THE PROBLEM OF TORT REFORM: FEDERALISM AND THE REGULATION OF LAWYERS

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Over the past decade, the term "tort reform" has become a popular phrase among corporations, politicians, and lawyers alike. Corporations have seen tort reform as a means of controlling the massive liabilities to which they have been exposed during recent years, as certain lawyers have become more focused on amassing political influence and certain state court systems have allowed spiraling damage awards against corporate defendants. Politicians have frequently invoked the term, prominently so in the most recent Presidential election, raising hopes that executive and legislative action soon might be taken to cure what ails our nation's civil justice system. And attorneys of all stripes have often invoked the term as a label for a wide variety of legal reforms that they would happen to prefer.

To date, this extensive talk of tort reform has produced limited results. Interested parties have been quick to cite the flaws of the current tort litigation system, but efforts to correct those flaws have been largely unsuccessful. Legislative solutions to existing problems have been hard to come by, and even those measures that have been enacted have met with a host of post-enactment obstacles to success, including invalidation by state supreme courts.[1] While the term tort reform is frequently bandied about, there seems to be a lack of

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1. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) (invalidating Ohio civil justice reform statute, which included a cap on punitive damages); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (striking down Illinois Civil Justice Reform Amendments of 1995, which included a $500,000 cap on compensatory damages for non-economic injuries).

any consensus on what the term means, let alone what needs to be done under its banner.

What is clear is that our civil justice system faces dramatic problems of a kind unparalleled in its more than two centuries of existence. There has been a dramatic increase in the number of suits and the magnitude of liability payouts.[2] In addition to the direct losses from liability payouts, the tort system imposes costs by increasing the prices of consumer goods, discouraging technological innovation, and decreasing the supply of reasonably priced insurance.[3] One scholar has estimated that tort liability costs American individuals, businesses, municipalities, and other government bodies at least eighty billion dollars a year.[4]

Against this backdrop, the time is ripe to step back and attempt to ascertain a larger perspective on some of the causes of the current tort crisis. This Essay addresses two such factors, selected because they are often not the first that come to mind: federalism and the ethical regulations governing attorneys. Both topics, while often not considered under the rubric of "tort reform," have profoundly shaped the civil justice system as we know it today. How we approach both issues will be of great significance in future efforts to reform civil litigation and improve the administration of justice in the United States.

I. FEDERALISM, PREEMPTION, AND THE NEED TO PREVENT STATE USURPATION OF THE FEDERAL COMMERCE POWER

Perhaps no area of law has been the subject of as much attention and debate during the tenure of the Rehnquist Court as has federalism. Over the past seven years, the Supreme Court has effected wholesale changes in the way the courts view the prerogative of the States to legislate in those matters that are of local concern. Most notably, the Court has breathed life back into the Commerce Clause, ruling that neither the possession of guns near schools,[5] nor the availability of a civil

2. *See* George L. Priest, *The Culture of Modern Tort Law*, 34 VAL. U. L. REV. 573, 574 (2000).

3. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 11-14 (1990).

4. *See id.* at 4.

5. *See* United States v. Lopez, 514 U.S. 549 (1995).

remedy for gender-motivated violence,[6] were proper topics for Congressional, as opposed to state, regulation. Just as important, in its interpretation of the Eleventh Amendment and the concept of sovereign immunity, the Court clarified the circumstances in which the federal government can permit States to be haled into federal (or state) court.[7]

This renewed focus on the importance of States' prerogatives is for the good. For too long, the bedrock principle that our national government is one of enumerated powers, and the related precept that the States are distinct sovereign entities entitled to regulate that which is not delegated to the federal government, had been lost in legal and political dialogue. As such, traditional state authority had been compromised, to the point where the federal government was attempting to regulate all manner of local activity, and even to commandeer the mechanisms of the States' own governments.[8] The pendulum of dual sovereignty had swung too far toward concentration of power at the national level.

