucky Supreme Court in *Williams v. Wilson*[40] struck down a punitive damages statute, designed by the Kentucky legislature to modify Kentucky's law of punitive damages. Specifically, the statute modified Kentucky's "traditional common law standard" applicable to punitive damages determinations, requiring plaintiffs seeking punitive damages to show that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct [would] result in human death or bodily harm."[41] The lower court held that this modification of the common law standard was unconstitutional, and the Kentucky Supreme Court agreed.[42] According to the court, certain sections of the Kentucky Constitution "work in tandem" to form a constitutional "right" known as the "jural rights" doctrine.[43] This court-invented "right," in turn, prohibited the legislature from enacting legislation that might limit the remedies available to plaintiffs under the common law.[44] The majority's decision drew a strong dissent from Justice Cooper, who stated:

> [Under the majority's holding], 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.*[45]

Justice Cooper concluded that nothing in the "jural rights" provisions of the

38 *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1100.

39 *See id.* at 1101-02.

40 972 S.W.2d 260 (Ky. 1998).

41 *Id.* at 261.

42 *Id.*

43 *See id.* at 267.

44 *See id.* at 267-68.

45 *Williams*, 972 S.W.2d at 272 (emphasis added).

Kentucky Constitution should be interpreted to "transfer power over public policy with respect to tort law from the legislature to the judiciary."[46] "*We, like Bonaparte*," Justice Cooper said, "*have placed that crown upon our own head.*"[47]

Another example of judicial nullification of state tort law occurred in December of 1997 when the Illinois Supreme Court, in *Best v. Taylor Machine Works*,[48] overturned a comprehensive 1995 Illinois tort reform statute, holding that the legislation violated the Illinois Constitution.[49] In so doing, the *Best* Court, like the court in *Ohio Academy of Trial Lawyers*, used the purported invalidity of certain provisions in the statute to declare the legislature's entire tort reform act unconstitutional.[50] First, a majority of the Illinois court held that, as a threshold matter, provisions of Illinois's tort reform statute limiting noneconomic damages and providing for access to a tort claimant's medical records were unconstitutional.[51] Next, the majority opinion, written by Justice McMorrow, declared unconstitutional a provision of the law that abolished joint liability.[52] This was the first time that *any* court had ever overturned a modification of that doctrine.[53] The court concluded by then declaring that the narrow provisions on which it was ruling were so inextricably linked to other, totally unrelated product liability reforms in the legislation, that not one section in the multi-section statute could be severed and saved.[54] Accordingly, the legislation was declared unconstitutional "*in toto*."[55]

In one broad sweep, the Illinois Supreme Court's overreaching opinion in

46 *Id.* at 275.

47 *Id.* (emphasis added). *See also* M. Scott McIntyre, Note, *The Future of Kentucky's Punitive Damages Statute and Jural Rights Jurisprudence: A Call for Separation of Powers*, 88 KY. L.J. 719 (2000) (arguing that the Kentucky Supreme Court's expansive interpretation of the jural rights doctrine usurps the legislature's proper role in developing broad public policy).

48 689 N.E.2d 1057 (Ill. 1997).

49 *See* J.V. Schwan, *State Courts Blur the Lines Separating Powers*, CHI. TRIB., Sept. 22, 1999, at 19. From the beginning of statehood, the Illinois General Assembly had repealed or modified the common law of torts on many occasions without having its work nullified by Illinois courts. *See also* Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745 (1997).

50 *See Best*, 689 N.E.2d at 1064, 1076-78.

51 *See id.* at 1064, 1089-1100.

52 *See id.* at 1103-04.

53 *See, e.g.*, Church v. Rawson Drug & Sundry Co., 842 P.2d 1355 (Ariz. App. 1992) (statute abolishing joint liability in tort actions held constitutional); Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990) (statutory limit on municipal joint liability not unconstitutional); Evangelatos v. Superior Ct., 753 P.2d 585 (Cal. 1988) (Fair Responsibility Act, which abolished joint liability for noneconomic damages, held constitutional). Some state supreme courts have even abolished joint liability by judicial decision. *See, e.g.*, McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985); Brown v. Keill, 580 P.2d 867 (Kan. 1978).

