WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES?

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INTRODUCTION

The most fundamental question about America's liability, or tort law, today focuses on who should make it — legislatures or courts? The answer to this question has far more long-term significance than other disputes that fill press stories and discussions about the subject, such as whether there should be limits on punitive damages awards. If courts declare themselves the "exclusive oracle" of who can and should decide tort law, debate about whether there should be any limits on liability becomes academic, at best. Judges will simply answer all of the questions that surround the debate.

The question about who should make law is not academic; tort law affects people's lives, every day. Tort law can discourage conduct such as medical malpractice and help remove truly defective products from the marketplace. But, unchecked, unbalanced tort law can remove good products from the marketplace, discourage innovation, limit the supply of necessary medical services, and unduly raise costs for consumers.

In light of the profound impacts that tort law may have on society, it is important that state legislatures, as well as courts, have their voices heard. If legislatures have a rational basis for their proposals, they should not be silenced by judges who believe that "they know better."

As this monograph will demonstrate, that is precisely what is going on in some states today. In little over a decade, over *sixty* state court decisions have used provisions in *state* constitutions to nullify attempts by state legislatures to reform America's tort law.[1] The courts declared legislative efforts "unconstitutional" under a variety of provisions in *state* constitutions. Never before have *state* constitutional provisions been used on so grand a scale to overturn state legislative policy decisions. The pace is unparalleled in American history, without precedent, and simply wrong.

In addition, some judges have, on a retroactive basis, created brand new tort claims that have no basis in precedent or state public policy. The courts have, in some instances, acted as legislators.

This monograph will show that these decisions have ignored fundamentals of legal history and have unduly tipped the balance of power from legislatures toward courts, and will suggest how and why that balance should be restored.

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[1] *See* APPENDIX A ("Tort Reform Laws Held Unconstitutional By State Courts After January 1983"). *Compare* APPENDIX B ("Tort Reform Laws Upheld As Constitutional By State Courts After January 1983").

I.

A PAGE OF LEGAL HISTORY

A. The Reception Statutes — Legislative Power Delegated to Courts

In the battle between state courts and legislatures, a fundamental part of legal history has been ignored. Legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of state legislatures was to "receive" the Common Law of England as of a certain date and have that provide a basis for a state's tort law. In the same piece of legislation, called a "reception statute," state legislators *delegated* to state courts the authority to develop the English Common Law in accordance with the "public policy" of the state.[2] These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries.

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, such as the formulation of the very basics of a "new society." As some "reception statutes" made clear, however, what the legislature delegated, it could retrieve, at *any* time.

B. From Incrementalism to "Making" Tort Law

For over 200 years, the authority delegated to courts to "make" tort law continued and, in most instances, worked well.

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[2]*See* APPENDIX C (providing state reception statutes).

Courts developed the "common law" in a slow, incremental fashion in accordance with societal needs.

In the 1970's, however, some courts strayed from this incremental approach. Judicial "lawmaking" was no longer gradual or evolutionary, but bold-faced, new, and sometimes revolutionary in content.

For example, some courts extended the concept of punitive damages into new and unchartered territory. For over 200 years, punitive damages were reserved for a small class of torts involving intentional wrongs such as assault and battery,[3] libel and slander,[4] malicious prosecution,[5] false imprisonment,[6] and intentional interferences with property such as trespass and conversion or destruction of property.[7] The cases involved

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[3]*See, e.g., Corwin v. Watson*, 18 MO. 71 (1853); *Porter v. Seiler*, 23 PA. 424 (1854); *Lyon v. Hancock*, 35 CAL. 372 (1868); *Ward v. Blackwood*, 41 ARK. 295 (1883); *Trogden v. Terry*, 172 N.C. 540 (1916).

[4]*See, e.g., Sheik v. Hobson*, 64 IOWA 146 (1884); *Louisville & Nashville R.R. Co. v. Ballard*, 85 KY. 307 (1887); *Coffin v. Brown*, 50 A. 567 (Md. 1901); *Ellis v. Brockton Pub. Co.*, 84 N.E. 1018 (Mass. 1908).

[5]*See, e.g., Brown v. McBride*, 24 MISC. 235, 52 N.Y.S. 620 (1898); *Jackson v. American Tel. & Tel. Co.*, 51 S.E. 1015 (N.C. 1905).

[6]*See, e.g., Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893); *Schenckler v. Risley*, 4 ILL. 483 (1842); *Taber v. Hutson*, 5 IND. 322 (1854); *Parsons v. Harper*, 57 VA. 64 (1860); *Hamlin v. Spaulding*, 27 WIS. 360 (1869); *Green v. Southern Express Co.*, 41 GA. 515 (1871); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 KAN. 350 (1887).

[7]*See, e.g., Taylor v. Giger*, 3 KY. 586 (1803); *North v. Cates*, 5 KY. 591 (1812); *Treat v. Barber*, 7 CONN. 274 (1828); *Huntley v. Bacon*, 15 CONN. 267 (1842); *Clark v. Bales*, 15 ARK. 452 (1855); *Schindel v. Schindel*, 12 MD. 108 (1858); *Dorsey v. Manlove*, 14 CAL.

basically one or perhaps a few injured plaintiffs and one defendant who had engaged in intentional wrongdoing. Then, some courts applied the punitive damages concept to product liability without careful consideration of the fact that suddenly there was one defendant with many potential plaintiffs who could seek to punish the defendant again for essentially the same conduct. One of the most perceptive and learned judges of this century recognized the problem and warned against it.[8]

In addition, some state courts retroactively changed the standard for when punitive damages could be imposed. They began to use vague phrases such as "gross negligence" as the standard for imposing punishment.[9] These looser standards could lead to severe economic punishment; they gave potential

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553 (1860); *Lynd v. Picket*, 7 MINN. 184 (1862); *Brown v. Allen*, 35 IOWA 306 (1872); *Singer Mfg. Co. v. Holdfodt*, 86 ILL. 455 (1877); *Bradshaw v. Buchanan*, 50 TEX. 492 (1878); *Huling v. Henderson*, 161 PA. 553 (1894).

