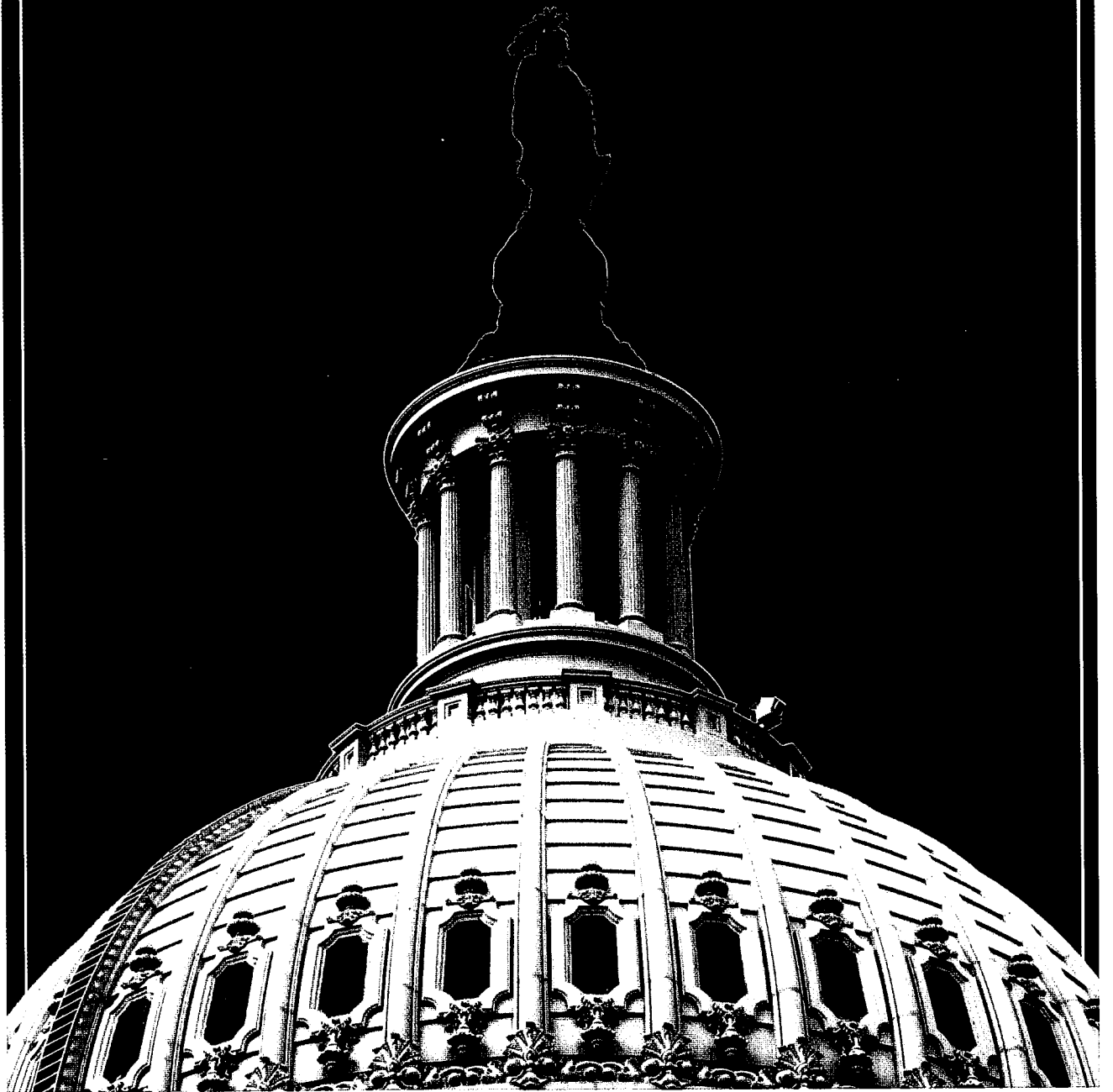
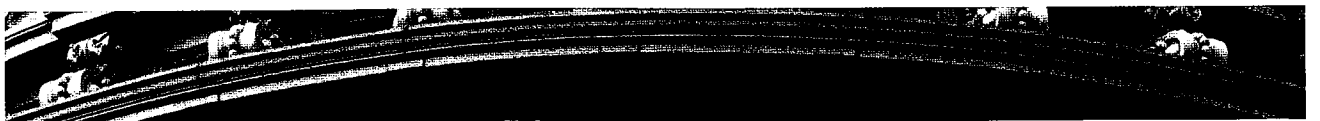