54 *See Best*, 689 N.E.2d at 1104.

55 *See id.*

Best ignored the fundamental separation of powers principle upon which our entire system of government is based. In a strong dissent, Justice Miller wrote:

> Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature.[56]

Decisions like *Ohio Academy of Trial Lawyers*, *Williams*, and *Best* show a great lack of respect for the legislative branch of government. If judicial nullification of state tort legislation continues, it will upset the delicate system of checks and balances between the courts and legislatures, and subsequently undo the careful tripartite form of government that provides the foundation for our civil justice system. Furthermore, the tactics used in cases overturning state tort reform laws are likely to be perceived by many in the public as "gamesmanship." An apparent national trend toward state court decisions decided under obscure provisions of state constitutions that the public has never heard of and does not understand, and that cannot be appealed to the federal courts, may well affect the public's perception of the judiciary, and lead to the impression that "equal justice" is not being served.

IV. LEGISLATURES HAVE A ROLE IN THE DEVELOPMENT OF TORT LAW

Many of the decisions overturning tort reform statutes have been premised on the assumption that state courts have a fundamental and exclusive right to make state tort law. These decisions ignore both legal history and sound policy considerations.

A. "Reception Statutes"

State legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of the legislatures was to "receive" the common and statutory law of England as of a certain date, and have that law provide a basis for a state's tort law.[57] In these "reception statutes," the

56 *Id.* at 1113 (Miller, J., concurring in part and dissenting in part).

57 *See* ALA. CODE § 1-3-1 (1999); ALASKA STAT. § 01.10.010 (Michie 1998); ARIZ. REV. STAT. ANN. § 1-201 (West 1995); ARK. CODE ANN. § 1-2-119 (Michie 1996); CAL. CIV. CODE § 22.2 (West 1999); COLO. REV. STAT. § 2-4-211 (1988); DEL. CONST., SCHEDULE, s. 18 (West 1999); D.C. CODE ANN. § 49-301 (1997); FLA. STAT. ANN. § 2.01 (West 1998); GA. CODE ANN. § 1-1-10(c)(1) (1990); HAW. REV. STAT. § 1-1 (1993); IDAHO CODE § 73-116 (1999); 5 ILL. COMP. STAT. ANN. 50/1 (West 1993); IND. CODE ANN. § 1-1-2-1 (West 1998); KAN. STAT. ANN. § 77-109 (1997); KY. CONST. § 233 (1988); ME. CONST. art. 10, § 3 (West 1985); MD. CONST. art. 5(a) (Michie Butterworth 1998); MASS. CONST. Pt. 2, Ch. 6, Art. 6 (West 1997); MICH. CONST. art. 3, § 7 (West 1999); MO. REV. STAT. § 1.010 (1995); MONT. CODE ANN. § 1-1-109 (1999);

legislatures also *delegated* to state courts the authority to develop the common law in accordance with the "public policy" of the state.[58] These long-forgotten statutes were the basic vehicles through which legislative power was vested in state judiciaries.[59]

Early state legislatures delegated the task of developing tort law to state judiciaries because the legislatures did not have the time (or perhaps the inclination) to formulate an extensive "tort code." They faced more extensive and pressing tasks. Many "reception statutes" made clear, however, that the power to develop tort law that was delegated to the courts could be *retrieved* by the legislatures at *any* time.

B. Legislatures Are Well-Suited to Develop Broad Public Policy

Decisions overturning tort law rules also overlook the fact that legislatures have certain tools that make them uniquely well situated to reach fully informed decisions about the need for broad public policy changes in the law. This is particularly important in the area of liability law, because the impacts go far beyond who should win a particular case. Legislatures are in the best position to weigh and balance the many competing policy considerations involved. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives, and the ability to use the legislative process to obtain new information. If a point needs further elaboration or clarification, a prior witness can be recalled, or an additional witness can be asked to testify. This process allows the legislature to engage in broad policy deliberations and to formulate policy carefully.[60]