[8]In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967), Judge Henry Friendly noted the court's "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." Judges in more recent times, even some who are perceived to be quite sensitive to plaintiffs, have recognized the same problem, but have suggested that individual judges cannot solve the problem, only the United States Supreme Court or Congress can. *See Juzwin v. Amtorg Trading Co.*, 718 F. SUPP. 1233 (D.N.J. 1989) (Sarokin, J.), *rev'd on other grounds sub nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990). *See generally* Victor Schwartz, Mark Behrens and Lori Bean, *Multiple Imposition Of Punitive Damages: The Case For Reform*, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

[9]*See, e.g., Wisker v. Hart*, 766 P.2d 168 (Kan. 1988); *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991); *Universal Servs. Co. v. Ung*, 904 S.W.2d 638 (Tex. 1995) (noting that, in 1995, the Texas legislature eliminated gross negligence as a ground for punitive damages in all but wrongful death claims).

defendants little "notice" of what was expected of them in terms of behavioral norms.[10]

In another example of judicial lawmaking, some courts went beyond imposing so-called "strict liability" against product manufacturers and, without careful consideration for public policy implications, created absolute liability — manufacturers would be liable 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.[11] The implications of these decisions on our society as a whole (*e.g.*, their effect on product innovation or insurability) were ignored.

C. Legislatures Retrieve Their Power

In response to these cases, some state legislatures in the 1970s began to "retrieve" their clear historical right to decide tort law. Most state courts respected what their legislature had done — these were appropriate legislative prerogatives and policy choices.[12]

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[10]In *BMW of North America, Inc. v. Gore*, 116 S. CT. 1589, 1598 (1996), the United States Supreme Court said: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

[11]*See, e.g., Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318 (Ma. 1992); *Ayers v. Johnson & Johnson Baby Products Co.*, 818 P.2d 1337 (Wash. 1991).

[12]*See generally* JOHN W. WADE *et al.*, PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 807-09 (9th ed. 1994).

In the 1980's, the involvement of state legislatures in deciding tort law increased.[13] 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. Organized plaintiffs' lawyer groups and sometimes state and national bar associations, as well as professional "consumer" groups, lined up on the other. When legislatures determined that some modification of their state's tort law should occur, plaintiffs' bar groups challenged these reforms under provisions of state constitutions.

II.

LEGISLATURES VERSUS COURTS: WHO SETS PUBLIC POLICY?

Most people think of "the law" in terms of legislation, a prospective rule enacted by the legislature that they can read and understand. They appreciate that, however imperfect, the development of "law" by legislatures is a public event with hearings, debates, and compromise. The public also knows that they have the *final* say about the wisdom of what legislators may do or may not do — if the majority of the public believes that legislation is not in accord with the public interest, they can "retire" the legislator who supported it. This is particularly true of so-called "tort reform," which is very public in its making.

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[13]For example, *Beshada, supra* note 11, and *Halphen, supra* note 11, were overruled by legislation so as to require proof of defect. *See* N.J. REV. STAT. § 2A:58C-3(3) (1987); LA. REV. STAT. ANN. § 2800.56(1) (1991). 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) (West Supp. 1990).

By way of contrast, the development of the "common law" by judges is not made in the public light, is retroactive, and often is not understood by the public. In addition, judges in many states are appointed, not elected, so the public often lacks an effective check on judicial decision-making.

Yet, most of America's tort law has been "common law." What judges say they are doing is not "making law," but "discovering" the law from past precedents. They look to past cases to "discover" what the law is and should be today. Lawyers know, however, that sometimes there really is *nothing* to discover in the past. In such a case, judges can sometimes measure the norms of society and "fill in the gaps" of the common law. But, when judges go beyond this and decide to create a new duty that was not recognized previously in the law and award damages for its breach, they have entered into a legislative role.[14]

It may be argued that the creation of a "new cause of action" is simply a traditional gradual development of the common law. It is not. Judicial creation of new legal duties is different in both form and substance from traditional common law developments in the law of torts. They have generally been incremental in nature.

For example, in the 19th Century in every state, a person's right to recover for an injury was barred if he or she was in any way at fault.[15] In 1854, a Pennsylvania judge called the defense "a rule from time immemorial" and ventured to guess that it was

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[14]*See generally Harrison v. Montgomery Co. Bd. of Educ.*, 456 A.2d 894, 904 (Md. 1983) (stating that the judiciary should defer "to the legislature where change is sought in a long-established and well-settled common law principle").

[15]*See* WILLIAM PROSSER and PAGE KEETON, THE LAW OF TORTS § 65 at 451-52 (5th ed. 1984). The doctrine of contributory negligence had its origin in the English case of *Butterfield v. Forrester*, 103 ENG. REP. 926 (K.B. 1809).

"not likely to be changed for all time to come."[16] The judge who wrote the opinion was a poor prognosticator of history, but he must be given some credit as the rule took more than 150 years to change in common law development. Gradually, state courts narrowed this so-called "contributory negligence defense" and developed exceptions to it, such as not applying it when the defendant had a "last clear chance" to avoid an accident or where the defendant engaged in "reckless" behavior.[17] But, it was not until 1973 that the first common law decision permitted comparative fault as a general rule, and that was in a state that had already used comparative fault in a wide matrix of specific statutes.[18] This was not the creation of an entirely new duty or obligation, only the gradual modification of a defense.

When other changes have developed in the common law, such as the recognition of strict products liability, they have also occurred gradually. For example, it took almost *fifty* years from the time of then-Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*,[19] removing the privity barrier in product liability negligence cases, before the New Jersey Supreme Court decided *Henningsen v. Bloomfield Motor Co.*,[20] removing the privity barrier in implied warranty actions involving personal injury. Three additional years passed before Justice Traynor, writing for the California Supreme Court, recognized privity-free strict liability in tort in *Greenman v. Yuba Power*

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[16]*Pennsylvania R.R. Co. v. Aspell*, 23 PA. 147, 149 (1854).

[17]*See* WILLIAM PROSSER and PAGE KEETON, *supra* note 15 at 462-464.

[18]*See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). *See generally* VICTOR SCHWARTZ, COMPARATIVE NEGLIGENCE (3rd ed. 1994).

[19]111 N.E. 1050 (1916).

[20]161 A.2d 69 (N.J. 1960).

