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Even Tort Reform Proponents Oppose National Texas-Style Law

Posted by Andrew Cochran

September 21, 2011 11:00 AM

On September 12, Texas Governor Rick Perry called for federal tort reform during the GOPPresidential debate. "You want to talk about some powerful job creation, tell the trial lawyers to get out of your state and to quit costing businessmen and women. That's what needs to happen in the states. and it's also what needs to happen at the federal level, passing federal tort reform at those federal levels." **As I wrote on September 16**, Gov. Perry now stands against some of the most respected Tea Party-side and conservative legal experts in America, who have written that a federal tort reform law is as unconstitutional as ObamaCare, and for the same reasons. But Gov. Perry also ignored *two* of the leading *proponents* of tort reform, who conceded months ago that a Texas-style national limit on medical malpractice lawsuits is clearly unconstitutional.

Walter Olson of the Cato Institute has been dubbed the "intellectual guru of tort reform." He was previously a senior fellow at the Manhattan Institute, and his writing appears regularly in all of the major newspapers and networks. But on May 24, Mr. Olson wrote that conservative and anti-ObamaCare Professor **Randy Barnett of the Georgetown University law Center** was right in stating that tort law is strictly a state power and not subject to federal oversight. **A short segment of his concession post**: "*Thanks to star libertarian lawprof and Cato senior fellow Randy Barnett for pointing out something that has needed saying for a while: most proposals in the U.S. Congress to address medical malpractice law run into serious federalism problems. Most medical malpractice suits go forward in state courts under state law. If the U.S. Congress wishes to impose a nationwide rule on these suits, such as by limiting damages for pain and suffering, it first needs to answer the question: under which of the federal government's constitutionally prescribed powers is it acting? Even if it can identify such authority, it should also ask: is it a wise idea--consistent with what one might call a prudential federalism--to gather yet more power in Washington at the expense of the states? Unfortunately, the backers of the current federal med-mal bill have chosen to rely on the Supreme Court's very expansive "substantial effects" doctrine*..."

Ted Frank, Adjunct Fellow with the Center for Legal Policy at the Manhattan Institute, is described by the *Wall Street Journal* as a "leading tort-reform advocate." He's also the Editor of **the pro-tort reform *Point of Law* blog**; president of the Center for Class Action Fairness; has written for law reviews and numerous media outlets; and has testified before Congress multiple

times. Mr. Frank is one of the chief theorists and spokepersons for the pro-tort reform movement. **But also on May 24, Ted Frank conceded** that Prof. Barnett and another conservative and anti-ObamaCare Professor, **Ilya Somin of the George Mason University School of Law,** were correct in their criticism of a federal tort reform law. Mr. Frank's quote: "*It's easy enough for Congress to condition portions of Medicare block grants on a state establishing reasonable medical-malpractice litigation guidelines, or for Congress to prohibit certain types of lawsuits over federally-funded medical care. It doesn't need to impermissibly federalize all medical malpractice litigation to accomplish reform*."

So the "intellectual guru of tort reform" says that a national, one-size-fits-all law killing medmal lawsuits would have "serious federalism problems," while "a leading tort-reform advocate" says a Texas-style federal medmal law is "impermissible." Between them and **the five conservative legal experts, such as Randy Barnett**, it looks like the case is closed.

Is Rick Perry listening? Maybe we'll find out during the next GOP Presidential debate on Thursday. Personally, I'm not optimistic, since he ignored the writings of the five conservative legal experts and two pro-tort reform experts on the Internet months before he went nuclear on the subject.