NEB. REV. STAT. ANN. § 49-101 (Michie 1998); NEV. REV. STAT. ANN. § 1.030 (Michie 1999); N.J. CONST. art. 11, § 1, (West 1997); N.M. STAT. ANN. § 38-1-3 (Michie 1999); N.Y. CONST. art. 1, § 14 (McKinney 1998); N.Y. STATE L. § 4 (McKinney 1995); N.C. GEN. STAT. § 4-1 (1999); OKLA. STAT. ANN. tit. 12, § 2 (West 1999); OR. CONST. art. 18, § 7 (West 1999); 1 PA. CONS. STAT. ANN. § 1503(a), (c) (West 1999); R.I. GEN. LAWS § 43-3-1 (1999); S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1977); S.D. CODIFIED LAWS § 1-1-24 (Michie 1992); TENN. CONST. art. XI, § 1 (West 1995); TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (West 1999); UTAH CODE ANN. § 68-3-1 (1996); VT. STAT. ANN. tit. 1 § 271 (1995); VA. CODE ANN. §§ 1-11 (Michie 1995); WASH. REV. CODE ANN. § 4.04.010 (West 1988); W. VA. CODE § 2-1-1 (1999); W. VA. CODE § 56-3-1 (1997); WIS. STAT. ANN. § 13 (West 1999); WYO. STAT. § 8-1-101 (Michie 1999). Ohio repealed its reception statute in 1806. *See* Drake v. Rogers, 13 Ohio St. 21 (1861). North Dakota repealed its reception statute in 1978. *See* N.D. CONST. TRANSITION SCHEDULE §§ 1 to 25 (Michie Butterworth 1999). When Minnesota was created as a territory, it received the laws of Wisconsin, including the common law, but later repealed the laws of Wisconsin in favor of its own law. *See* Cashman v. Hedberg, 10 N.W.2d 388, 390 (Minn. 1943). Louisiana is a "code," not a common law, state. *See* King v. Cancienne, 316 So. 2d 366 (La. 1975).

58 The process leading to Virginia's adoption of its "reception statute" is instructive in this regard. In 1792, the language from the ordinance of Virginia's Convention of 1776 adopting the "acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the First" was repealed by the General Assembly, "but that part of the ordinance of 1776 which established the common law until it should be altered by legislative power has never been repealed." Foster v. Commonwealth, 31 S.E. 503, 504 (1898).

59 *See* Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 649 (1987).

60 *See* Smith v. Cutter Biological, Inc., 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting their rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark punitive damages decision, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]."[61]

Courts have different strengths. They are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. Yet, this advantage also has its limitations. The focus on individual cases does not provide comprehensive access to broad scale information.[62] Moreover, judicial changes in tort law apply retroactively rather than prospectively, denying "fair notice" to everyone potentially affected.[63] Finally, some reforms simply cannot be achieved through judicial decision. For example, a large number of states have enacted statutes of repose to deal with the drain on resources and the competitive threat to American jobs caused by "long tail" liability involving old products.[64] Many states have enacted statutory limits to help guard against excessive and potentially unconstitutional punitive damages awards.[65] Some states have enacted aggregate limits on medical malpractice awards and limits on noneconomic damages to contain medical liability premiums.[66] These laws could not have been accomplished

and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "[t]here are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures can determine").

61 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (emphasis added).

62 *See* Berger v. Supreme Court of Ohio, 598 F. Supp. 69, 76 (S.D. Ohio 1984), *aff'd*, 861 F.2d 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989). In this case, the Court upheld a judicial canon restricting a judicial candidate's campaign activities. The trial court noted that "[t]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office. *A judge acts on individual cases, not broad programs.*" *Id.* (emphasis added).

63 *See BMW*, 517 U.S. at 574.

64 *See* ARK. CODE ANN. § 16-116-105(c) (Michie 1997); COLO. REV. STAT. § 13-80-107(1)(b) (1987); COLO. REV. STAT. § 13-21-403 (1987); CONN. GEN. STAT. § 52-577a (1991); FLA. STAT. ANN. § 95.031(b) (West 1998); GA. CODE ANN. § 51-1-11(b)(2) (1999); IDAHO CODE § 6-1403(2) (1998); 735 ILL. COMP. STAT. 5/13-213(b) (West 1992); IND. CODE § 34-20-3-1(b) (1998); IOWA CODE § 614.1(2A) (1997); KAN. STAT. ANN. § 60-3303 (1994); KY. REV. STAT. ANN. § 411.310(1) (Michie 1992); MICH. COMP. LAWS § 27A.5805(9) (1986); MINN. STAT. ANN. § 604.03 (West 2000); NEB. REV. STAT. § 25-224 (1995); N.C. GEN. STAT. § 1-50(a)(6) (1999); OR. REV. STAT. § 30.905(1) (1999)); TENN. CODE ANN. § 29-28-103(a) (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012 (West 1999); WASH. REV. CODE § 7.72.060(1) (1999).

