

POTENTIAL CONGRESSIONAL RESPONSES TO THE
SUPREME COURT'S DECISION IN STATE FARM
MUTUAL AUTOMOBILE INS. CO. V. CAMPBELL:
CHECKING AND BALANCING PUNITIVE DAM-
AGES

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
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THE SUPREME COURT'S DECISION IN *STATE
FARM MUTUAL AUTOMOBILE INS. CO. V.
CAMPBELL*: CHECKING AND BALANCING PU-
NITIVE DAMAGES**

TUESDAY, SEPTEMBER 23, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Subcommittee met, pursuant to call, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. Good afternoon. This is the Subcommittee on the Constitution. I am Steve Chabot, the Chairman. This afternoon's hearing is concerning the issue of punitive damages.

I will begin by making an opening statement. If one of our Democratic colleagues gets here, they will have an opportunity to do that as well; and then we will introduce our panel.

The United States Supreme Court noted in 1974 that, "Juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."

Until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages awarded in each case was modest in proportion to the compensatory damage award. Then, in the late 1970's and 1980's, the size of punitive damage awards increased dramatically. The advent of mass tort litigation led to an increase in punitive damages claims against manufactures, including the possibility of repeated imposition of punitive awards for essentially the same conduct. Along with these changes came a dramatic increase in the size and frequency of punitive awards.

Today juries have awarded punitive damages against companies in amounts exceeding a hundred billion dollars, well in excess of the gross domestic products of many industrialized nations. These enormous punitive damage awards have greatly enriched the personal injury industry, which a report released today by the Manhattan Institute Center for Legal Policy calls Trial Lawyers Inc. That report shows that Trial Lawyers Inc. rakes in almost \$40 billion a year in revenues, which is one and a half times more than Microsoft or Intel and twice as much as Coca-Cola.

On April 7th, 2003, the Supreme Court, in *State Farm Mutual Automobile Insurance Company v. Campbell*, held that an award of

\$145 million in punitive damages on a \$1 million compensatory judgment violated due process.

The Court further held that the jury had been allowed unconstitutionally to award punitive damages to punish and deter conduct that occurred out of State and bore no relation to the insured's harm.

Finally, the Court stated that, for purposes of determining whether an award of punitive damages is excessive, an award that exceeds a single-digit ratio between punitive and compensatory damages may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages, but that higher ratios are likely to be unconstitutional.

Even Supreme Court Justice Ruth Bader Ginsburg, who disagreed with the majority's constitutional analysis and dissented in the *State Farm* case, nevertheless stated that, "Damage-capping legislation may be altogether fitting and proper."

In light of the Supreme Court's decision, today the Constitution Subcommittee will explore the insights of the Court into the unfairness of large punitive awards in certain circumstances and steps Congress might take to alleviate that unfairness. Indeed, Federal statutory guidelines for the award of punitive damages would provide potential wrongdoers with the sort of, "fair notice," regarding potential punishments the Supreme Court has held is required under the due process clause.

Possible steps Congress might take to that end include the following:

- Prohibiting the multiple imposition of punitive damages by courts in different States for the same conduct;

- Requiring that punitive damages be redirected to the State, with appropriate safeguards for the abuse of punitive damages;

- Providing for protections from excessive punitive damages for small businesses; and

- Providing that judges decide the appropriate size of punitive damages, just as judges decide on appropriate sentences in criminal cases.

Congressional action might also be necessary to codify the due process standards the Supreme Court handed down in *State Farm* because some lower courts are attempting to skirt the impact of the ruling by broadly defining compensatory damages and thereby bringing large punitive awards within single-digit ratios to compensatory damages.

As the Wall Street Journal recently editorialized, "A high point of the Supreme Court's last term was its 6-3 decision to draw the line on outrageous punitive damages awards. But a large section of the Nation's plaintiffs' bar and even some judges have been working harder since to undermine the ruling."

I look forward to hearing from all of our witnesses here this afternoon and exploring ways Congress might enact checks and balances that deter abuses of punitive damages.

I would now recognize the gentleman from New York, the Ranking Member, Mr. Nadler, for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

This Committee has devoted a great deal of time to the question of punitive damages and Congress' role to the extent there might be appropriate and constitutional policy grounds to intervene.

While the Supreme Court has made clear that in its opinion due process rights are implicated in the awarding of punitive damages, and the Supreme Court seems to be reestablishing substantive due process, it is not entirely clear to me how much beyond the Court's own strictures we may permissibly go. I hope our witnesses will address this.

The limits on Congress' power to enforce the due process clause under section 5 of the 14th amendment is one that this very activist Court has pushed front and center. If more judicial activists like the President's ideal Justices, Scalia and Thomas, should find their way onto the Court, our power to address any such issues will likely be further diminished as the Court decreases the power of Congress under section 5 of the 14th amendment.

It is our Subcommittee's direct responsibility for reviewing such issues, and I hope we can get to this.

In addition to the constitutional limits of Congress' power, I would also hope that we would try to clarify what in fact the Court was telling us in *State Farm* and in *BMW v. Gore*. Reading some of the discussions of these cases, I can't help but sense an overriding desire on the part of some commentators to read far more into these cases than the Court wrote into its decisions.

Punitive damages serve a number of important functions which—despite a few horror stories, which are themselves either apocryphal or overturned in the courts, the functions remain valid and in the public interest. Persons causing great harm—persons deliberately or with gross negligence causing great harm should not view paying damages as merely a cost of doing business, a cost that might fit neatly into a risk analysis of wrongdoing. That is what happened in the Ford Pinto case in which the cost of paying claims to victims of a known deadly hazard was deemed less than the cost to retool the assembly line, and thus the hazard was maintained knowing full well that further people—more people would be injured or killed.

This is the purpose of punitive damages, to punish this kind of egregious wrongdoing, and to deter, to be a deterrent to such conduct. It is not immediately clear why a deterrent—or the necessity of the deterrent should bear any great relationship to the amount of actual damages in a given case. There is nothing wrong and indeed something highly desirable in maintaining this disincentive to wrongdoing in an appropriate relationship to the harm and the conduct of the tort-feasor.

The Court has made some effort to spell out those factors without setting a bright line formula. I would hope that we can get a clear view of those factors.

Similarly, when looking at the imposition of punitive damages in multiple jurisdictions, I would ask our witnesses to consider that proposal in conjunction with the Supreme Court's restriction on the awarding of punitive damages for action jurisdictions other than the one hearing the case, as well as the extent to which such a proposal might undermine the core deterrent purposes of punitive damages.

In other words, if you are in Michigan, deliberately making a car that is knowingly unsafe, how do you fashion punitive damages for someone who is injured in New Jersey or in New York and who doesn't suffer a heck of a lot of damages, although the next fellow might be killed in a way that would serve the deterrent function of the punitive damages and will meet the requirements of the Court with respect to multiple jurisdictions?

Finally, with respect to various other proposals, including those suggested that the Government, rather than the injured parties receive some or all of the punitive damages, how would this affect the rights of plaintiffs and whether current law allows for the appropriate use by Government of some portion of an award or settlement?

I might add here that I made a proposal a number of years ago suggesting that where a very large punitive damage award was necessary for deterrent or punishment purposes but that in a case in which this might result in unjust enrichment to a plaintiff who had suffered damages and got the damages, then you wanted to award, because it is against a very large tort-feasor, a very large award as a deterrent to further wrongdoing, that perhaps a fraction, perhaps the amount that the plaintiff received should be—have some relation to the damages, and the balance should go to Government or some charity or whatever. So you wouldn't limit the deterrent effect of the punitive damages but would do something about the sense of injustice of an unjust enrichment of a plaintiff.

I thank the Chairman for scheduling this hearing. I hope it will clear away much of the uncertainty surrounding the Court's punitive damages decisions and yield some clarity in this field, and I yield back.

Mr. CHABOT. Thank you very much.

At this time, we will introduce the panel this afternoon.

Our first witness is David Owen. Mr. Owen is the Carolina Distinguished Professor of Law and Director of the Office of Tort Law Studies at the University of South Carolina, where he teaches courses on tort law and products liability. In addition to numerous journal articles, Professor Owen has edited and coauthored various books, including *Prosser and Keaton on Tort Law*, several books and a treatise on products liability law, and *Philosophical Foundations of Tort Law*. He is also an advisor to the American Law Institute on the Restatement (Third) of Torts, and he was the editorial advisor for the Restatement of Products Liability. We welcome you here this afternoon.

Our second witness is Robert Peck. Mr. Peck is Senior Director of Legal Affairs and Policy Administration for the Association of Trial Lawyers of America. He is also President of the Center for Constitutional Litigation. In 2001, Mr. Peck shared the Public Justice Achievement Award from Trial Lawyers for Public Justice with other members of his law firm and received the Pursuit of Justice Award from the American Bar Association's Tort and Insurance Practice Section. And we welcome you here this afternoon.

Our third witness will be Victor Schwartz. Mr. Schwartz is a member of the American Law Institute. He has served on the Advisory Committee on the Restatement of Torts, Products Liability, and he continues to sit on the Advisory Committee to the Restate-

ment of Torts Third, General Principles. For over two decades he has been the coauthor of the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz Cases and Materials on Torts*. He has authored hundreds of law review articles and speaks before national and international audiences interested in civil justice reform. Mr. Schwartz also co-chairs the Civil Justice Reform Committee of the American Legislative Exchange Council and chairs the American Bar Association's Legislative Subcommittee of the Product Liability Committee. He is also a partner at Shook, Hardy & Bacon. And we welcome you here this afternoon as well.

We look forward to all of the testimony this afternoon.

You are probably familiar with our 5-minute rule. The lights in front of you will indicate—when the yellow light comes on, you have 1 minute to wrap up. When the red light comes on, your 5 minutes is up, and we would appreciate if you would conclude at approximately that time.

Mr. CHABOT. We will begin with you, Mr. Owen.

**STATEMENT OF DAVID OWEN, CAROLINA DISTINGUISHED
PROFESSOR OF LAW AND DIRECTOR OF THE OFFICE OF
TORT LAW STUDIES AT THE UNIVERSITY OF SOUTH CAROLINA**

Mr. OWEN. Thank you, Mr. Chairman, Members of the Committee. It is my great pleasure to be with you today to talk about what I have been researching, writing and teaching about for 30 years, which is punitive damages law.

My particular areas that I have emphasized in that field are products liability in particular but more broadly punitive damages in general.

In 5 minutes, I would like to summarize what I have learned in 30 years; and I understand that the purpose of the panel's meeting today is to see if there is a way to constitutionalize legislatively punitive damages in order to make them more reasonable and perhaps more effective.

The first point I would like to make, because I think the assumption behind this hearing is that punitive damages are bad, is that in fact I believe that, on balance, they are good, that they are an important, vital, historical, ancient part of the jurisprudence of most civilizations.

In fact, the very earliest known legal code known to men and women, the Code of Hammurabi, had provisions for punitive damages for particular wrongful acts. And through Mosaic law of 1200 BC through Roman law up through the middle ages in England and from America in the 1700's, we have had this form of principle, with one foot in the criminal law and one foot in the civil law, to punish egregious acts of misconduct that are not caught by the criminal prosecutor and that do not fully compensate the victim.

So while most modern civilized countries have abandoned at a superficial level punitive damages, I think it is important to realize that it is deeply imbedded in our own jurisprudence, both in some State constitutions, in many Federal statutes, and in many State decisions and also legislation.

So that is my first point.

