

*Democracy and Tort Reform in the U.S.A.*

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“Leading Political Scientists Warn of Threat to American Democracy in Rare Nonpartisan Statement,”<sup>1</sup>

Democracy in the United States of America is in decline. In much the same way that progressive tort reform was made possible by the democratic gains of the mid twentieth century, much of the current tort retrenchment has been made possible by our democratic losses since the late twentieth century. Just as tort reform in the 1960s and 1970s helped consolidate and protect our democratic gains, the tort “reforms” from the 1980s to the present have helped further consolidate and protect our rising plutocracy.

After a brief introduction setting the stage for the argument that follows, part II details the extent of our economic inequality while parts III and IV show how our economic inequality is bound up with political inequality and the demise of our democracy, both in terms of being heard by those who represent us (part III), and in terms of having a voice to reach those who represent us (part IV). Gross inequality in political voice is bound up with a lack of responsiveness and accountability and this in turn leads to the erosion of government interventions to correct or counterbalance the ever widening gap between the “haves” and “have-nots.” As Part V illustrates, interventions by the courts and legislators in the area of torts follows this model. This is illustrated by counter-democratic interventions by the Supreme Court as well as the bulk of tort reform efforts since the 1980s. Part V, will first briefly address the larger terrain of tort

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<sup>1</sup> Press Release, American Political Science Association, Leading Political Scientists Warn of Threat to American Democracy in Rare Nonpartisan Statement (2004), [www.apsanet.org/imgtest/taskforce](http://www.apsanet.org/imgtest/taskforce). See also E. J. Dionne Jr., *Poor Version of Democracy*, WASHINGTON POST, June 11, 2004, at A25 (calling attention to and commenting on the Task Force report), available at <http://www.washingtonpost.com/wp-dyn/articles/A33144-2004Jun10.html>. Although not conceived as such, this article, in effect, is a response to the challenge raised by Nockleby and Curreri, “that those who wish to defend the civil justice system against retrenchment should explicitly address how the legal system changed from 1900 to 1980 to grant far more protections to citizens.” John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1023 (2005).

reform (both progressive and regressive) before turning to the role of the Supreme Court in tort reform. The article concludes with a few comments on developments in the area of products liability that may cast a ray of hope on the otherwise gloomy condition of tort law and democracy in America.

## **I INTRODUCTION**

While we wage war in distant lands for the purported purpose of spreading democracy, our own democracy is under threat. The threat is not external; it does not come from communists or terrorists, but from deep within the fabric of our society. It does not come solely nor even primarily from the president, the conservative right, or our national leaders, although they are part of the problem. Rather, the threat comes from an ever widening gap between those who have and those who do not have:

- a stake in this country,
- a voice and hand in shaping this country's future,
- and the ears of others who are shaping that future.

Thus, the gap between the “haves” and “have nots” is not merely economic but cuts across both socio-economic aspects of life (education, jobs, income, mobility) and civil and political aspects of life (the ability to participate in civic and political life, through voting, volunteering, protesting, donating, etc.). This, in turn, impacts the responsiveness of government to the needs and preferences of the people.

This account of the derailing of our democracy is not based on an elaborate or idealistic view of democracy. It is not based on shattering the illusion of direct democratic participation, or

on the dream of a truly deliberative democracy,<sup>2</sup> or even a republican democracy.<sup>3</sup> The standard is not the equal provision of conditions for human development and self actualization,<sup>4</sup> nor even the ideal of equal concern and respect, although we are failing on all these accounts.<sup>5</sup> No, the critique is based on the failure of even achieving the modest ambitions of representative democracy. The standard is based on the rather simple notions that democracy consists of "... government of the people, by the people, for the people"<sup>6</sup> and that a "a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals"<sup>7</sup> Democracy requires accountability and respect for the rule of law and this entails equality before the law. It also requires transparency and access to accurate information, for without it, "the people" have no chance of authentic participation, or of holding representatives accountable. As will be detailed below, our democracy is failing, because we do not have government by, of, or for the people; those who govern are not responsive to the people, considered as political equals.

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<sup>2</sup> The argument does not rely on a conception of democracy that is as rich as deliberative democracy, which requires not only that representatives represent the populace, but that they should have inclusive deliberations about the decisions they make and justify their decision with publicly acceptable reasons. A GUTMANN & D THOMPSON, WHY DELIBERATIVE DEMOCRACY 3 (2004).

<sup>3</sup> JÜRGEN HABERMAS, *Three Normative Models of Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL, (CH. 1) (Seyla Benhabib ed., 1996) (comparing liberal, republican and deliberative forms of democracy).

<sup>4</sup> McPherson identifies the underlying moral value of democracy as "provid[ing] the conditions for the free development of human capacities, and to do this equally for all members of society." C.B. MACPHERSON THE REAL WORLD OF DEMOCRACY 58 (1966).

<sup>5</sup> Ronald Dworkin's view of our Constitution is "that it aims to create ... a "partnership" rather than a majoritarian form of democracy by insisting that all citizens are entitled to an equal role and voice in their self-government, that government at all levels must treat citizens with equal concern, and that government must leave individual citizens free to make the personal decisions for themselves that they cannot yield to others without compromising their self-respect." Ronald Dworkin, *Judge Roberts on Trial*, 52 NEW YORK REVIEW OF BOOKS (Oct. 2005), available at, <http://www.nybooks.com/articles/18330#fnr6> (referring to his elaboration of this ideal in FREEDOM'S LAW (1996), and SOVEREIGN VIRTUE (2000)).

<sup>6</sup> Abraham Lincoln , 16th President of the United States of America (1961-65), The Gettysburg Address (Nov. 19, 1863). Even the U.S. State Department begins its discussion of the definition of "What is Democracy" with Lincoln's definition, <http://usinfo.state.gov/products/pubs/whatsdem/whatdm2.htm>.

<sup>7</sup> ROBERT DAHL, POLIARCHY: PARTICIPATION AND OPPOSITION 1 (1971). Note, this is a standard liberal notion of democracy.

Although it is not uncommon to hear of references to our founding as a democratic founding, this is not an accurate depiction of our history.<sup>8</sup> It took the United States nearly 200 years to achieve a level of political participation which would justify the claim that it was a democracy. As C.B. MacPherson pointed out long ago,

In our Western societies the democratic franchise was not installed until after the liberal society and the liberal state were firmly established. Democracy came as a top dressing. It had to accommodate itself to the soil that had already been prepared by the operation of the competitive, individualist, market society, and by the operation of the liberal state, which served that society through a system of competing though not democratic political parties. It was the liberal state that was democratized, and in the process, democracy was liberalized.<sup>9</sup>

It is difficult to speak at all about American democracy prior to 1920 when women finally won the right to vote.<sup>10</sup> But further, as Alexander Keyssar notes, until the 1960s most African Americans could not vote in the South,<sup>11</sup> and “As late as 1950s, basic political rights were denied [not only to those blacks in the South but]...to significant pockets of voters elsewhere, including the illiterate in New York, Native Americans in Utah, many Hispanics in Texas and California, and the recently mobile everywhere.”<sup>12</sup>

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<sup>8</sup> Even Jay Feinman refers to the United States at its founding as “the newly democratic” America. JAY M. FEINMAN, UNMAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 56 (2004).

<sup>9</sup> MACPHERSON, *supra* note 4, at 5.

<sup>10</sup> U.S. CONST. amend XIX. Note that 12 of the western territories along with New York extended the franchise to women before the Amendment. ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 211-218, app. at 390 (Table A.20 States and Territories Fully Enfranchising Women Prior to the Nineteenth Amendment) (2001).

<sup>11</sup> *Id* at xvi.

<sup>12</sup> *Id* at 316. Universal suffrage is not a right enshrined on our constitution.

Part of the myth that the current rollback of torts is compatible with democracy is based on the misconception that the founding was democratic. However, the classical liberal state was not democratic and thus it should not be surprising that the common law and tort law were not supportive of democracy. The common law system largely presumed equality and freedom while exploiting the lack thereof, for example, by limiting access to courts for the poor, allowing those with superior bargaining power to bind and keep the gains of unequal power through contract and tort law and by providing remedies that replicated status quo inequalities. It was not until the early 1900s that tort law started its modern trend towards the expansion of liability, and this really did not take off, so to speak, until the 1960s.<sup>13</sup>

The 1960s and 1970s were decades of considerable progress in civil and political rights as well as for socio-economic rights.<sup>14</sup> These advances came from increased political participation, and from executive,<sup>15</sup> legislative<sup>16</sup> and judicial developments.<sup>17</sup> They were also years in which our democracy was further consolidated through progressive reform of the common law in general and torts in particular.<sup>18</sup> It was not mere coincidence that progressive

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<sup>13</sup> FEINMAN, *supra* note 8, at 53.

<sup>14</sup> President Carter even signed the International Covenant on Economic, Social and Cultural Rights in 1977, although it was never ratified by Congress, *see* <http://www.unhcr.ch/pdf/report.pdf>.

<sup>15</sup> For instance, The War on Poverty which was introduced by Lyndon B. Johnson during his State of the Union address (Jan. 8, 1964), as well as proposed legislation which culminated in the Economic Opportunity Act and the Establishment of the Office of Economic Opportunity.

<sup>16</sup> *See, e.g.* The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 1, 78 Stat. 508 (1964); Civil Rights Act of 1964, Pub. L. No. 88-352, Title II, § 201, 78 Stat. 243 (1964); Social Security Act of 1965, Pub. L. No. 86-778, Title VII, § 701(a)-(e), 74 Stat. 992, 993 (1965); and The Age Discrimination Act of 1967 (ADEA), Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967). Title VII of the Civil Rights Act of 1964 also created the Equal Employment Opportunity Commission (EEOC), Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253. The EEOC obtained enforcement authority under the Equal Opportunity Act of 1972; Pub. L. No. 92-318, Title IX, 86 Stat. 235 (1972)) (Education Amendments prohibit sex discrimination in all aspects of education programs that receive federal money); The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978).

<sup>17</sup> For a list of landmark cases, *see, e.g.*, Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, Appendix One: American Tort Law Timeline: 1200-2002 (2002).

<sup>18</sup> *See* section V. B *infra*. Although torts still reflected social inequalities, the reforms during the 60s provided easier access to courts and better protection for consumers. Constitutional torts also emerged during this period, with

tort reform tracked the coming to age of our democracy. It was made possible by the democratic gains of the 1960s and 1970s and helped consolidate and protect those gains.

Since the 1980s those democratic gains have been eroding. As Keyssar states, “Although the formal right to vote is now nearly universal, few observers would characterize the United States as a vibrant democracy.”<sup>19</sup> In 2004 the American Political Science Association came out with its warning that American democracy was in peril. They did so with the press release quoted at the beginning of this article,<sup>20</sup> and through a set of reports commissioned by the Association.<sup>21</sup> Those reports located the cause of this demise in the widening gap between rich and poor, as its authors state, “progress toward realizing the American ideals of democracy may have stalled, and in some arenas reversed” due to the broadening gap in income and wealth in America.<sup>22</sup>

As our democracy appears to be on the decline, around the world, democracy seems to be on the rise. The late 1980s brought about a whole wave of democratic revolutions in Europe, Africa and Latin America.<sup>23</sup> Arguably, the US has had a number of constitutional revolutions between the foundings and the present.<sup>24</sup> Few, if any, would argue that these revolutions, past or

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Monroe v. Pape, 365 U.S. 167 (1961) and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

<sup>19</sup> KEYSSAR, *supra* note 10 at 4, at 322. For the view that our democracy is crumbling based on current obstacles to voting *see*, SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006).

<sup>20</sup> Press release, *supra* note 1.

<sup>21</sup> The task force compiled a series of reports in 2004: AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY; THREE CRITICAL ANALYSES ON ECONOMIC, GENDER, RACIAL, AND ETHNIC INEQUALITIES IN AMERICAN POLITICS; and a set of teaching materials. Apsanet.org, Task Force on Inequality and American Democracy, [http://www.apsanet.org/section\\_256.cfm](http://www.apsanet.org/section_256.cfm) (last visited July 9, 2006). These materials were edited into a book. INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN (Lawrence Jacobs & Theda Skocpol eds., 2005).

<sup>22</sup> AMERICAN POLITICAL SCIENCE ASSOCIATION, AMERICAN DEMOCRACY IN THE AGE OF RISING INEQUALITY I (2004), <http://www.apsanet.org/imgtest/taskforcereport.pdf>.

<sup>23</sup> See, e.g. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1993).

<sup>24</sup> According to Ackerman, the US has gone through three historical ruptures or transitions brought about by heightened democratic participation resulting in “higher law making”: the extra legal Founding which did not follow the procedures set out in the articles of Confederation, the 13<sup>th</sup> and 14<sup>th</sup> Reconstruction amendments which bypassed

present, have been as fundamental as those revolutions brought about by the third wave of democratization in the late 80s and early 90s.<sup>25</sup> Even fewer would consider themselves to be in the throws of a revolution, or in the recent aftermath of such a revolution.<sup>26</sup> Yet, a number of commentators have characterized the culmination of changes brought about by the Rehnquist Court over the last two decades in these very terms.<sup>27</sup> Andrew Seigel recently noted that those commentating on the history of the Rehnquist Court are nearly uniform in their view that "... Chief Justice Rehnquist and his allies on the Court instigated a judicial "revolution" that has fundamentally altered both the substance of American law and the institutional arrangements through which we develop and enforce legal norms."<sup>28</sup>

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the proper Article V procedures and the New Deal amendments which took place largely through the pressure brought to bear on the courts to switch in time in order to save the nine Supreme Court justices from having to share the bench with a few more judges. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42-44 (1991). Contrary to these constitutional moments the current revolution is not a democratic moment of higher law making.

<sup>25</sup> See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 206-209 (2002) (arguing that even our founding revolution was conservative compared to many of the legal transitions that took place around the world in the 90s). Our founding revolution was conservative because, contrary to popular belief, it did not establish a political system that was markedly different, in democratic terms, from the British system that preceded it.

<sup>26</sup> Perhaps we are now in a phase of consolidation. As Andrew Siegel puts it, "In rough cut, one might suggest that the years prior to 1994 represent rehearsal and experimentation with the agenda for the Rehnquist Revolution, the period from 1994 until 2002 or 2003, the years of the Revolution, and the years since then a period of consolidation or retrenchment." Andrew Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 *TEX. L. REV.* 1097, 1112 (2006).

<sup>27</sup> Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045 (2001). See also CHARLES J. OGLETREE, JR., *THE REHNQUIST REVOLUTION IN CRIMINAL PROCEDURE*, IN *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 55 (2002); Larry D. Kramer, *The Supreme Court, 2000 Term--Foreword: We The Court*, 115 *HARV. L. REV.* 4, 130 (2001); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 *U. CIN. L. REV.* 367, 370 (2002) (critiquing the "federalism revolution"); cf. Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 *IND. L. J.* 47, 49-52 (2003) (taking a "modest" view of the Court's rulings); Dawn Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *IND. L. J.* 363, 364 (2003) (remaining agnostic about the "revolution").

<sup>28</sup> Siegel, *supra* note 26, at 1100.

This “revolution” is routinely described in undemocratic terms. For instance, Jack Balkin and Sanford Levinson place the Court's contraction of congressional power at the core of this "constitutional revolution."<sup>29</sup> Or, as Larry Kramer puts it,

The defining characteristic of that Court is not its commitment to political conservatism nor a love of states' rights.... but ... the Justices' conviction that they and they alone are responsible for the Constitution... [A]ny notion that what the Constitution does or permits might best be left for the people to resolve using the ordinary devices available to express their will seems beyond the Rehnquist Court's compass.<sup>30</sup>

The “revolution” is undemocratic, both because of the usurpation of the power of Congress and the people and because of the erosion of mechanisms developed over time to hold government accountable and to keep democracy on track. According to Sylvia Law, the Supreme Court has limited the ability of Congress to address national problems to a degree only matched by the *Lochner* Court's interference with attempts by Congress and the president to respond to the Great Depression.<sup>31</sup>

This includes: restricting the constitutional power of Congress to regulate interstate commerce, and to enforce the guarantees of the Fourteenth Amendment; expanding state immunity from federally defined claims of unfair labor practices and discrimination; and “rejecting settled interpretations of federal civil rights laws to limit the protection that Congress

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<sup>29</sup> Balkin & Levinson, *supra* note 27, at 1045 (noting the revolution and criticizing the bare majority of the Court which has systematically reappraised the doctrines of federalism, racial equality, and civil rights, and who also gave the presidency to George W. Bush).

<sup>30</sup> Kramer, *super* note 27 at 158.

<sup>31</sup> Law, *supra* note 27, at 371.

has sought to give to the civil and economic rights of many vulnerable people, including older people, people with disabilities, women, and working people.”<sup>32</sup>

It may come as little surprise that this judicial revolution also tracks the decline in American Democracy. It may come as more of a surprise that both of these changes track the onslaught of regressive tort reform in the U.S. In part V below, we will look at the supporting role the Supreme Court has played in the regressive tort reform movement. This is not to say that the Supreme Court has played a leading role in this movement, but the mere fact that the Supreme Court is involved at all is notable. It is testament to the fact that the present counter-democratic changes that are taking place are not merely economic or political, or limited to broad public law areas like federalism. Rather, these changes are pervasive, cutting across the public and private law domains.