Products, Inc.[21] Several more years passed before the rule of strict product liability became the common law of most states.[22] Even when this expansion occurred, a fault base remained in the key areas of product design and warnings.[23]

The same slow, meticulous, evolvement of the common law has been true with other tort law developments, such as the modification of traditional immunities, permitting recovery for a prenatal injury, or modification or abolition of the assumption of risk defense. Even when duties were created in the distant past they were minor in scope. Today, the retroactive creation of duties is basically unfair and can have major economic and social impacts.

A. Judicial Lawmaking Adversely Affecting Plaintiffs

This monograph has shown some examples from the 1980's where judges abandoned the "incremental" approach that is appropriate for the judicial system. Plain and simple, the courts acted as legislators.

Unfortunately, in the 1990's, in some situations, this trend has accelerated. In general, this activity has assisted plaintiffs and the plaintiffs' bar, but not always. When judges act like

[21]59 Cal. 2d 57, 62, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[22]*See* JOHN W. WADE *ET AL.*, supra note 12 at 717.

[23]*See* RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft (Preliminary Version) Oct. 18, 1996).

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legislators, they can adversely affect plaintiffs as well as defendants.[24]

For example, in *Life Insurance Co. of Georgia v. Johnson*, the Supreme Court of Alabama recently decided that *half* of all punitive damages awarded in Alabama should go to a "state general fund."[25] When the court created this rule, it cited *no* precedent from judicial decisions of Alabama or any other state. Of course, the court conducted no hearings on the subject. In fact, the issue of whether punitive damages should go to a state general fund was not even argued before the court.

Whether any percentage of an individual's punitive damage award should go to a state fund is a decision for a state legislature. A legislature can consider key public policy issues that the Supreme Court of Alabama ignored, such as the issue of whether allocating a portion of a punitive damages award to the

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[24]For example, some state courts have abolished joint and several liability. *See 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). Some courts have also raised the burden of proof needed to impose liability for punitive damages. *See Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980); *Rodriguez v. Suzuki Motor Corp.*, 1996 WL 726788 (Mo. Dec. 17, 1996) (*en banc*).

[25]1996 WL 202543 (Ala. April 26, 1996), *vacated and remanded for further consideration*, 117 S. CT. 288 (1996).

state may create a conflict of interest between a plaintiff's attorney and his or her client.[26]

Conflict of interest problems are not the only legislative issue involved in the question of whether it is sound public policy to have a portion of a plaintiff's punitive damage award go to the state. There also is the question of whether such funds should go to a general fund or some specialized fund. The legislature also could look to the experience of other states that have enacted legislation directing a portion of a plaintiff's punitive damage award to the state.

If the Alabama legislature held hearings on the issue of whether all or a portion of punitive damage awards should go to the state, it well might decide that the idea is unsound. In any case, it would be acting on more complete information and would be more aware of the issues that need to be addressed in evaluating the idea.

B. Judicial Lawmaking Adversely Affecting Defendants

A basic fundamental principle of tort law for over 200 years is that liability should only be imposed when a person has suffered an injury. There are reasons for this basic rule. In order

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[26]In the *Johnson* case, the court stated that plaintiff attorneys are to receive their "contingency" fees out of the *entire* punitive damages award, not simply the portion of the award that flows to the client. Thus, the attorney has a strong motive to pursue punitive damages even though his or her client may not. First, the client has to pay federal income tax on the punitive damages portion of any award received, but not on the portion of a settlement or award deemed to be "compensatory." Second, when cases go to trial, plaintiff attorney contingency fees are usually more (35-50%) than when cases are settled (33%). Although the choice of whether or not to accept or reject a settlement is up to the client, in practical terms, the client usually follows the lawyer's advice.

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to determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective manifestation that an individual has been harmed.

Nevertheless, a few courts have determined that it is appropriate to award damages to a plaintiff for so-called "medical monitoring," even though the individual currently suffers no harm and no symptoms of harm.[27] Whether individuals should receive payment from private parties for medical monitoring is a question for legislatures to answer. There are several reasons why this is true.

First, courts cannot assure that awards for medical monitoring will actually be used for that purpose — tort awards are made in lump sums. The lump sum award could be used for purposes having *nothing* to do with medical monitoring. Legislation could address this problem. Second, courts that have decided to create this "new tort" have given no consideration to the fact that the plaintiff already may have opportunities for medical monitoring under workers' compensation or a health insurance plan. A legislature could consider whether the "new tort" should be limited to people who do not have existing resources that provide for medical monitoring. Third, courts do not have the scientific knowledge to determine when and if medical monitoring is appropriate. Legislators are in a better position to obtain such information.

Broad and complex tort policy issues, such as medical monitoring, are more appropriately left to legislatures, because of their ability to hear from a wide array of witnesses and create prospective rules of law. Courts are not as well-equipped to resolve such issues, principally because their perspective is

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[27] *See Ayers v. Township of Jackson,* 525 A.2d 287 (N.J. 1987); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) ("*Paoli II*"), *cert sub nom. General Elec. Co. v. Ingram*, 499 U.S. 961 (1991); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Buckley v. Metro-North Commuter R.R. Co.*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

generally limited to arguments from opposing counsel seeking to advance purely *private* interests. Further, when courts "make" law, they do so retroactively, denying "fair notice" to the public about rights and responsibilities that may result from significant new changes in the law. Legislative questions deserve legislative answers — they are not questions that can or should be addressed by courts.

III.

STATE "CONSTITUTIONALISM" RUN WILD

As the introduction indicated, in slightly over a decade, courts have nullified state tort law legislation over *sixty* times.[28] In each of these cases, state courts have turned to a state's constitution rather than the federal constitution.

By utilizing a state's constitution, state courts, as a practical matter, have precluded defendants from raising federal constitutional questions that could be appealed to the United States Supreme Court. The Supreme Court has tried to distinguish situations in which a legislature violated a person's constitutional rights from situations in which legislatures have made a public policy decision with which Justices of the Supreme Court might not have personally agreed. Apart from a very bleak and highly discredited period in the Court's history which began around the turn of the century and ended in the mid-1930s (known as "the *Lochner* era"), the Court has shown deference to legislative policy judgments.[29] Most of the decisions nullifying state tort reforms

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[28]*See* APPENDIX A.