My second point, however, is that it is a very powerful instrument of the law, and it can be substantially abused. So I think the underlying purpose behind this hearing is vital, and that is, the State patchwork of judicial and statutory rules governing the limitations on punitive damages, and there have been a number of substantial reforms enacted by State legislators and by common law judges as well as by the Supreme Court over the last decade. Despite those substantial reforms, I think in a Nation such as ours, where manufacturers market to the 50 States, that it would be helpful to have principles that were more predictable in the way that the Supreme Court suggests is desirable.

So my conclusion is that Federal reform appears to be a desirable path; and I make that conclusion as a tort and punitive damages specialist, not as a constitutional scholar.

Now, what I would like to do is to identify those reforms. I have studied all of the various reforms for, as I say, three decades, that I believe are the most straightforward, that might have the best potential for keeping the substance of punitive damages punishment, deterrence, and I believe retributive compensation, while harnessing them to a manageable level.

The first such reform I would propose is that the standard of proof be identified as clear and convincing evidence, as opposed to the normal preponderance of the evidence in civil actions, remembering that punitive damages are in a sense quasi-criminal, standing half-way toward the criminal law. I think that is an effective reform.

Another reform that the Supreme Court hinted at but has not yet required, is to require trial judges to issue written opinions. I think that would be a very important way that would help appellate courts then review their rationality and appropriateness.

Finally, I think the most important reform is to enact some form of cap. Although I believe in the theory that Mr. Nadler was suggesting in terms of allowing punitive damages as high as possible for individualized justice in a particular case, I like that view from a theoretical perspective, I think it is correct ideologically. I think in the real world it doesn't work and that it causes more injustice than justice and that caps such as treble damages in the antitrust area and with respect to consumer protection statutes are a particularly desirable way to go.

So my particular recommendation would be, in that respect, to impose a principle of treble damages, either as a maximum or simply as an absolute amount in every case, plus attorneys fees and the costs of litigation to take care of the cases involving less substantial harms to be sure that the litigation costs are fully compensated.

Then, together with that, I would have a special cap for mass disaster cases, that is like asbestos, what might have happened in the Firestone/Ford Explorer situation had that litigation not been effectively controlled, and that might be that once a litigation was designated as defined somehow in the legislation as a mass disaster, thereafter the cap would be reduced from three times compensatory damages to one times compensatory damages. That would assure that every plaintiff was fully compensated for attorneys' fees, costs of litigation and something extra. And yet, as the

companies perhaps march toward bankruptcy, more would be left in the corporate tills for the remaining plaintiffs.

Those are simple reforms. They are straightforward. I think they are reasonable and help from a due process perspective to tailor punitive damage assessments in a way that can be contemplated by defendants, that will be painful to defendants, but they will not give rise to the type of extraordinary awards such as we saw in *State Farm*.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Owen follows:]

PREPARED STATEMENT OF DAVID G. OWEN

INTRODUCTION

Mr. Chairman, Members of the Committee, thank you for inviting me to offer some thoughts on whether and how Congress might reform the law of punitive damages, a topic I have studied in depth over the last thirty years of teaching, writing, and consulting (with counsel for plaintiffs and defendants) on the role of punitive damages in American jurisprudence. Since the Committee is now just beginning to investigate this rich topic, my materials first outline the subject and then provide a background describing various aspects of punitive damages law and its reform by judiciary, state legislatures, and the Supreme Court.

I conclude that punitive damages serve a variety of important goals; that abuses in their use suggest the propriety of some reforms; that reform proposals vary widely in their logic, fairness, and practicality; that state legislatures and the courts, particularly the United States Supreme Court, already are substantially reforming this area of the law; and that Congress should proceed with utmost caution in legislating in this complex area of the law.¹

Nature of Punitive Damages

"Punitive" or "exemplary" damages are money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights. The principal purposes of such damages are usually said to be (1) to punish a defendant for outrageous conduct, and (2) to deter the defendant and others from similarly misbehaving in the future. The law and commentary on punitive damages is vast, rich, and expanding exponentially.

A jury (or judge, in the absence of a jury) may, in its discretion, render such an award in cases in which the defendant is found to have injured the plaintiff maliciously, intentionally, or with a "conscious," "reckless," "willful," "wanton," or "oppressive" disregard of the plaintiff's rights. Punitive damages may be assessed against an employer vicariously for the misconduct of its employees, although some states restrict such awards to instances where a managing officer of the enterprise ordered, participated in, or consented to the misconduct. The damage to the plaintiff may involve physical, emotional, property, or financial harm. The amount of the award is determined by the jury upon consideration of the seriousness of the wrong, the seriousness of the plaintiff's injury, and the extent of the defendant's wealth.

¹ This statement draws from D. Owen, *Products Liability Law* (Thompson/Westgroup 2004, forthcoming) © 2003 David G. Owen and Westgroup, which itself draws from D. Owen, M. S. Madden, & M. Davis, *Products Liability* ch. 18 (2000); Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Villanova L. Rev. 363 (1994); Owen, *Civil Punishment and the Public Good*, 56 So. Cal. L. Rev. 103 (1982); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976).

Straddling the civil and the criminal law, punitive damages are a form of “quasi-criminal” penalty: they are “awarded” as “damages” to a plaintiff against a defendant in a private lawsuit; yet their purpose in most jurisdictions is explicitly held to be noncompensatory and in the nature of a penal fine. Because the gravamen of such damages is considered civil, the procedural safeguards of the criminal law (such as the beyond-a-reasonable-doubt burden of proof and prohibitions against double jeopardy, excessive fines, and compulsory self-incrimination) have generally been held not to apply. This strange mixture of criminal and civil law objectives and effects -- creating a form of penal remedy inhabiting (some would say “invading”) the civil-law domain -- is perhaps the principal source of the widespread controversy that has always surrounded the allowance of punitive damages awards.

The punitive damages doctrine is mixed as well in terms of its institutional derivation, which is partly judicial and partly legislative. While the doctrine is fundamentally a creature of the common law, both its historical roots and many current sources are found in statutory, and even constitutional, provisions. Many western states, whose legal systems are codified to a large extent, have express legislative provisions which generally authorize punitive damages in appropriate cases involving aggravated misconduct. In addition, a large miscellany of statutes, both federal and state, expressly provide for punitive or multiple damages in a great variety of particular situations, including products liability cases. By contrast, many states, either statutorily or constitutionally, prohibit punitive damages in a vast array of contexts, including commercial transactions under the Uniform Commercial Code. More broadly, five states prohibit all awards of punitive damages unless specifically authorized by statute.² Since the 1980s, punitive damages have been a favorite target of tort reformers, so that most states now have some form of tort reform legislation limiting punitive damages in a variety of ways. And, beginning largely with the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*³ in 1991, punitive damages awards have been increasingly subjected to federal constitutional review and control.

Functions of Punitive Damages

In order to determine whether punitive damages are appropriate in particular cases, it is necessary to understand the objectives of such damages that may justify their award. Although courts typically refer only to “punishment” and “deterrence” as the purposes of such damages,⁴ this commonly stated duality of goals masks the nuanced variety of specific functions served by

² Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington.

³ 499 U.S. 1 (1991).

⁴ See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 611 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); Restatement (Second) of Torts § 908(1).

punitive damages. While the various overlapping functions may be formulated and subdivided in any number of ways, five separate objectives may usefully be identified: (1) retribution, (2) education, (3) deterrence, (4) compensation, and (5) law enforcement.

Problems and Recurring Criticisms

Punitive damages suffer from a variety of problems, and such awards are subject to a number of criticisms, some with merit and some without. Some of the most basic criticisms are: (1) that punitive damages result in a confusion of tort and criminal law; (2) that manufacturers and innocent shareholders are unfairly subjected to vicarious liability for punitive damages; (3) that insurance against punitive damages destroys their punitive effect; (4) that the legal standards for determining punitive damages liability are hopelessly vague; and (5) that the methods for determining and controlling the amounts of punitive damages awards are unfair.

1. Confusion of Tort and Criminal Law

Because punitive damages are designed to punish a defendant and deter gross misbehavior rather than to provide a plaintiff with compensation, one of the oldest criticisms of such assessments is that they intrude into the realm of criminal law and thus may be seen as deforming the symmetry of the law.

2. Vicarious Liability and the Innocent Shareholder

The logic and fairness of assessing punitive damages against a corporation for the misconduct of its employees has long been questioned by both courts and commentators.

3. Punitive Damages Insurance as Against Public Policy

To the extent that liability for a punitive damages award is insured, the impact of such an award is transferred to the insurer and thereby avoided by the wrongdoer, which undercuts the supposed punitive and deterrent effects of such awards.

4. Vagueness in Liability Standards for Punitive Damages

The typical liability standards for punitive damages – such as “malicious,” “oppressive” or “outrageous” behavior, or a “conscious,” “willful,” “wanton,” or “reckless” disregard of safety– are such broadly pejorative characterizations of misbehavior that they contain little descriptive power for determining whether punitive damages are appropriate in particular cases.

5a. Amount – Standards of Measurement

One of the most perplexing problems for courts and juries has been how to determine an appropriate *amount* for a punitive damages award. Under the *Restatement (Second) of Torts*, followed in most jurisdictions, the trier of fact determines the amount of a punitive damages award based upon a consideration of “the character of the defendant's act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant.”⁵ As with the standards of *liability* for punitive damages just discussed, courts and commentators long have criticized the vague standards governing the *amount* of such awards. As with the liability standards defining when punitive damages are appropriate, there really is no entirely satisfactory answer to the vagueness problem in determining the amount of such damages.

Precise measurement of a punitive damages award simply is not possible because of the indeterminate nature of the disparate goals it serves. Yet a number of courts, legislatures, commentators, the Commerce Department's Model Uniform Products Liability Act, and the Model Punitive Damages Act all agree that the careful use of factors such as those below should help considerably to reduce the risk of capriciously determined awards and to assure that punitive damages awards assessed in products liability cases are more consistent with their underlying objectives. These factors are:

- (1) the amount of the plaintiff's litigation expenses;
- (2) the seriousness of the hazard to the public;
- (3) the profitability of the marketing misconduct (increased by an appropriate multiple);
- (4) the attitude and conduct of the enterprise upon discovery of the misconduct;
- (5) the degree of the manufacturer's awareness of the hazard and of its excessiveness;
- (6) the number and level of employees involved in causing or covering up the marketing misconduct;
- (7) the duration of both the improper marketing behavior and its cover-up;

⁵ Restatement (Second) of Torts § 908(2). See Pace, Recalibrating the Scales of Justice Through National Punitive Damage Reform, 46 Am. U. L. Rev. 1573, 1583 (1997) (“The many factors that legislators and judges have created can be reduced to three basic considerations: (1) the character of the defendant's act; (2) the nature and extent of the plaintiff's injuries; and (3) the defendant's wealth.”).

- (8) the financial condition of the enterprise and the probable effect thereon of a particular judgment; and
- (9) the total punishment the enterprise probably will receive from other sources.