There is very little written in the legal literature connecting tort reform to constitutional change, much less democratic change,<sup>33</sup> although some have been arguing for years that tort law reflects and further entrenches the inequalities that exist in the U.S.,<sup>34</sup> and numerous writers have

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<sup>32</sup> *Id.* at 371-2.

<sup>33</sup> *But see* Jo Ellen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values* 37 AKRON L. REV. 717, 719 (2004) (arguing that federal legislation moving class actions into federal courts poses risks to the role of states in promoting the democratic values of political participation, transparency, and accountability); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 556 (1999) (arguing that in the confrontation between courts and legislators in the arena tort reform “that courts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions”); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (arguing for a Constitutional Right to an adequate legal scheme for the redress of wrongs); George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 SETON HALL L. REV. 683, 683 (2001). There are many articles written on the subject of constitutional torts, *see e.g.*, Thomas A. Eaton, *Symposium: Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts* 35 GA. L. REV. 837 (2001); and for the relationship between state constitutions and tort law, *see* John Fabian Witt, *The Long History of State Constitutions and American Tort Law* 36 RUTGERS L.J. 1159 (2005).

<sup>34</sup> The most prominent example is Richard Abel. *See, e.g.*, Richard Abel, *The Real Tort Crisis--Too Few Claims*, 48 OHIO ST. L. J. 443 (1987); Richard Abel, *A Critique of American Tort Law*, 8 BRITISH J. L. & SOC'Y 199-231 (1981) (Reprinted in CRITICAL LEGAL STUDIES (Allan Hutchinson ed., Rowman & Littlefield, 1989)); Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)* 55 DEPAUL L. REV. 253 (2006). *See also* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort*

noted that tort reform has been a product of powerful corporate interest groups and a campaign of disinformation.<sup>35</sup> Over the last 20 years, those inequalities have risen at unprecedented rates, and during that same period we have seen the erosion of civil and political rights, the dismantling of the welfare state and serious incursions into the rights of victims to access the courts and receive full compensation for the harms they suffer.

Michael L. Rustad and Thomas H. Koenig come very close to linking democracy and tort reform when they label the period from 1945 to 1980 “the Democratic Expansionary Era.”<sup>36</sup> Although the facts perhaps speak for themselves, Rustad and Koenig do not actually argue for, or explain why the period from 1945 to 1980 is an era of democratic expansion and they do not seem to fully appreciate or at least do not argue, that the current era is a period of democratic contraction. Jay Feinman also comes close to connecting the “un-making” of the common law to democratic decay.<sup>37</sup> His first main point regarding the “Right’s” attack on the common law is that “...the law has dramatically changed to the detriment of ordinary people.”<sup>38</sup> As he goes on to state, “To the extent that conservatives transform the common law, injury victims will find it

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*Law*, 146 U. PA. L. REV. 463 (arguing that deep biases in tort law result in higher damage awards for white men than for women and minorities).

<sup>35</sup> See, e.g., Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1300 (2005) (“The story of the punitive damages recoil is a familiar one about special legislation to help corporate America.” (Rustad also points to Jerry J. Phillips, *Comments on the Report of the Governor's Commission on Tort and Liability Insurance Reform*, 53 TENN. L. REV. 679, 680 (1986) (punitive damages reform is about special legislation for corporate America) and John W. Wade, *Strict Products Liability: A Look at its Evolution*, THE BRIEF, Fall 1989, at 8, 56 (tort reform should be unconstitutional because it is special interest legislation)). See also Siegel, *supra* note 26 at 1147 (noting the substantial energies and resources spent by American businesses in their fight for constitutional protection against punitive damages); See also Abel, *supra* note 33; and FEINMAN, *supra* note 8. For the view that the tort reform campaign is based on misinformation, see Abel, *supra* note 33; FEINMAN, *supra* note 10 at 48, 190-192; and Rustad & Koenig, *supra* note 17. See also THOMAS BAKER, *THE MEDICAL MALPRACTICE MYTH* (2005) (deconstructing the myths surrounding the calls for medical malpractice reform). For misinformation concerning punitive damages, see Eisenberg, *infra* note 245.

<sup>36</sup> Rustad & Koenig, *supra* note 17, at 4. Nockleby & Curreri note that the first wave of tort neo-liberal tort reform began in the 1970s. Nockleby & Curreri, *supra* note 1, at 1030-31.

<sup>37</sup> FEINMAN, *supra* note 8. While Feinman places the blame on “radical conservatives,” “the right” and/or “Republicans,” the problem is more pervasive than that. The lack of responsiveness cuts across party lines. For examples of regressive legislation (including tort reform) and policies during the Clinton presidency see *infra* notes 67, 77, and 216.

<sup>38</sup> FEINMAN, *supra* note 8, at 3.

harder to get into court to sue wrongdoers who hurt them, harder to win when they get there, and harder to be adequately compensated for their injuries if they do win their suits.”<sup>39</sup>

If commentators like Abel, Baker, Feinman, Rustad and others are correct, that the success of the regressive tort reform movement can be credited to political influence, power lobbying and “a campaign of misinformation [that] convinces people that reducing their rights is actually in their own interest,”<sup>40</sup> then there is little room for question that the process behind this wave of tort reform is undemocratic. As the argument in parts II-IV should make clear, regressive tort reform is a predictable outcome of the state of our democracy even without the “campaign of misinformation.” Nonetheless, this campaign of misinformation further erodes the democratic values of transparency and accountability, making it harder for truly democratic reforms to gain traction.

To argue that the democratic gains of the 60s and 70s have come undone and that we are in a stage of consolidating plutocracy must sound radical, or like a conspiracy theory.<sup>41</sup> This is, perhaps, because the average reader of law review articles (law professors, students, lawyers and the occasional business person or academic from another discipline) thinks he or she does, or could have, not only a stake in, but a voice in, our political system.<sup>42</sup> While this may be true for some of these readers, it is not true for the majority of Americans.

The idea that we are “the model” of democracy for the world is well entrenched in the American psyche. We often equivocate having the longest standing written Constitution with the

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 19 See also Lind, *supra* note 33, at 719; Abel, *supra* note 33, at 556; Goldberg, *supra* note 33; Priest, *supra* note 33, at 683; Eaton, *supra* note 33; Witt, *supra* note 33,

<sup>41</sup> The argument that follows does not depend on conspiracy theory nor any “radical” or socialist view of the state or democracy.

<sup>42</sup> It may be particularly difficult for law professors to imagine that they have little voice in American politics (see part III below on the impact of academics on political responsiveness).

idea that we are one of, if not the, longest established democracies.<sup>43</sup> However, our democracy is very young. In order to rid ourselves of the illusion that we live in a thriving democracy, I will go into considerable detail to show just how large the gap is between the ‘haves’ and the ‘have-nots’ in our political and economic system, as well as how the rising inequality gap is bound up with losses in socio-economic and political stake, political voice, and losses in political responsiveness and accountability.<sup>44</sup> The spiraling downward pressure of both socio-economic and political inequality has resulted in unresponsive legislation and policies, including tort reform, that is contrary to the needs and interests of the majority of Americans. Unlike the tort reform that helped consolidate our democracy in the 60s and 70s, the tort reform of the last two decades has acted to further entrench and consolidate oligarchy if not outright plutocracy. At times I will draw on contrasting trends in Europe to illustrate and support these points.

## II INEQUALITY: ECONOMIC

For a short time, the impact of hurricane Katrina on the people of New Orleans brought American inequality into sharp relief. As one commentator wrote, “Katrina’s whirlwind has laid bare the fault lines of race and class in America. For a lightning moment, the American psyche was singed.”<sup>45</sup> There appeared to be some hope that “the shock and shame” of Katrina might “strip away the old evasions, hypocrisies and not-so-benign neglect” surrounding issues of

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<sup>43</sup> Thirteen countries extended the franchise to women before the United States.

<http://ap.grolier.com/article?assetid=0279670-0&templatename=/article/article.html>

<sup>44</sup> In spite of the fact that surveys are somewhat biased against those with egalitarian views, Schlozman et al’s survey results revealed substantial pro-egalitarian sentiments. KAY L. SCHLOZMAN ET. AL., *INEQUALITIES OF POLITICAL VOICE* 12-13 (2004), <http://www.apsanet.org/imgtest/voicememo.pdf>. Those pro-egalitarian sentiments are much stronger when it comes to the preferences of Americans for political equality than for economic quality. *Id.* at 11.

<sup>45</sup> Johnathan Tilove, “*Our Society is So Uneven*”: *Katrina Exposes Inequalities of Race, Wealth*, *TRENTON TIMES*, Sept. 4, 2005, at B1.

inequality in America.<sup>46</sup> The overwhelming racial dimension to the impact of the hurricane no doubt further accentuated the contrast between the ‘haves’ and the majority of African-American ‘have-nots’. These socio-economic inequalities gave rise to fears of gross political inequality as significant worries of disenfranchisement abounded in the lead up to the first city elections since the hurricane, given the large numbers of poor African-Americans who were resettled outside the city.<sup>47</sup> By the time of this publication most Americans will have tired and forgotten about hurricane Katrina and New Orleans. No doubt most politicians have.

However inconvenient it might be, gross inequality is not limited to New Orleans and other areas of drastic natural disaster. Inequality is pervasive in our country. As Table 1 illustrates, the statistics on inequality show that among rich western nations we “have the highest level of inequality by far.<sup>48</sup> We have the largest decile ratio gap (the gap between the lowest 10% in relation to the median income and the highest 10% in relation to the median income)<sup>49</sup> and the highest Gini coefficient gap (the Gini coefficient measures equality across all income distributions).<sup>50</sup> No other economically advanced state approximates our decile ratio and our

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<sup>46</sup> Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42-48; Larry Bartels, *Is the Water Rising? Reflections on Inequality and American Democracy*, 39 PS: POLITICAL SCIENCE & POLITICS 39 (2006). “Many Americans were shocked and shamed by the televised images of New Orleans in the wake of Hurricane Katrina.... Thousands of residents, mostly Black and poor, seemed to be trapped in a Hobbesian state of nature, abandoned by government and civilized society.” Bartels, *supra* note 46, at 46.

<sup>47</sup> See, e.g. Marc Morano, *Voter Disenfranchisement Predicted in New Orleans* (March 09, 2006) CNSNews.com available at:

<http://www.cnsnews.com/ViewPolitics.asp?Page=%5CPolitics%5Carchive%5C200603%5CPOL20060309a.html>; Jesse Jackson, *Secret rolls undermine N. Orleans vote*, CHI. SUN-TIMES, Mar. 7, 2006, available at [suntimes.com](http://suntimes.com).

<sup>48</sup> Andrea Brandolini & Timothy M. Smeeding, *Patterns of Economic Inequality in Western Democracies: Some Facts on Level and Trends*, in 39 PS: POLITICAL SCIENCE & POLITICS 21, 23 (2006); See also *Id.* at 22, Figure 1.

<sup>49</sup> In the U.S., the numbers were 39% in the bottom 10<sup>th</sup> percentile and 210 in the top 10<sup>th</sup> percentile. This means that the population in the bottom 10% income group receive only 39% of the median income while the top 10% receive 210% of the median income. This results in a decile ratio in which the top 10% income group receive 5.45 times what the bottom group receives.

<sup>50</sup> *Id.* at 22. The US CIA fact book put the U.S. at 45 for 2004 with a 2004 estimate of 12% of the population below the poverty line. CIA, THE WORLD FACTBOOK, <http://www.cia.gov/cia/publications/factbook/geos/us.html> (last visited June 6, 2006).

lowest 10% are significantly worse off than their European counterparts.<sup>51</sup> Since WWII this gap has widened at a pace and to a degree unmatched by other economically advanced countries.<sup>52</sup>

Table 1

Economic Inequality: Lowest 10% compared to medium income; Highest 10% compared to Medium; the Decile ratio of P90/P10; and the Gini Coefficient.<sup>53</sup>

<b>COUNTRIES</b>	<b>P10</b>	<b>P90</b>	<b>P90/P10</b>	<b>GINI</b>
Luxembourg 2000	66%	215%	3.257576	0.26
Finland 2000	57%	164%	2.877193	0.247
Norway 2000	57%	159%	2.789474	0.251
Sweden 2000	57%	168%	2.947368	0.252
Netherlands 1999	56%	167%	2.982143	0.248
Austria 2000	55%	173%	3.1455	0.26
Switzerland 2000	54%	182%	3.3704	0.28
France 1994	54%	191%	3.5370	0.288
Denmark 1992	54%	155%	2.8704	0.263
Germany 2000	54%	173%	3.2037	0.252
Belgium 2000	53%	174%	3.2830	0.277
Canada 2000	48%	188%	3.9167	0.302
United Kingdom 1999	47%	215%	4.5745	0.345
Italy 2000	44%	199%	4.5227	0.333
Spain 2000	44%	209%	4.75	0.34
Ireland 2000	41%	189%	4.6098	0.323
United States 2000	39%	210%	5.3846	0.369
Average	51.76%	184%	3.65	0.287647
Average w/o U.S.	52.56%	183%	3.54	0.282563

<sup>51</sup> Brandolini & Smeeding, *supra* note 48, at 22, Figure 1, available at <http://www.lisproject.org/keyfigures>. Converting these numbers to a standard curve might bring them into perspective. The standard deviation for the Decile ratio is 0.812 and thus the US ratio of 5.38 is over 2 standard deviations away from the average of 3.65. The Gini coefficient is likewise over 2 standard deviations from the average. On the decile score, the U.S. is almost a full standard deviation away from the next worst group of performing countries (i.e. Spain, Ireland, the U.K. and Italy). Thus, while these countries are in the C- to D range the U.S. is alone in the F range of the curve.

<sup>52</sup> Lawrence Jacobs & Theda Skocpol, *Restoring the Tradition of Rigor and Relevance to Political Science*, in 39 PS: POLITICAL SCIENCE & POLITICS 27 (2006) (referring to L MISHEL ET. AL, THE STATE OF WORKING AMERICA (2005)). See also Brandolini & Smeeding, *supra* note 48, at 25, figures 3 & 4. Jacobs and Skocpol report that as of 2003 the most affluent fifth of the population received 47.6% of family income while the top 5% received 21% of that income. Jacobs & Skocpol, *supra* note 21.

<sup>53</sup> Brandolini & Smeeding, *supra* note 48, at 22 Figure 1.

Stand. Deviation	6.94	19.83	0.812	0.040
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The inequality in America is not merely due to market based inequalities but also due to a lack of intervention to mitigate the inequalities generated by the market.<sup>54</sup> As Table 2 shows, the Market based Gini coefficients between these 13 states and the U.S. do not significantly diverge. However, market interventions by way of taxes and benefits significantly dampen the disparity between the rich and poor in most of these countries. The resulting post reduction coefficients reveal significant disparities between the U.S. and these western countries. While the average reduction is over 30%, the reduction in the U.S. is about 20%. In those countries where the reduction percentages approximate our numbers, the pre- benefit Gini coefficient is significantly lower than our own. For instance, Switzerland’s pre-benefit Gini coefficient is nearly as low as our post-benefit Gini coefficient.

Table 2

Inequality of Market Income and Disposable Income: Gini Coefficients before and after taxes and benefits<sup>55</sup>

	Mkt Gini	after ben	reducti on
Finland	38	25	34%
Netherlands	39	25	36%
Sweden	45	25	44%
Austria	43	26	39%
Germany	46	26	42%
Belgium	47	28	41%
France	49	29	47%

<sup>54</sup> Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, in 3 PERSPECTIVES ON POL. 449 (2005) available at <http://www.u.arizona.edu/~lkenwor/pop2005.pdf> (last visited June 13, 2006). This data does not reflect government spending on infrastructure, the military, or the civil and criminal justice system, which provide a disproportionate benefit to businesses and the wealthy.

<sup>55</sup> Table based on data extracted from A Brandolini & T Smeedling Figure 2 (based on the Luxemburg Income Study). Brandolini & Smeedling, *supra* note 48, at Figure 2.

Canada	41	30	27%
Switzerland	39	30	20%
Ireland	44	32	27%
Italy	46	33	27%
Spain	47	34	28%
United Kingdom	50	35	31%
United States	47	37	22%
Average	44.36	29.64%	33.21%

The data on Gini coefficient reduction through taxes and benefits does not include pensions or the public provisions of services such as education or health care, even though low or no cost provision of these benefits greatly reduces consumption inequality.<sup>56</sup> Because educational provisions in most states in the U.S. are still based on local property values the distribution of this service entrenches and exacerbates the above inequalities within the U.S. No other country finances education in this way.<sup>57</sup> There is also a significant gap in the provision of health care between the U.S. and other O.E.C.D. countries which significantly exacerbates the disposable income gap.<sup>58</sup> This has a significant impact on those who are uninsured or under-insured.<sup>59</sup> To bring this home, between 1973 and 2000, the income of the bottom 90% of U.S. tax payers fell by 7 percent while the income of the top 1% grew by 14 percent.<sup>60</sup>

<sup>56</sup> Kenworthy & Pontusson, *supra* note 54, at 455.