65 *See* ALA. CODE § 6-11-21 (1993); ALASKA STAT. § 09.17.020(f)-(h) (Michie 1998); COLO. REV. STAT. § 13-21-102(1)(a) (1987); CONN. GEN. STAT. § 52-240b (1991); FLA. STAT. ANN. § 768.73(1)(b) (West Supp. 1998); IND. CODE § 34-51-3-4 (1998); KAN. STAT. ANN. § 60-3701(e), (f) (1994); N.J. STAT. ANN. § 2A:15-5.14 (West Supp. 2000); N.C. GEN. STAT. § 1D-25 (1999); N.D. CENT. CODE § 32.03.2-11(4) (1996); OKLA. STAT. tit. 23, § 9.1 (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 1997); VA. CODE ANN. § 8.01-38.1 (Michie Cum. Supp. 2000).

66 For states limiting noneconomic damages in medical malpractice actions, see LA. REV. STAT. ANN. § 40:1299.42(b) (1992); MASS. GEN. LAWS, ch. 231, § 60H (2000); MICH. COMP. LAWS § 600.1483 (1996); MONT. CODE ANN. § 25-9-411 (1999); NEB. REV. STAT. § 44-28-25 (1998); N.D. CENT. CODE § 32-42-02 (1996); S.D. CODIFIED LAWS § 21-3-11 (Michie 1987); UTAH CODE ANN. § 78-14-7.1 (1999); W. VA. CODE § 55-7B-8 (1994); WIS. STAT. § 893.55 (1997). For states placing aggregate limits on medical malpractice awards, see N.M. STAT. ANN. § 41.5 (Michie 1996); VA. CODE ANN. § 8.01-581.15 (Michie Cum. Supp. 2000).

67 *See* Bureau of Insurance, State Corporation Commission, *Medical Malpractice in Virginia – the Scope and Severity of the Problem and Alternative Solutions*, Nov. 1975. The Report focused on tracking malpractice insurance rates beginning in approximately 1960 and continuing through the early 1970's.

68 Etheridge v. Medical Ctr. Hosp., 376 S.E.2d 525, 527 (Va. 1989).

69 *Id.*

by a court because it is doubtful that a court could draw such bright-line rules.

V. MUTUAL RESPECT AND COOPERATION BETWEEN THE JUDICIAL AND LEGISLATIVE BRANCHES: THE "VIRGINIA MODEL" OF "GOOD GOVERNMENT" IN TORT LAW

The development of state tort law does not, and should not, have to result in a tug of war between courts and legislatures. Better public policy can be developed in a more amicable fashion if the separation of powers principle is respected, and there is mutual cooperation between the two co-equal branches of state government.

Virginia's process of developing tort law stands as an excellent model of "good government" – a shining example of the type of coordination between the judicial and legislative branches that is not only possible but critical to the formulation of sound public policy. In Virginia, the development of tort law has been a "give and take" between the General Assembly and the Supreme Court, not a tug of war. This process is best illustrated by the Commonwealth's efforts to promote access to affordable health care by limiting damage awards in medical malpractice actions.