[29]*See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (1978).

have *not* given state legislative policy judgments the same level of respect. As a result, state court judicial decisions have had an unprecedented, crushing effect on the prerogative of state legislatures in the area of liability law.

Perceptive plaintiffs' bar scholars have hailed this development as one of the most important and significant occurrences in the development of tort law in the past fifty years.[30] Many of these decisions, however, were premised on the assumption that courts had a "fundamental and exclusive right" to make state tort law. The decisions ignored basic legal history — the "reception" statutes. They also betray a solipsistic view of the formulation of public policy — the formulation of tort law has never been an exclusive province of *any* one branch of government. In addition, the cases often show judges substituting their own views of what tort law "ought to be" for that of the legislature; they do not represent sound constitutional law decisions. More importantly, like the United States Supreme Court's *Lochner* era cases, the decisions create precedents so that courts in the future can nullify a wide array of state legislation, whether "conservative" or "liberal," in support of tort reform or not.

We will explore three examples: modifications to the collateral source rule, statutes of repose, and punitive damages limitations.

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[30]*See* Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, TRIAL, July 1996, at 51 (hailing the "revival of state constitutionalism" as one of the greatest developments to help plaintiffs' lawyers over the past 50 years). The problem with this statement, in part, is that there has been no "*revival*" — there is *no* historical evidence that state courts have *ever* used state constitutions in the manner that they are currently being used to nullify state tort reforms.

A. Modifications to the Collateral Source Rule

The collateral source rule, which developed in common law decisions, says that a plaintiff can be paid even though he or she already has received compensation for a specific harm if that compensation came from a source that is not connected with (*i.e.*, is "collateral" to) the defendant. The common law rule is based on the assumption that the defendant is a "wrongdoer," the plaintiff has been "provident" in buying insurance, and the defendant should not benefit from the plaintiff's providence.

In modern times, however, plaintiffs may benefit from the "collateral source rule" even though the sources of payment for their injuries do not stem from their own "providence." A plaintiff may have received workers' compensation benefits or state health benefits or other funds that he did not create, or insurance benefits that he did not purchase. With these facts in mind, plus a fiscal resources policy judgment that a "double recovery" is inappropriate, a legislative public policy determination can be made that the old common law collateral source rule should be modified or abolished. A number of state courts have agreed that legislative action in this area is appropriate.[31] Other courts, however, have used a variety of state constitutional provisions to sweep away legislative changes to the

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[31]*See Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); *Blue Cross and Blue Shield of Fla., Inc. v. Matthews*, 498 So. 2d 421 (Fla. 1986); *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985); *Heinz v. Chicago Rd. Inv. Co.*, 549 N.W.2d 47 (Mich. App. 1996) ; *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990); *Johnson v. Farmers Union Cent. Ex., Inc.*, 414 N.W.2d 425 (Minn. App. 1987); *Buchman v. Wayne Trace Local School Dist. Bd. of Educ.*, 652 N.E.2d 952 (Ohio), *reconsideration denied*, 655 N.E.2d 188 (Ohio 1995); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991).

collateral source rule.[32] When these decisions are carefully examined, regardless of the state constitutional provision chosen to strike down the legislative action — "open courts" or "equal protection" or "right to jury trial" — they often appear to be little more than "we know better than you how to make tort law" decisions.

B. Statutes of Repose

Statutes of repose bar liability claims a certain number of years after a product is sold or an activity is engaged in by an engineer or architect or physician or some other professional. They represent a legislative policy judgment that after a certain number of years it is inappropriate to allow a lawsuit regarding a product that is very old and may have been altered, modified, or not repaired, or an activity that is long since over. Most state courts have recognized that statutes of repose represent a public policy "judgment call" and have upheld them,[33] but some courts have treated statutes of repose as if they were limits on a person's *fundamental* civil rights or liberties.[34] They are not. They

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[32]*See American Legion Post No. 57 v. Leahey*, — So. 2d —, 1996 WL 390622 (Ala. July 12, 1996); *Whitely v. Sebas*, 1991 WL 32038 (Conn. Super. Feb. 27, 1991); *Denton v. Con-Way Southern Express, Inc.*, 402 S.E.2d 269 (Ga. 1991); *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987); *Wentling v. Medical Anesthesia Servs., P.A.*, 701 P.2d 939 (Kan. 1985); *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995); *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994).

[33]*See* Appendix B.

[34]*See Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725 (Ala. 1983); *Turner Const. Co., Inc. v. Scales*, 752 P.2d 467 (Alaska 1988); *Hazine v. Montgomery Elev. Co.*, 861 P.2d 625 (Ariz. 1993); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); *McKinzie v. AC&S*, No. 96-L-126 (Ill. Cir. Ct., Madison Cty. June 29, 1996); *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990); *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991); *Tabler*

represent a public policy decision and one that can be reversed by the electorate.

C. Punitive Damage Limitations

People accused of crimes are given at least three fundamental rights: notice of the wrong that is to be punished; a firm burden of proof (*i.e.*, "beyond a reasonable doubt"); and notice of the "sentence" that may be imposed upon them. Punitive damages "reform" laws generally contain one or more of these three basic elements: a definition of when punitive damages are to be awarded; a burden of proof standard that reflects the quasi-criminal nature of punitive damages; and an outer limit on the amount of punitive damages which can be awarded.[35] These efforts are directed at providing defendants in punitive damages cases with rights that approximate those that are inherent in our criminal justice system. The legislatures are also making a policy judgment that weighs the need for punishment against the need to protect potential defendants against overkill in our judicial system.

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v. Wallace, 704 S.W.2d 179 (Ky. 1985), *cert. denied*, 479 U.S. 822 (1986); *State Farm Fire and Casualty Co. v. All Elec., Inc.*, 660 P.2d 995 (Nev. 1983); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983); *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986); *Brenneman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709 (Ohio 1987); *Kennedy v. Cumberland Eng'g Co., Inc.*, 471 A.2d 195 (R.I. 1984); *Daugaard v. Baltic Coop. Building Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985); *Hales v. Industrial Comm'n of Utah*, 854 P.2d 537 (Utah App. 1993); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188 (Utah 1989); *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989); *Funk v. Wollin Silo & Equip., Inc.*, 435 N.W.2d 244 (Wis. 1989).