<sup>57</sup> Allan Odden & William H. Clune, *School Finance Systems: Aging Structures in Need of Renovation*, 20 EDEC. EVALUATION & POL'Y ANALYSIS 157, 168-69 (1998). For the intersection of law, race and education see Samuel R. Lucas & Marcel Paret, *Annual Reviews*, 1 ANNUAL REV. L. & SOC. SCI. 203 (2005), <http://arjournals.annualreviews.org/eprint/znK7y9nbHQND7hyTuGfb/full/10.1146/annurev.lawsocsci.1.041604.115931?cookieSet=1>. For facts on educational attainment by race SEE KAISER FAMILY FOUNDATION, KAISER FAMILY FOUNDATION FACT SHEET: YOUNG AFRICAN AMERICAN MEN IN THE UNITED STATES, <http://www.kff.org/minorityhealth/upload/7541.pdf> (last visited July 27, 2006).

<sup>58</sup> Although we spend twice as much for health care than most O.E.C.D. countries, most of the burden is born by the private sector. While the average O.E.C.D. country public expenditure on health as a percentage of total spending on health has consistently been over 70% (1980- 2005), the United States has averaged between 40% and 45% from 1980 to 2005. See OECD Health Data 2006 - Frequently Requested Data: Data on Public Expenditure on Health, <http://www.oecd.org/dataoecd/59/49/35529832.xls> (last visited July 27, 2006).

<sup>59</sup> For information on the uninsured see, KAISER FAMILY FOUNDATION, THE GROWING UNINSURED POPULATION AND THE HEALTH CARE SAFETY NET, <http://www.kff.org/uninsured/profile.cfm>. For statistics on provision of health care by race, see KAISER FAMILY FOUNDATION, *supra* note 57. Insurance coverage may have a significant impact on law suits. As Reisman states, “where consumers are heavily insured but manufacturers and sellers go bare, there will be fewer product liability actions than in a jurisdiction where victims have little coverage but businesses hold large policies.” Mathias Reisman, *Liability for Defective Products at the Beginning of the Twenty-First Century*:

Further, contrary to the belief of a majority of Americans, our chances of moving up the economic ladder are not as good as they were 30 years ago.<sup>61</sup> For instance, sons from the bottom three quarters of the socio-economic scale were less likely to move up in the 1990s than had sons in the 1960s.<sup>62</sup> What is perhaps more troubling is that household income inequality increased while those working within the household also increased.<sup>63</sup> Without the contribution of wives, the income of the bottom fifth would have decreased by 13.9% between 1979 and 2000 rather than raising by 7.5%.<sup>64</sup>

### III DEMOCRACY AND INEQUALITY: BEING HEARD

As early as 1955, Kuznet described the relationship between inequality and economic development in democratic terms. In that work he stated,

In democratic societies the growing political power of the urban lower-income groups led to a variety of protective and supporting legislation, much of it aimed to counteract the worst effects of rapid industrialization and urbanization and to

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*Emergence of a Worldwide Standard?* 51 AM. J. COMP. L. 751, 827 (2003). See also Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45, 47 (1999) ("the [British] National Health Service has in the past operated to relieve most tortfeasors from the costs of their victims' medical treatment.").

<sup>60</sup> Heather Boushey & Christian E. Weller, *Inequality and Household Economic Hardship* 5 (United Nations Dep't of Econ. & Soc. Affairs, Working Paper No. 18, April 2006).

<sup>61</sup> See e.g., Janny Scott & David Leonhardt, *Class Matters: Shadowy Lines that Still Divide* N.Y. TIMES, May 15, 2005, <http://www.nytimes.com/2005/05/15/national/class/OVERVIEW-FINAL.html?ex=1273809600&en=2fb756e388191419&ei=5088&partner=rssnyt&emc=rss>. The New York Times poll indicated that over 75% of Americans thought that the chances of moving up the economic ladder were as good or better than they were 30 years ago. Interactive Graphic, How Class Works, [http://www.nytimes.com/packages/html/national/20050515\\_CLASS\\_GRAPHIC/index\\_03.html](http://www.nytimes.com/packages/html/national/20050515_CLASS_GRAPHIC/index_03.html).

<sup>62</sup> Boushey & Weller, *supra* note 60, at 6 (citing Earl Wysong, Robert Perrucci, & David Wright, Organizations, Resources, and Class Analysis: The Distributional Model and the U.S. Class Structure (Ind. U. Working Paper, 2004) (comparing the incomes and occupations of 2,749 fathers and sons from the 1970s to the late 1990s)).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* The top fifth of incomes was not as heavily impacted by women entering the job market as was the bottom. Wives in families with children in the bottom fifth increased their working hours by 43.9% as compared to only a 27.4% increase in working hours among wives in the top fifth. *Id.*

support the claims of the broad masses for adequate shares of the growing income of the country.<sup>65</sup>

However, in recent years lower income groups have failed to secure such protective and supporting legislation, and the legislation that is on the books has been scaled back, and under-enforced,<sup>66</sup> leaving the poor and lower income groups to the vicissitudes of the market.<sup>67</sup> This means that either Kuznet was incorrect, or that we are not a democratic society.<sup>68</sup>

The impact of the gap between the ‘haves’ and have-nots’ on our democracy is explored in detail in the American Political Science Association task force Reports on Inequality and American Democracy.<sup>69</sup> As two of the authors state:

[The report] concluded that the privileged participate more than others and are increasingly well organized to press their demands on government. Public officials, in turn, are much more responsive to the privileged than to average citizens and the least affluent. Citizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while

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<sup>65</sup> Simon Kuznet, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1, 17 (1955).

<sup>66</sup> One example that resonates with tort reform is the E.E.O.C. See, e.g., Marni Goldberg, *Job-Discrimination Claims Pile Up With Budget Cuts*, CHI. TRIBUNE, June 17, 2006, <http://www.latimes.com/news/nationworld/nation/la-na-eeoc17jun17,1,7666899.story?coll=la-headlines-nation> (The claims backlog at the EEOC, which has lost 20% of its staff since 2001, grew 12% last year resulting in a backlog of over 33,000 claims; the backlog is expected to grow to 48,000 by 2007 while Bush is proposing another 4 million dollar reduction in funding).

<sup>67</sup> For instance Bill Clinton’s Welfare Reform of 1996 removed many important features of the U.S. welfare safety net. See TASK FORCE ON INEQUALITY AND AMERICAN DEMOCRACY, INEQUALITY AND PUBLIC POLICY 14 (2004) (referenced hereafter as TASK FORCE—HACKER), <http://www.apsanet.org/imgtest/feedbackmemo.pdf>. As Thomas Piketty and Emmanuel Saez note in *Income Inequality in the United States, 1913-1998*, CXVIII THE Q. J. OF ECON. 1, 1-2 (2003), “Kuznet’s curve is widely held to have doubled back on itself, especially in the United States, with the period of falling inequality observed during the first half of the twentieth century being succeeded by a very sharp reversal of the trend since the 1970s.”

<sup>68</sup> Or, we are in a new industrial revolution (ie the computer revolution ). See Piketty & Saez, *supra* note 67, at 2, 24.

<sup>69</sup> TASK FORCE REPORTS, *supra* note 21.

the advantaged roar with a clarity and consistency that policymakers readily hear and routinely follow.<sup>70</sup>

According to some studies, the poorest 1/3 of Americans have virtually no influence on national legislation and the bottom 2/3 have less than half the influence of the top 1/3.<sup>71</sup> Bartels summarized his unpublished findings from the 101<sup>st</sup> congress of 1989 to the 103<sup>rd</sup> congress of 1994 to show that while there was a good deal of responsiveness to middle and high income constituents, senators completely ignored constituents in the bottom third economic bracket.<sup>72</sup> The figures are stark, with nearly twice as much responsiveness being shown for high income constituents than for middle income constituents and absolutely no weight given to the lower 1/3 of the population.<sup>73</sup> One may have expected that this would hold true for Republican members of congress, given the stereotype that Republicans are for the rich while Democrats are for the poor.<sup>74</sup> Bartels' statistics do in fact show that Republicans are nearly twice as responsive to the views of wealthy constituents as are Democrats.<sup>75</sup> While one might expect that Democrats would spread their responsiveness between the middle and lower income constituent, they in fact split their responsiveness nearly 50/50 between middle and high income constituents and, like

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<sup>70</sup> Jacobs & Skocpol, *supra* note 21, at 27. See also Kay Lehman Schlozman, *On Inequality and Political Voice: Response to Stephen Earl Bennett's Critique*, in 39 PS: POLITICAL SCIENCE & POLITICS 55, 56 (2006) (referring to SCHLOZMAN ET. AL., *supra* note 44, at 30-33).

<sup>71</sup> Bartels, *supra* note 46, at 40; See also Stephen Macedo & Christopher Karpowitz, *The Local Roots of Inequality*, 39 PS: POLITICAL SCIENCE AND POLITICS 59, 60 (2006); Larry M. Bartels, *Economic Inequality and Political Representation* (2005) (unpublished manuscript, on file with Princeton University), [www.princeton.edu/~bartels/economic.pdf](http://www.princeton.edu/~bartels/economic.pdf); Martin Gilens, *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* (2003) (unpublished manuscript, on file with Princeton University), <http://www.princeton.edu/~csdp/events/pdfs/Gilens.pdf>. See also Martin Gilens, discussing *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* at The Center for Study of Democratic Politics, Princeton University, conference on Global Inequality (Nov. 7-8, 2003).

<sup>72</sup> Bartels, *supra* note 46, at 40.

<sup>73</sup> See *id.* at 40, Figure 1.

<sup>74</sup> Although there is some truth to the former assertion, Bartels' work shows that there is little truth the latter assertion.

<sup>75</sup> Bartels, *supra* note 71, at 20-24; Tables 4-6 at 44-46 and Figure 3 at 53.

Republicans, are completely unresponsive to low income constituents.<sup>76</sup> This view is supported by historians of voting and by former democratic cabinet members. As Alexander Keyssar notes in his work on the history of voting in America, Democrats have spent more energy courting suburban swing votes and trying to keep Wall Street happy than trying to mobilize the masses of poor non-voters.<sup>77</sup>

Bartels also noted that the unpublished work of Martin Gilens supported his finding.<sup>78</sup> Gilens has since published his expanded research and the results are even more startling.<sup>79</sup> Although he found a moderately strong relationship between what the public wants and what the government does,<sup>80</sup> he also found that when Americans with different income levels had differing policy preferences the policy outcomes strongly reflected the preferences of the most affluent but not those of poor or even middle-income Americans.<sup>81</sup> Thus, Gilens' published work goes much further than questioning whether our democratic system works for the poor to whether our society can be characterized as democratic at all.

Lawrence Jacobs and Benjamin Page found similar results when it came to U.S. foreign relations.<sup>82</sup> These authors tested the impact of four different factors on U.S. foreign policy (public opinion, labor, members of epistemic communities (educators and leaders of private

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<sup>76</sup> The actual ratio is 54/46, and thus Democrats can boast that they are moderately more the party of the middle class than of the upper class (Bartels, *supra* note 71, at 53, Figure 3).

<sup>77</sup> KEYSSAR, *supra* note 10, at 4, 321. Keyssar also refers to the work of Robert Reich, Clinton's secretary of labor (ROBERT B. REICH, *LOCKED IN THE CABINET* (1997)) noting that Reich's memoirs have a number of references to the fact that the Clinton administration's political strategies subordinated social policy to the preferences of Wall Street. KEYSSAR, *supra* note 10, at 4, 321.

<sup>78</sup> Bartels, *supra* note 46, at 40; (referring to Gilens, *supra* note 71).

<sup>79</sup> He has almost doubled his data set from 754 to 2000 questions and expanded the years from 1992 to 1998 to between 1981 and 2002. Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUBLIC OPINION QUARTERLY 778-796 (2005). Note that these years substantially overlap with the Rehnquist Court and with the beginning of regressive tort reform.

<sup>80</sup> He notes, however that even with proposed changes receiving 90% public support there is only a 46% chance the policy makers will adopt the policy. Gilens, *supra* note 71, at 786

<sup>81</sup> See Gilens, *supra* note 71, at 788-789.

<sup>82</sup> Lawrence R. Jacobs & Benjamin I Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107 (2005).

foreign policy organizations and think tanks[hereinafter experts]), and business).<sup>83</sup> They used four different types of regression models and found that under the four models, business was by far the most dominant influence on U.S. foreign policy (across the House, the Senate and the executive/ administration).<sup>84</sup> Public opinion, had virtually no impact,<sup>85</sup> and the impact of experts was dubious.<sup>86</sup> It was unclear whether their opinions were causes or effects of the views of policy makers,<sup>87</sup> and how much of their views were the product of the influence of business and labor.<sup>88</sup> If the impact of business and labor, on expert opinions is plugged into their analysis, the impact of business on foreign policy raises from .52 to just over .70 while the impact of labor raises from .16 to about .29.<sup>89</sup> While labor has some impact, it is still dwarfed by the impact of business.

The results of this study again bring into question democratic responsiveness and accountability.<sup>90</sup> If public opinion has little to no influence on foreign policy, the real impact of experts is dubious and business has two to three times the impact of labor, then one must question the true vitality of our democracy. Given the standards articulated above, these signs of non-responsiveness and grossly unequal responsiveness threaten democracy conceived in these terms.<sup>91</sup>

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<sup>83</sup> *Id.* at 110.

<sup>84</sup> *Id.* at 114-117.

<sup>85</sup> *Id.* at 114, table 1, 115, table 2 and 3, and 116, table 4.

<sup>86</sup> *Id.* at 117, 114, table 1, 115, table 2 and 3, and 116, table 4.

<sup>87</sup> *Id.* at 117.

<sup>88</sup> *Id.* at 119.

<sup>89</sup> *Id.* at 119 and *see id.* at 120, table 5. For a treatment of this phenomenon in the context of tort reform, *see* FEINMAN, *supra* note 8, at 175.

<sup>90</sup> The authors note that their finding may have troubling normative implications for “adherents to democratic theory who advocate substantial government responsiveness to the reasoned preferences of citizens.” *Id.* at 121 (referring to such adherents as ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989) and BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICA’S POLICY PREFERENCES* (1992)).

<sup>91</sup> Bartels, *supra* note 46, at 39.

#### IV PARTICIPATION: HAVING NO VOICE

Social scientists have identified voter turnout as the potential cause of both the failure to alleviate the inequality gap<sup>92</sup> and the failure to respond to lower income constituencies.<sup>93</sup> Others have argued that affluence and actual contact with politicians or the lack thereof may be more significant in determining the responsiveness of politicians to different constituencies.<sup>94</sup>

According to Kenworthy and Pontusson, the median-voter model predicts that with increases in market inequality the distance between median and mean income increases (the mean or average wage goes up more than the wage in the middle, or median wage) and as a result support for government spending increases and thus the inequality gap is narrowed.<sup>95</sup> As documented above, while the model works in Europe, it has failed in the U.S. How do we account for the failure? One viable explanation for why Europe does and we do not close the gap is voter turnout. In the countries surveyed by Kenworthy and Pontusson the differences in responsiveness to inequalities roughly track voter turn-out rates.<sup>96</sup> In other words, the higher the voter turnout, the more redistribution from rich to poor.<sup>97</sup>

##### *A. Voter turnout: the most egalitarian form of political participation*

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<sup>92</sup> Kenworthy & Pontusson, *supra* note 54, at 456-461, 459 (emphasize added), 462, Figure 9. This is the contemporary variant of Kuznet's work cited above. Kuznet, *supra* note 65.

<sup>93</sup> John Griffin & Brian Newman, *Are Voters Better Represented*, 67 J. POL. 1206 (2005).

<sup>94</sup> Bartels, *supra* note 71, at 26-27.

<sup>95</sup> Kenworthy & Pontusson, *supra* note 65, at 456 (referring to Allan Meltzer & Scott Richard, *A Rational Theory of the Size of Government*, 89 J. POL. ECON. 914 (1981)).

<sup>96</sup> Kenworthy & Pontusson, *supra* note 54, at 459, 462, Figure 9.

<sup>97</sup> Compare table 2, *supra* at 10 and table 3, *infra* at 16. The explanation is strengthened in the U.S. case by the data presented below, which shows that the poor have much lower voter turnout rates than those in the middle class and above.

The average voter turnout for elections in the 16 countries in table 3 is about 76%.<sup>98</sup> Although the 2004 U.S. national elections saw a somewhat respectable turnout of almost 60%, that number was unusually high for U.S. national elections.<sup>99</sup> The average turnout for U.S. congressional elections from 1945 to 2001 was 48%, which is quite low compared to the average. The turnout at local elections tends to hover at about 30% and below.<sup>100</sup> Statistics collected by Michael P. McDonald from state elections from 1980-2004 show voter participation rates from between 47% and 50%.<sup>101</sup> Even if state officials are responsive to voters, these numbers call into question the democratic pedigree of state legislative tort reform.