A. Background on Virginia's Medical Malpractice Damages Cap

The Virginia General Assembly first became concerned about the effect of medical malpractice claims on liability insurance premiums and access to health care in the early 1970's. The State Corporation Commission's Bureau of Insurance was asked to study the issue. In November 1975, the Bureau reported dramatic increases nationwide in medical malpractice insurance rates and filings of medical malpractice claims over the time periods studied.[67]

Based upon this study, the General Assembly "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] Providers would have to concentrate in more populated regions of the state and/or charge more for their services to pay for the increased insurance premiums that would

result.[70] The General Assembly concluded that passage of an aggregate limit on medical malpractice awards "was an appropriate means of addressing the problem" of escalating medical malpractice insurance costs and preserving the ability of Virginians to obtain affordable health care.[71]

To address these concerns, in 1976, the General Assembly enacted a $750,000 cap on the total amount recoverable in a medical malpractice action against a health care provider.[72] In 1983, the General Assembly increased the limit to $1,000,000.[73]

B. *Round One in the Virginia Supreme Court: The Etheridge Case*

In *Etheridge v. Medical Center Hospitals*,[74] the Virginia Supreme Court held that the $1 million statutory limit on the amount recoverable in a medical malpractice case, as enacted by the General Assembly, satisfied the right to a jury trial provision in the Virginia Constitution, the Due Process Clauses of the United States and Virginia Constitutions, the doctrine of separation of powers set forth in the Virginia Constitution, the "special legislation" provisions of the Virginia Constitution, and the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution.[75]

The *Etheridge* court began its opinion by examining the need and reasons for the General Assembly's passage of the malpractice damages cap.[76] The court then rejected plaintiff's contention that the statute violated the jury trial provision of the Virginia Constitution,[77] noting that the "Virginia Constitution guarantees only that a jury will resolve disputed facts."[78] Accordingly, the court held that, because the statute "applies only after the jury has fulfilled its fact-finding function, [it] does not infringe upon the right to a jury trial."[79] The court also held that the jury trial guarantee "secures no rights other than those that existed at common

70 Providers also could choose to leave Virginia to practice in neighboring Maryland and West Virginia, which have upheld limits on medical malpractice damage awards. *See, e.g.*, Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877 (W. Va. 1991).

71 *Etheridge*, 376 S.E.2d at 528.

72 *See* 1976 Va. Acts ch. 611.

73 *See* 1983 Va. Acts ch. 496.

74 376 S.E.2d 525 (Va. 1989).

75 *See id.*; *see also* Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) (declaring Virginia's medical malpractice cap to be constitutional).

76 *See Etheridge*, 376 S.E.2d at 527.

77 *See* VA. CONST. art. I, § 11.

78 *Etheridge*, 376 S.E.2d at 529.

79 *Id. See also* Speet v. Bacaj, 377 S.E.2d 397 (Va. 1989) (holding that admission of medical review panel's opinion into evidence did not infringe upon plaintiff's right to trial by jury under the Virginia Constitution).

law," and correctly observed that "the common law never recognized the right to a full recovery in tort."[80]

Next, the court rejected plaintiff's contention that the $1 million limit on medical malpractice recoveries violated the separation of powers doctrine set forth in the Virginia Constitution.[81] The court emphasized the General Assembly's preeminent role in developing public policy for Virginia's citizens,[82] stating that "the legislature has the power to provide, modify, or repeal a remedy."[83]

Significantly, the court perceptively observed that, if it were to declare the statute unconstitutional, the court itself could be in violation of the separation of powers doctrine. 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."[84]

Finally, the court rejected plaintiff's contention that the statute violated the Due Process Clauses of the United States and Virginia Constitutions,[85] the "special legislation" provision of the Virginia Constitution,[86] or the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution.[87] With respect to each of these claims, the court noted that economic regulations are "entitled to wide judicial deference,"[88] because they do not implicate fundamental rights.[89] If the General Assembly had a rational basis for its decision, the Virginia Supreme Court said, then the legislation "must be upheld."[90] The court concluded that "[t]he

80 *Etheridge*, 376 S.E.2d at 529. *See also Boyd*, 877 F.2d at 1196 (holding that the statutory cap on malpractice damages does not violate the right to jury trial under the Seventh Amendment to the United States Constitution, because the "Constitution does not forbid . . . the abolition of old [rights] recognized by the common law, to attain a permissible legislative object").

81 *See* VA. CONST. art. III, § 1.

82 *See* Howell v. Commonwealth, 46 S.E.2d 37, 40 (Va. 1948) ("There is nothing in the common law that is not subject to repeal by the Legislature unless it has been reenacted in some constitutional provision.").