But it must be remembered that federalism is not, and never has been, a codeword for giving all power to the States. Federalism, properly defined, does not mean power in the States as opposed to in Washington. Rather, federalism means an efficiency-enhancing division of governmental labor. It is the term we use to describe our unique system of governance, in which the atom of sovereignty has been split not just between two levels of government, but between two distinguishable sets of functions.[9] Federalism, properly defined, is equally undermined by the tenet that if anything is wrong then the national government must fix it, and by the opposite, "states' rights" tenet that any and every power should be devolved to the States.

As we move forward, the Supreme Court's ongoing reexamination of the Constitutional framework for the relationships between state and national powers will be most

6. *See* United States v. Morrison, 529 U.S. 598 (2000).

7. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999); Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

8. *See* Printz v. United States, 521 U.S. 898 (1997).

9. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.").

useful not as signifying that the States should have increased authority at the expense of the national government, but rather as a powerful reminder that the question of state versus federal must be taken into account at the outset of any debate over how a given problem should be addressed. Most importantly, inherent in the very notion that federalism is properly viewed as a division of labor is the idea that, while some activities are beyond the federal government's regulatory authority, others, because of their truly national scope, are exclusively reserved for national regulation. This should come as no surprise, for it has been recognized since the Founding that power to regulate that which is truly national is best vested with the national government. No less a figure than James Madison deemed the commerce power a "new power" allocated to the federal government, and viewed that allocation as uncontroversial.[10]

And it is here that we come to the intersection between federalism and tort reform. Our current civil litigation system, for better and for worse, is in a significant measure defined by the doctrine of preemption, whereby, through operation of the Supremacy Clause, federal law displaces inconsistent state law. Preemption defines the tort system in that it tells us when state law—be it statutory law or the common law of torts—may regulate particular conduct, and when federal law regulates an activity in a way that wholly or partially excludes the States. It is by reference to preemption doctrine, then, that we learn what body of law applies to particular substantive claims.

The Supreme Court has gone to great lengths to develop a jurisprudence indicating when state laws are considered preempted by related federal laws. The Court has set forth four situations in which federal law preempts state law.[11] First, "express preemption" occurs when Congress has "defined explicitly the extent to which its enactments pre-empt state law," and the state or local law at issue falls within the preemptive scope articulated by Congress.[12] Second, "field preemption" takes place when a State or local measure

10. *See* THE FEDERALIST NO. 45, at 261 (James Madison) (Clinton Rossiter ed., 1999) ("The regulation of commerce, it is true, is a new [national] power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."). *Id.*

11. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

12. *Id.*

"regulates conduct in a field that Congress intended the federal government to occupy exclusively."[13] Third, "pure conflict preemption" occurs where "it is impossible for a private party to comply with both state and federal requirements" on the matter.[14] And last, "obstacle preemption" takes place when a state or local measure "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[15]

The problem of preemption is multifaceted and complex. For purposes of the tort reform debate, however, my suggestion is relatively straightforward, and it is this: the same concerns that animated Madison's unhesitating allocation to the national government of the power to regulate interstate commerce counsel in favor of interpreting the law of preemption to displace state law when the federal government chooses to regulate—or not regulate—activities that are truly national in scope. For example, when the Department of Transportation regulates whether and when an automobile sold throughout the United States should include an air bag, that law should preempt the use of state common law to hold a manufacturer liable for failing to include an air bag not required by the national regulation. This result follows inevitably from the very structure of the Constitution's division of sovereign labor.