Table 3 VAP statistics by country

Country	VAP Parliamentary voter turnout 1945-2001
Italy	92%
Belgium	85%
Austria	84%
Sweden	84%
Netherlands	84%
Denmark	84%

<sup>98</sup> Derived from statistics of averages of voting age population ratios across 169 countries in parliamentary elections from 1945-2001 compiled by the International Institute for Democratic and Electoral Assistance. Rafael López Pintor et. al., *Voter Turnout Rates From a Comparative Perspective*, in *VOTER TURNOUT SINCE 1945: A GLOBAL REPORT* 75, 83-84 (2002), <http://www.idea.int/publications/vt/upload/Voter%20turnout.pdf>. Note that not only are we significantly below every other country on this list, we rank 139<sup>th</sup> out of the 169 countries in the survey. *Id.*

<sup>99</sup> The U.S. census report puts the number higher because it excludes those people of voting age who are not eligible to vote like certain immigrants and felons/ ex felons. U.S. Dept. of Com., Econ. and Stat. Admin., U.S. Census Bureau, *Voting and Registration in the November 2004 Election: Population Characteristics 1* (March 2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf> (written by Kelly Holder) (Hereafter known as “Census Bureau—Holder”).

<sup>100</sup> Macedo & Karpowitz, *supra* note 71, at 59-60 (referring to STEPHEN MACEDO ET. AL., *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION AND WHAT WE CAN DO ABOUT IT* 66 (2005) and Zoltan Hajnal & Jessica Trounstine, *Where Turnout Matters: The Consequences of Uneven turnout in City Politics*, 67 *J. POL.* 515 (2005), as well as others).

<sup>101</sup> United States Election Project, *Voter Turnout Statistics, Turnout 1980-2006*, <http://elections.gmu.edu/Turnout%201980-2006.xls>. See also Michael P. McDonald, *State Turnout Rates Among Those Eligible to Vote, 1980-2000*, 2 *ST. POL. AND POL’Y Q.* 1999 (2002).

Canada	83%
Germany	80%
Norway	79%
Finland	78%
Spain	76%
Ireland	75%
United Kingdom	74%
France	67%
Luxembourg	64%
Switzerland	52%
United States	48%
Average	76%

Writing prior to the 2000 elections, Alexander Keyssar noted that historically, low voter turnout correlated with class and education and that “the people who are least likely to be content and complacent (and most likely to need government help) are those who are least likely to vote.”<sup>102</sup> This debunks the idea that Americans don’t vote because they are generally content. He goes on to state that low voter turnout persists among the same groups to whom the franchise was limited throughout much of our history, namely, the poor, the young, certain minorities and those with less education—i.e. the ‘have-nots.’<sup>103</sup>

These observations were borne out in the 2004 elections. Those in the over \$50,000 income bracket had a 77% voter turnout as opposed to those making less than \$20,000, who had a 48% voter turnout.<sup>104</sup> The poor were greatly overrepresented among non-voters while those making over \$100,000 a year are greatly underrepresented among non-voters.<sup>105</sup> The employed had a 66% turnout as opposed to a 50% turnout for the unemployed.<sup>106</sup> Those with Bachelor’s

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<sup>102</sup> KEYSSAR, *supra* note 10, at 321.

<sup>103</sup> *Id.* The notable exception is women. Census Bureau—Holder, *supra* note 113, at 2.

<sup>104</sup> Census Bureau—Holder, *supra* note 99, at 5. The income based statistics stop at \$100,000 and over and so it is difficult to know what the numbers are like for the very wealthy.

<sup>105</sup> *Id.* at 10, table C.

<sup>106</sup> *Id.* at 5.

degrees had about twice the voter turnout as those without high school degrees (78% vs. 40%).<sup>107</sup> Those in the 18-24 year old bracket who do not have a high school degree had a rate of under 25% while those in the same bracket with college degrees had a 67% rate.<sup>108</sup> Non-Hispanic white citizens had turnout rates at 67% while black citizens were at 60%, Hispanic citizens at 47% and Asian citizens at 44%.<sup>109</sup>

As one might predict, the increase in voter turnout for the 2004 election was not due to higher turnout rate from Blacks, Asians, Hispanics or from the poor, but from non-Hispanic whites who increased their turnout from 60.5% in 2000 to 67% in 2004 and those making over \$50,000 per year who increased their turnout from 72% in 2000 to 77% in 2004.<sup>110</sup>

As noted above, voter turnout has also been used to explain the closely related phenomenon of a lack of responsiveness. Griffin and Newman found that voters are better represented than non-voters.<sup>111</sup> Given that the middle and upper income groups have better voter turnout rates than the poor this may account for at least some of the difference in responsiveness. There is a whole host of explanations for why certain minorities, the poor, and uneducated have such low voter turnouts. Those explanations include:

- lack of stake in the system (little to gain),<sup>112</sup>
- the complex non-user-friendly procedures,<sup>113</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 6.

<sup>109</sup> *Id.* at 7.

<sup>110</sup> Compare Census Bureau—Holder, *supra* note 99 with U.S. Dept. of Com., Econ. and Stat. Admin., U.S. Census Bureau, Voting and Registration in the November 2000 Election: Population Characteristics 3, 5 (Feb. 2002), <http://www.census.gov/prod/2002pubs/p20-542.pdf>. (written by Jamieson, et. al.) (Here after known as “Census Bureau—Jamieson, et. al.).

<sup>111</sup> Griffin & Newman, *supra* note 93.

<sup>112</sup> Clinton’s own secretary of labor said that “the great mass of non-voters ... didn’t vote in 1996 because they saw nothing in it for them.” REICH, *supra* note 77, at 330.

<sup>113</sup> KEYSSAR, *supra* note 10, at 321; *see also* MARTIN WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 162 (2002). Wattenberg finds it impressive how good our turnout is given how complicated our process is compared to other countries. *Id.*

- conflicts with work, school or childcare obligations,<sup>114</sup>
- the fact that voting is not mandatory,<sup>115</sup> and
- the fact that we have a two party system, under which neither party caters to the interests of the poor.<sup>116</sup>

If elected officials were concerned about the groups that have such low voter turnout, a number of simple reforms would make it easier to go to the polls. As common sense suggests, given that those who do not vote did not elect the people currently in office, there is not much incentive for those in office to enact reforms to bring them to the polls.<sup>117</sup>

Setting aside the problems created by our two party system,<sup>118</sup> which would be difficult, both practically and politically, to change, many other changes would be simple, for instance: making ballots less complicated,<sup>119</sup> making elections mandatory,<sup>120</sup> making election day a

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<sup>114</sup> This is because our elections are held during the work week and not on a public holiday. See WATTENBERG, *supra* note 113, at 169-71. Wattenberg notes that in President Clinton's last official message to Congress he wrote, "We should declare election day a national holiday so that no one has to choose between their responsibilities at work and their responsibilities as a citizen." *Id.* at 170-71 (citing William Jefferson Clinton, 42th President of the United States, *The Unfinished Work of Building One America*, Message to Congress (Jan. 15, 2001)).

<sup>115</sup> In the 9 countries where compulsory voting is enforced, the turnout rate is over 85% compared to nearly 75% in the 10 states that do not enforce their mandatory voting laws. Compare this to the average of approximately 68% for the remaining 147 states that do not have compulsory voting. Pintor, et. al., *supra* note 98.

<sup>116</sup> KEYSSAR, *supra* note 10, at 321. As he further notes, Clinton's own secretary of labor said that "the great mass of non-voters ... didn't vote in 1996 because they saw nothing in it for them." *Id.* See also REICH, *supra* note 77, at 330.

<sup>117</sup> Here, the democratic process has very little hope of correcting itself.

<sup>118</sup> See e.g. AREND LIJPHART, PATTERS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX DEMOCRACIES (1999); see also Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT'L POL. SCI. REV. 297 (1997) (Special issue: Contrasting Political Institutions), available at [http://www.cuhk.edu.hk/gpa/wang\\_files/Dem09.pdf](http://www.cuhk.edu.hk/gpa/wang_files/Dem09.pdf).

<sup>119</sup> Wattenberg notes that in Europe there are generally much fewer choices to make on ballots, making them much easier to complete. WATTENBERG, *supra* note 113, at 166.

<sup>120</sup> See Pintor, et. al., *supra* note 98; see also WATTENBERG, *supra* note 113, at 164; and Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997). Note that compulsory voting laws do not require that one actually vote, but they do require that one show up to vote unless one has an appropriate excuse or justification for not doing so. WATTENBERG, *supra* note 113, at 164.

national holiday,<sup>121</sup> putting it on a weekend,<sup>122</sup> or simply extending the hours.<sup>123</sup> These would significantly improve democratic participation.

*B. Other more stratified forms of political participation*

Bartles tested the hypothesis that voter turnout was the cause of lack of responsiveness along with a few other contenders, e.g., ‘political knowledge’ and ‘contact with senators and/or staff’ and found the latter (contact with senators and/or staff) to have the most significant impact on responsiveness.<sup>124</sup> By comparing his work with Sidney Verba’s, he was also able to roughly test the hypothesis that campaign contributions impacted on responsiveness, and found that in two of the eight issue areas the projected disparities in responsiveness matched the disparities in income contribution while in the others, the disparities did not quite match the dollar for dollar disparities although, unsurprisingly, they did tend in the same direction.<sup>125</sup>

Despite low voter turnout rates, voters are the most numerous and most representative group of political activists.<sup>126</sup> At the other end of the representative spectrum are campaign contributors, who are the least representative.<sup>127</sup> 85% of those making a donation to a presidential candidate of over \$1,000 had at least a BA, and 95% of the substantial donors to presidential candidates in 2000 made over \$100,000.<sup>128</sup> The race, sex and age discrepancies in donations of over \$200 to presidential candidates reflect similar discrepancies, with 96% of

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<sup>121</sup> WATTENBERG, *supra* note 113, at 170-71.

<sup>122</sup> *Id.* at 169.

<sup>123</sup> *Id.* at 172 (drawing on the Japanese experience).

<sup>124</sup> Bartels, *supra* note 71, at 24-29, 47, Table 7.

<sup>125</sup> *Id.* at 28-29 (using SIDNEY VERBA ET AL., VOICE AND INEQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 194, 565(1995)

<sup>126</sup> SCHLOZMAN ET AL., *supra* note 44, at 22, 38, Table 3.

<sup>127</sup> *Id.* at 22.

<sup>128</sup> *Id.* at 22. This group comprised only 12% of the population. *Id.*

donations coming from Whites, 70% coming from males and over 99% of donations coming from those over 30. Those in the 18-30 bracket contributed only 1% while those over age 46 contributed 83%.<sup>129</sup>

Looking across the spectrum of participation, the statistics show that those making over \$75,000 per year are between two and six times more likely to participate in politics through campaign work, direct contact, protests, affiliation with political organizations, informal community activities, and campaign contributions than those making under \$75,000 per year.<sup>130</sup> Those making over \$75,000 per year have approximately twice as much direct contact as those making under \$75,000 per year. The numbers are not as drastic for race, but they do show significant disparities between Whites, African Americans and Latinos.<sup>131</sup> The discrepancy in political activity between those in the 18-24 age range and those in the ranges of 24-49 and 50-59 was about 1-2.<sup>132</sup>

Education, is a central element in the relationship between socio-economic status and participation because it affects many other determinants of socio-economic status as well as the other determinants of participation, e.g. job, income, knowledge, civic and organizational skills, as well as connections with other politically active people who are more likely to enlist their aid in political activities.<sup>133</sup>

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<sup>129</sup> *Id.* at 38 table 3.

<sup>130</sup> *Id.* at 23, Figure 1. Class based stratification affects the entire range of political activities. KEYSSAR, *supra* note 10, at 321-322 (referring to VERBA, ET. AL., *supra* note 125, at 1-13, 23-24, 511-33). “The affluent and well-educated are not only able to afford the financial costs of organizational support but they are in a better position to command the skills, acquire the information, and utilize connections that are helpful in getting an organization off the ground or keeping it going.” SCHLOZMAN ET. AL., *supra* note 44, at 20.

<sup>131</sup> Gilens, *supra* note 71, at 24, Table 2. *See also Id.* at 24, Figure 3. In terms of mean number of political activities Anglo-White men had 2.36 compared to 1.94 for Black men and 1.61 for Latino men. Among women, Whites had 2.08, Black’s 1.86, and Latinas .9. *Id.*

<sup>132</sup> *Id.* at 25, Figure 4. It shows 1.26 political acts performed by those in the 18-24 age range compared with 2.17 in the 30-39 range, 2.54 in the 40-49 range, 2.52 in the 50-59 range, 2.35 for 60-69, with the numbers understandably dropping off for those over 70 to 1.82.

<sup>133</sup> *Id.* at 26. Access to selective colleges is highly skewed by race and ethnicity, and even more skewed by socio-economic status. Anthony P. Carnevale & Stephen J. Rose, Socioeconomic Status, Race/Ethnicity, and Selective

Given the growing inequality in America, the low voter turnout among the poor and uneducated, the lack of access of middle and lower income Americans to politicians, and the resulting lack of influence on “representatives” it is not surprising that legislation in general, and tort reform in particular, would not tend to the needs and preferences of a majority of Americans.

*C. Disenfranchised citizens (Illegal Americans)*<sup>134</sup>

Since 1975, incarceration rates in the United States have quadrupled and over 5.3 million felons and ex felons are prohibited from voting.<sup>135</sup> 2.5% of the general population is denied the vote.<sup>136</sup> The demographics for the prison population significantly overlap with those in society who have low voter turnout and low political participation in general. Richard Freeman of Harvard University and the National Bureau of Economic Research reports that the prison population is disproportionately black and young with low education and literacy levels.<sup>137</sup>

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College Admissions 10-11, 69, Table 1.1 (Century Foundation, Paper, March 2003), *available at* [http://www.tcf.org/Publications/Education/carnevale\\_rose.pdf](http://www.tcf.org/Publications/Education/carnevale_rose.pdf). Carnevale and Rose found that “74 percent of the students at the top 146 highly selective colleges came from families in the top quarter of the SES scale (as measured by combining family income and the education and occupations of the parents), just 3 percent came from the bottom SES quartile, and roughly 10 percent came from the bottom half of the SES scale. If attendance at these institutions reflected the population at large, 85,000 students (rather than 17,000) would have been from the bottom two SES quartiles.” *Id.* 11.

<sup>134</sup> I use the term “illegal American” because it tracks the pejorative term “illegal immigrant.” It is a way marking them as “illegal” rather than as, say, hard working exploited immigrants. We do not usually label people as “illegal” when they break the law and do not usually talk about the “illegal employer” problem in America. Felony disenfranchisement, particular post-release, is a way of marking people as outlaws or second class citizens.

<sup>135</sup> Manza and Uggen put the number at 5.3 million with 39% having completed their sentences. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 77 (2006). *See also* KATHERINE I PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (2005). As of June 2005, there were 4.8 people incarcerated out of every 1,000, that is almost one out of every 200 people. U.S. Department of Justice, Bureau of Justice Statistics, Prison Statistics (2005), <http://www.ojp.usdoj.gov/bjs/prisons.htm>. The percentages for Black males at the end of 2004 was over 3% compared to white males at less than .05% of their population. *Id.*

<sup>136</sup> LALEH ISPAHANI, ACLU, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (May 2006), [http://www.aclu.org/images/asset\\_upload\\_file825\\_25663.pdf](http://www.aclu.org/images/asset_upload_file825_25663.pdf).

<sup>137</sup> Richard Freeman, *Can We Close the Revolving Door? Recidivism vs. Employment of Ex-Offenders in the U.S.* 4 (The Urban Inst. Reentry Roundtable Discussion Paper No. 2 2003), *available at* <http://www.ssw.umich.edu/events/CASD/freeman.pdf>.

Information on released prisoners indicates that 14% have less than 8 years of schooling and 67% have less than high school.<sup>138</sup> Nearly half of the prison population consists of black males and 68% of all prisoners are below the age of 34.<sup>139</sup>

Ex offenders do not do well in the job market. They have low employment rates and they tend to earn less than others with similar demographics<sup>140</sup> Further, nearly one third have a physical impairment or mental condition and 21% have some physical or mental condition that impairs work ability.<sup>141</sup> As Freeman states, “Since persons with physical and mental health problems, limited education, and poor literacy do badly in the US job market independently of a criminal record, [it should come as no surprise that] ex-offenders fare poorly in the job market.”<sup>142</sup> It should also come as little surprise that under these conditions, most prisoners end up back in prison.<sup>143</sup>

The felon/ ex-felon, is a distinct, insular and growing minority in our society. Although they represent an extreme case, their disenfranchisement is compounded by the fact that they have very little mobility, very little stake, and even less say in the future of our society.<sup>144</sup>

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<sup>138</sup> *Id.* at 7, Table 3.

<sup>139</sup> *Id.* at 15, Table 1.

<sup>140</sup> *Id.* at 9-10 (referring to Richard Freeman, *Economics of Crime*, in THE HANDBOOK OF LABOR ECONOMICS Vol 3C (Orley Ashenfelter & David Card eds., 1999) (Chapter 52)); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. (2002).

<sup>141</sup> *Id.* at 10, 11, Table 5.