[35]*See* Victor Schwartz and Mark 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).

Nevertheless, a number of state courts have nullified these basic legislative policy judgments about punitive damage awards.[36] The Supreme Court of Alabama, in the *Johnson* case discussed earlier, was candid in its assessment of its role in formulating public policy regarding punitive damage limits. The court said:

> Under our system of government, with its guarantee of separation of powers between the executive, legislative, and judicial branches of government, *it is peculiarly and exclusively the function of the judiciary to determine whether a jury award in a civil case exceeds the amount that the State and Federal Constitutions will allow* without violating the due process rights of this State and this country.[37]

The Supreme Court of Alabama did not acknowledge the state's reception statute or the basic power of legislators to protect defendants from excessive civil punishment.

D. "All" Tort Reforms

In one recent case, an Illinois trial court used its state constitution to strike down *all* of the civil justice reform laws passed by the Illinois legislature in 1995 in their *entirety*. In *Best v. Taylor Machine Works, Inc.*, the court said that it was "the express intent of the Legislature . . . to usurp the powers of the

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[36]*See Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994), *reconsideration denied*, 644 N.E.2d 1389 (Ohio), *cert. denied*, 116 S. Ct. 56 (1995).

[37]*Johnson, supra* note 18, at *15.

judicial branch."[38] The court further expanded upon its view of the role of courts versus legislatures in formulating state tort law. The court said:

> [C]itizens [could] pursue their *inalienable right* to complete compensation and to have an impartial panel of fellow citizens make that decision . . . . The public policy of this state is that disputes between citizens are best decided by a jury of other citizens without interference of an overreaching government. The Illinois Constitution restricts the Legislature from manipulating public policy in the manner demonstrated by this Act.[39]

This case is being reviewed by the Illinois Supreme Court.

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[38]No 96-L-167 (Ill. Cir. Ct. Madison Cty. Aug. 20, 1996), *review granted*, Numbers 81890-93 (Ill.).

[39]*Id.* (emphasis added). Thomas Jefferson would be surprised to learn that the *Best* court unilaterally expanded the inalienable rights of life, liberty, and pursuit of happiness to include the "right to complete compensation" in tort actions.

IV.

BALANCING THE ROLES OF STATE LEGISLATURES AND COURTS OVER WHO SHOULD MAKE TORT LAW

A. The Problem of Judicial Overreaching

As this monograph has shown, the balance of power between courts and legislatures over who makes America's tort law has become unfairly skewed in some jurisdictions. Some courts have taken on a legislative role.

The problem is two-fold. First, courts have nullified public policy choices made by the legislature about a state's tort law. Second, courts have taken on a legislative role in "making law." These are decisions not based on past precedent or judicial "gap-filling" of the common law; rather, they reflect state court judges' own views of what the law of the state "should be." As this monograph has shown, the resulting impact can be adverse to both plaintiffs and defendants. If the law of torts is to be changed in significant ways, that is the province of legislatures, not courts.

These two problems have been studied and are being addressed by the American Legislative Exchange Council (ALEC), a bipartisan group which represents more than 3,000 state legislators from all fifty states. ALEC has developed model state legislation entitled the "Adoption of Common Law Act."[40] The model legislation accomplishes three principal purposes:

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[40]*See* APPENDIX D.

First, it serves as a reminder to courts and the public that, as a matter of history and logic, the power to decide tort law is both a legislative right and duty. Second, it makes the legislature, not the judiciary, the source for creating new tort law. Third, it provides an alternative mechanism for the creation of new tort causes of action that has the potential to combine the talents of both legislators and judges.

B. Reaffirming the Legislature's Historical Right to Decide Tort Law

The ALEC model Act reaffirms the historic right of legislatures to make a state's tort law. It reminds courts and the public that the power to decide state tort law was originally vested in legislatures, then delegated to courts, and that legislatures were clear about their right to retrieve that power. That model Act language is based on the "reception statutes."

The Alabama reception statute exemplifies a predicate for the model Act. The Alabama statute states:

> The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this State, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, *except as from time to time it may be altered or repealed by the legislature*.[41]

The Illinois reception statute similarly provides:

> That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply

[41] ALA. STAT. §1-3-1 (West 1995) (emphasis added).

> the defects of the common law, prior to the fourth year of James the First, excepting the second section of the ninth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, *shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority*.[42]

State court decisions, such as the Supreme Court of Alabama's *Johnson* case and the Illinois trial court's decision in the *Best* case, both discussed earlier, are incorrect as a matter of history and policy. The model Act makes that clear.

State legislatures which repeal or modify a common law cause of action are following a practice that state legislatures have engaged in from the earliest days of this country's history and they have done so without having their work nullified by courts.

The commentary to the model Act expands upon this basic fact. It describes, for example, that from 1789 until the late 1800's, courts "made" contract law. In the early 1900's, state legislatures literally "took over" the common law of contracts and replaced it with the Uniform Sales Act and the Uniform Negotiable Instruments Act[43] (later the Uniform Commercial Code).[44] As the model Act's comments indicate, even when legislatures engaged in such massive "retrievals" of the right to make law and replaced the fundamentals of English Common

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[42]5 ILL. COMPILED STAT. ANN. [ILCS] 50/1 (West 1995) (emphasis added).

[43]*See* UNIFORM SALES ACT § 1, *et seq.*; UNIFORM NEGOTIABLE INSTRUMENTS ACT § 1, *et seq.*

[44]*See* UNIFORM COMMERCIAL CODE, ART. 1, *et seq.*

Law, state courts respected the legislatures' prerogatives and did *not* hold the new legislation unconstitutional.

Of even greater relevance are state court decisions that upheld workers' compensation laws which replaced workers' tort law rights to sue. The statutes abolished *all* damages for pain and suffering and provided *limited* recovery of economic losses and *no* punitive damages. In addition, the jury "system" was replaced by an administrative board.[45] Nevertheless, state courts generally respected their state legislature's choice to abolish the common law and replace it with legislation.[46]

Judicial respect for legislative choices is a fundamental underpinning of American law. 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.[47]

State courts also have recognized that "[declaring] public policy is the domain of the legislature."[48] Chief Justice Bilandic of the Supreme Court of Illinois said not more than a year ago

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[45]*See generally* ARTHUR LARSON, WORKERS' COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH (desk ed. 1991).