Fortunately, this result is also exactly what the Supreme Court recently held, under the rubric of obstacle preemption, in *Geier v. American Honda Motor Co.*[16] Importantly, in holding that the state common law suit could not lie, the Court necessarily and expressly rejected the proposition that the ability to satisfy both a state law and a parallel, but less onerous, federal law does not indicate that the state law is no obstacle to the achievement of the federal law's objectives. In particular, the Court noted that there are sound reasons why a federal agency might require certain safety measures, but no more, such that a State's more stringent requirements would serve as an obstacle to the achievement of the federal regulation's goals.[17]

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13. *Id.*
14. *Id.*
15. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
16. 529 U.S. 861, 874-81 (2000).
17. *Id. Cf.* Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will

Had the Court held otherwise, requiring manufacturers to satisfy both federal regulations on airbags and state common law (or statutory) "regulations" on the same subject, the national power to regulate aspects of commerce that are truly national would have been eviscerated. This is so because a company faced with two regulatory standards, and a legal burden to adhere to both, will necessarily adhere to the most rigorous of the two regulations. Thus, for example, if California imposes stricter air bag requirements than the Department of Transportation, auto manufacturers will be compelled to follow the California rules. Moreover, because companies must manufacture automobiles that will be sold nationwide, the California standard (or whatever standard is adopted by the most restrictive State) will likely be adhered to in producing cars in the entire United States. The problem is clear: the stringent regulation of a truly national activity by a single State can have the effect of taking the power to regulate interstate commerce away from the national government, vesting it instead with that stringently regulating State. And while the mention of auto safety regulations connotes some sort of administrative promulgation, the imposition by a jury of massive civil liability for failing to satisfy a particular level of safety with respect to airbags can be every bit as powerful (if much less predictable) as formal regulation. Companies will structure their behavior (to the extent that they are able to do so) in ways to avoid the imposition of extensive civil sanctions.

As *Geier* powerfully illustrates, it is preemption that saves us from this misallocation of the power to regulate that which is truly national in scope. In this light, it is fortunate that recent legislation that would have severely limited the federal preemption of state law did not meet with success in Congress.[18] Out of a well-meaning desire to respect the States, these bills would have had a significant negative impact on the tort system by effectively eliminating obstacle and field preemption.[19] The important principle of *Geier* would thus

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or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

18. *See* The Federalism Accountability Act of 1999, S. 1214, 106th Cong. (1999); The Federalism Act of 1999, H.R. 2245, 106th Cong. (1999).

19. *See* S. 1214 § 6(a); H.R. 2245 § 9(a).

have been jeopardized, and regulation of national industries might well have been ceded in large measure to isolated state court determinations.

This proposed legislation brings us full circle, for it illustrates the very point with which we started: viewing federalism as a one-sided proposition, geared toward devolving power to the States, can in fact harmfully disrupt the fundamental division of labor that *is* federalism. Where institutions or activities are national in scope, only national regulation is sensible. According preemptive effect to such national regulation is often the only way to ensure that it is the national government's rule that is in fact the law throughout the land.

II. THE DE-REGULATION OF ATTORNEYS AND THE BIRTH OF THE "ENTREPRENEURIAL LAWYER"

Although the relationship between federalism and the regulation of lawyers, as these two issues pertain to tort reform, is not obvious, it is real. The relationship has for the most part been defined by federally-mandated changes, at the hands of the Supreme Court, and in the ethical regulations applied to lawyers by their state bar organizations. Many of the changes from above have encouraged ailments that now plague the tort system. These federally-mandated changes are an excellent illustration of the law of unintended consequences, for they have produced a set of pecuniary incentives for lawyers that can often work to the detriment of the larger goals of civil justice. These consequences could not have been contemplated in advance.