<sup>142</sup> *Id.* at 13.

<sup>143</sup> *Id.* at 2 (citing PATRICK LANGAN & DAVID LEVIN, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (June 2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>).

<sup>144</sup> This is also true of the over 10 million unauthorized immigrant living in the U.S. For the numbers see JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 1 (2005), <http://pewhispanic.org/files/reports/46.pdf>. Unauthorized immigrants provide a cheap, hard working and docile labor force. Their presence keeps authorized immigrants and U.S. citizens relatively docile while keeping their wages low. They also provide a scapegoat for our woes and threats to our security, even though they put much more into our economy than they take out (including social security and taxes) and there have been few if any terrorists threats coming from unauthorized immigrants, especially from Mexico. The nineteen 9/11 terrorists entered the country legally. 9/11 COMMISSION REPORT 27 (2004).

Looking at the phenomenon comparatively, we incarcerate between 5 and 8 times the number of people incarcerated in other advanced industrial nations.<sup>145</sup> The overwhelming majority of Western European states have no ban on voting at all,<sup>146</sup> or only ban voting for specific criminals who commit certain serious crimes, and usually as explicit additional aspects of their prison sentence.<sup>147</sup> While some twelve European states completely ban voting for incarcerated prisoners,<sup>148</sup> ten of these twelve states are former Eastern Bloc countries who have a history of limited enfranchisement.<sup>149</sup> Of the two Western European countries, Spain and the United Kingdom, Spain rarely disenfranchises its prisoners,<sup>150</sup> and the practice of blanket bans in the United Kingdom has recently been condemned by the European Court of Human Rights in *Hirst v. United Kingdom (No 2)*.<sup>151</sup> Further, while some countries disqualify ex-felons from voting, “the sanction is purposefully and narrowly targeted, and the number of disenfranchised people is probably in the dozens or hundreds. In the United States, the disqualification is automatic, pursues no defined purpose and affects millions.”<sup>152</sup>

Not only has the European Court of Human Rights condemned practices like that in the U.S., but so has the Supreme Court of Israel,<sup>153</sup> the Supreme Court of Canada,<sup>154</sup> and the

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<sup>145</sup> ISPAHANI, *supra* note 136, at 6.

<sup>146</sup> Seventeen European states do not ban voting at all, nine of which are Western European states. *Id.*

<sup>147</sup> *Id.* at 7. Eleven states fall in this category, with eight of them coming from Western Europe (Greece is counted in this tradition).

<sup>148</sup> *Id.* at 8.

<sup>149</sup> *Id.* at 8.

<sup>150</sup> *Id.*

<sup>151</sup> *Hirst v. United Kingdom (No 2)*, 681 Eur Ct. H.R. (2005) (discussing a U.K. law denying the vote to all prisoners, stating “Such a general, automatic, and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide the margin might be, and is incompatible with Article 3 of Protocol No. 1.”); ISPAHANI, *supra* note 156, at 8.

<sup>152</sup> ISPAHANI, *supra* note 155, at 6.

<sup>153</sup> *Hilla Alrai v Minister of Interior HC2757/06 P.D. 50(2) 18 (1996)* (refusing to disenfranchise Yigal Amir, the individual convicted of assassinating Yitzak Rabin, the Israeli Prime Minister. “[W]ithout the right to elect, the foundation of all other rights is undermined... Accordingly every society should take great care not to interfere with the right to elect except in extreme circumstances.”).

<sup>154</sup> *Sauvé v. Canada [2002] 3 S.C.R. 519* (striking down a law which denied the right to vote to those serving more than two years “Denying the vote denies the basis of democratic legitimacy.. if we accept that governmental power

Constitutional Court of South Africa.<sup>155</sup> These countries recognize that denying prisoners the right to vote is not undesirable merely because it harms the individual who loses the right, but because it harms the democratic legitimacy of the state. As McLachlin CJ, writing for the majority in *Sauvé v. Canada* said:

The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardises its claims to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.<sup>156</sup>

Denying prisoners the right to vote, particularly after they have served their time makes it clear that some people simply do not count, and are not a part of the same “democratic” America that the rest of us are. This is particularly troubling given that this class is greatly overrepresented by minorities, those who are economically disadvantaged, educationally deprived and who have mental and physical disabilities. Taking away this right sends the message that these people are second class citizens, in effect, “illegal Americans.”

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in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.” *Id.* at para 32).

<sup>155</sup> National Institute of Crime Prevention and the Re-Integration of Offenders (NICRO), *Erasmus and Schwagerl v. Minister of Home Affairs* (CCT 03/04 2004) (striking down the Electoral Laws Amended Act 34 of 2003, which denied the right to vote for those serving prison sentences that did not have the option of a fine); *August and Another v Electoral Commission and Others* (CCT 8/99 1999) (holding that the Electoral Commission, by not providing the means and mechanisms for prisoners to vote, had breached the prisoner's rights to vote under the Constitution).

<sup>156</sup> *Sauvé v. Canada* [2002] 3 S.C.R. 519, para 34.

## V. TORT “REFORM”

Jay Feinman links the current wave of tort “reform” to a systematic campaign to unmake the common law.<sup>157</sup> Feinman traces the campaign to Ronald Regan’s inaugural address, where he stated that “Government is not the solution to our problems; government is the problem.”<sup>158</sup> Although this might not sound like an agenda to un-make the common law, the undoing of some 100 years of common law developments is an integral part of this rather comprehensive view of the role of government in democracy. The idea is a return to a time of minimal governmental interference with the market (*laissez faire* capitalism) and with its pre-modern or classical legal thought under which judges are mere neutral referees, rather than guardians of justice. Here, individual negative rights embodying such notions as ‘freedom of contract’ and ‘buyer beware’ trump public policy embodying ideas such as corporate responsibility and consumer safety, or taking measures to ensure that people actually are free.

Feinman makes three main points concerning the “Right’s” attack on the common law. “First, the law has dramatically changed to the detriment of ordinary people.”<sup>159</sup> Second, the various individual developments in contract, property and tort law are part of a comprehensive, coordinated campaign,<sup>160</sup> “by an army of corporations, foundations, lobbyists, litigation centers,

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<sup>157</sup> FEINMAN, *supra* note 8, at 1. Feinman credits Stephan D. Sugarman, in *Judges as Tort Law Un—Makers: Recent California Experience with ‘New’ Torts* 49 DEPAUL L. REV. 455 (1999) for the label. . For a comprehensive database on state tort reform totaling over 1,000 pages see Ronen Avraham, *Database of State Tort Law Reforms*, (May 16, 2006) (Northwestern Law & Econ Research Paper No. 902711), available at <http://ssrn.com/abstract=902711>.

<sup>158</sup> FEINMAN, *supra* note 8, at 172 (citing JOHN B. JUDIS & TUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* 151-52 (2002)).

<sup>159</sup> FEINMAN, *supra* note 8, at 3.

<sup>160</sup> *Id.* According to Feinman, Federalist Society members boasted that they occupied all of the assistant attorneys general positions and more than half of all other political appointments within the Regan-Meese Justice Department.

think tanks politicians and academics.”<sup>161</sup> And third, the campaign is not conservative but is radical in its rejection of developments in the law over the last one hundred years.<sup>162</sup> Feinman describes a campaign that is designed to take us back to the thoroughly discredited “classical theory” of the *laissez faire* Lochner era.<sup>163</sup>

Feinman, like others, makes the point that the tort reform campaign is based on misinformation, if not lies.<sup>164</sup> As Feinman states, “The problem with the conservative campaign, however, is that it is false. Not debatable, or a matter of opinion or political viewpoint, but false.”<sup>165</sup> Its falsity is based in many little lies that exaggerate cases, overstate the amount of and the effect of frivolous lawsuits, the impact of regulations on property rights and as well as the impact of liberal adjudication on the sanctity of contract.<sup>166</sup> When combined they feed into the big lie that the common law has been hijacked by greedy plaintiffs and lawyers as well as by liberal activist judges.<sup>167</sup>

Although tort reform is not the only area of law that is bound up with our democratic deficit, as Feinman notes, “The longest-running front in the ... campaign to reshape the common law has played out in ... what lawyers call “tort law.””<sup>168</sup> Given the data and arguments put forth above in parts II-IV, one does not need to be a conspiracy theorist to predict that a well

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Further, one fourth of all federal judicial candidates for under the second Bush administration were recommended by the Federalist society and most of the lawyer’s in the White House Counsel’s office have been active members. *Id.* at 189.

<sup>161</sup> FEINMAN, *supra* note 8, at 189.

<sup>162</sup> *Id.* at 3-4. It is in fact radical and undemocratic.

<sup>163</sup> *Id.* at 3-5, 7-18. Compare with Law, *supra* note 31-32 (making similar comments regarding the Rehnquist Court).

<sup>164</sup> See Lind, *supra* note 33, at 719; Abel, *supra* note 33, at 556; Goldberg, *supra* note 33; Priest, *supra* note 33, at 683; Eaton, *supra* note 33; Witt, *supra* note 33,

<sup>165</sup> FEINMAN, *supra* note 8, at 190.

<sup>166</sup> *Id.* at 191.

<sup>167</sup> *Id.* at 191.

<sup>168</sup> *Id.* at 19. Feinman identifies the campaign as the “Right’s” campaign in the ellipse. The tort reform part of this campaign came together in the Tort Policy Working Group within the Reagan-Meese justice department. *Id.* at 186 (citing the TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986)). See also Dawn Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L. J. 363 (2003).

organized and funded campaign to institute reform for the ‘haves’ by the ‘haves’ in the area of tort law would be successful even if it was not good for most Americans. The pervasive disinformation that accompanied this movement has no doubt acted like grease on a pig for those fighting against these “reforms” while acting like grease on the cogs of the machine for those pushing the reforms.

I will first briefly canvass both the main achievements in democratic tort reform as well as the recent retrenchment of some of those achievements along with other regressive changes in tort law. I will then look at the role of the Supreme Court in tort reform to show the unprecedented extent to which that institution has engaged in an area generally considered the domain of the states, their courts and Congress, to the detriment of the people and of democracy.

Before doing so, it might be good to respond to a preliminary challenge. One may argue that since the bulk of progressive tort reform during the 60s and 70s was judicially created and most of the tort reform since the 1980s is legislative, the latter trend of regressive tort reform must have a better democratic pedigree than the former. This is dubious for at least two reasons. First, it is by no means settled that the bulk of progressive tort reform in the former period was judicial (see part V.A. below). More importantly, given the evidence above that our traditional “democratic” institutions (the executive and legislative branches) are skewed, or corrupted from the perspective of democratic values, then it follows that courts, which are generally insulated from interest group power politics and which are required to justify their decisions to the public through written decisions, may have a better chance of delivering decisions that are democratically justifiable. This is particularly true in the area of personal injury tort law where by and large the plaintiff class is unorganized and under funded, and the defendant class is well

organized and well funded.<sup>169</sup> Potential victims have neither the motive nor the easy means for organizing. Most people do not think of themselves as potential plaintiffs and thus are not generally mobilized to press their concerns, while most businesses and their associations do factor in the potential of being a defendant and thus, they have both the motive and the means to press their interests in tort reform through experts, lobbying, and campaign contributions.<sup>170</sup> Abel also notes that the plaintiff's bar does not necessarily have the interests of plaintiff's in mind in its battle with the defense bar over tort reform, for instance when it comes to no-fault automobile compensation schemes.<sup>171</sup>

One way around the lack of influence in the judicial sphere is by contracting out of court and into arbitration where businesses, particularly businesses that are repeat players have a distinct advantage.<sup>172</sup> The other tactic is try to break down the barriers that insulate courts as much as possible, and this takes place in part through concerted efforts to get pro-tort reform judges elected and appointed. For instance, the movement to dismantle strict liability in products cases in California came after 1986 when three liberal judges were voted off the bench and replaced with conservatives.<sup>173</sup> Of course, the politicization of the judiciary took off under former President Reagan.<sup>174</sup> As David Law notes “commentators have singled out Reagan for taking the politicization of the judiciary to new heights by implementing a centralized high-level

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<sup>169</sup> Of course this is not true of business to business torts, but business to business torts is largely unaffected by tort reform. Nockleby & Curreri, *supra* note 1, at 1080-85.

<sup>170</sup> See Abel, *supra* note 33, at 536-37.

<sup>171</sup> *Id.* at 537.

<sup>172</sup> See part V B.4 *infra* for the Supreme Court's support of this move; See also Bryant G. Garthy, *Tilting the Justice System from ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002)..

<sup>173</sup> Stephan D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with 'New' Torts*, 49 DEPAUL L. REV. 455 (1999).

<sup>174</sup> Note the early department of justice reports under Reagan, U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL POLICY, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION iii (1988), <http://islandia.law.yale.edu/acs/conference/meese-memos/year2000.pdf> (focusing on 15 key areas of constitutional controversy likely to go before the Court between 1988 and 2000, “the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court”).

process for the ideological vetting of judicial candidates.”<sup>175</sup> According to Goldman, Reagan was very successful in appointing circuit court justices that remained faithful to his conservative agenda.<sup>176</sup> This has been reinforced ever since by the active participation of conservative groups in the process of judicial nominations.<sup>177</sup>

## *A. Tort Reform in General*

### **1. Progressive democratic tort reform**

Democracy reinforcing reform of tort law began in the early 1900s when workmen’s compensation schemes started to spread. The schemes were the clearest and earliest examples of trying to find collective justice for a group of people who were severely disadvantaged by the extant rules of the tort system.<sup>178</sup> Other than workmen’s compensation and Cardozo’s opinion in

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<sup>175</sup> David Law, *Appointing Federal Judges: The President, The Senate and the Prisoner’s Dilemma* 26 CARDOZO L. REV. 479, 485-6 (2005) (referring to Elliot E. Slotnick, *Federal Judicial Selection in the New Millennium*, Prologue, 36 U.C. DAVIS L. REV. 587, 589-90 (2003)); and Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667, 678 (2003) (remarking upon Reagan’s reputation for attending to the ideology of his judicial nominees).

<sup>176</sup> SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 116, 307 (1997).

<sup>177</sup> FEINMAN, *supra* note 8, at 189. See also Nina Totenberg, *Conservative Groups Push for More Judicial Confirmations* (National Public Radio, Morning Edition radio broadcast, June 28, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5517409> (Conservative groups are urging President Bush and Senate Republicans to push harder to get more of the president’s judicial nominees approved. Social conservatives want more confirmations before the November elections in case the GOP loses Senate seats.).

<sup>178</sup> The extant rules included such defenses as the fellow servant exception to master servant liability, voluntary assumption of risk, and contributory negligence. See ARTHUR LARSON, 1-2 LARSON’S WORKERS’ COMPENSATION LAW §§ 2.03, 2.07-2.08 (2005), <http://www.lexis.com>. Some courts did temper these defenses in the late 1800s and early 1900s allowing more workers to gain compensation, however the bulk of workers injured on the job were left without compensation or with very little compensation. *Id.* at § 2.04, 2.07. See also part V. *infra*. See LARSON, *supra* note 177, at §4, 7. These were also years of progress for the women’s suffrage movement. Note that women’s rights to tort compensation was also limited from the 1800s to the modern period. See Rustad & Koenig, *supra* note 17, at 34-35. See also Margo Schlanger, *Injured Women Before Common Law Courts: 1860- 1930*, 21 HARV. WOMEN’S L.J. 79 (1998).

MacPherson v. Buick Motor Co., not much reform took place until the "Democratic Expansionary Era" after the Second World War.<sup>179</sup>

This period saw the court moving from a view of the tort system as case by case corrective justice to a view of the system as a mechanism for collective justice, or providing justice across classes of cases.<sup>180</sup> This is partially what allowed the courts to think not only of putting people back into the place they were before the tort, but of other social goals like deterring wrongs and providing incentives for manufacturers to make their products safer for society.<sup>181</sup> Courts stopped merely accepting that the status quo distributions of power and wealth were just and tailored corrective justice to collective and distributive justice concerns.

Democratic developments during the era resulted in the removal of immunity at both the federal level and the state level.<sup>182</sup> It began with the Federal Tort Claims Act 1946 28 U.S. § 2875 and most states followed with similar legislation, opening up their court for suits, thus making the state and the people equal before the law.<sup>183</sup> The 1960s saw the 1964 Civil Rights Act which provided statutory tort actions for discrimination in employment, housing, educational, or public accommodations on the basis of race, sex, national origin, or religion.<sup>184</sup>

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<sup>179</sup> Macpherson v. Buick Motor Co., 11 N.E. 1050, 1051-55 (N.Y. 1916) (holding that Buick owed a duty of care to the ultimate purchaser despite the absence of privity); Rustad & Koenig, *supra* note 17, at 38

<sup>180</sup> FEINMAN, *supra* note 8, at 53 (Feinman puts the starting date at 1920). The previous era (the late 1800s to early 1900s) is often recognized as an era where the compensatory function of tort law was actually constricted. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 61 (1980).

<sup>181</sup> There of course is the challenge that this should be left to legislators to decide. *Cf.* Abel, *supra* note 33.