5b. Amount – Risk of Over-Punishment in Mass-Disaster Litigation

One of the most troublesome aspects of punitive damages awards in products liability litigation is their potential not only to punish an offending enterprise but also to impair its finances severely or even to bankrupt it. If a product is dangerously defective because of inadequate warnings or design, or because of a recurring flaw in manufacture, hundreds or thousands of similar injuries may result from a single defect in the product line. Such a result can be a “mass disaster” for both the consuming public and the manufacturer. In such situations, as presently in the asbestos industry, the manufacturer may be overwhelmed by the resulting liability for compensatory damages alone; massive additional awards of punitive damages to each plaintiff may virtually ensure the manufacturer's bankruptcy, destroying the enterprise and depriving plaintiffs of corporate funds to cover even their actual damages. Since the purpose of punitive damages is to punish a defendant, not to bankrupt it, and since the law's first objective should be to compensate victims for their losses before punishing the offending enterprise, fashioning a proper role for punitive damages in mass-disaster litigation is an especially sensitive problem that merits serious consideration.

Defining the Standard of Misconduct

A liability standard for punitive damages in products liability cases should be broad enough to cover the variety of ways in which a manufacturer may deliberately or recklessly disregard consumer safety. Most of the products liability decisions addressing punitive damages have applied the traditional common-law and statutory general standards for punitive damages liability, such as “willful and wanton,” “malice, oppression, or gross negligence,” or “ill will, . . . actual malice, or . . . under circumstances amounting to fraud or oppression.” But these traditional liability standards were originally formulated to cover interpersonal intentional torts or oppressive misconduct by government officials exhibiting personal hostility or a callous abuse of power. In cases where a manufacturer's marketing misconduct is sufficiently culpable to deserve the sanction of punitive damages, the particular misconduct may fairly be characterized as “wanton” or “oppressive.” Such phrases, however, are at best vague and imprecise, and they do little to help a manufacturer conform to the law or to help a court or jury apply the standard to concrete cases.

Courts often define the proscribed behavior as conduct that is in “conscious” or “reckless” disregard of the victim's rights or safety. The formulation of a liability standard in forms like these lies close to the mark, but the precise wording is important to avoid ambiguity. One way to improve the punitive damages standard of liability is to define it in terms of whether the defendant “flagrantly” violated the victim's rights. Adding “flagrancy” to a punitive

damages standard in any type of case helpfully emphasizes that the defendant's conduct ordinarily must be proven to have deviated substantially from acceptable behavior before it fairly may be punished.⁶ By emphasizing to judges and juries that punitive damages are available only for extreme departures from the norm, a flagrant disregard test provides fair breathing space for defendants to make good faith mistakes. Recognizing the advantages of this conception, a number of courts have adopted some form of flagrant disregard formulation.⁷ Yet there is nothing magical in the word "flagrant," and a court may achieve the same beneficial results by enhancing the more conventional liability formulations to stress that a manufacturer's conduct should be found to have extended far outside the bounds of normal and proper conduct in order to be branded quasi-criminal. For example, such a standard might frame the prohibited misconduct as the conscious or reckless disregard of consumer safety which constituted an extreme departure from proper conduct,⁸ or something similar.⁹

⁶ Serving to limit the standard's scope, the word "flagrant" connotes misconduct significantly more serious than inadvertent negligence and thus assures that only the most egregious misbehavior is punished. Yet it does not call for proof of a subjective awareness of wrongdoing that the word "conscious" implicitly requires. Instead, the word imputes such awareness to the manufacturer when its conduct is obviously and seriously wrong; it suggests that punitive damages are appropriate only in cases of extreme departure from accepted safety norms, that is, only if a product was very defective, and plainly so, at the time it was sold. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 27, 38 (1982). "A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all." *Id.* at 38.

⁷ See, e.g., *Owens-Coming Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 412 (Ky. 1998) ("flagrant indifference to the rights of the Plaintiff"); *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568, 580 (Ohio 1981) (quality control "so inadequate as to manifest a flagrant indifference to the possibility that the product might expose consumers to unreasonable risks of harm"); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984) (referring to "marketing of a product in flagrant disregard of consumer safety," but applying statutory standard of conduct that was "attended by circumstances of fraud" or a "wanton and reckless disregard of the injured party's rights and feelings"); *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 617 (Ill. App. Ct. 1981) (adopting standard of "conduct that reflects a flagrant indifference to the public safety" for products liability cases); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (recognizing both "flagrant indifference to public safety" standard used in products liability cases and "the more traditional phrasing of willful and wanton misconduct").

⁸ For discussions of the extreme departure notion, see Owen, The Moral Foundations of Punitive Damages, 40 Ala. L. Rev. 705, 730 (1989); Owen, Problems In Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 27-28 (1982); Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 407 (1994).

⁹ See, e.g., *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 557 (Ind. Ct. App. 1999) ("[r]ecklessness is

Reforms – Judicial and Legislative

The various problems with punitive damages explored in the previous section, some only imagined but others very real, suggest a rather compelling need to reform the law of punitive damages in a variety of ways. A number of “reform” proposals are indeed afoot, all designed to improve the logic and fairness of punitive damages law. It is important to note at the outset, however, that the purpose of the various reforms is to adjust various aspects of how the law of punitive damages is administered, not to eliminate it as a remedy available in appropriate cases. With few exceptions, neither the courts nor the community of scholars has urged that the institution of punitive damages be abolished. In this nation, most people still view punitive damages as an important remedy that checks, rectifies, and helps prevent extreme misconduct. In recent decades, however, both courts and legislatures have initiated a series of reforms in an effort to reduce as much as possible the most serious problems with the law and administration of punitive damages.

Following are the major types of punitive damages reforms and controls that courts and legislatures have adopted in recent years.¹⁰ The focus here is on common-law and statutory reform; constitutional reform of punitive damages, under the due process clause in particular, is examined later.

1. Refining the Standards of Liability and Measurement

One of the first and most important reforms that some courts and legislatures have taken is to narrow and refine the standard of liability for punitive damages, sometimes specifying the forms of flagrant misbehavior deserving punishment and the culpability factors that a trier of fact might consider in a products liability case, as discussed above. In similar fashion, to assist triers

characterized by . . . a gross departure from ordinary care, in a situation where a high degree of danger is apparent”), cert. denied, 120 S.Ct. 1424 (2000).

¹⁰ See generally V. Schwartz & Behrens, Punitive Damages Reform – State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in *Haslip*, 42 Am. U. L. Rev. 1365 (1993); Rustad & Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269 (1993) (arguing that punitive damages reform is unnecessary).

of fact assess particular amounts of punitive damage awards, a number of jurisdictions have specified the factors relevant to the proper measurement of such awards. Both the definitions of the proscribed misconduct and the standards for determining amounts for such awards may be improved by expressly tying them to the goals of punitive damages applicable to the products liability context.

2. Prima Facie Case and Other Pretrial Showings; Evidentiary Rulings

Although all courts do not have the power to do so without legislative authorization, California and several other states have legislation requiring a plaintiff to make a prima facie showing of the defendant's liability for punitive damages before punitive damages may be pleaded, pretrial discovery of wealth may proceed, evidence of wealth may be admitted, a provisional cap on the amount of a punitive damages award may be removed, or the amount of punitive damages may be argued to the jury.

3. Judgments on the Merits

Many trial courts generally are reluctant to exercise their powers to grant summary judgment, directed verdicts, judgments notwithstanding verdicts, and new trials; such powers, being in derogation of the judgment of the jury, are properly exercised only with studied care. Yet to avoid the special risks of erroneous jury awards of punitive damages in products liability cases, trial courts should give especially careful consideration to motions of this type. Courts should make every effort to cut through the morass of proof, the semantics of the rules of liability, and the rhetoric of counsel to pass judgment at the earliest reasonable time on whether a fair case really has been made that the manufacturer's conduct was flagrant. If such a fair case has not been made, the court should relieve the jury of the temptation to base its decision on passion and prejudice, or it should correct the error if the jury in its verdict succumbed to such emotions. In recent years, trial courts increasingly have rendered summary judgment, directed verdicts, and rendered judgments notwithstanding the verdict on punitive damages claims.

Particularly since the inception of the review of punitive damages awards on constitutional grounds during the 1990s, but also earlier, appellate courts have been showing an increasing sense of obligation to subject punitive damage awards to close scrutiny and to reverse them when unwarranted on the record. Scrupulous appellate review is especially important because it is a defendant's final protection against the infliction of punishment that may be very large and unfairly imposed. On the appeal of such awards, the trial record should be scrutinized with special care for improper evidence, for argument that might have inflamed the jury, and for the sufficiency of the evidence on the whole.

4. Standard of Proof – “clear and convincing evidence”

“Because punitive damages are extraordinary and harsh,”¹¹ many courts and legislatures in recent years have raised the standard of proof from the “preponderance of the evidence” standard, the ordinary standard used in civil law litigation, to a “clear and convincing” standard of proof. This is an important reform that reflects the intermediate position of punitive damages, a “quasi-criminal” remedy, between the civil and criminal law. This salutary adjustment of the standard of proof should serve to focus the decision-maker on the importance of careful deliberation on the merits of the case, and it appears to provide courts with both the authority and obligation to review carefully the sufficiency of the evidence for such awards.

5. Compliance with Government Standards

Some states have enacted legislation providing an absolute defense for manufacturers of pharmaceutical drugs to punitive damages for selling drugs that comply with applicable regulations of the Food and Drug Administration. Some states have broader statutes that shield manufacturers from liability generally, and that apply to all manufacturers and products, but these statutes merely raise a rebuttable presumption that a manufacturer complying with an applicable governmental safety standard is not negligent, or that a product meeting such standards is not defective. Assuming that such a presumption is applicable to the manufacturer, and that it is not rebutted, such a statute should serve to bar punitive as well as compensatory damages.

6. Remittitur

Another common mechanism of judicial control is the remittitur of excessive awards, that is, granting a defendant's request for a new trial (or reversing and remanding for a new trial, in the case of an appellate court) conditioned on the plaintiff's failure to accept a reduction in the punitive damages award to some specified amount.

7. Caps – Absolute; Multipliers; Etc.

In an effort to bridle jury discretion so as to prevent runaway punitive damages awards, some jurisdictions have adopted various arbitrary types of measurement approaches that reduce or remove discretion from the trier of fact. The most common form of limitation is to cap punitive damages at some multiple of the plaintiff's compensatory award, at one, two, three, four, or five times compensatory damages. Some jurisdictions use other measures to cap punitive awards, such as absolute dollar amounts, the defendant's gross income, a percentage of the

¹¹ *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996) (en banc).

defendant's net worth,¹² or the amount (or some multiple thereof) by which the defendant profited from the misconduct.¹³ Most statutes include more than one limitation. While the most common form of combined-cap provision limits such damages to the greater of some dollar amount, such as \$250,000, or to some multiple of the compensatory damages, such as three times that award, the statutes vary considerably in their complexity and ingenuity in combining various caps for different situations. At least a couple of the caps build in an exception for especially egregious or profit-motivated behavior, but even these provisions fail to fully implement deterrence theory by failing to multiply the defendant's expected profit by the defendant's expected probability of getting caught and punished for the wrongful behavior.

In all but three or four states, punitive damages are awarded solely within the discretion of the fact finder, such that there is no right or entitlement to punitive damages, as previously discussed. For this reason, legislative caps on the amounts of punitive damages would seem to be constitutional in most jurisdictions. Indeed, caps quite clearly reduce the due process threat of unbridled jury discretion. But caps by their nature do deprive juries of authority to fix an amount of punitive damages they deem appropriate in particular cases, so that there may be some fair question of whether this form of legislative control may abridge a defendant's state constitutional right to jury trial. However, it seems more logical to conclude that a legislature generally should have the power to limit or even eliminate an extra-compensatory remedy to which plaintiffs have no entitlement. Thus, except in the very few states in which plaintiffs have a right or entitlement to punitive damages, such as Alabama, caps on punitive damages awards should not be constitutionally objectionable.