[46]*See Inspiration Consol. Copper Co. v. Mendez*, 166 P. 278 (Ariz. 1917); *Georgia Casualty Co. v. Haygood*, 97 So. 87 (Ala. 1923); *State ex rel. Yaple v. Creamer*, 97 N.E. 602 (Ohio 1912).

[47]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[48]*People v. Felella*, 546 N.E.2d 492, 498 (Ill. 1989).

that public policy first and foremost "should emanate from the legislature" because, among other reasons, "it is the only entity with the power to weigh and properly balance the many competing societal, economic and policy considerations involved."[49]

The model Act recognizes this fundamental allocation of powers between the judicial and legislative branches.

C. Restoring to the Legislature the Province of Making Tort Law

The second and equally important public policy declaration of the model Act is to restore the state legislature's power to make new tort law. As this monograph has demonstrated, there is a major difference between "filling in gaps" in the common law and creating brand new causes of action or other major changes in tort law.

For example, it is the province of legislatures to determine whether punitive damages should go to the state or to a private party; it is the province of legislatures to determine whether a new cause of action should be allowed for medical monitoring or for "emotional harm." While some plaintiffs' lawyers may bitterly contest this aspect of the model Act, it is rooted in basic fairness: if "new law" is to be made, it should be made *prospectively* with all public policy aspects given due and fair consideration.

Finally, this aspect of the model Act reflects what judges themselves say. An Illinois state jurist recently observed:

> When the legislature has declared, by law, the public policy of the State, the judicial department must remain silent, and if a

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[49] *Charles v. Seigfried*, 651 N.E.2d 154, 160 (Ill. 1995).

modification or change of such policy is desired, *the law-making department must be applied to, and not the judiciary, whose function is to declare the law but not to make it.*[50]

V.

PROVIDING AN ALTERNATIVE MECHANISM FOR CREATING LAW

The third aspect of the ALEC model Act recognizes that there may be times where the needs of our society make it appropriate to modify or create new tort causes of action. Tort law should not be frozen in the past; situations arise where it may need to be changed. Rather than have a situation where tort law is frozen, the model Act provides a vehicle for making new rules.

The model Act suggests the establishment of state commissions to study whether new causes of action are necessary. The model Act should make clear that any commission include state judges in order to draw upon their perspectives.

CONCLUSION

The so-called "rise of state constitutionalism" and state court nullification of tort reform is unprecedented in the history of American jurisprudence. A reading of the approximately *sixty* opinions nullifying state tort reforms makes clear that, in many instances, judges are merely substituting their own view of what

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[50]*Roanoke Agency, Inc. v. Edgar*, 461 N.E.2d 1365, 1371 (Ill. 1984) (quoting *Collins v. Metropolitan Life Ins. Co.*, 88 N.E. 542, 544 (Ill. 1907)) (emphasis added).

tort law "ought to be" for that of the legislature. The opinions often lack a true "constitutional" dimension.

At the same time, some judges are acting like legislators; they are creating new causes of action in tort law on a retroactive basis — claims that have little or no basis in precedent or existing state public policy.

The answer to the basic question of who should make America's tort law is not a simple one. The current "battle" between state legislatures and courts stirs emotions and controversy, but has not, in general, focused on a rational and reasonable way to address this question. The model "Adoption of Common Law Act" is a meaningful start to resolving the battle between state courts and legislatures and for moving toward cooperation between these key branches of state government.

APPENDIX C

STATE "RECEPTION" STATUTES[51]

ALABAMA

ALA. STAT. § 1-3-1 (West 1995) ("The common law of England, so far as it is not inconsistent with the Constitution, laws, and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature").

ALASKA

ALASKA STAT. § 01.10.010 (West 1995) ("So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state").

ARIZONA

ARIZ. REV. STAT. ANN. § 1-201 (West 1995) ("The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the

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[51]Our research did not identify "reception statutes" for Connecticut, Iowa, Mississippi, or New Hampshire. Ohio repealed its reception statute on January 2, 1806. *See Drake v. Rogers*, 13 OHIO ST. 21 (1861). North Dakota repealed its reception statute on September 5, 1978. *See* NORTH DAKOTA CONST. TRANSITION SCHED. §§ 1 to 25 (Michie Butterworth 1995). 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 (Minn. 1943). Louisiana has never followed the common law; all tort law in Louisiana is based on statutory law. *See King v. Cancienne*, 316 So. 2d 366 (La. 1975).

constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state").

ARKANSAS

ARK. CODE § 1-2-119 (West 1995) ("The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States, or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state").

CALIFORNIA

CAL. CIV. CODE § 22.2 (West 1995) ("The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State").

COLORADO

COLO. REV. STAT. § 2-4-211 (West 1995) ("The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British Parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority").

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Del. Const. Schedule § 18 (West 1995) ("All the laws of this State existing at the time this Constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws").

DISTRICT OF COLUMBIA

D.C. CODE ANN. § 49-301 (West 1995) ("The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code").

FLORIDA

FLA. STAT. ANN. § 2.01 (West 1995) ("The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state").

GEORGIA

GA. CODE § 1-1-10(c)(1) (West 1995) ("The following specific laws and parts of laws are not repealed by the adoption of this code and shall remain of full force and effect, pursuant to their terms, until otherwise repealed, amended, superseded, or declared invalid or unconstitutional: (1) An Act for reviving and enforcing certain laws therein mentioned and adopting the common laws of England as they existed on May 14, 1776, approved February 25, 1784").