<sup>182</sup> Sovereign immunity from suit was abandoned in France by 1905. The first case to undermine the doctrine occurred in 1873 with the Tribunal des Conflicts cases of l'arrêt Blanco TC 8 Feb 1873, D.1873.17 (according jurisdiction to the administrative courts for actions brought against the state for damages caused by actions of persons employed in the public service) and the doctrine was solidified by 1905 in the case of Tomaso Grecco, CE 10 Feb 1905, D.1906.3.81. *See* DUNCAN FAIRGRAVE, STATE LIABILITY IN TORT: A COMPARATIVE STUDY 12-13 (2001).

<sup>183</sup> *See* FEINMAN, *supra* note 8, at 56-57; DAN DOBBS, THE LAW OF TORTS §268 (2001). England also followed suit in 1947 with the Crown Proceedings Act of 1947, although vestiges of immunity still exist. FAIRGRAVE, *supra* note 182, at 12, 14-16.

<sup>184</sup> 42 U.S.C. §§ 2000e-2000e-17 (2001) (Equal Employment Opportunities).

Developments came in the area of consumer protection and products liability,<sup>185</sup> which were crystallized in the Restatement Second of Torts in 1965.<sup>186</sup> Comparative fault did not begin to overtake the draconian rule/ defense of contributory negligence (which in many cases completely barred a plaintiff from bringing a claim if she was at all negligent) until the 1970s.<sup>187</sup> The general no duty rule in torts (the rule that we are not responsible for others and have no positive duties towards them) was also narrowed during the 1970s when courts started imposing duties on people in “special relations” with others (e.g. psychiatrists and patients, common carriers and passengers, schools and their pupils, landlords and tenant, and business and their customers).<sup>188</sup> These reforms helped consolidate democracy by providing enforcement mechanisms for hard won democratic rights as well as by making it easier for those whose rights had been violated to access the justice system and vindicate those rights.

## 2. Regressive tort reform

As noted above, Feinman identified the Tort Policy Working Group from the Ronald Reagan-Edwin Meese justice department, as one of the main catalysts of the tort reform movement.<sup>189</sup> That group identified a number of causes of the “liability insurance crisis,”<sup>190</sup> and a set of recommendations or strategies for attacking that “crisis.” They summarily excluded all other explanations besides the civil justice system and thus unsurprisingly their recommendations or strategies focused only on attacking that system, by:

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<sup>185</sup> *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962). See also FEINMAN, *supra* note 8, at 55-56. Rustad and Koenig note a whole range of progressive decisions by the California courts during this era. Rustad & Koenig, *supra* note, 17 at 45-49.

<sup>186</sup> Restatement (Second) of Torts § 402A (1965).

<sup>187</sup> Nockleby & Curreri, *supra* note 1, at 1069-70.

<sup>188</sup> *Id.* at 1065-69.

<sup>189</sup> FEINMAN, *supra* note 8, at 25.

<sup>190</sup> The decline of fault as the basis for liability, the undermining of causation, the explosive growth in damage awards, and the high transaction costs of the system. *Id.* at 26.

- 1) making it harder for injury victims to get into court,
- 2) making it more difficult to win once they are there, and
- 3) restricting damage recoveries for plaintiffs who do win.<sup>191</sup>

This, in perhaps oversimplified terms, has guided the tort reform movement ever since.<sup>192</sup>

a. Keeping plaintiffs out of court.

How do you keep plaintiffs out of court? You make it less attractive for lawyers to take the cases, by putting limits on contingency fees,<sup>193</sup> or through “early offer” mechanisms (which include attorney fee limits) for economic damages which would preclude or make it very difficult to receive non-economic damages like pain and suffering.<sup>194</sup> Or you can make it difficult for states to hire attorneys for complex litigation (e.g. tobacco and gun cases).<sup>195</sup> And finally, you can make it harder for people to join together in class actions.<sup>196</sup> This has been done in part through the Class Action Fairness Act of 2005 which takes many class actions out of the state courts and puts them into the federal courts.<sup>197</sup> The “federalization” of class actions may act

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<sup>191</sup> *Id.* at 25, 27.

<sup>192</sup> *Id.* Note, the structure of this overview follows the structure of FEINMAN, *supra* note 8, at 27-46, but is not limited to its substance.

<sup>193</sup> *Id.* at 27-28.

<sup>194</sup> *Id.* at 29-30.

<sup>195</sup> *Id.* at 30-31.

<sup>196</sup> *Id.* at 31-32.

<sup>197</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (to be codified at 28 U.S.C. §§ 1332(d), 1335(a)(1), 1453, 1603(b)(3), 1711-15). The literature on the act is already quite extensive. *See e.g.*, Robert H. Klonoff & Mark Herrmann, Symposium: *Class Actions in the Gulf South and Beyond, The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695 (2006); *see id.* at 1996, footnote 1 for an extensive list of academic commentary on the Act (forty plus pieces). As Klonoff and Herrmann state, “It is well known that under CAFA, most major class actions, including virtually all multistate class actions, will now be heard in federal court.” *Id.* at 1696.

to deny or impede plaintiff's access to justice for in a number of reasons,<sup>198</sup> including the relative difficulty of certifying classes in federal courts,<sup>199</sup> and the fact that the federal courts are overcrowded and appeals may cause undue delay.<sup>200</sup> Further, to the extent that Republicans have managed to take over the federal judiciary and/or to secure anti-litigation justices on the federal bench, one would expect more bias against plaintiffs in general and against class actions in particular.<sup>201</sup> As we will see below, access to courts can also be limited through the enforcement of arbitration agreements that often preclude class actions,<sup>202</sup> and that, by definition, limit access to the courts, both in the first instance and as a matter of review.

#### b. Making it harder for plaintiff to win cases

The other more direct route is to change the liability rules to make it harder for plaintiffs to win when they get to court. This has happened in the case of making strict liability less strict in products liability cases,<sup>203</sup> setting up procedural obstacles in medical malpractice cases,<sup>204</sup> and

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<sup>198</sup> Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006).

<sup>199</sup> The federal courts' reluctance to issue class certification is well documented (referring to S. Rep. No. 106-420, at 57-59 (2000) (noting minority senators' views on CAFA)) (noting also that a review of forty-three class action cases involving life insurance marketing practices found that cases were nearly twice the certification in state court as in federal court) (referring to Public Citizen, Unfairness Incorporated: The Corporate Campaign Against Consumer Class Actions 85 (June 2003), <http://www.citizen.org/documents/ACF2B13.pdf>).

<sup>200</sup> Kanner, *supra* note 198, at 1654. For the view that class actions are undemocratic because they have led to substantive changes in the law, which did not go through the legislative process, see Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

<sup>201</sup> For an account of the Republican efforts to appoint conservatives to the bench since Reagan see, e.g., Law, *supra* note 27, at 485-86 (noting that Reagan succeeded in making ideological considerations paramount: by one observer's count, over three-quarters of his circuit court appointees furthered his conservative agenda, with the balance appearing to reward the party faithful. *Id.* at 490).

<sup>202</sup> See part V.B.4 *infra*.

<sup>203</sup> See FEINMAN, *supra* note 8, at 34-40. See part V *infra*. In fact the move is to return certain forms of products liability to a negligence standard.

<sup>204</sup> See, e.g., Thomas Baker who, commenting on the effect of the Harvard Medical Malpractice Study (HMPS), notes that "policymakers have seized on the weakest aspect of the HMPS, the analysis of the validity of medical

by providing immunity from suit for certain industries.<sup>205</sup> This has been the case with gun manufacturers<sup>206</sup> as well as biomaterials manufacturers.<sup>207</sup>

c. Capping damages and making punitive damages harder to get.

Finally, one of the most active areas of tort reform has centered around limiting damages, and this has happened by placing limits on joint and several liability,<sup>208</sup> limiting the collateral source rule,<sup>209</sup> and non-economic damage caps,<sup>210</sup> including not only limits on punitive damages,<sup>211</sup> but also limits on pain and suffering damages.<sup>212</sup> In addition to placing caps on

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malpractice claims, and used that analysis to justify imposing caps on damages in medical malpractice cases and additional procedural hurdles for medical malpractice claimants. For that reason the practical impact of the HMPS may well have been to expand the gap between the large number of people who are injured by medical malpractice and the few people who are compensated and to increase the likelihood that the compensation that is received will be inadequate.” Thomas Baker, *Reconsidering the Harvard Medical Malpractice Study: Conclusions About the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501, 511 (2005).

<sup>205</sup> This also echoes the reinvigorated state immunity doctrine of the Supreme Court. See V.B.5 *infra*.

<sup>206</sup> FEINMAN, *supra* note 8 at 33; Daniel Feldman, *Legislating or Litigating Public Policy Change: Gunmaker Tort Liability* 12 VA. J. SOC. POL'Y & L. 140 (2004); *But see* the repeal of immunity in California, John Fowler, *Will a Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?* 34 MCGEORGE L. REV. 339 (2003).

<sup>207</sup> FEINMAN, *supra* note 8, at 33 - 34. See also James D. Kerouac, Note, *A Critical Analysis of the Biomaterials Access Assurance Act of 1998 as Federal Tort Reform Policy*, B.U. J. SCI. & TECH. L. 327 (2001).

<sup>208</sup> See, e.g., the National Association of Mutual Insurance Companies' report on Joint and Several Liability Rule Reform. NAT'L ASS'N OF MUT. INS. COS., JOINT AND SEVERAL LIAB. REFORM STATES, <http://www.namic.org/reports/tortReform/JointAndSeveralLiability.asp> (last visited July 27, 2006).

<sup>209</sup> See NAT'L ASS'N OF MUT. INS. COS., COLLATERAL SOURCE RULE REFORM, <http://www.namic.org/reports/tortReform/CollateralSourceRule.asp> (last visited July 27, 2006). Note that according to Kevin S. Marshall and Patrick W. Fitzgerald, forty-four states have enacted legislation allowing for the consideration of the payment of collateral source benefits. Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL'Y 57, 61 (2005) ( See Appendix I) (arguing that tort reform designed to undermine the collateral source rule is the product of defense oriented public interest group lobbying and has resulted in arbitrary wealth transferring legislation that not only undermines the legitimate purposes of tort law, namely, compensation, indemnity, restitution and deterrence, but is economically unsound).

<sup>210</sup> See, e.g., NAT'L ASS'N OF MUT. INS. COS., NON-ECONOMIC DAMAGE REFORM, <http://www.namic.org/reports/tortReform/NoneconomicDamage.asp> (last visited July 27, 2006).

<sup>211</sup> See, e.g., NAT'L ASS'N OF MUT. INS. COS., PUNITIVE DAMAGE REFORM, <http://www.namic.org/reports/tortReform/PunitiveDamage.asp> (last visited July 27, 2006).

<sup>212</sup> See, e.g., FEINMAN, *supra* note 8, at 40-46. Medical malpractice reform is one very significant area of regressive reform. Nockleby & Curreri believe that reform efforts in this area can be traced to the abandonment of the locality rule of practice which undermined the "conspiracy of silence" by holding doctors to a national standard of care. Nockleby & Curreri, *supra* note 1, at 1023, Part III.B.2.

punitive damages, tort reform has also included increasing the burden of proof on the plaintiff in order to receive punitive damages.<sup>213</sup> As Michael L. Rustad explains,

Forty-five out of the fifty-one jurisdictions either do not recognize punitive damages or have enacted one or more restrictions on the remedy since 1979. These reforms include capping punitive damages, bifurcating the amount of punitive damages from the rest of the trial, raising the burden of proof, allocating a share of punitive damages to the state, and restricting use of evidence of corporate wealth. The handful of jurisdictions that have yet to enact tort reforms are mostly punitive damages cold spots rather than tort hellholes.<sup>214</sup>

All of these mechanisms undermine achievements from the 60s and 70s which made it easier for relatively weak and unorganized victims to organize and to access justice to vindicate their rights. They undermine the deterrent effects of tort law designed to keep consumers safe and hold those who profit from placing dangerous products into the stream of commerce responsible for those products. These changes benefit the few at the expense of the majority of Americans.

#### d. Illegal Americans revisited

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<sup>213</sup> See, e.g., JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 4:60 CLEAR AND CONVINCING EVIDENCE STANDARD (3rd ed) (WL database updated April 2006); See also 22 AM. JUR. 2d Damages § 706 VI. Practice and Procedure B. Evidence 1. Burden; Sufficiency of Proof, Punitive or exemplary and multiple damages (WL database updated May 2006) (requiring clear and convincing evidence and in some jurisdictions, proof beyond a reasonable doubt).

<sup>214</sup> Rustad, *supra* note 35, at 1300.

It may come as little surprise that there has been regressive tort reform at the federal level in the area of prison litigation that achieves all three goals, i.e. making it harder for prisoners to get into court, making it more difficult to win once they are there, and restricting damage recoveries for them when they do win.<sup>215</sup> As James Robertson notes,

The [Prison Litigation Reform Act] constrains inmates by requiring them to exhaust administrative remedies before bringing suit; pay filing fees; and forgo damages for emotional injuries absent a prior physical injury. While the Act permits the judiciary to sua sponte dismiss claims failing to state a cause of action, its power to grant prospective relief cannot extend beyond correcting the right in question; and the relief can be terminated within two years or, in some instances, sooner. In addition, the Act caps fees for attorneys and special masters.<sup>216</sup>

These reforms severely limit victims rights to access to justice and compensation for the violation of their rights. The extent of the limits placed on prisoners, the most vulnerable and politically disempowered minority population in our country is particularly troubling. It is the most drastic demonstration of the symbiotic relationship between the loss of political equality and the further erosion of rights through regressive tort reform.

### *B. The Role of the Supreme Court in Regressive Tort "Reform"*

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<sup>215</sup> Prison Litigation Reform Act Pub. L. No. 104-134, 110 Stat. 1321 (1996).

<sup>216</sup> James Robertson, *The Jurisprudence of the PLRA: Inmates as "Outsiders" and the Counter-majoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 188-189 (2002) (Fall 2001/Winter 2002). President William Clinton signed this bill into law.

For the greater part of the history and evolution of American tort law, the U.S. the Supreme Court has not been a central actor. Few, if any, of the major advances in tort law during the 60s and 70s are credited to that institution.<sup>217</sup> This is because, tort law is traditionally either a part of state common law or state and federal statutory law. Heavy involvement by the Supreme Court in either of these areas raises the possibility of activism, either in the form of the court overstepping boundaries based on federalism concerns or overstepping boundaries based on separation of powers concerns. Of course, it may be contended that either the states or Congress has overstepped rather than the Supreme Court.

In either event, significant legal change in the area of civil litigation and torts at the Supreme Court level signals that something more significant is a-foot than the normal ebb and flow of state based tort reform initiatives. While the wave of tort reform beginning in the 80s is not generally credited to the Supreme Court,<sup>218</sup> the Court has played a very strong supporting role in that movement, both in its rhetoric,<sup>219</sup> and in its decisions during the last two decades. The court has had a significant impact on the broader category of civil litigation, and this impact is commensurate with regressive tort reform in general. The Supreme Court, has, in effect put its imprimatur on the movement.

Andrew Siegel in a careful and thorough piece, paints a picture of the Rehnquist Court as a Court with an overarching hostility to litigation.<sup>220</sup> As Seigel states, “In case after case and in

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<sup>217</sup> See, e.g., Rustad & Koenig, *supra* note 17, at 105, Appendix One: American Tort Law Timeline: 1200-2002. The notable exception is in the area of the first amendment.

<sup>218</sup> Most of it has been carried out state by state through legislation and in their courts. See eg., FEINMAN, *supra* note 8, at 44.

<sup>219</sup> Note the many jibes in the cases limiting the ability of plaintiffs to seek relief in the courts . Siegel, *supra* note 26, at 1124, footnote 102 (mainly coming from Scalia). Note also the rhetoric in the punitive damages cases of damages “running wild.” Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) [Hereinafter Haslip].

<sup>220</sup> Siegel, *supra* note 26, at 1097. Although Siegel is not the first to identify this attitude, he is the first to draw it out as an overarching theme of the court. For earlier, more partial references to the idea, See Vicki C. Jackson,

wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation.”<sup>221</sup> Siegel’s point is not to dismiss the voluminous existing explanatory narratives of the court such as, federalism, conservatism, or even judicial supremacy, but to show that they are incomplete and misleading without an understanding of the Court’s hostility to litigation.<sup>222</sup>

This hostility is not an even handed hostility to all litigants alike. It manifests itself most prominently to the disadvantage of plaintiff’s, and common people, and to the advantage of defendants and legal fictions, namely states and other corporate entities.<sup>223</sup>

Siegel finds it curious that this hostility coexists with “the Court’s concurrent commitment to an aggressive form of judicial supremacy”<sup>224</sup> and he explores a range of explanatory vectors, not least of which is the strong correlation between a conservative social vision and the cases in which the Court has shown the most hostility to litigation as well as when it seems to most zealously promote its supremacy.<sup>225</sup> Other explanatory vectors include an oversimplified view of separation of powers,<sup>226</sup> and the structure and sociology of the American legal profession within which there is a tendency for the best trained and best connected lawyers (including the members of the Court and their associates) to congregate in civil defense and constitutional litigation rather than in personal injury.<sup>227</sup>

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*Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L. J. 691, 706-19 (2000) (identifying "hostility to litigation" as one of the themes behind the court’s 1999 sovereign immunity decisions).