Some combination of arbitrary limitations on punitive damages awards are a partial solution to the risk of over-punishment, if an imperfect one. As in a number of state statutes, exceptions to caps probably should provide at least for particularly reprehensible misconduct, and for cases in which the defendant has continued the misconduct after getting caught and appears likely to continue it in the future.

There is virtue as well as vice in the vagueness of the standards for determining the size of punitive damage assessments; the very vagueness that permits their abuse permits as well their

¹² See Kans. Stat. Ann. § 60-3702(e) (the lesser of 50% of defendant's net worth, if necessary to penalize defendant, otherwise highest annual gross income over five years preceding punishable act, or \$5 million).

¹³ See Okla. Stat. Ann. tit. 23, § 9.1(C); Kans. Stat. Ann. § 60-3702(f) (1 ½ times amount of profit defendant gained or is expected to gain).

enlightened use to achieve individualized justice tailored to the parties and the circumstances of the case. Legislatures thus should adopt arbitrary measurement-control rules with caution to avoid over-mechanizing the administration of justice in cases involving flagrant misconduct.¹⁴

8. Single Award

A recurring problem with punitive damages awards in products liability litigation is that a defendant may be subject to punishment over and over again for a single design or warning defect. While punitive damages awards in some amount are justifiable in every case of flagrant misconduct on retribution and restitution grounds, very large, repetitive awards are more difficult to justify. Accordingly, a small number of states, at least Georgia and Florida, have enacted “one-bite” reform legislation that limits punitive damages to one punishment for a single act or course of conduct.¹⁵ Georgia’s statute limits punitive damages awards in products liability litigation to one award without exception, whereas Florida’s statute allows subsequent awards “if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant’s behavior.” In such a case, the court must reduce the amount of any such subsequent award by the amount of any earlier awards, so that the defendant is still ultimately liable only for a single, ultimate punishment for the same act or course of conduct.

Although limiting punitive damages to a single assessment may superficially appear logical and fair, this approach too easily may be manipulated by defendants and otherwise is likely to work poorly in mass products liability litigations in which claims mount over time. Even assuming the feasibility of establishing a proper aggregate amount for a single punitive damages award, a quite unlikely possibility, the “one-bite” or “single-shot” approach denies the importance of the functions of compensation and restitutionary retribution to plaintiffs not included in the single punitive damages recovery. Thus, courts have uniformly and properly refused to adopt a common-law one-bite approach to mass liability ongoing-claim situations, on grounds of both principle and practicality.¹⁶ Yet, the single-shot approach appears desirable in single-event disasters, such as airplane or train crashes and hotel fires, where a defendant’s

¹⁴ “Overall, statutory caps provide a certain and administratively easy solution to the perceived problem of excess in punitive damages awards, but they may prove to be too crude a reform measure, sacrificing flexibility and precision in the imposition of punishment and deterrence for the sake of greater control over the size of awards.” *Development in the Law – The Civil Jury*, 110 Harv. L. Rev. 1408, 1534 (1997).

¹⁵ See Annot., 11 A.L.R.4th 1261 (1993).

¹⁶ A multiplier approach, perhaps determined once and for all in an aggregate claims proceeding, appears to be a preferable approach in such ongoing mass tort situations. See § 18:5, above.

aggregate liability is reasonably determinable within a finite period of time, especially if it is determinable in a single proceeding. In such a context, the adjudication of a single judgment for punitive damages would seem feasible and efficient, and the court could assure that each victim received a fair share of the aggregate award.

9. Splitting Awards With the State

A reform adopted in some states, designed to capture the supposed “windfall” aspect of punitive damages awards from plaintiffs and in recognition of the public policy purposes of punitive damages, is to provide that some portion of punitive damages assessments go to the state. The statutes, variously called “split-recovery” or “state-extraction” statutes, have varied in the amount of the award provided to the state: 35 percent of a punitive damages award goes to the state in Florida; 50 percent in Alaska, Kansas, Missouri, and Utah; 60 percent in Oregon; 75 percent in Georgia and Iowa; and a percentage within the court's discretion in Illinois. Some of the statutes deduct attorneys' fees and other litigation costs prior to calculating the amount to go to the state, and the statutes vary on whether particular state agencies are designated as the recipients of such recoveries or whether the state's share simply goes into its general treasury. This kind of statutory division of punitive damages awards has been successfully attacked on state constitutional grounds in Colorado, but split-recovery punitive damages statutes have been upheld against a variety of state and federal constitutional attacks in a number of other states. Because this reform provides that the state shares in the punitive damages award, very large awards may violate the excessive fines clause of the eighth amendment, an issue left open by the Supreme Court.¹⁷

Whether this reform is desirable depends to a large extent on the absolute size of particular compensatory and punitive awards. While requiring that such awards be split between the plaintiff and the state may reduce somewhat a plaintiff's incentive to pursue such claims, this reform otherwise appears sensible in cases involving very large punitive assessments. Awards of punitive damages, being “quasi-criminal,” are by their nature “quasi-public”; therefore, the public logically should share in very large awards. But split-recovery statutes do suffer from a

¹⁷ See *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989). Although the matter was left undecided, Justice O'Connor expressed little doubt that the Excessive Fines Clause would indeed apply to punitive damages assessments paid to the government. See *id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part). See generally McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. Kan. L. Rev. 761 (1995); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233 (1987).

One commentator has argued that state extraction statutes as drawn generally violate the takings clause of the fifth and fourteenth amendments. Burrows, *Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled With Punitive Damages Goals and the Takings Clause*, 47 U. Miami L. Rev. 437 (1992).

number of theoretical and practical problems,¹⁸ including the infection of the jury's deliberations with extraneous information if it is improperly informed that the public will share in the award. The first and foremost office of punitive damages should be to achieve justice between the parties in the "private" lawsuit, such that the victim ought to be truly fully compensated – both in terms of actual losses and retribution – before the public should have a claim at all. Thus, in cases where the amount of such damages is relatively modest, a plaintiff fairly should have a prior, exclusive claim to the total award.

10. Bifurcation

Some courts and legislatures require or permit, upon the defendant's (or any party's) motion, that the punitive damages issue be bifurcated at trial, so that the jury's decision on liability and compensatory damages will not be contaminated by the plaintiff's evidence of the defendant's wealth, and possibly by other punitive damages evidence and argument. Some jurisdictions bifurcate all punitive damages issues from the basic liability and compensatory damages issues; others segregate only the determination of the *amount* of punitive damages, leaving the issue of liability for punitive damages to be decided in the preliminary proceeding along with liability for and the amount of compensatory damages. The Federal Rules of Civil Procedure accommodate bifurcation of punitive damages in its rule permitting federal courts to order separate trials of claims and issues in the interests of convenience, expedition, economy, or to avoid prejudice.¹⁹

For many years, conventional wisdom held that bifurcation, by fractionizing the issues in the case, benefits defendants. Consequently, during the late twentieth century, permitting or requiring bifurcation of some or all aspects of punitive damages from liability for compensatory damages was a central feature of both state and federal products liability legislative reform initiatives. But experience and recent studies suggest that the blessings of bifurcation may be mixed. The bifurcated Florida smokers class action trial against the tobacco industry, which ended in a punitive damages verdict of \$145 billion, is the most dramatic illustration of the risks to defendants of bifurcating punitive damages liability. In any products liability litigation, restricting the issues at a second, independent trial to liability for and the amount of a punitive damages award (or, what may be even more difficult for defendants, solely to how large a punitive damages award should be) may provide a jury solely concerned with a manufacturer's culpability with an inquisitorial frame of mind. Moreover, in a second, punitive damages phase of a protracted trial, the jury will be asked to examine an artificially narrow slice of the manufacturer's marketing decisions which are drained of the broad real-world range of considerations contextually at play in institutional decisionmaking over time. While the courts may no longer question whether bifurcation unconstitutionally deprives a non-consenting party

¹⁸ See generally Development in the Law – The Civil Jury, 110 Harv. L. Rev. 1408, 1535-36 (1997).

¹⁹ See Fed. R. Civ. P. 42(b).

of the right to jury trial, this procedure does substantially restrict the freedom of the parties in deciding how to present their claims and defenses.

Recent empirical studies suggest that bifurcating compensatory and punitive damages liability is likely to produce two important effects in jury trials: (1) the defendant is indeed more likely to prevail in the preliminary, compensatory damages stage of the litigation; but (2) in the second phase, a punitive damages award is both more likely to be rendered and likely to be considerably higher than in a unitary trial.²⁰ In short, “if the defendant has lost at the stage of compensatory liability, the chance becomes very great that the defendant will lose at the punitive liability stage.”²¹ Thus, not only is the bifurcation device procedurally awkward, but it presents defendants with a significant strategic dilemma of whether to gamble with a higher chance of success in the compensatory damages phase in exchange for a higher risk of disaster in the punitive damages phase.

11. Judicial Determination of Amount of Punitive Damages Awards

At least three states, Connecticut, Kansas, and Ohio, have enacted legislation allowing juries to determine whether a defendant should be liable for punitive damages but transferring to the court responsibility for determining the *amount* of such awards.²² This shift of responsibility is designed to prevent the perceived risk of biased juries rendering run-away punitive damage awards. Challenges to these statutes in two of the three states on grounds that they violated the state constitutional right to a jury trial met with mixed results: the Ohio Supreme Court struck down its statute,²³ while the Kansas Supreme Court upheld the constitutionality of its statute, reasoning that punitive damages were merely a discretionary remedy of the common law not subject to the right to jury trial.²⁴

In some ways it makes good sense to shift decisions on the amounts of punitive damages to the courts, for such determinations are in the nature of quasi-criminal sentencing, and judges are generally more qualified than jurors -- in training, temperament, and experience -- to fix the amounts of punitive sanctions. This reform, which has been advocated for many years, offers several advantages over the traditional method of allowing the jury to determine the amounts of such awards. First, it reduces the probability that punitive damages awards are unduly

²⁰ See Landsman, Diamond, Dimitropoulos, & Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 335.

²¹ *Id.* at 330.

²² See generally *Development in the Law – The Civil Jury*, 110 Harv. L. Rev. 1408, 1527 (1997).

²³ See *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994).

²⁴ See *Smith v. Printup*, 866 P.2d 985, 997-98 (Kan. 1993).

influenced by emotion, since most judges are more detached in their deliberations and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration without bifurcating the jury trial. Further, judges would be able to call upon their experience in criminal sentencing, unavailable to jurors, in evaluating the need for particular levels of punishment and deterrence in particular cases. Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far-reaching effects that punitive damages awards may have on the operations of particular corporate defendants. On the other hand, even judges may be biased and ideologically committed, one way or the other, and the institution of the jury at least requires a compromise among extremes. Instead of relieving the jury of its historic task of determining the amount of punitive damage awards, the most practical, second-best solution to the measurement problem may lie in formulating a combination of procedural and arbitrary measurement devices of the sort considered above.

12. Written Explanations

Many punitive damages problems may be minimized if courts are required to provide explicit justifications – in the record or by opinion – for allowing, upsetting, or remitting punitive damage assessments. Such justifications, tying the evidence to the facts and the principles of punitive damages, should assure that the courts work through the smoke of rhetoric and emotion at the trial to determine if such damages truly are deserved on the evidence, and, if they are, whether the amounts of such awards are truly warranted. In response to the Supreme Court's insistence that punitive damages be based on fair procedures,²⁵ a number of jurisdictions now require judicial explanations of punitive damages rulings, some requiring appellate courts²⁶ and others requiring trial courts²⁷ to explain their rulings. The importance of this reform should not be underestimated, and it would seem to be a necessary procedural bedrock for substantive fairness in the administration of the law of punitive damages.