MATERIALS ON
TORT REFORM



ANDREW F. POPPER



Who Should Decide Tort Law? A Fundamental Issue in the Public Debate Over Civil Justice Reform

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One of the most frequently raised questions in the public dialogue about civil justice reform is whether courts or legislatures should make tort law. Tort law affects people's lives every day. It can discourage misconduct and help remove truly defective products from the marketplace. On the other hand, unchecked and unbalanced liability can discourage innovation, limit the availability of affordable health care, slow economic growth, result in loss of jobs, and unduly raise costs for consumers. It is, thus, very appropriate to ask, who should decide tort law—courts or legislatures? It is also appropriate to ask whether changes, if they are to occur, should be made at the federal or state level. This brief essay discusses these two fundamental questions and seeks to give students some perspectives that may generate interesting classroom debate.

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Courts or Legislatures?

The vast majority of tort law has been, and should continue to be, decided by state courts. I often point out when talking to students that they will notice that the popular law school text co-authored by my law firm partner Victor Schwartz is called *Prosser, Wade and Schwartz's Cases and Materials on Torts*, not *Cases and Statutes on Torts*. Also, the text is popularly referred to as a "casebook." These titles reflect the reality that most tort law in this country is judge-made, even in states that have enacted comprehensive civil justice reforms.

State legislatures, however, do have an important, overlapping role to play in the development of tort law. As a matter of history and sound public policy, neither branch of government should have a tort law "monopoly." If that were true—if only "one voice" could be heard to the exclusion of all others—the public would lose out in the long run. The balanced development of tort law would suffer, and so would the public's perception of the judiciary.

Legislatures are uniquely well-equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the legislature is the best body equipped to hold a full discussion of the competing principles and controversial issues of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully. Ultimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a remedy through the ballot and the processes of democratic government. Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

A well-functioning government requires mutual cooperation between the branches. If a state legislature makes a broad policy decision with respect to tort law, that action should be respected by the courts unless the law is not rationally related to any legitimate governmental objective. These changes may not always favor defendants. Furthermore, a reform may be pro-consumer in the aggregate even if it negatively impacts the distinct minority of the population that may be involved in a tort case.

Students should keep an open mind as to all of these perspectives as they debate what role the courts and legislatures should have in the development of sound tort policy rules.

State or Federal?

Students also may wish to consider whether changes to tort law rules, if any, should be made at the state or federal levels. This particular debate is interesting because the responses may not fall neatly along traditional lines, namely, plaintiffs and their political allies lined up on one side and defendants and their political allies lined up on the other. For example, some highly conservative Members of Congress that frequently vote to support business interests have been known to express reservations about federal initiatives that, in their opinion, may go too far in displacing the rights of states to decide their own tort law rules. It is also interesting to hear Members of Congress that frequently support broad expansion of the federal government suddenly become concerned about "states' rights" in the debate over a federal tort reform initiative. Whether these positions are based on ideology or political expediency, the point is that there is often a healthy debate about the role of the federal government when civil justice reforms are considered on Capitol Hill.

Just as the question as to who should decide tort law rules—courts or legislatures—does not require granting either branch a monopoly, the same type of calculus may apply with respect to the federal-state issue. Legislative changes to tort law rules need not be made exclusively at the state or federal level. There may be times, for instance, when the involvement of interstate commerce provides an appropriate "hook" to bring about federal action. Students may come to their own conclusions as to the proper federal-state balance.