<sup>221</sup> Siegel, *supra* note 26, at 1117. While I track Siegel’s treatment of the Court’s hostility to litigation the treatment below focuses on how that hostility translates into undermining democratic values.

<sup>222</sup> *Id.* at 1102.

<sup>223</sup> As Siegel notes, “Any survey of the Rehnquist Court’s hostility to litigation, however cursory, must begin with the obvious: In myriad ways, the Court has made life very difficult for civil plaintiffs.” *Id.* at 1117. Siegel notes that while the court is generally hostile to litigation, it treats “plaintiffs litigation” as particularly “demeaning and disreputable.” *Id.* at 1201.

<sup>224</sup> *Id.* at 1098.

<sup>225</sup> *Id.* at 1199-1200.

<sup>226</sup> *Id.* at 1200-1201. Although Siegel sees this as one possible explanatory vector, he notes that it is not an explanation that is consistent with a number of the court’s decisions. *Id.* at footnote 458 (referring to the discussion in the text accompanying footnotes 109-110. The implausibility of this explanation is further explored below).

<sup>227</sup> *Id.* at 1202.

The democracy based explanation, which is not directly pursued by Siegel, but which is consistent with both Supreme Court elitism and certain aspects of a conservative social vision, is that the Court lacks sufficient concern for democratic values. The point is not to simply trot out the old hobby horse of counter-majoritarianism (i.e. the court is an activist Court with little respect for other democratic institutions)<sup>228</sup> but that many of the Court's decisions undermine democratic accountability and fail to accord equal concern and respect for everyone who is affected by their decisions.

Those cases which evidence the Court's hostility to litigation most directly include cases involving the Court's reluctance to provide remedies for those whose rights have been violated, official immunity and fee shifting statutes cases, punitive damages cases, cases that involve the Federal Arbitration Act and state sovereign immunity cases.

## 1. Constricting remedies

A number of authors have commented on the Court's constriction of remedies for those whose rights have been violated.<sup>229</sup> One of the most recent authors to address this issue is Andrew Seigel, who analyzes four paradigm case,<sup>230</sup> out of many,<sup>231</sup> in which the Rehnquist

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<sup>228</sup> See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L. J. 481, 495 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 130 (2001). Note that courts are not categorically counter-majoritarian. Given the evidence above concerning the "representative" branches and Richard Abel's work, Abel, *supra* note 33, there is no reason to think that the courts are less likely to provide democratically justifiable decisions in the area of torts.

<sup>229</sup> See Goldberg, *supra* note 40 (arguing for a Constitutional Right to an adequate legal scheme for the redress of wrongs); Christopher J. Roederer, *Another Case in Lochner's Legacy, The Court's Assault on New Property* 54 DRAKE L. REV. 321, 341-42, 342-351, 360 (2006); Andrew Siegel & Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. J. 223 (2003).

<sup>230</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action exists to enforce the disparate impact regulations barring entities who receive federal funds from adopting policies that have the "effect" of discriminating

Court has undermined the traditional view that rights imply remedies for their violation.<sup>232</sup> He analyzes these cases in considerable detail noting that in every case there was an acknowledged or assumed injury to a defined legal interest and there was Supreme Court precedent supporting relief.<sup>233</sup>

It is interesting to note that the Court at times attempts to justify these decisions on democratic grounds.<sup>234</sup> Siegel phrases the court's democratic justification in terms of ensuring that coercive sanctions are not imposed without careful communal deliberation.<sup>235</sup> This line of argument is rooted in separation of powers concerns, namely concerns that the courts not encroach on the prerogatives of representative institutions to make the law and determine whether there should be remedies for the breach of law.<sup>236</sup> In a number of these cases, the Court appears to engage in a dialogue with Congress and or the states, imploring them to speak more clearly if they wish to create private remedies.<sup>237</sup>

However, it is difficult for this explanation of the Court's decisions to hold up, given the Court's assault on §1983 claims, for that assault is in direct conflict with the spirit, if not the

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on the basis of race) *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) (Bivens action (private remedy for Constitutional right violation not available for a federal prisoner held in a private correctional facility in a claim against the corporation for violation of the Eighth Amendment's prohibition on "cruel and unusual punishment."); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (a remedial provision of the Employee Retirement Income Security Act of 1974 (ERISA) does not provide a right of recovery); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (private individuals harmed by violations of the Family Educational Rights and Privacy Act of 1974 (FERPA) cannot seek redress under 42 U.S.C. § 1983).

<sup>231</sup> Siegel lists several cases but does not include *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (dismissing respondent's case for failing to establish that she had a property right in the enforcement of a mandatory restraining, thereby failing to establish that she had a right that was worthy of procedural due process protection which would provide a right to sue under 42 U.S.C. § 1983).

<sup>232</sup> Siegel, *supra* note 26, at 1118-1129.

<sup>233</sup> *Id.* at 1122.

<sup>234</sup> *Id.* at 1129.

<sup>235</sup> *Id.*

<sup>236</sup> Siegel refers to *Corr Servs. Corp. v. Malesko* (534 U.S. 204, 67-69 (2002)) which discusses a number of cases limiting remedies to civil litigants on the grounds of separation of powers). Siegel, *supra* note 26, at footnote 119.

<sup>237</sup> Siegel refers to *Gonzaga University v. Does*, (536 US 273, 280-81 (2002)) (describing the need for congress to speak clearly of its intention to create a private remedy) Siegel, *supra* note 26. See also *Castle Rock*, 125 S. Ct. at 2806 (quoting Colo. Rev. Stat. § 18-6-803.5(a)-(b) (1999)). It is doubtful that the Court in *Castle Rock* was genuine. See, Roederer, *supra* note 229, at, 341-42, 342-351, 360.

letter of §1983 under which Congress explicitly provided for the right to a remedy for the violation of federal law, including constitutional law.<sup>238</sup> This is not only evidenced by some of the cases mentioned above, including *Gonzaga* and *Castle Rock*, but also in cases where the court has expanded official immunity from damages under §1983 and its decisions which make it harder to recoup attorneys fees under §1983.<sup>239</sup>

These decisions fly in the face of democratic concerns, not only by undermining “democratically” passed legislation but by undermining mechanisms designed to help consolidate and protect democratic rights.

A similar pattern is found in the Court’s expansion of the doctrine of qualified immunity over the last twenty years which have resulted in more stringent standards for determining a clearly established right as well as greater tolerance for errors of judgments on the part of officials claiming the immunity.<sup>240</sup> The result is that it is harder in these cases for victims who have had recognized rights violated to vindicate those rights.<sup>241</sup>

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<sup>238</sup> Oddly, the Court uses arguments and policy drawn from implied right of actions cases (under which separation of powers concerns perhaps justifiably act to limit the court in creating rights of action) to limit §1983 claims. This is odd because §1983 was specifically enacted to provide rights of action and thus the Court is undermining the separation of powers when it denies such claims. *See Siegel, supra* note 26, at 1126 *and* Roederer, *supra* note 229, at 321-69.

<sup>239</sup> *See Siegel, supra* note 26, at 1126, 1130.

<sup>240</sup> *Id.* at 1130-31, footnote 123 (also see the cases cited therein); *see Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) *But see* the handful of cases where the Court has limited overly expansive interpretations/ applications of immunity by circuit courts *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (holding that the circuit court erred in applying a “rigid gloss” to the qualified immunity standard that denied relief to tort plaintiffs if there was no prior case with “materially similar” facts where a constitutional violation had been established); *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (unanimously holding, contrary to the position of a number of circuits, that an order denying summary judgment in a qualified immunity case because of uncertainty about the factual sufficiency of the allegations was not immediately appealable).

<sup>241</sup> *Siegel, supra* note 26, at 1131-32; *see e.g.*, Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 482-84 (2002); *Jackson, supra* note 220, at 691, 707 (locating the Supreme Court’s 1999 sovereign immunity decisions in the context of a variety of other anti-litigation initiatives of the Rehnquist Court and offering the Court’s “hostility to litigation” as one of many overlapping themes motivating those decisions). David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989) (arguing that the doctrine is based on right wing judicial activism). The push for the immunity of corporate entities is not confined to the state. FEINMAN, *supra* note 8, at 33-34.

## 2. Access to Fee Shifting

Fee shifting legislation which allowed for those suing to vindicate their civil rights to claim attorneys fees when they prevailed in their cases constituted a very important and progressive development for civil litigants.<sup>242</sup> This development accompanied the Civil Rights Act of 1964 and was later incorporated into the Civil Rights Attorney's Fees Act of 1976. That reform helped to ensure that the rights won on paper, and which evidence the coming to age of our democracy, could actually be vindicated in practice. This reform not only made it easier for victims to obtain counsel, bring claims and receive remedies for the wrongs they suffered, but it had the further purpose and effect of keeping those hard won democratic gains on track. Plaintiff's in these cases are not merely vindicating private wrongs but helping vindicate and deter public wrongs.

Again, however, the Rehnquist Court has widdled away at this mechanism for vindicating those rights which help keep our democracy on tract. It has done so by narrowing down the class of "prevailing plaintiffs" and it has done this by devaluing the importance of having the Constitution, and one's rights under the Constitution, vindicated. In other words the devaluation of constitutional rights is not merely the result of this practice, but is in fact the means through which it is achieved. The Court has denied "prevailing party" status to plaintiff's in cases where the decision that the plaintiff's rights had been violated were not entered into a formal declaratory judgment or injunction, when although entered into judgment they did not provide a "substantial benefit" to the claimant, where the claimant only receives nominal damages, and/ or

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<sup>242</sup> See *eg.*, Siegel, *supra* note 26, at 1136. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243, tit. II & tit. VII.; *see .eg.*, Fair Housing Amendment Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622, 1623, 1636.; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328.

where the claimant whose suit compels the abandonment of an illegal practice or rule is not accompanied by a binding judicial decree.<sup>243</sup>

These cases appear to deny the congressionally mandated relief on rather narrow and technical grounds which are not supported by the separation of powers, nor the democracy reinforcing purposes of the provisions themselves. The cases which narrowly read “prevailing party” to exclude those whose rights are vindicated but whose damages are nominal or insubstantial completely undervalues the federal and constitutional rights these provisions were designed to help safeguard. The fact that money damages are inadequate or inappropriate in some of these cases, or that specific performance is more appropriate does not mean that a vindication of the right is less important or valuable. It demeans the legislation and the rights it was designed to protect to act as if it was designed to only protect losses that could be, or are, converted into money damages. Further, to deny the shifting of fees in these cases does the most damage to the purpose of the legislation, which was to encourage these types of suits.<sup>244</sup> This is because, it is exactly in those cases where there are few monetary damages that it will be most difficult for plaintiff’s to secure adequate legal representation. Without monetary damages or fee shifting the attorney’s fees must come from the plaintiff.

### **3. Punitive Damages**

The Supreme Court has also weighed in on punitive damages, and while Siegel is correct to point out that punitive damages are something of a lightning rod for tort reform advocates, he is incorrect to think that this is in part due to the fact that they “represent a substantial share of

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<sup>243</sup> See e.g., Siegel, *supra* note 26, at 1137. See also *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam); *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *Buckhannon Bd. & Care Home v. W. Va. Dept’s of Health & Human Res.*, 532 U.S. 598, 605(1994).

<sup>244</sup> see *Kay v. Ehrler*, 499 US 432, 436 (1991).

the costs of our current regime.”<sup>245</sup> Punitive damages are in fact very rare<sup>246</sup> and although awards may be extreme in some cases, the numbers are not significant in light of the vast majority of cases.<sup>247</sup>

The Rehnquist Court, unlike any Court before has sought to limit the availability of punitive damages. The changes in this area have gone from requiring certain procedural safeguards to substantive limits on the amount of damages.<sup>248</sup> Not unlike the fee shifting limitation, here the Court pegs its substantive limits to compensatory damages,<sup>249</sup> thus making

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<sup>245</sup> Siegel, *supra* note 26, at 1148. See e.g., Rustad & Koeigin, *supra* note 17 at 60-65. Theodore Eisenberg et. al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*. 3 J. EMPIRICAL LEGAL STUD. 263 (2006) (Hereinafter Eisenberg Et. Al.—Legal Stud.), available at <http://ssrn.com/abstract=912309>. As Eisenberg has stated elsewhere, “Misperceptions about juries and punitive damages are especially strong. Contrary to popular belief, juries rarely award such damages, and award them especially rarely in products liability and medical malpractice cases. Rather, juries tend to award punitive damages in intentional misconduct cases. When juries do award punitive damages, they do so in ways that relate strongly to compensatory awards.” Theodore Eisenberg Et Al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) (Hereinafter known as Eisenberg Et. Al.—Cornell).

<sup>246</sup> Eisenberg found that judges award punitive damages in about 4% of decided cases and juries in about 5% of decided cases. Eisenberg Et. Al.—Legal Stud., *supra* note 245, at 268. However, given that these numbers reflect cases in which plaintiffs win, they only represent about half of all cases tried, and since less than 5% of cases go to court, while the rest settle, and this makes the number of punitive damages cases quite deminimus (below 3 in 10,000).

<sup>247</sup> Eisenberg’s study indicates that most cases involve awards of under \$100,000 (60%); over 23% are under \$10,000, and less than 11% are over 1 million. *Id.* at 270.

<sup>248</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (striking down a damage award as excessive); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426, 448 (2001) (holding that appellate courts should review trial court determinations as to the constitutionality of punitive damage awards *de novo*); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (striking down a damage award as excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (holding that the lax standard for appellate review of punitive damages mandated by the Oregon Constitution violated the Due Process Clause of the Fourteenth Amendment); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446, 465-66 (1993) (reviewing a punitive damage award for excessiveness but finding it within constitutional limits); *Haslip*, 499 U.S. at 23-24 (reviewing both Alabama’s method of assessing punitive damages and the magnitude of an award in a particular case but finding no constitutional problem); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damage awards and declining to set aside a punitive damage award as excessive); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988) (discussing but declining to answer on prudential grounds major constitutional questions regarding punitive damage awards). See Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004).

<sup>249</sup> In *State Farm*, although the Court would not make a bright line ratio, it stated that “...in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 538 U.S. at 410. However the Court did note that “ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.” *Id.* (citing *Gore*, 517 U.S. at 581-82).

cases that do not involve high levels of economic damages harder to bring.<sup>250</sup> Again, like in the fee shifting cases, limiting punitive damages, particularly in this fashion, reduce the efficacy of punitive damages as a way of deterring the egregious behavior of defendants. Whereas above the Court was undermining the role that fee shifting played in securing federal and constitutional rights, here, limitations on punitive damages also limits the public policy role that punitive damages play in deterring some of the worst forms of corporate irresponsibility.<sup>251</sup>

#### **4. Arbitration Clauses (contracting out of defending claims in court, etc.)**

The Court has also gone out of its way to broadly construe the Federal Arbitration Act. As was noted above, contracting out of courts and into arbitration is one way of circumventing an institution that is unresponsive to special interest pressures. There may be a tendency to think that arbitration, as a form of alternative dispute resolution, is thereby progressive.<sup>252</sup> At the very least some might think that it is no less progressive than regular litigation and should be given equal footing. Siegel in fact acknowledges that the Court's recognition of Arbitration may have began as an effort to put arbitration on an equal footing with litigation. However, as he notes, it has ended up as "a policy-driven assault on the wisdom and propriety of litigation as a

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<sup>250</sup> Siegel, *supra* note 26, at 1147.

<sup>251</sup> See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347, 355 (2003); DAN B. DOBBS, *THE LAW OF TORTS* §381 (2000); FEINMAN, *supra* note 8, at 42- 46. Siegel notes that the court is particularly hostile to litigation in cases like punitive damages where litigation is meant to achieve greater societal purposes. Siegel, *supra* note 26, at 1160, footnote 255.

<sup>252</sup> As Garthy notes, "...mandatory arbitration, ...gained support from idealistic academic studies... promoting "procedural justice." The idea was that arbitration allows individuals to tell their stories, and therefore litigants perceive the process as a more legitimate form of justice than the usual result of litigation-a negotiated settlement. Both mediation and arbitration contain a tradition-now seemingly muted-that the results are supposed to be better than strict enforcement of the law." Garthy, *supra* note 172.

mechanism for resolving such disputes.”<sup>253</sup> There is little question that arbitration has its benefits, particularly in terms of costs to the parties. For equal bargaining partners arbitration may in fact be superior to litigation.

The Court’s practice, however, has been to ignore the bargaining disparities of the parties (particularly of economically weaker plaintiffs). As Siegel states, “[i]t has consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs.”<sup>254</sup> There are at least five significant effects of allowing companies to bind consumers (and smaller less powerful companies) to arbitration. First, the company gets to choose a venue that is more congenial to it. Second its gets a forum that has less due process than a court has,<sup>255</sup> e.g. in terms of discovery, the right to a jury,<sup>256</sup> and judicial review. Third it can oust the possibility of punitive damages. Fourth, it can eliminate the

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<sup>253</sup> Siegel, *supra* note 26, at 1141.

