

WORKPLACE INJURIES AS A CONSTITUTIONAL LAW ISSUE

EDITED TRANSCRIPT*

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You have heard the other speakers offer some immensely practical strategies, new places to look for sources of law, new texts to employ in what Professor Williams concedes are defensive skirmishes to preserve what remains of the compensation system in states where it is under attack. And you have also heard from Judge Freedman that these are challenging arguments to make regardless of how clear the texts might seem or how strong your analysis might be, because in every state constitutional case you have an additional task that you do not have when arguing either federal constitutional law or even federal statutory law. And that's that the documents should matter, and that judges should follow it. You have to, in each and every case, convince the court that the state constitution is something they should abide by and essentially convince them from scratch. So that leaves state constitutions disfavored in a variety of ways. People don't know about them. People don't feel intuitively that they have the kind of majesty or power that we associate with the Federal Constitution. But they really can embody deep constitutional values, and the opportunity to raise those questions is there for those who can do so.

I want to focus on special laws as an example of appealing to the deep values embedded in state constitutions. Judge Freedman mentioned the idea that special laws prohibitions are about preventing the legislature from giving away public resources to special interests. So, you can think about it like a takings clause in reverse, where instead of taking a private asset for public good without compensation, in special laws cases, the legislature is giving public assets to a private party or a private entity without adequate public reward for that gift.

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And so, as Professor Williams has said in this symposium, when a court rejects that kind of special interest giveaway, it is actually acting in a majoritarian fashion, a majoritarian judicial review.

In thinking about majoritarian judicial review, I wanted to step back a little bit and get a little bit more abstract. Because I think what is happening in the workers' comp field—a large-scale retrenchment across the states—is really part of the same cultural moment, the same legal movement that we see in other areas: religious exemptions from generally applicable laws; mandatory arbitration in consumer contracts; mandatory arbitration in employment contracts; and even charter schools. Together, the move to reopen what had been an uneasy consensus in these areas represents an attempt to escape or evade the sovereignty of the people. Libertarian/conservative activists in these areas seek to exempt private institutions from the ordinary operation of generally applicable law and, in doing so, to put aside what we share in common with each other—our democracy, our government by the people. The result recalls the Dark Ages, where every guild, and every town, and every church made its own law, and if you were outside of that institution you were outside of the law—*persona non grata*.

When we see these different issues across the country where people are trying to evade the public system, the democratic answer to that can't just be let's tinker with the precedents or let's tinker with the statutes. It has to be something beyond the law. We have to get to a point of cultural or even spiritual reform where we rethink our relationship to each other as it is mediated via the democratic state. So the question has to really be, am I my brother's keeper?

What is this nation? It is an imaginary construct that exists only so long as enough of us pretend it exists. And we are able to survive in a pluralist democracy only as long as we treat ourselves as having mutual obligations to each other as fellow Americans. So when we retreat from that public world, it becomes easier and easier to dissociate from the community—from the larger national community or from the local state community—and to disregard the welfare of others. We heard earlier this morning about the loss of the humanitarian mission as an honored policy rationale for workers' comp. But beyond the humanitarian aspect is this idea that if we want to maintain a nation or a state as a polity, then we have to regard each other as having mutual obligations, with both participation in, and submission to, public resolution or public regulation. That is how we make the "sovereignty of the people" more than an empty phrase.

What does that mean in practice? How do workers' compensation advocates take that kind of abstract, touchy-feely idea and turn it into functional results? To me, it suggests that we need to look for new

allies, and we need to think about who else, aside from workers and their advocates, have a dog in the American fight. Who else wants to see the retention of the rule of the majority in our pluralist democracy? What other institutions, what other special interests have a stake in this? I don't have the answer to that question, but in terms of finding political allies, I would suggest that that's where we need to look.