Reform – Constitutional

²⁵ See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). See generally § 18:7, below.

²⁶ See, e.g., *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). In order for an appellate court to provide the type of post-trial scrutiny of punitive damages awards required by *Haslip*, a fair reading of that case might well lead to the conclusion that appellate courts must provide written explanations for upholding punitive damages awards in every case.

²⁷ Although, in *Moriel* 879 S.W.2d at 32-33, the Texas Supreme Court concluded that it could not require its already overburdened and understaffed trial courts to provide a written explanation on punitive damages rulings in every case, that court did urge its trial courts to do so to the extent feasible, indicating that “at least eight jurisdictions now expressly require the trial court to articulate its reasons for refusing to disturb a punitive damage award.”

Courts and commentators long have questioned the fairness of assessing civil penalties for conduct described so vaguely as “malicious,” “reckless,” or “willful and wanton,” with no real ceiling on the size of the assessments, and without the procedural safeguards used in criminal cases to assure the propriety of punishment. Yet, until quite recently, due process and other constitutional challenges to punitive damages fared poorly in the courts. Toward the end of the twentieth century, in a string of cases which constitutionalized the law of punitive damages, the United States Supreme Court began to address concerns over the increase in multi-million dollar awards of punitive damages and the widespread perception that such damages are too often assessed arbitrarily and unfairly.²⁸

State Farm Mutual Automobile Insurance Co. v. Campbell

The Court’s most recent treatment of the constitutional aspects of punitive damages law is *State Farm Mutual Automobile Insurance Co. v. Campbell*.²⁹ This was a bad faith failure to settle case in which the plaintiff’s insurance company, State Farm, failed to settle within the policy limits tort claims against the plaintiff for causing a serious car accident. Although there was no doubt of the plaintiff’s negligence in causing the accident in which one driver died and another was disabled, State Farm told him that he did not need independent representation, assured him that his personal assets were safe, and refused to settle the case for the policy limits of \$50,000. The jury returned a verdict for more than \$185,000, leaving the plaintiff with excess liability of more than \$135,000.

Initially, State Farm refused to cover the plaintiff’s excess liability or even to post bond to permit the plaintiff to appeal. Thereafter, plaintiff and his wife sued the company for bad faith failure to settle, fraud, and intentional infliction of emotional distress. At the trial of these claims, plaintiff introduced evidence that State Farm’s denial of the plaintiff’s claim was part of the company’s nation-wide scheme over 20 years to limit claim payouts improperly in order to improve profitability. On this evidence, the jury returned verdicts of \$2.6 million in compensatory damages and \$145 million in punitive damages which the trial judge remitted, respectively, to \$1 million and \$25 million. Reinstating the full \$145 million punitive damages

²⁸ See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Oberg v. Honda Motor Co.*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. ___, 123 S.Ct. 1513 (2003).

²⁹ 538 U.S. ___, (2003).

verdict, the Utah Supreme Court concluded that it was warranted under the three *Gore*³⁰ measurement guideposts because the defendant's nation-wide scheme to cheat its policyholders was reprehensible, coupled with the company's "massive wealth" and the improbability of its being caught and punished due to the clandestine nature of its activities.

State Farm appealed the case to the Supreme Court, arguing that the \$145 million punitive damages assessment was excessive and violative of due process because the Utah courts had improperly considered conduct outside the state and otherwise violated the due process principles set forth in *Gore*. Agreeing, the Supreme Court reversed and remanded, stating that the case was "neither close nor difficult" under *Gore*'s guideposts for avoiding constitutionally excessive punitive damages awards.³¹ As for reprehensibility, the first and most important guidepost, the court acknowledged the impropriety of the defendant's scheme but explained that due process precluded courts from basing punitive awards on misconduct, especially conduct outside the state, unrelated to the plaintiff's harm.³² So long as a defendant's misconduct to other persons is similar to the conduct that harmed the plaintiff, courts and juries may properly consider it as showing that the defendant is a repeat offender and hence deserving of greater punishment, but the majority concluded that the record in this case revealed scant evidence of repeated misconduct of the kind that injured the plaintiff – the denial of third-party liability claims. Noting that a much lower award would have adequately protected Utah's interest in punishing and deterring State Farm's relevant misconduct that occurred in Utah, the Court observed that the case was improperly "used as a platform to expose, and punish, the perceived

³⁰ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

³¹ *Id.* at _____. The majority decision was authored by Kennedy, J. Scalia, Thomas, and Ginsburg, JJ., in separate dissents, reasoned that the Supreme Court should not review state court punitive damages judgments.

³² "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.* at _____. Nor did the Court think that a punitive damages award could be supported by substantially dissimilar conduct by the defendant that harmed persons other than the plaintiffs:

A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct

Id. at _____.

deficiencies of State Farm's operations throughout the country."³³ Unfortunately, the majority ignores considerable reprehensibility evidence of serious State Farm misconduct, much of which was directly relevant to the company's abusive practices in this case.³⁴

As for the second guidepost, the ratio between punitive and compensatory damages, the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." While signaling that "few awards exceeding a single-digit ratio . . . will satisfy due process," the Court observed that due process may permit greater ratios in certain circumstances – for particularly egregious misconduct resulting in small economic damages,³⁵ where the injury is hard to detect, or where the misconduct causes physical injuries. In all cases, however, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount

³³ Id. at _____. The court concluded its analysis of reprehensibility:

The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbell's have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

Id. at _____. As pointed out in Justice Ginsburg's dissent, discussed in the following footnote, the majority's last assertion is simply wrong.

³⁴ In dissent, Justice Ginsburg summarized evidence, conveniently ignored by the majority, of the defendant's truly intolerable business practices, some of which the company employed in this case, that were in fact highly relevant to an assessment of the defendant's reprehensibility. See id. at _____ - _____. "[O]n the key criterion 'reprehensibility,' there is a good deal more to the story than the Court's abbreviated account tells." Id. at _____. The evidence revealed an ongoing, company-wide scheme to falsify records and use trickery and other dishonest techniques – such as unjustly attacking a claimant's character, reputation, and credibility by making false and prejudicial notations in the file – to pay less both first-party and third-party claims at less than fair value. Two of the defendant's Utah employees testified to "intolerable" and "recurrent" pressure to reduce payouts below fair value, id. at _____, and the local manager ordered the adjuster for the Campbell case to falsify company records by inventing a story that the driver who died in the accident was speeding to see a pregnant girlfriend who did not exist. Several former State Farm employees testified "that they were trained to target 'the weakest of the herd' – 'the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value.'" The plaintiffs fell into this vulnerable claimant category – economically, emotionally, and physically, Mr. Campbell (since deceased) having suffered from a stroke and Parkinson's disease. Id. at _____.

³⁵ Conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. at _____.

of harm to the plaintiff and to the general damages recovered.” Because State Farm eventually paid the plaintiffs’ excess liability, their losses were mostly emotional, leading the Court to determine that the generous \$1 million compensatory damages award contained a substantial punitive component such that a large punitive award would be constitutionally inappropriate.³⁶ Finally, the Court explained that the very large punitive damages award was unjustified by the third and final *Gore* guidepost which compares the punitive award to other civil and criminal penalties that may also apply to the defendant’s misconduct which, in Utah, was a mere \$10,000 fine for fraud. For these reasons, the Court concluded that the \$145 million punitive damages assessment in this case was “neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.”

Applying Constitutional Doctrine to the Products Liability Context

One must question how meaningfully the due process excessiveness principles of *Gore* and its progeny may be applied to products liability cases involving personal injury or death. In *Gore*, the Supreme Court noted that the reprehensibility of misconduct is affected by certain “aggravating factors,” including whether the conduct threatened merely economic interests or health and safety,³⁷ and whether the defendant acted with “trickery and deceit” – with “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive.” In *TXO*,³⁸ trickery was the only aggravating factor, and the Court there upheld a \$10 million punitive award that was ten times the amount of potential harm and 527 times the actual harm. Products liability cases ordinarily involve a significant threat to human safety, and trickery and concealment frequently pervade those products liability cases in which punitive damages are fairly implicated. Another of *Gore*’s aggravating factors is whether the defendant had engaged in repetitive misbehavior, whether it was a repeat offender.³⁹ Products liability cases in which the manufacturer continues to market a product despite increasing proof that it is

³⁶ “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at ____.

³⁷ See *id.* at 575-76. “The harm BMW inflicted on Dr. Gore was purely economic in nature. . . . BMW’s conduct evinced no indifference to or reckless disregard for the health and safety of others.” *Id.* at 576. See also *Campbell*, 538 U.S. at ____ (discussing *Gore*’s second guidepost).

³⁸ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

³⁹ “Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law. . . . Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.” *Gore*, 517 U.S. at 576-77.

dangerously defective, particularly if it also continues to tout the product's safety, implicate precisely this form of aggravating misbehavior.

The fact that each of *Gore's* aggravating factors commonly exists in products liability cases involving large punitive damages awards – cases in which multi-million dollar punitive damages awards are assessed against multi-billion dollar, multi-national manufacturers of defective products – frustrates their usefulness in this context. Stated otherwise, *Gore's* excessiveness guideposts provide manufacturers and the courts with little useful guidance on the constitutional limitations on the size of punitive damage awards.⁴⁰ The only really helpful lesson from *Gore* is its central theme, underscored by the Court's shift to a standard of *de novo* review in *Cooper Industries*,⁴¹ that reviewing courts must closely examine the culpability and other punitive damages evidence in relation to the rules and goals of punitive damages law, particularly if the size of a particular award raises "a suspicious judicial eyebrow,"⁴² which may indeed be all that due process truly should require.⁴³ One should not minimize the importance of this due process requirement, commenced in *Haslip*⁴⁴ and continued in *Gore*, *Cooper Industries*, and *State Farm*, that courts scrutinize the evidence closely to assure that the procedures by which punitive damages are assessed are fair to the defendant. But conspicuously absent from the Court's listing of due process excessiveness guideposts in *Gore* and its progeny is the matter of the defendant's financial condition or "wealth." While defendants and economic theorists vigorously challenge the relevance of such evidence to punitive damages determinations,⁴⁵ common law courts long have considered it to be an important guidepost for establishing the proper size of punitive damages assessments, which has been acknowledged by the Court.⁴⁶ The

⁴⁰ See Justice Scalia's observation that "the 'guideposts' mark a road to nowhere; they provide no real guidance at all." *Gore*, 517 U.S. at 605 (Scalia, J., dissenting).

⁴¹ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

⁴² *Id.* at 583.

⁴³ See Scalia, J., dissenting, *id.* at 598.

⁴⁴ See *Haslip*, 499 U.S. at 9-10.

⁴⁵ See, e.g., Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 910 (1998) (irrelevant to deterrence in case of economic harms); Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415 (1989).