<sup>254</sup> Siegel, *supra* note 26, at 1117-1118. The literature critiquing the court on this point is vast. *See e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996) (arguing that the Supreme Court's arbitration jurisprudence will allow "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WISC. L. REV. 33, 36 (1997) ("The Supreme Court has created a monster."); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (critiquing arbitration case law for increasingly favoring arbitral forums without regard for basic fairness or rule of law norms); *See also e.g.*, Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); David M. Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B. U. L. REV. 745 (1999); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); Margo E. K. Reder, *Arbitrating Securities Industry Employment Discrimination Claims: Restructuring a System to Ensure Fairness*, 2 U. PA. J. LAB. & EMP. L. 19 (1999); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WISC. L. REV. 831 (2001).

<sup>255</sup> “Just as important to anyone concerned with the morality of law is the fact that the arbitrator can decide a case without regard for the law or the facts in a case. There is no predictable outcome, no procedural protection.” Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205, 1236 (2000). *See also* Garthy, *supra* note 172.

<sup>256</sup> This arguably undermines one of the main democratic components of our system of justice (both civil and criminal).

possibility of victims joining together in class actions to bring suit.<sup>257</sup> Finally, as Richard Posner states, parties are not entitled to awards that are “correct or even reasonable, since neither error nor clear error, nor even gross error is a ground for vacating an award.”<sup>258</sup> All of these factors benefit the few at the expense of the majority. As Garthy suggests,

It is not the simplistic bias of decision-making structured for the employers or companies to win. Instead, the bias is found in a system in which only a few constituencies are comfortable making their arguments and confident that their concerns will be understood, even if they lose some cases. The bias is also in a process that selects neutrals who will be safe for the leading lawyers and clients- whoever controls the selection- and rejects those who appear too political, too unreliable, or too risky even on the basis of cultural stereotypes.<sup>259</sup>

This is about as undemocratically tailored as a justice system can be. It is perfectly suited for employers and companies who are repeat players and everyone else, must simply take it, or go without.<sup>260</sup> Deborah Post, in describing the 7<sup>th</sup> Circuit case of *Hill v. Gateway 2000 Inc.*,<sup>261</sup>

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<sup>257</sup>Eliminating class actions means that many consumers with small harms simply won't pursue claims, thereby allowing business to defraud large numbers of consumers in small amounts. FEINMAN, *supra* note 8, at 104. It is only through joining as a class that they can in any way approximate the power of big business. *Id.* at 80; *see also* Post, *supra* note 255, at 1226. In *Gateway*, Justice Easterbrooke upheld an “arbitration agreement” that was not negotiated, but simply shipped with the plaintiffs computer binding the plaintiff/consumer to its terms unless the consumer shipped the computer back to the manufacturer at its own cost within 30 days (a rolling shrink wrap). *Hill v. Gateway 2000*, 105 F.3d 1147 (7<sup>th</sup> Cir. 1997) cert. denied 522 U.S. 808, 118 S. Ct. 47 (1997); *see also* FEINMAN, *supra* note 8, at 88. This is just one way of forming binding contracts with little to no notice, much less bargaining. In addition to the normal boilerplate adhesion contract, others include, shrink wraps, browse-wraps and click-wraps in which the agreement is packaged with the product, put on a website or on the computer screen to click. FEINMAN, *supra* note 8, at 86.

<sup>258</sup> *IDS Life Insurance Company v. Royal alliance Associates, Inc.*, 266 F. 3d 645, 650-651 (7<sup>th</sup> Cir. 2001).

<sup>259</sup> Garthy, *supra* note 172, at 933.

<sup>260</sup> Just as we saw the Court abandoning its fidelity of separation of powers, the Court here abandons its fidelity to federalism when into comes into conflict with its desire to limit access to the courts through the FAA. Siegel, *supra*

states, “The Gateway case ...threatens the democratic process on two levels. Not only does it create a model of contract formation that gives entire control over the terms of the agreement to one side, it also deprives the less powerful party, the individual consumer, of the only mechanism she has to directly confront behavior that is predatory, abusive or simply overreaching.”<sup>262</sup>

## 5. States Rights

One of the most dramatic areas of constitutional change has been in the area of “states rights”. The Court has brought new life to state sovereign immunity in a whole host of cases through a diverse set of mechanisms.<sup>263</sup> The result, as with many of the cases above involving rights of action, qualified immunity, and arbitration, is that colorable claims are dismissed without regard for their merit.<sup>264</sup> The result is that victims of illegal government conduct are denied access to justice.<sup>265</sup> It also means that one important mechanism for holding government accountable to the people is eroded, and with it, respect for the rule of law.

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note 26, at 1142-3. *See e.g.*, *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (holding that the FAA preempts state law protecting access to courts in wage collection actions).

<sup>261</sup> Gateway, 105 F.3d 1147.

<sup>262</sup> Post, *supra* note 255, at 1235.

<sup>263</sup> Siegel summarizes the area: “the Court has reaffirmed and firmly constitutionalized the expansive and counter-textual reading of the Eleventh Amendment ..., held that Congress may not abrogate states' Eleventh Amendment immunity under any of its Article I powers, developed a fairly intrusive test to determine whether Congress has properly abrogated the states' immunity pursuant to its Fourteenth Amendment powers, and applied that test with increasing rigor and skepticism. At the same time, the Court has--without relying on the Eleventh Amendment or any other textual provision--held that the Constitution's structure requires that the states be accorded sovereign immunity from suits in their own courts (absent their consent) and from federal administrative proceedings that bear significant indicia of adjudication. In a variety of less well-known cases, the Court has also narrowed the well-established doctrine whereby individuals may, notwithstanding sovereign immunity, seek injunctions against state officials in their official capacity, made it easier for state officials to obtain dismissal of lawsuits on sovereign immunity grounds at an early stage in the litigation process, and overruled precedent suggesting that a state does not possess full Eleventh Amendment immunity when it engages in routine commercial activity. Siegel, *supra* note 26, at 1153-54, n 219-228.

<sup>264</sup> Siegel, *supra* note 26, at 1163.

<sup>265</sup> *Id.*

The justification for the revival of state immunity is a somewhat odd anthropomorphism of the state.<sup>266</sup> The idea is that states are somehow endowed with sovereignty, the likes of which make them susceptible to moral harm or assaults to their dignity. The concept is a throwback to the days in which Kings and Queens ruled the land, when they were “the sovereign” wholly capable of suffering indignity at the hands of others. There is considerable debate as to whether or not dignity actually was the animating idea behind the 11<sup>th</sup> Amendment and sovereign immunity.<sup>267</sup> The historical argument as to whether or not dignity was crucial to the 11<sup>th</sup> amendment and state sovereign immunity is somewhat wayward to our concerns. Like many issues in legal history, there are arguments and authority on both sides.

As Siegel points out, however, even if dignity was the original rationale for the 11<sup>th</sup> Amendment, it was a different notion of dignity than the one called forth by the Court today. The dignity referred to before consisted in the notion that sovereigns were equal and that it was inappropriate (or undignified) to subject one sovereign to the courts of another sovereign.<sup>268</sup> This purportedly undermined the equality of sovereigns.<sup>269</sup> However, the modern focus is on the indignity of being brought into court (even the state’s own court). While the former view sounded in notions about the equality of sovereigns, if Siegel is correct, the modern notion is not animated by equality, but by a sort of elitism which places the state sovereign above its citizens.

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<sup>266</sup> Siegel notes that Justice Thomas has provided the fullest articulation of the dignity principle, “[t]he preeminent purpose of state sovereign immunity is to accord the States the dignity that is consistent with their status as sovereign entities.” *Id.* (citing Fed. Mar. Comm’n, *FMC v. South Carolina State Ports Authority*, 535 U.S. 743 (2002)). Siegel, *supra* note 26, at 1157.

<sup>267</sup> Note that the dignity rationale for sovereign immunity was only used sporadically. It came up in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and then in *In re Ayers*, 123 U.S. 503 (1887). It was only raised again in 1959 where it was not relied upon. *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 276, n.1 (1959). As the court pointed out in that case, “More than the dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!” *Id.* (citing MARIAN D. IRISH ET. AL., *THE POLITICS OF AMERICAN DEMOCRACY* 123 (1959)).

<sup>268</sup> This was the kind of dignity at play which was rejected by Chief Justice Marshall in *Cohens v. Virginia*. Siegel, *supra* note 26, at 1160.

<sup>269</sup> Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

As Siegel notes, “As the Court sees it, compelling an unwilling state to defend a private lawsuit for damages threatens state dignity for much the same reason and in much the same way that subjecting a private party to such a suit diminishes the dignity and threatens the status of that private party”<sup>270</sup> In other words, for Siegel, its part of a visceral reaction to having to defend oneself in court.

However, modern states, be they national or federal, like corporations and associations, are artificial entities, and do not possess the moral qualities needed to have dignity. While the earlier conception of equal dignity of states vis-a vis other states resonates with democratic impulses (although it too raises concerns in our global interdependent world),<sup>271</sup> the modern form of the idea, is decidedly undemocratic. Again, the idea is a throwback to pre-democratic times, when the sovereign made, imposed and was above the law. This is inconsistent with notions of equality before the law. The Court, in effect, is choosing to protect the “dignity” of the state over the rights of plaintiff citizens. It is undermining “the rule of law” and equality before the law, thereby elevating “rule by the sovereign” and undermining democratic accountability.<sup>272</sup>

## VI. CONCLUSION

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<sup>270</sup> Siegel, *supra* note 26, at 1162.

<sup>271</sup> See, e.g., DARREL MOELLENDORF, *COSMOPOLITAN JUSTICE* (2002) (critiquing John Rawls statist approach to global justice on Rawlsian grounds).

<sup>272</sup> Although beyond the scope of this paper, the present administration’s attack on the rule of law should be noted. The attack has taken many forms since the beginning of the “war on terror”, but a few recent examples include the president’s abuse of signing statements to selectively enforce the law as well as proposed amendments to the War Crimes Act to insulate government officials from suits based on war crimes committed against detainees. See, e.g. Press Release, American Bar Association, Blue-Ribbon Task Force Finds President Bush’s Signing Statements Undermine Separation of Powers (July 24, 2006) *available at* <http://www.abanet.org/media/releases/news072406.html>; and Jeffrey Smith, *Detainee Abuse Charges Feared: Shield Sought From '96 War Crimes Act*, WASHINGTON POST, July 28, 2006, at A01, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2006/07/27/AR2006072701908\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/07/27/AR2006072701908_pf.html).

Given the political science findings from sections II-IV above, there is little hope that this work, or anyone else's academic work, is going to revitalize our democracy. This is not to say that critical work has no place or no chance of impact. There is some hope that this piece, like the works of professors Abel, Baker, Feinman and Rustad, among others, will at least demystify what is at stake in modern tort reform. Demystification is a necessary, although insufficient step towards transparency, accountability and a revitalized democracy. Although many authors have all but said what was put so bluntly in the opening sentence to this article, the choice to be brutally frank about our democracy's demise was intended to place the present course of tort "reform" in sharp relief against the unreflective idea that our ship of state and law has been sailing a steady democratic course for over two hundred years. Although peculiar, this frankness was inspired in part by the authors of the American Law Institute Restatement (Third) of Products Liability. Although, their sincerity is dubious in a number of respects,<sup>273</sup> their "restatement" of the law also placed the course of products liability in sharp relief against the path of the ALI Restatement (Second) of Torts §402A. Their, perhaps overzealous, crystallization of:

- the death of strict liability in product design and failure to warn cases (§2);
- the death of the consumer expectations test, and the requirement that the plaintiff prove the existence of reasonable alternative design (§2(b));
- the nearly complete immunity given to prescription drugs (§ 6(c)); and

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<sup>273</sup> The fact that they attempt to maintain that their restatement is not political, but merely a restatement of existing laws is as hard to accept as their assertion that the choice between the risk-utility approach to products liability and the consumer expectation approach is merely a pragmatic choice, a matter of getting it right, like figuring out the boiling point of water, rather than a choice deeply rooted in political as well as principled considerations of justice. See, James A. Henderson Jr. & Aron D. Twersky, *What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L L.J. 1, 14. (1999).

- the pass given to “unavoidably unsafe” products such as drugs, cigarettes and alcohol,<sup>274</sup> made it very clear just how far off course the law of products liability was going from the path of the Second Restatement, and what was being lost from the perspective of consumer protection and corporate responsibility. Whether one thinks the Third Restatement was merely a cold but brutally accurate obituary or a politically motivated attempt to put a bounty on the head of strict liability,<sup>275</sup> it brought the issue out in stark relief. As Ellen Wertheimer notes, “The Third Restatement... made it impossible for courts to ignore what they had done, and many did not like what they saw.”<sup>276</sup>

What they saw, once the dust settled, was that the risks and losses did not go away. In fact, those risks and losses fell on innocent consumers who are not only at a disadvantage from the perspective of making products safer, but who also are not equally equipped to insure for,

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<sup>274</sup> Earlier outlines of the present work included a section depicting the rise of consumer protection and strict liability in democratically accountable Europe and the fall of strict liability and consumer protection in “manufacturer’s accountable America.” Luke Nottage in his comparative study of products liability in Japan the U.S. E.U., and Australia, depicts EU law as making steady pro-consumer progress from the 1960s to the present, Australia making rather steady progress from the 60s until about 2000, Japan making very little pro-consumer progress until 1994, when it adopted its Product Liability Law which was modeled on the E.U. directive, and the United States, whose pro-consumer product liability law peaked in the early 80s and started a rather steep decline until the present. Luke Nottage, *Comparing Product Safety and Liability Law in Japan: From Minamata to Mad cows – and Mitsubishi in* PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE 336 (Duncan Fairgrieve ed., 2005). See also Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 994 (1998); Josephine Liu, *Two Roads Diverged in a Yellow Wood: The European Community Stays on the Path to Strict Liability*, 27 FORDHAM INT’L L.J. 1940 (2004). Cf. Matias Reisman, *Liability for Defective Products at the Beginning of the Twenty-first Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 801 (2003) (somewhat more cautious about the E.U. being more protective of consumers); and cf. Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT’L L.J. 45, 53-61 (1999) (arguing that the E.U. also uses a negligence standard in design and failure to warn cases).

<sup>275</sup> See, FEINMAN, *supra*, note 8 at 40. The idea that §2(b) represents a wish list for manufacturers has been repeatedly cited since it was first stated by Frank Vadall in 1997. See, e.g., *id.*; Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 927 note 116 (2005); Aaron Arnold, Note, *Rethinking Design Defect Law: Should Arizona Adopt the Restatement (Third) of Torts: Products Liability?*, 45 ARIZ. L. REV. 173, 174 (Spring 2003); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1727 n.116 (2003) (quoting *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 751 n.16 (Wis. 2001) (quoting Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Product Liability section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 261 (1997)).

<sup>276</sup> Wertheimer, *supra* at 274. Although she does note that some courts did follow the Third Restatement even though it conflicted with earlier precedent. *Id.*

absorb or spread the losses they suffer.<sup>277</sup> Although the campaign to see the corporate producer as the symbol of American freedom -- like a mustang, tethered to a shrub in the desert of social-welfare tort law, being fed upon by greedy parasitic lawyers and consumers-- persists,<sup>278</sup> the reality is that, when horses run wild, people get trampled. Under the Third Restatement, those who trample (who profit from putting products into the stream of commerce, who are best placed to test and make products safe or warn of their hazards, and are best placed to insure against, absorb and spread the risks and losses) now have a much better chance at avoiding responsibility and liability for those losses. This not only raises the risk of being trodden (by undermining the deterrent effect of products liability law) but it also raises the risk that once trodden upon, the consumer must bear the loss.

Although she is perhaps overly optimistic, Wertheimer's argument, that "the courts are now in the process of reaffirming their commitment to retaining--or reinstating--the doctrine [of strict liability]" because they did not like what they saw, provides some hope that if people see clearly what is at stake in the current wave of tort reform, they may actually react progressively, putting torts back to work for democratic progress.

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<sup>277</sup> As Reisman notes, "In the United States, accident victims are not nearly protected comprehensively. In 1997, 16 % of all Americans and 37 % of the low-income population had no health coverage at all, and the number kept rising. Only 66 % of the adult workforce have disability benefits, and these benefits are usually less than ample. All States have enacted workers compensation schemes but the compensation they pay is fairly low and often insufficient to make ends meet. Overall, social and workers insurance cover only about three-fifths of the economic consequences of accidents, forcing victims to bear the remaining 40 % themselves." Reisman, *supra* note 59, at 828.

<sup>278</sup> See, e.g. Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, 645 ("The free enterprise system is the engine that drives America's healthy economy, the benefits of which necessarily include inherent risks. Unfortunately, many facets of America's civil justice system operate to shift all of those risks to the entrepreneurs who produce the consumer goods and services that make people's lives easier or more pleasant....The tort system has undergone a transformation from one designed solely to redress wrongs to one focusing more and more on criminal-style retribution and redistribution of wealth.") Although it is doubtful that this statement was ever true, it may have come closer to the truth some 30 years ago, but not today.