For the adopting Act of 1784, see Cobb's 1851 Digest, p. 721 ("*Be it enacted*, That all and singular the several Acts, clauses, and parts of Acts, that were in force and binding on the inhabitants of the said province, on the 14th day of May, A.D. 1776, so far as they are not contrary to the Constitution, Laws, and form of Government now established in this State, shall be, and are hereby declared to be in full force, virtue, and effect, and binding on the inhabitants of this State, immediately from and after passing of this Act, as fully and effectually, to all intents and purposes, as if the said Acts, and each of them, had been made and enacted by this General Assembly, until the same shall be repealed, amended or otherwise altered by the Legislature: And also the Common Laws of England, and such of the Statute Laws as were usually in force in said province, except as before excepted") (italics in original).

HAWAII

HAW. CODE ANN. § 1-1 (West 1995) ("The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise provided by the Constitution or laws of the United States, or by the laws of this State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State").

IDAHO

IDAHO CODE § 73-116 (West 1995) ("The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state").

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INDIANA

IND. STAT. ANN. § 1-1-2-1 (West 1995) ("The law governing this state is declared to be . . . [t]he common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section").

KANSAS

KAN. STAT. ANN. § 77-109 (West 1995) ("The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object").

KENTUCKY

KY. CONST. § 233 (Michie 1995) ("All laws which, on [June 1, 1792], were in force in the State of Virginia, and which are of a general nature not local to that State, and not repugnant to this Constitution, or to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly").

MAINE

MAINE CONST. ART. 10, § 3 (West 1995)("All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation").

MARYLAND

MD. CONST. DECL. OF RIGHTS ART. 5(a) (Michie Butterworth 1995) ("That the Inhabitants of Maryland are entitled to the common law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on [July 4, 1776]; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on [June 1, 1867]; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revisions of, an amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by his Majesty Charles the First to Caecilius Calvert, Baron of Baltimore").

MASSACHUSETTS

MASS. CONST. ANN. Pt. 2, Ch. 6, Art. 6 [§ 97] (West 1995) ("All the laws which have heretofore been adopted, used and

approved in the Province, Colony or State of Massachusetts Bay, and usually practised [sic] on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution").

MICHIGAN

MICH. CONST. ART. III, § 7 (West 1995) ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed").

MISSOURI

MO. REV. STAT. § 1.010 (West 1995) ("The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof").

MONTANA

MONT. CODE ANN. § 1-1-109 (West 1995) ("The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state").

NEBRASKA

NEB. REV. STAT. ANN. § 49-101 (West 1995) ("So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state is adopted and declared to be law within the State of Nebraska").

NEVADA

NEV. REV. STAT. ANN. § 1.030 (West 1995) ("The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state").

NEW JERSEY

NEW JERSEY CONST. ART. XI, § 1, ¶ 3 (West 1996)("All law, statutory and otherwise, all rules and regulations of administrative bodies and all rules of courts in force at the time this Constitution or any Article thereof takes effect shall remain in full force until they expire or are superseded, altered or repealed by this Constitution or otherwise").

NEW MEXICO

N.M. STAT. ANN. § 38-1-3 (West 1995) ("In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision").

NEW YORK

MCKINNEY'S CONST. ART. 1, § 14 (McKinney 1995) ("Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of

the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated").

MCKINNEY'S STATUTES § 4 (McKinney 1995) ("Neither the English or colonial statutes are of any effect, as such, today, and the practical effect of the present Constitution is to continue in force only the unwritten rules of the common law which have not been abrogated, although our courts still apply such common law").

NORTH CAROLINA

N.C. GEN. STAT. § 4-1 (West 1995) ("All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declare to be in full force within this State").

OKLAHOMA

OKLA. STAT. ANN. TIT. 12, § 2 (West 1995) ("The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object").

OREGON

OR. CONST. ART. 18, §7 (West 1995) ("All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed").

PENNSYLVANIA

PA. C.S. § 1503(A), (C) (West 1995) ("The common law and such of the statutes of England as were in force in the Province of Pennsylvania on May 14, 1776 and which were properly adapted to the circumstances of the inhabitants of this Commonwealth shall be deemed to have been in force in this Commonwealth from and after February 10, 1777 [unless such law or statute] has been heretofore or in hereafter amended or repealed or which has expired by its own limitation . . . or is repugnant to the Constitution of this Commonwealth or of the United States").

RHODE ISLAND

R.I. STAT. ANN. § 43-3-1 (West 1995) ("In all cases in which provision is not made herein, the English statutes, introduced before the Declaration of Independence, which have continued to be practiced under as in force in this state, shall be deemed and taken as a part of the common law thereof and remain in force until otherwise specially provided").

SOUTH CAROLINA

S.C. CODE ANN. § 14-1-50 (West 1995) ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section").

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SOUTH DAKOTA

S.D. CODIFIED LAWS § 1-1-24 (West 1995) ("The evidence of the common law, including the law merchant, is found in the decisions of the tribunals. In this state the rules of the common law, including the rules of the law merchant, are in force, except where they conflict with the will of the sovereign power, expressed in the manner stated in § 1-1-23").

TENNESSEE

TENN. CONST. ART. XI, § 1 (West 1996) ("All laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, be altered or repealed by the Legislature; but ordinances contained in any former Constitution or schedule thereto are hereby abrogated").

TEXAS

TEX. CIV. PRAC. & REM. CODE § 5.001 (West 1995) ("The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state").

UTAH

UTAH CODE ANN. § 68-3-1 (West 1995) ("The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state").

VERMONT

VT. STAT. ANN. § 271 (West 1995) ("So much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be laws in this state and courts shall take notice thereof and govern themselves accordingly").

VIRGINIA

VA. CODE § 1-10 (Michie 1995) ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly").

VA. CODE § 1-11 (Michie 1995) ("The right of all writs, remedial and judicial, given to any statute or act of Parliament, made in aid of the common law prior to the fourth year of James the First, of a general nature, not local to England, shall still be saved, insofar as the same are consistent with the Bill of Rights and Constitution of this Commonwealth and the Acts of Assembly").

WASHINGTON

WASH. CODE ANN. § 4.04.010 (West 1995) ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state").

WEST VIRGINIA

W. VA. CODE § 2-1-1 (West 1995) ("The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the

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general assembly of Virginia before [June 20, 1863], or has been, or shall be, altered by the Legislature of this state").

W. VA. CODE § 56-3-1 (West 1995) ("The right and benefit of all writs, remedial and judicial, given by any statute or act of parliament made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, so far as the same may be consistent with the Constitution of this State, the acts of the general assembly of Virginia passed before [June 20, 1863], and the acts of the legislature of this State").