⁴⁶ See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 & n.28 (1993), specifying the "petitioner's wealth" as one basis for upholding large punitive damages award, and recognizing that reliance on evidence of a defendant's wealth is "typically considered" and allowable under "well-settled law." See also *id.* at 464; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (finding

point simply is that a \$1 million punitive damages award that may be trivial for General Motors may bankrupt a small automotive parts company.⁴⁷ For this reason, some courts actually *require* proof of a defendant's wealth before a punitive damages award properly may be assessed.⁴⁸ In its latest pronouncement, *State Farm*, the majority seems to shift from a recognition of the states' conventional and legitimate use of wealth for helping to ascertain an appropriate amount of a punitive damages assessment into viewing evidence of the defendant's wealth almost as perverse.

If a guidepost list for determining the excessiveness of punitive damages awards is to be limited to three indicia, as it most assuredly need not,⁴⁹ it would be much improved if the Court were to substitute the defendant's *wealth* for a comparison of the punitive award with other sanctions.⁵⁰ Just as due process fairly requires that punitive damages awards be tied to the

defendant's "financial position" a legitimate factor). But see *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) ("evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses").

⁴⁷ See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 586, 591 (1996) (Breyer, J., concurring) ("Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the state's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives).") (citations omitted).

⁴⁸ See, e.g., *Adams v. Murakami*, 813 P.2d 1348, 1351 (Cal. 1991) (information on defendant's wealth is necessary for appellate review of alleged excessiveness of punitive award; trial court should instruct jury to consider defendant's financial condition); *Herman v. Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1087 (N.J. 1993) (holding in a non-products liability case that "a jury must consider evidence of a defendant's financial condition in determining the amount of punitive damages" and noting state statute mandating such evidence in products liability actions).

⁴⁹ Although Justice Stevens' majority opinion in *Gore* does not address this point directly, Justice Scalia observes that "the Court nowhere says that these three 'guideposts' are the only guideposts; indeed, it makes very clear that they are not . . ." *Gore*, 517 U.S. at 606. See, e.g., *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 666 (Mo. Ct. App. 1997); *Patton v. TIC United Corp.*, 859 F. Supp. 509 (D. Kan. 1994).

⁵⁰ See, e.g., Note, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 Wis. L. Rev. 427, 460 ("While a comparison to legislative sanctions may be quite objective, and thus desirable from a defendant's point of view, a small legislative sanction often warrants a higher punitive award when the conduct is fairly egregious. Thus, the defendant's wealth would have provided a better guidepost than legislative sanctions for excessiveness review."). Justice Breyer's attempt in *Gore* to explain why wealth is not included on the excessiveness constraint list, 517 U.S. at 591, betrays a failure to perceive that the concept of excessiveness is but a part of the broader concept of appropriateness: if for some reason (the defendant's wealth or other factual indicium omitted from *Gore's* short list) a "large" punitive award is

overall objectives of such assessments, the ultimate due process fairness question pertaining to the size of an award is the overall *appropriateness* of any given award on all the facts of the particular case. Unlike the concept of “excessiveness,” which seems more narrowly to focus on the size of an award in numerical terms, the concept of appropriateness more embracingly includes all aspects of a defendant's and plaintiff's situations relevant to the amount of punishment proper in any given case. Particularly in the products liability context, there may be as many as *nine* separate considerations (“guideposts”) that properly bear on the measurement issue.⁵¹ Confining the measurement criteria to only three of the many relevant factors forces the underlying fairness inquiry awkwardly into an incomplete and rigid mold. If substantive due process is to be revived, as it now appears that it surely has, it should not be used to make the states recraft their law according to a structure that is flawed. At least in products liability cases, the marked deficiencies in *Gore*'s guidepost list robs it of usefulness and validity for testing the fairness of a punitive damages award of a given size.

The extraterritoriality aspect of *Gore*,⁵² underscored in *State Farm*, is important in products liability litigation where a manufacturer's sale of thousands or even millions of similarly defective products across the nation (or throughout the world) is often argued by plaintiff's counsel as aggravating the misconduct and as so providing in the aggregate a proper foundation for calculating an appropriate punitive assessment proportionate to the wrong. But the *Gore* majority's analysis of the extraterritorial punishment issue translates poorly into products liability cases where the sale of a seriously defective product is patently unlawful and contrary to the public policy of every state in the nation. While the purpose of a punitive damages award in an individual case should not be to provide an optimal punitive assessment for a manufacturer's entire marketing misconduct across the entire nation, rarely can a manufacturer's marketing behavior be evaluated intelligently solely from a narrow state-oriented perspective. Many products (especially automobiles) first sold into one state are later transported into others, and major manufacturers make engineering, safety, marketing, and profitability decisions on a national (or international) basis. At the time of making decisions of this type that may improperly expose consumers across the nation (or globe) to an excessive risk of harm, a

warranted, it can hardly be “excessive.”

⁵¹ In *Gore*, Justice Breyer criticized Alabama's “*Green Oil*” list of seven such factors on the ground that the Alabama courts in practice had not used the factors to restrain excessive punitive awards. See *Gore*, 517 U.S. at 586 & 592 (Breyer, J., concurring) (“the state courts neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the [seven factors] lack”). While the Alabama courts may well not have applied their seven factors with sufficient vigor, drastically cutting the list to the bone, and including in it the most arbitrary factors (guideposts 2 & 3), would seem to exacerbate the problem rather than to help resolve it.

⁵² See *Gore*, 517 U.S. at 568-74.

manufacturer has no idea which consumers in which states its products will likely injure. Accordingly, in judging the flagrancy of a defendant's misconduct that eventually injures a particular plaintiff in a particular state, and in ascertaining the proper level of retribution and deterrence for that misconduct, it would seem that punitive damages fact finders would necessarily have to consider the manufacturer's entire misconduct and decisionmaking as it extended nation-wide.

Additional due process (and other constitutional) questions remain unresolved that the Supreme Court may one day choose to answer. Probably the most significant unresolved issue is whether the Constitution imposes any restraints on the repetitive imposition of punitive damages in mass disaster cases, such as the litigation that has confronted the asbestos industry for many years. Indeed, it is difficult to understand why the Court has failed to review this most important matter when presented with what appeared to be the perfect opportunity.⁵³ Many other fairness questions about punitive damages may (or may not) have due process implications, such as whether the burden of proof for punitive damages may properly be set at only a preponderance of the evidence,⁵⁴ the propriety of basing punitive assessments upon the defendant's wealth,⁵⁵ and many others.

However one views the claim that punitive damages awards have "run wild,"⁵⁶ one may

⁵³ In *Dunn v. HOVIC*, 13 F.3d 137 (3d Cir.) (en banc), modified in part, 13 F.3d 58 (3d Cir.), cert. denied sub nom. *Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993). Collecting the state and federal cases to that date, the court in *Dunn* observed that virtually every court to address the issue has "declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct," noting that "[i]n concluding that multiple punitive damage awards are not inconsistent with the due process clause or substantive tort law principles, both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products." 1 F.3d at 1386. Accord, *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994); *W.R. Grace & Co. – Conn. v. Waters*, 638 So. 2d 502 (Fla. 1994) (noting the problems of successive awards in mass tort litigation, but refusing to limit their imposition). Although the opportunity for consideration of the multiplicity of awards issue was less appropriate in *Gore* than in *Dunn*, the issue was presented to and sidestepped by the Court in *Gore*. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 607, 612 n.4 (1996) (Ginsburg, J., dissenting).

⁵⁴ *Haslip* suggests that such a higher standard of proof may not be constitutionally required. *Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 23 n.11 (1991).

⁵⁵ A defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at ____.

⁵⁶ See *Haslip*, 499 U.S. 1, 18 (1991).

question whether the United States Supreme Court ever should have begun to constitutionalize state tort law in this area.⁵⁷ But *Haslip* decidedly crossed that Rubicon in 1991, since which time the Court has continued its march toward Rome. It is difficult to predict how far the Supreme Court ultimately may extend its foray of substantive due process into the punitive damages lair, and one must hope that the Court will be cautious in attempting to reform this unruly beast. While recent years have witnessed occasional punitive damages awards that by historical standards are extremely large, the accelerated growth and consolidation of corporate institutions is making more and more multi-national enterprises wealthier and more powerful than many nations on the planet. In this rapidly changing world, substantive due process should not require that people be deprived of what may be their most effective protection against the abuses of megalithic enterprises which may trample, sometimes flagrantly and always in the pursuit of profit, the safety and other interests of private individuals. The Constitution ought not be read to prohibit states from using all available resources, including the possibility of large assessments of punitive damages, to teach such enterprises that profitability at some point must give way to public safety and to provide an effective level of retribution and deterrence for flagrantly improper conduct that harms the citizens of this nation.

It is possible that the Supreme Court in time will recognize the perils of treading too deeply into this particular quagmire of state tort law, as it eventually saw the error of excessive constitutional zeal in reforming the law of defamation.⁵⁸ If Congress chooses to enter this ever-shifting quagmire, it should only do so after deliberative study.

⁵⁷ See generally Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859 (1991); Zwier, *Due Process and Punitive Damages*, 1991 Utah L. Rev. 407.

⁵⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

Mr. CHABOT. Mr. Peck.

STATEMENT OF ROBERT PECK

Mr. PECK. Thank you, Mr. Chairman and Members of the Subcommittee. It is a pleasure to start some remarks without having to say, "Mr. Chief Justice and may it please the Court."

For the past 25 years I have been a constitutional lawyer and scholar. I don't pretend to have the expertise on tort law that my colleagues on this panel have, but I do have expertise on constitutional law.

So when we look at constitutional court cases like *State Farm*, we begin with the empirical evidence. Clearly, the best statistics are those that have been generated by the Bureau of Justice Statistics. That Department of Justice agency has found that there are only 3 percent of cases in which plaintiffs are successful and punitive damages are awarded, and that the median award is \$38,000. That is not exactly an eye-popping amount that requires this Committee's attention.

What is remarkable is that, 4 years earlier, it showed that awards of punitive damages were at 6 percent of plaintiffs cases and \$50,000. So what we are seeing is actually a downward trend rather than an upward one.

Professor Michael Rustad has done a comprehensive study of punitive damages in products liability cases. In 1992, his study indicated that there had been, in the previous 25 years, a total of 355 products liability punitive damage cases. Because of the downward trend—

Mr. NADLER. Successful cases or cases?

Mr. PECK. Total cases where punitive damages were awarded. Many of them were also in low amounts.

What we see from the trend downward in products liability litigation generally is that that is probably now a high-water mark and that there has not been an increase.

To turn to *Campbell*, everyone talks about the ratios because that was the headline in the newspapers, that a single-digits ratio may be the outer limit of constitutional propriety. Well, that kind of description is wishful thinking. What the Court specifically said is that we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. We decline again to impose a bright line ratio.

Now, remember, when the Court talks about ratios, they are not talking about the amount of compensatory damages awarded. They are talking about the harm and potential harm to plaintiffs and similarly situated plaintiffs and that the State has a right to vindicate the rights of all of those citizens in that State who could have been injured by this harmful, egregious, reprehensible conduct.

They said that we are going to offer these ratios, but these ratios are not binding—this is the Supreme Court's words. This is not spin. They are instructive—and that there are no rigid benchmarks that punitive damages may not surpass.

So the Court is sending all sorts of signals that this is not a hard and fast rule. This is not something that someone is supposed to codify. They indicated that a 9 to 1 ratio, the single-digit ratio, is

more likely to pass constitutional muster than 500 to 1, but more likely means that there are circumstances in which 500 to 1 does pass constitutional muster. They said the precise award in any particular case must be based on the facts and circumstances of the defendant's conduct and the harm to the plaintiff. That does not give rise to a simple mathematical formula.