83 *Etheridge*, 376 S.E.2d at 532. *See also Boyd*, 877 F.2d at 1196 (holding that medical malpractice damages cap does not violate federal separation of powers principles "for the simple reason that those principles are inapplicable," because they are "not mandatory on the States").

84 *Etheridge*, 376 S.E.2d at 531.

85 *See* U.S. CONST. amend. XIV, § 1; VA. CONST. art. I, § 11.

86 *See* VA. CONST. art. I, § 4; VA. CONST. art. IV, § 14.

87 *See* U.S. CONST. amend. XIV, § 1.

88 *Etheridge*, 376 S.E.2d at 531.

89 *See id.* ("[A] party has no fundamental right to a particular remedy or a full recovery in tort.").

90 *Id. See also* Wackenhut Applied Tech. Ctr., Inc. v. Sygnetron Protection Sys., Inc., 979 F.2d 980, 985 (4th Cir. 1992) (upholding Virginia's $350,000 statutory cap on punitive damages awards); King v. Virginia Birth-Related Neurological Injury Comp. Program, 410 S.E.2d 656 (Va. 1991) (Virginia Birth-Related Neurological Injury Compensation Act, a physician funded "no-fault" compensation program for birth-related neurological injuries, held constitutional); Hess v. Snyder Hunt Corp., 392 S.E.2d 817 (Va. 1990) (five-year statute of repose on litigation involving improvements to real property declared constitutional).

purpose of [the statutory limit] – to maintain adequate health care services in this Commonwealth – bears a reasonable relation to the legislative cap, thereby ensuring that health care providers can obtain affordable medical malpractice insurance."[91]

C. *Round Two in the Virginia Supreme Court: The Pulliam Case*

In 1999, the Virginia Supreme Court was asked to revisit the constitutionality of the medical malpractice damages cap in *Pulliam v. Coastal Emergency Services of Richmond, Inc.*[92] Once again, the court declined to second-guess the General Assembly's informed public policy decision about the legislation.

Writing for the court, Chief Justice Carrico held that the medical malpractice damages cap did not violate procedural or substantive due process rights, equal protection, the right to a jury trial, or the separation of powers doctrine.[93] It also did not constitute an unconstitutional taking of property.[94] 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" and, therefore, "represented an appropriate exercise of the legislature's ability to enact tort reform legislation."[95]

The Virginia Supreme Court's *Pulliam* decision marks a sharp break from recent decisions by courts in states like Ohio, Kentucky, and Illinois that have nullified policy judgments by state legislatures about liability law. Unlike these other courts, the Virginia Supreme Court wisely refused to be drawn into invitations by trial lawyer groups to sit as a "superlegislature."

Moreover, the court wisely perceived what is an essential truth about

91 *Etheridge*, 376 S.E.2d at 531. *See also Boyd*, 877 F.2d at 1197 ("[W]e agree with the conclusion of the Supreme Court of Virginia that the cap on liability bears a reasonable relation to a valid legislative purpose – the maintenance of adequate health care services in the Commonwealth of Virginia. We therefore agree that [the cap] does not violate the fourteenth amendment's guarantees of due process or equal protection."). Other jurisdictions have upheld health care liability damages limits. *See, e.g.*, Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992); Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990); Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977); Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993).

92 509 S.E.2d 307 (Va. 1999).

93 *See id.* at 314-15, 318-19.

94 *See id.* at 317-18. In addition to the aforementioned challenges, at oral argument plaintiff contended for the first time that the damages cap constituted impermissible "special legislation" in violation of the Virginia Constitution. *See id.* at 315-17. The majority did not address this issue because plaintiff had not preserved it for appeal. *See id.* at 316-17. In a concurring opinion, Justice Hassell, joined by two other Justices, addressed the "special legislation" argument and indicated that the statute passed muster under that constitutional provision as well, stating, "I can only conclude, based upon the record before this Court, that [the cap] does not contravene Virginia's constitutional prohibition against special legislation." *Pulliam*, 509 S.E.2d at 322 (Hassell, J., concurring).

95 *Id.* at 321.

liability reform or any other type of legislation – if voters disagree with the wisdom of a particular law, they have a remedy at the polls. It should not be the position of courts to make the type of political and policy choices that are the job of legislatures.