First, although the legal profession has traditionally looked with great disdain on the solicitation of new clients by lawyers, that stigma was greatly diminished by the Supreme Court in *NAACP v. Button*[20] and *In re Primus*.[21] These decisions, of course, had nothing to do with tort reform. Rather, *Button* and *Primus* held that the First Amendment prohibited the States from banning the solicitation of legal representation where that representation was performed on a *pro bono* basis by non-profit organizations that engage in litigation as a form of political

20. 371 U.S. 415 (1963).
21. 436 U.S. 412 (1978).

expression and political association.[22] In *NAACP v. Button*, the NAACP challenged the interpretation of Virginia anti-solicitation statutes to prohibit the NAACP's legal activities to promote desegregation of the Virginia public school system.[23] *In re Primus* addressed a reprimand by the State of South Carolina against a member of its bar who, in concert with the American Civil Liberties Union, offered free legal services to pregnant women on public assistance who were being sterilized or threatened with sterilization as a condition of their continued receipt of Medicaid benefits.[24] In handing down such obviously compelling (and compelled) constitutional rulings, there can be little doubt that tort reform—quite rightly—was the furthest thing from the Court's mind. But these cases have nonetheless had powerful impacts on the legal profession. In particular, the rule of *Primus* and *Button* has muted what was once a nearly absolute rejection of solicitation as unprofessional. This near elimination of the profession's stigma on solicitation has paved the way for lawyers seeking clients in order to bring suits that will prove profitable to the lawyers. For example, lawyers now often solicit named plaintiffs for class actions. To be sure, the profession still largely prohibits the solicitation of paid legal work, making clear that a lawyer cannot initiate contact with a prospective paying client with whom he has no family or professional relationship.[25] But, perhaps in part because of the evisceration of the stigma against solicitation, this rule often goes unenforced.[26] Simply put, it strains credulity to contend that the solicitation of plaintiffs by lawyers is not more prevalent now than ever.

Second, developments in the Supreme Court's commercial speech jurisprudence that had nothing to do with either the legal profession or the civil justice system have eliminated the profession's historic refusal to countenance advertising by lawyers. In 1976, the Supreme Court, in addressing the regulation of pharmacists, held that commercial speech—

22. *See Button*, 371 U.S. at 428-29; *Primus*, 436 U.S. at 424-26.

23. *See Button*, 371 U.S., at 419-26.

24. *Primus*, 436 U.S. at 416-21.

25. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (1999).

26. *See, e.g.*, Eric S. Roth, *Confronting Solicitation of Mass Disaster Victims*, 2 GEO. J LEGAL ETHICS 967, 971 (1989); *see also* Wade H. Logan, III, *Lawyer Advertising and Solicitation: The Birth of the Marlboro Man*, 42 S.C. L. REV. 859, 877 (1991).

specifically, advertising by pharmacists—enjoyed First Amendment protections, against state regulation.[27] The following year, the Court similarly held that truthful advertising by attorneys was protected by the first amendment, noting that its decision "might be said to flow *a fortiori*" from the ruling with respect to pharmacists.[28] Here again, a rule developed wholly outside the context of the legal profession has profoundly shaped the way in which lawyers may conduct their business.

Under current law, although bar associations may prohibit lawyers from advertising in a false or misleading manner,[29] the regulation of truthful, nondeceptive advertising is permitted only when narrowly drawn to directly and manifestly advance a substantial state interest.[30] As such, while ABA Model Rule of Professional Conduct 7.1 bars advertising that is "false or misleading," attorneys in reality have wide latitude to advertise broadly and aggressively. In practice, as in the case of solicitation, this evisceration of the bar on advertising has allowed lawyers to actively recruit clients for reasons having to do with their own interests.

A third factor that has shaped the modern legal profession, and in particular certain parts of the bar, is the failure to enforce the ethical rules prohibiting exorbitant legal fees. To be sure, ethical rules do prohibit lawyers from charging and collecting excessive fees, requiring that "[a] lawyer's fee shall be reasonable," taking into account factors such as: the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the assigned task effectively, the likelihood that the work will prohibit the lawyer from doing paying work for other clients, customary charges in the locality for similar services, the amount involved and the results obtained, time limits imposed on the work, the relationship with the client, the lawyer's experience and ability, and whether the fee is fixed or contingent.[31]

This prohibition on exorbitant fees also has gone largely

27. *See* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 768-70 (1976).

28. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 365, 382-84 (1977).

29. *See In re* R.M.J., 455 U.S. 191, 203 (1982).

30. Fla. Bar v. Went for It, Inc., 515 U.S. 618, 624 (1995).

31. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (1999).

unenforced, however, and lawyers are left, as a practical matter, essentially free to charge what they choose.[32] In particular, due process protections arising from state-created rights in professional licenses have, in the years after the Supreme Court's watershed due process decision in *Goldberg v. Kelly*,[33] greatly complicated the enforcement of such prohibitions. Most jurisdictions, through their systems of licensing and regulation, have defined the right to practice law as a property right.[34] In keeping with Supreme Court precedents such as *Schware v. Board of Bar Examiners of New Mexico*,[35] States cannot deny an individual of such a property right to practice law without prior notice of the applicable legal standard and then a fair hearing to determine compliance with that standard. The emergence of this jurisprudence has made it much more difficult for state regulatory boards to enforce loosely defined legal norms such as the rules restricting lawyers' duty to decline to collect excessive fees.

The combination of the profession's relatively newfound permissiveness with respect to advertising and solicitation, along with the ability of lawyers to charge essentially anything they wish, has been the rise of what one might call the entrepreneurial lawyer. That is the lawyer who engineers a case from its very inception; the lawyer who finds "clients" to serve as parties to the benefit primarily of the lawyer and to the possible detriment of the civil justice system. This type of lawyering turns on its head the traditional understanding of the courts as a venue for the resolution of disputes between private citizens, and it has the effect of leaving lawyers with more influence than ever over the regulation of national

32. *See* Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price: Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. REV. 1, 2 (1999) ("Although complaints about fees are a major cause of client dissatisfaction, the reasonable fee rules have gone almost entirely unenforced .... Only two published cases involve a lawyer disciplined solely for charging excessive fees; both involve lawyers representing criminal defendants."); Heather M. Williams, *Attorney Fees in Class Action Lawsuits: Implementing Change to Protect Plaintiffs from Unethical Attorney Behavior*, 7 KAN. J.L. & PUB. POL'Y 68 (1998) (observing that the rules governing legal ethics devote scant attention to disciplinary measures for attorneys who charge unreasonable fees).

33. 397 U.S. 254 (1970).

34. *See, e.g.*, DeLisio v. Ala. Superior Court, 740 P.2d 437, 440 (Alaska 1987) (holding that a property interest and due process protections are accorded to "membership in the state bar entitling one to engage in the practice of law.").

35. 353 U.S. 232, 238-39 (1957).

industries. Put differently, the current system of (non)regulation of lawyers allows a very small number of attorneys to effectively seize portions of the national government's authority to regulate interstate commerce.

This problem is now perceived as so bad that some corporations have resorted to unusual ways of attacking the entrepreneurial bar, such as suing them under the Racketeer Influence and Corrupt Organizations Act (RICO), arguing that their concerted activity makes them a criminal enterprise for purposes of RICO.[36] While the fate of such suits remains to be seen, such litigation cannot address the heart of the problem. Rather, we must seriously rethink the standards of conduct that society in general expects of the legal profession, and that the profession expects of its members. With expectations as they are, it should come as little surprise that some lawyers on some occasions will seek to exploit the system in ways inimical to the interests of justice.

III. CONCLUSION

The tort reform debate is a complex and multifaceted one. As this Article indicates, however, one cannot approach the problem of tort reform wearing blinders. The factors that create the civil litigation system as it exists today, and that therefore hold the keys toward shaping the system as it should exist tomorrow, often arise in contexts seemingly only tangentially linked to civil litigation. Only by ascertaining and confronting these underlying causes can we attain meaningful reforms.

36. *See, e.g.*, S. Scrap Material Co. v. Fleming, No. Civ. A. 01-2554, 2001 WL 1631344 (E.D. La. 2001).