What the Court found that Utah had done wrong—it is not that the jury had done it wrong. Because the Utah Supreme Court, trying to obey the strictures of the U.S. Supreme Court, engaged in de novo review. They took a \$30 million punitive damage award, and they restored to it a \$145 million award because they found the actions of State Farm to be so reprehensible.

Where they went wrong is that they tried to do it on the basis of nationwide conduct, which was fraudulent, wherever it might have been, but the Supreme Court, announcing a new rule, said that you cannot even punish for unlawful out-of-State conduct, making punitive damages an entirely in-State issue.

This has bearing on the federalism issue. Because the Court has recognized that under our principles of federalism—and they say so directly in *State Farm*—under our principles of federalism, a State may make its own reasoned judgment about what conduct is permitted or prescribed within its borders and what measure of punishment, if any, to impose. Congress has no authority to override that. This is basic 10th amendment law.

Now, one thing that Mr. Schwartz says in his testimony is he points out that there are some rogue courts out there that are not following the strictures of the Supreme Court. He identified three.

He identifies the Utah Supreme Court for issuing its \$145 million award, which under the law that existed before *State Farm v. Campbell* was not a violation of any order from the U.S. Supreme Court. They followed *BMW v. Gore*. They followed *Copper v. Leatherman*.

He points to the Alabama Supreme Court in the *BMW v. Gore* case. And again, what they did not follow, because they followed the *Haslip* decision which said that Alabama's procedures for awarding punitive damages met due process. So until they enunciated in *BMW v. Gore* the way that you evaluate excessiveness there was no problem.

And, finally, he points to an Oregon Court of Appeals case where they awarded a 7-to-1 ratio which—punitive damages to compensatory damages which still meets *State Farm v. Campbell*. And he seems to think that just because the Court remanded in light of *Campbell* that that has meaning. But the Supreme Court itself calls that a GVR order—grant, vacate and remand. It is a docket-clearing device. It has nothing to do with any substantive evaluation of the case. It simply says we have made an intervening decision. It may change your mind. It may not. We are giving you another opportunity. So that is not a substantive decision on their part.

Finally, let me just say that there is an issue that Congress can deal with, and that is the tax issue that I raise in my testimony, where it is possible that someone who can win a punitive damage judgment will end up owing more than they have won because of the strange operation of the tax laws that also tax them for the

amount that would go to the State on a State—on a sharing type of institute or on the amount that goes to their counsel, who will also still have to pay taxes on that.

Senator Hatch offered an amendment to the tax bill earlier this year to try and resolve that problem. That did not end up in the tax bill. I commend it to you to move on to other of your colleagues.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Peck follows:]

PREPARED STATEMENT OF ROBERT S. PECK

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee:

I thank the Subcommittee for its invitation to testify today on the topic of punitive damages. To begin, allow me provide the Committee with a little of my background. I am president of the Center for Constitutional Litigation, P.C., a Washington, D.C. law firm that limits its practice to constitutional cases in furtherance of access to justice. One of our firm's clients is the Association of Trial Lawyers of America, for whom I serve as Senior Director for Legal Affairs and Policy Administration.

In addition to being a practitioner, I also serve as an adjunct professor of constitutional law at the law schools of both American University and George Washington University. I am as well a member of the Board of Overseers of the RAND Institute for Civil Justice, the Lawyers Committee of the National Center for State Courts, and the Council of the American Bar Association's Tort Trial and Insurance Practice Section.

Of most immediate relevance to the Subcommittee's topic today, I argued a punitive damage case, *Rhyne v. K-Mart, Inc.*, in the North Carolina Supreme Court just two weeks ago. The case involved the constitutionality of a state statute limiting punitive damages and, alternatively, the application of *State Farm Mutual Automobile Insurance Co. v. Campbell*. I am also Counsel of Record in *Philip Morris v. Williams*, where the defendant has sought review of a punitive damage judgment in the United States Supreme Court on the issue of excessiveness. My law firm also represents the Smith family in *Estate of Smith v. Ford Motor Co.*, which will be argued in the Kentucky Supreme Court in a few weeks on remand from the U.S. Supreme Court in light of *Campbell*.

The *Campbell* decision has also figured in other activities of mine. On Friday of last week, I participated on a panel with the two lawyers who will be arguing the remand of the *Campbell* case before the Utah Supreme Court in a few weeks. I have also chaired a continuing legal education program for the Practicing Law Institute on "Punitive Damages after *State Farm v. Campbell*," and will participate in a second program of the same title for them in New York on October 7. Finally, I am the author of the upcoming American Jurisprudence Proof of Facts 3d on Punitive Damages. I come to this hearing with a close and thorough appreciation of *Campbell*.

II. THE LANDSCAPE OF PUNITIVE DAMAGES

A. Legal Treatment of Punitive Damages

It is useful to begin with an understanding of the development and law of punitive damages. Punitive damages originated in the common law.¹ In 1763, English courts firmly established the legitimacy of punitive, or exemplary, damages as a common-law device within the jury's province.² In *Wilkes*, one of the most important and influential cases of English law to the American founders,³ Lord Chief Justice Pratt announced: "[A] jury shall have it in their power to give damages for more than the injury received as a punishment to the guilty, to deter from any such pro-

¹ Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* §1.0, at 1 (4th ed. 2000) (finding that punitive damages "evolved from the common law . . . to meet certain societal needs such as compensation for mental anguish or other intangible harms, punishment and deterrence of wrongdoers, and as a substitute for revenge"). Schlueter and Redden also note that use of multiple damages for these purposes existed at least as far back as the Code of Hammurabi in 2000 B.C. *Id.*

² *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

³ See *City of West Covina v. Perkins*, 525 U.S. 234, 247 (1999).

ceeding for the future, and as a proof of the detestation of the jury to the action itself.”⁴

Soon after *Wilkes*, American courts began to award punitive damages, with South Carolina being the first in 1784.⁵ Typical of these cases was a 1791 New Jersey case in which the jury was instructed “not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for example’s sake, to prevent such offenses in [the] future.”⁶ Typically, if the jury’s punitive verdict was either insufficient or excessive, the appropriate remedy was a choice between a judge-chosen number (remittitur) or a new jury trial.⁷ Given this history, the U.S. Supreme Court has observed that punitive damages “have long been a part of traditional state tort law.”⁸

From those early days, the practice was not without criticism. Still, while acknowledging that “some writers” had questioned the “propriety” of punitive damages, the U.S. Supreme Court in 1851, ruled that this “well-established principle of the common law” was too much a part of the fabric of the law to undo.⁹ In fact, the Court said:

if repeated judicial decisions for more than a century are to question will not admit of argument. By the common law as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action, and the damages inflicted, by way of penalty or punishment, given to the party injured . . . the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant’s conduct, and may properly be termed exemplary or vindictive rather than compensatory . . . This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.¹⁰

As the Court’s opinion indicates, the jury was vested with broad discretion to determine the amount of punitive damages without limitations and respecting only the circumstances of the case. Early caselaw also recognized that the punishment of wealthy defendants often required a larger punitive amount than poorer defendants because “a thousand dollars may be a less punishment to one man than a hundred dollars to another.”¹¹ Authority to determine that a punitive award was excessive rested with the trial judge, who had “a unique opportunity to consider the evidence in the living courtroom context” and would only be overruled for an abuse of discretion.¹²

Recently, another wrinkle was added to punitive damages—constitutional considerations of due process. In *Pacific Mutual Life Insurance Co. v. Haslip*,¹³ the Supreme Court held that the Fourteenth Amendment’s Due Process Clause applies to a punitive damage award between private litigants, but that the Alabama procedures at issue in that case satisfied due process. The *Haslip* Court, much like the *Campbell* Court, offered a ratio as guidance to the lower courts. Although not creating any hard and fast rule, it said “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.”¹⁴

In its next decision, the Court showed how little that ratio mattered. In *TXO Production Corp. v. Alliance Resources*,¹⁵ the Court was asked to rule that \$10 million in punitive damages was unconstitutionally excessive when compared to an award of \$19,000 in compensatory damages, which consisted entirely of the cost of defending a declaratory judgment action. The Court ruled that the 526:1 ratio was not excessive considering the potential loss to the plaintiff if the fraudulent scheme had succeeded, the bad faith of the defendant, the fact that the scheme was part of a “larger pattern of fraud, trickery and deceit, and [the defendant’s] wealth.”¹⁶

Next, rather than consider issues of excessiveness, the Supreme Court found that judicial review of punitive damages was needed and the standard employed had to

⁴ *Wilkes*, 98 Eng. Rep. at 498–99.

⁵ See *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (S.C. 1784).

⁶ *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (N.J. 1791).

⁷ See, e.g., *Harton v. Reavis*, 4 N.C. 256 (N.C. 1815).

⁸ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

⁹ *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

¹⁰ *Id.* (emphasis added).

¹¹ *Pendleton v. Davis*, 46 N.C. 98, 1853 WL 1452, at 1 (1853).

¹² *Worthington v. Bynum*, 290 S.E.2d 599, 606 (N.C. 1982).

¹³ 499 U.S. 1 (1991).

¹⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003), characterizing *Haslip*, 499 U.S. at 23–24.

¹⁵ 509 U.S. 443 (1993).

¹⁶ *Id.* at 18 (footnote omitted).

be more than whether there was evidence to support the verdict.¹⁷ Then, in *BMW of North America, Inc. v. Gore*,¹⁸ the Court found, for the first time, that a punitive award violated due process by being grossly excessive. To make that determination, the Court established three guideposts, the most important of which was the extent of reprehensibility of the defendant's conduct, which in turn is measured, in large part, by the presence of up to five aggravating factors.¹⁹ These guideposts remain the means of measuring constitutional excessiveness.

The last of the pre-*Campbell* punitive damage cases is *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*²⁰ Cooper established that punitive verdicts in federal court are subject to *de novo* review and that the Seventh Amendment jury trial right does not reexamine punitive damages, even though it left that subject untouched when it comes to state constitutional law in state courts.

B. Empirical Data on Punitive Damages

Before briefly reviewing the *Campbell* decision, it is worth reviewing the relevant empirical research on punitive damages. First, it is important that this Subcommittee understand that punitive damage awards remain the most rare of results. When awarded, the numbers are simply not eyepopping. A study conducted by the U.S. Department of Justice, using 1996 statistics from 75 of the Nation's largest counties found that only three percent of plaintiffs who won their cases were awarded punitive damages and that the median punitive damage award was \$38,000.²¹ More recent empirical studies conducted by researchers at the National Center for State Courts confirm those findings.²² These figures represent a decline, rather than an upward trend. The previous Justice Department study, using 1992 data, showed about six percent of plaintiffs received an award and that the median award was \$50,000.²³ The trend is downwards.

Statewide studies similarly show punitive damages are insignificant. The most recent Georgia study, for example, concludes "punitive damages currently are not a significant factor in personal injury litigation."²⁴ In Florida, the statistics show punitive damage verdicts to be "strikingly low."²⁵ A comprehensive study by Jury Verdict Research (JVR) found that for the period 1992–97 North Carolina punitive damage awards represented only four percent of all plaintiff verdicts.²⁶

In fact, as one researcher put it after surveying the academic literature, "[e]very empirical study of punitive damages demonstrates that there is no nationwide punitive damages crisis."²⁷ Even an 11-state study of 25,627 civil jury verdicts concluded claims of a punitive damage crisis were "unfounded, and perhaps manufactured."²⁸

Punitive awards in medical malpractice and products liability also tend to be sparse. Duke law professor and sociologist Neil Vidmar reviewed 1,300 medical malpractice cases in North Carolina, finding only two cases awarded punitive damages.²⁹ In demographically important Franklin County, Ohio, which is a microcosm of the entire U.S. population, researchers reviewed every verdict issued over a twelve-year period and found not a single punitive award in a medical malpractice or product liability case.³⁰ The Florida researchers found that, "with the exception of asbestos cases, punitive damages were almost never given in products liability cases."³¹ Incidentally, when punitive damages have been awarded in medical mal-

¹⁷ *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

¹⁸ 517 U.S. 559 (1996).