WISCONSIN

WIS. STAT. ANN. § 13 (West 1995) ("Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature").

WYOMING

WYO. STAT. § 8-1-101 (West 1995) ("The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory and remedial acts or statutes made in aid of, or to supply the defects of the common law prior to the fourth year of James the First (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth and ninth chapter of thirty-seventh Henry Eighth) and which are of a general nature and not local to England, are the rule of decision in this state when not inconsistent with the laws thereof, and are considered as of full force until repealed by legislative authority").

APPENDIX D

MODEL LAW:

Adoption of Common Law Act[52]

Summary

The Adoption of Common Law Act clarifies that when a state Legislature adopted the common law of England or the state's territorial or colonial court at the time of statehood and then delegated to the courts the power to develop that body of law in accord with the interests and public policy of the state, the legislative intent was to provide the courts with laws of reference until and unless the Legislature enacted rules to either complement or replace the common law. The Act reaffirms that, except for any causes of action that were specifically granted constitutional protection at the time of statehood, the Legislature may alter or abrogate any pre-statehood or post-statehood common law causes of action.[1]

Model Legislation

Section 1 {Short Title}
This Act shall be known and titled as the Adoption of Common Law Act.

Section 2 {Legislative Intent}

A. The Constitution of **{Insert State}** vests the Legislature with the authority to create laws in light of the public interest. [Cite applicable provision of state's constitution.] The Constitution enable courts to adjudicate cases by applying the laws enacted by the Legislature to the facts of those cases. [Cite to applicable provision of the state's constitution.]

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[52]Developed by the American Legislative Exchange Council.

B. After the Constitution of [name of state] was adopted, the Legislature enacted [applicable code section] to provide the courts of [name of state] with the authority to refer to the common law in adjudicating cases. The common law consisted of case holdings rendered by English courts prior to the Revolution of 1776 or by the [colonial or territorial] courts before the principles existing at the time a territory became a state. The purpose of [applicable code section] was to permit the courts to continue to apply the common law that was in existence at the time of statehood and develop it in the interest of the public policy of the state unless it was abrogated or altered by the Legislature.[2]

Section 3. {Effect on Pending Action}
An action or proceeding commenced before this Act takes effect is not affected by this Act but all actions or proceedings commenced after that date shall conform to this Act.[3]

Section 4. {Effective Date}

ENDNOTES

1. "From the time of the country's inception, state legislatures have abrogated common law causes of action and enacted statutes where the common law no longer adequately addressed certain areas of law. Notwithstanding the holdings of some courts that legislatures cannot abrogate pre-statehood causes of action, many legislatures have successfully abrogated common law causes of action. For example, thirty-four states, two territories, and the District of Columbia abrogated the majority of the common law applicable to contracts for the sale of good when they enacted the Uniform Negotiable Instruments law which was promulgated by the National Conference of Commissioners in 1896. Similarly, six states and one

territory further eroded the common law applicable to the sale of goods by passing the Uniform Sales Act promulgated in 1906.

By passing the Uniform Negotiable Instruments law and the Uniform Sales Act, the state legislatures effectively repealed the landmark commercial case decided by Lord Mansfield, on of England's leading commercial judges. Thus, states which repeal a common law cause of action are continuing a practice followed by many state legislatures from the earliest days of the country's independence." *Proceedings of the 20th Annual Conference of Commissioners on Uniform State Laws*. Bliss, page 130 (1948).

2. Thirty-seven states have "open court" provisions in their constitution. These provisions generally state that courts shall be open to every person and provide a remedy for their injuries. 49 IOWA LAW REV. 1202 (1964). Some state courts have interpreted the open court provisions as permitting courts to create post-statehood causes of action. The open court provision has also been construed by some courts as prohibiting the Legislature from abrogating post-statehood common law causes of action. *Id*. In states without an open court provision or where the open court provision has not been construed as prohibiting the Legislature from abrogating pre-statehood or post-statehood causes of action, the following paragraph may be inserted:

> "C. The Constitution of **{name of state}** does not provide the courts with authority to create new causes of action. When the Legislature adopted the common law that was in existence prior to statehood, it did not intend to vest the courts with the authority to create new causes of action or to permit them to independently set forth the public policy

> of the state. It is the intent of the Legislature to reaffirm that the courts shall not create new causes of action or use the common law adopted by [applicable code section] to alter, modify or evolve the pre-statehood common law causes of action into new causes of action.

Following the last sentence of this paragraph, states that have common law causes of action that are constitutionally protected may want to insert the following: "except for [cite specific common law causes of action that are constitutionally protected.]."

In states without an open court provision or where the state court has construed the open court provision as not prohibiting the Legislature from abrogating common law causes of action, the second sentence of paragraph C can be deleted and the following language inserted to prohibit courts from creating new common law causes of action:

> "The courts shall not create a new cause of action or otherwise alter, modify or evolve a common law cause of action adopted herein to address an issue before the courts."

3. States that choose to abrogate all post-statehood common law causes of action may want to include a provision establishing a study commission. The commission will study which post-statehood common law causes of action are affected by the amendment and make recommendations to the Legislature regarding those causes of action that the commission suggests be reincorporated into the state's law by statute. This commission may permit a more thorough understanding of which causes of action are being abrogated, thus foreclosing concerns that might be raised by some. States

that choose this option may want to insert the following paragraph in the Act:

> **"Section 4. {Study Commission}** The Legislature shall appoint a Commission to study which post-statehood common law causes of action are abrogated by this amendment and to make recommendations to the Legislature regarding those causes of action which the Commission believes should be reincorporated in the **{insert State}** law by way of statute."

Historically, legislatures have had the right and duty to create and enact laws without any improper interference from courts. The U.S. Constitution and state constitutions vest authority in the legislatures to make public policy because the legislative process involves public hearings at which all views are presented and debated. In contrast, courts only review the narrow arguments of the parties before the court, which are necessarily restricted to the interests of those two parties. Legislatures, not courts, are the appropriate forum for developing law which raises broad policy issues, such as the creation of new legal causes of action.