Importantly, the Virginia Supreme Court upheld the statute despite the fact that at least one of the Justices, Justice Kinser, indicated that she was personally troubled by the legislation. Nevertheless, she was careful not to substitute her own views for those of the legislature. Justice Kinser wrote:

> The General Assembly has the responsibility to protect the health, welfare, and safety of the citizens of this Commonwealth through appropriate legislation. However, the medical malpractice cap works the greatest hardship on those individuals who are the most severely injured by the negligence of health care providers. Nevertheless, I cannot be influenced by such concerns when deciding the constitutionality of a challenged statute. I can only express my views with the hope that the General Assembly will adopt a more equitable method by which to ensure the availability of health care in this Commonwealth.[96]

D. *The General Assembly Responds to Justice Kinser's Concerns*

The Virginia Supreme Court's decision to respect the General Assembly's policy decision and the separation of powers principle is commendable. Equally commendable is the General Assembly's response.

Out of respect for the Virginia Supreme Court's discomfort over the size of the cap, as voiced by Justice Kinser in her concurring opinion, the General Assembly decided to revisit the legislation, and determined that a change was appropriate. The General Assembly amended the medical liability statute to permit recoveries up to $1.5 million for acts of malpractice occurring on or after August 1, 1999 – a fifty percent increase over the $1 million limit at issue in *Pulliam*.[97] The General Assembly also provided for additional annual adjustments that will increase the $1.5 million limit by $50,000 on July 1, 2000, and each July 1 thereafter, with final annual increases of $75,000 on July 1, 2007 and July 1, 2008.[98]

E. *A Lesson in "Good Government" for Other States*

The Virginia Supreme Court's opinion in *Pulliam* and the General Assembly's decision to revisit and amend the medical liability statute to

96 *Id.* at 322-23 (Kinser, J., concurring).

97 *See* VA. CODE ANN. § 8.01-581.15 (Michie 1999).

98 *See id.*

accommodate the concerns expressed by Justice Kinser in her concurring opinion reflect the kind of mutual respect and cooperation between courts and legislatures that is imperative for the development of sound tort law. Neither branch of government had to declare a tort law monopoly to have its way, with both emerging as "winners."

Most importantly, the flexibility shown by the Virginia Supreme Court and the General Assembly produced the best outcome for the citizens of Virginia. Many Virginians have benefited from the General Assembly's decision to do something about the problem of excessive awards in lawsuits against healthcare providers. The Virginia Supreme Court's decision to uphold the law will help ensure the continued availability of quality, affordable health care for Virginians. At the same time, the General Assembly's recent action will help ensure that persons who are injured in the Commonwealth as a result of medical malpractice will receive reasonable compensation for their injuries.

Other states should embrace the "Virginia model" as a sound alternative to the tort tug of war that currently exists in some states. If a court disagrees with the policy choices of the legislature, the justices can respect the legislature's independence while still making their voices heard. This is what Justice Kinser did in Virginia. She voted to uphold the statute at issue, using her concurring opinion to critique the General Assembly's past policy choice – a wise and mature alternative to invalidating the law because she did not like it.

When courts show such wisdom and restraint, legislatures must be prepared to respond in kind, like the Virginia General Assembly did after *Pulliam*. This is not to say that legislatures must always follow the personal policy preferences expressed by judges – after all, the legislature has the ultimate responsibility of writing the law. Legislators should, however, at least consider judges' views. If the legislature, after considering judicial commentary, finds that changes to the law are appropriate, it should make them.

VI. CONCLUSION

Historically, state supreme courts have respected rational efforts by state legislatures to develop tort law. Resisting the urge to act as "superlegislatures," these courts have instead recognized that the crafting of broad public policy initiatives is a task particularly suited for the legislative branch to undertake.

Recent decisions overturning legislative policy choices about state tort law have overlooked this basic tenet, and have instead been premised on the assumption that state courts have an exclusive right to make tort law. The decisions ignore both legal history and sound public policy.

There is an answer to the tort tug of war that now exists in some states. It is called "give and take." All that is required is a professional level of mutual respect and cooperation between courts and legislatures. Virginia has proven that such mutual respect and cooperation can and, in fact, does work. Other states should strive to follow Virginia's model of "good government."