¹⁹ *Id.* at 575–76.

²⁰ 532 U.S. 424 (2001).

²¹ U.S. Dep't of Justice, Bureau of Justice Statistics, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (NCJ 179769), at 1 (Aug. 2000).

²² Theodore Eisenberg, *et al.*, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002).

²³ U.S. Dep't of Justice, Bureau of Justice Statistics, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES, at 1 (1995).

²⁴ Thomas A. Eaton, *et al.*, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1094 (2000).

²⁵ Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 487 (2001).

²⁶ Jury Verdict Research, 1998 North Carolina Verdict Survey 9 (1998).

²⁷ Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 69.

²⁸ Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 64 (1990) (footnotes omitted).

²⁹ Neil Vidmar, MEDICAL MALPRACTICE AND THE AMERICAN JURY 254 (1995).

³⁰ Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 388 (1999).

³¹ Vidmar & Rose, *supra* note 25, 38 HARV. J. LEGIS. at 487.

practice cases, a shockingly high number of the cases involved sexual assault and battery on patients by the medical provider.³²

Nor do the studies show a difference between awards made by judges and awards made by juries. The National Center for State Courts study found that “[j]uries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.”³³ Study after study demonstrates that punitive verdicts correlate closely with the seriousness of the misconduct. One study of medical malpractice cases over a period of 30 years found “punitive damages were awarded in only the most egregious cases involving healthcare practitioners.”³⁴ Judge Richard Posner and Professor William Landes reviewed products liability cases to conclude “the cases as a whole are generally congruent with the formal legal standard for awarding punitive damages.”³⁵ Even when awards appear on their face to be disproportionate, the underlying facts often reveal them to be warranted.³⁶

Surprisingly, while so much legislative attention is paid to these unremarkable physical harm cases, the real action appears to be in financial injury cases, where punitive awards are increasing in number and size.³⁷ In fact, all of the punitive-damage excessiveness cases reviewed in the U.S. Supreme Court have involved pure economic harm, rather than physical harm. Simply put, punitive damages in personal injury matters are being handled sensibly by juries and judges. They remain infrequent, are generally modest in size, correlate closely with the severity of the misconduct, and are vigilantly reviewed by courts for excessiveness. No crisis warranting congressional attention is evident.

III. WHAT *STATE FARM V. CAMPBELL* HELD

Critics of punitive damages engage in wishful thinking when they claim the Supreme Court’s opinion in *Campbell* established that a ratio of punitive to compensatory damages in excess of single digits is presumptively unconstitutional. It clearly does not. Instead, *Campbell* reiterated:

“[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.’ We decline again to impose a bright-line ratio.”³⁸

In fact, the Court stated the ratios it articulated “are not binding, [instead] they are instructive.”³⁹ Still, it said, “*there are no rigid benchmarks that a punitive damages award may not surpass.*”⁴⁰ The Court did suggest that a 9 to 1 ratio was “more likely to comport with due process . . . than awards with ratios in range of 500 to 1.”⁴¹ However, the Court’s use of “more likely” signals that there will be circumstances where a 500:1 ratio would be appropriate. The “precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”⁴²

Campbell acknowledges, for example, that “ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’”⁴³ The Court further noted that a higher ratio *might* be necessary where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.”⁴⁴

Justice Stevens, the author of the *BMW v. Gore* decision, explained another of the circumstances warranting a high ratio:

³² Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 RUTGERS L. REV. 975, 1034–35 (1995).

³³ Eisenberg, *supra* note 22, 87 CORNELL L. REV. at 779.

³⁴ Rustad & Koenig, *supra* note 32, 47 RUTGERS L. REV. at 1027.

³⁵ William M. Landes & Richard A. Posner, *THE ECONOMIC STRUCTURE OF TORT LAW* 185 (1987).

³⁶ See, e.g., Eisenberg, *supra* note 22, 87 CORNELL L. REV. at 756; Vidmar & Rose, *supra* note 25, 38 HARV. J. LEGIS. at 500–05.

³⁷ Erik Moller, *et al.*, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283 (RAND 1999).

³⁸ *Campbell*, 123 S. Ct. at 1524, quoting *BMW*, 517 U.S. at 582 (emphasis in original, citation omitted).

³⁹ *Id.*

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.*

⁴² *Id.* (there is no “bright-line ratio which a punitive damage award cannot exceed”).

⁴³ *Id.* (citation omitted).

⁴⁴ *Id.* (citation omitted).

It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims* that might have resulted if similar future behavior were not deterred.⁴⁵

A plain reading of *Campbell*, contrary to the fevered accounts that imaginative advocates have penned, indicates that there is nothing magical about the ratios. Moreover, because due process is a two-edged sword, there may be a due process violation of the plaintiff's rights by the creation of a rigid ratio that is less than necessary to serve the punishment and deterrence purposes of punitive damages in relation to the harm caused by the conduct.

So, then, what did *Campbell* do that is new? Certainly, it did nothing new with respect to gross excessiveness. The Court found the excessiveness issue in *Campbell* "neither close nor difficult" while applying the well-established "principles set forth in *BMW of North America, Inc. v. Gore*."⁴⁶ It did not change or further explain the guideposts established in *BMW*, although it could be argued that the third guidepost (comparability to civil or criminal fines or other punitive damage awards) is less relevant now.

What it did do, however, is limit the use of out-of-state conduct to determine punitive damages. Previously, the Court prohibited punitive damages based on out-of-state conduct that was lawful in other states.⁴⁷ In *Campbell*, the Court ruled that a State does not have a "legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State's jurisdiction."⁴⁸ In other words, when Utah levies punitive damages against a company for acts that are also illegal in other states, it must only concern itself with the impact in Utah and leave it to other states' courts to award appropriate punitive damages for the effects in those states. By doing so, the Court endorsed the multiple punitive damage approach that Mr. Schwartz has asked this Subcommittee to prohibit by law. Thus, his proposal is not an implementation of *Campbell*, but a repudiation of it.

Second, while acknowledging that wealth may be offered into evidence, the Court said that it alone may not justify the size of a punitive damage verdict.⁴⁹ Finally, to the extent evidence is introduced to demonstrate recidivism, the Court found that the prior acts must be similar on all points.⁵⁰ Thus, the bad-faith insurance claim at issue in *Campbell* had to be paired with similar bad-faith automobile insurance instances, rather than instances involving, for example, earthquake, hurricane or flood damage.

IV. FEDERALISM CONCERNS LIMIT CONGRESSIONAL AUTHORITY OVER PUNITIVE DAMAGES

Before Congress acts, it must come to terms with the very serious federalism concerns that indicate that there is a very circumscribed role for Congress in the area of punitive damages. Congressional authority is limited to federal causes of action that justify punitive damages, for punitive damages have no existence independent of the underlying cause of action, and to certain taxation issues. Federal actions in which punitive damages are authorized are largely civil rights actions. For example, the Civil Rights Act of 1991 authorizes punitive damages in Title VII cases where an employer intentionally discriminates "with malice or with reckless indifference to the federally protected rights."⁵¹ Even so, Congress has seen fit to limit the amounts of such awards on a sliding scale based on the employer's size. The limits apply to the "sum of the amount of compensatory damages awarded . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded."⁵²

Civil rights cases, however, are not the types of cases that have brought the proponents of legislative action before this committee. They instead have focused their attention entirely on state-based personal injury causes of action. This is curious because, as I indicated earlier, there is no punitive damage crisis in this area. It is instead in financial injury cases where there has been a growth in the number and amounts of punitive damage verdicts.⁵³ Each of the excessiveness cases heard in the

⁴⁵ *TXO*, 509 U.S. at 460 (emphasis added).

⁴⁶ *Campbell*, 123 S.Ct. at 1521.

⁴⁷ *BMW*, 517 U.S. at 572.

⁴⁸ *Campbell*, 123 S.Ct. at 1522.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 42 U.S.C. § 1981a(b)(1).

⁵² *Id.* at § 1981a(b)(3).

⁵³ See *Moller*, *supra* note 37.

U.S. Supreme Court—*Haslip*, *TXO*, *BMW*, *Cooper* and *Campbell*—have involved economic injuries, which the Court has repeatedly indicated are less reprehensible as a rule than those that involve physical harm.

In asking for a federal regulatory overlay on punitive damage judgments, advocates for the change are asking Congress to exceed its constitutional authority and intrude into a realm that the Constitution reserves to the States. The Supreme Court warned that Congress bears a “very heavy burden when affecting areas of traditional state concern.”⁵⁴ To understand why that burden cannot be met here, one need look little further than the Supreme Court’s punitive damage decisions. Nearly twenty years ago, the Supreme Court recognized that punitive damages “have long been a part of traditional state tort law.”⁵⁵ They serve the purpose of “further[ing] a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”⁵⁶ In *Campbell*, the Court reiterated the connection to a State’s sovereign authority:

A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.⁵⁷

For these reasons, the *Campbell* Court ruled, a State may not impose “punitive damages to punish a defendant for unlawful acts committed outside the State’s jurisdiction.”⁵⁸ Thus, because punitive damages may be assessed only to vindicate the State’s sovereign interests in punishment and deterrence, it is part of the irreducible core of a State’s authority and protected by the Tenth Amendment from congressional interference. It is intimately related to the process of democratic self-government, any interference with which, the Supreme Court has said, “would upset the usual constitutional balance of federal and state powers.”⁵⁹

A further complication is that some states do not permit punitive damages at all.⁶⁰ In other states, punitive damages have a compensatory element. For example, in Alabama, punitive damages in wrongful death are compensatory; the usual rules on punitive damages do not apply.⁶¹ This lack of uniformity in the states is a feature of federalism that the Constitution celebrates, rather than condemns. It poses insuperable obstacles to a federal regulatory scheme.

I am confident that the Court would find congressional interference with the core state function of assessing punishment in the form of punitive damages unconstitutional. Before the *Campbell* decision, multiple awards vindicating interstate interests were possible in a single State’s court and logically could have provided a basis for congressional action. After *Campbell*, that is no longer possible. With its disappearance as an issue, whatever congressional authority may have existed also evaporated. Congress may not legislate against multiple punitive damage judgments that vindicate a State’s own interests against reprehensible conduct, nor may Congress allocate how such an award is distributed when there is only a State, and not a federal, interest at stake.

The two most likely counterarguments that proponents of such measures might raise are easily dismissed. First, I can imagine these advocates asserting that such a law would be premised on congressional authority over interstate commerce. However, a State’s authority to punish and deter egregious misconduct is not a matter of commerce, but a function of their police power; it is not subject to federal preemption.

Nor can a credible argument be formulated that punitive damages place a burden on interstate commerce. A similar argument, supported by detailed legislative findings and voluminous testimony, was insufficient to save the Violence Against Women Act (VAWA) from constitutional invalidation in *United States v. Morrison*.⁶² *Morrison* said that the scope of the interstate commerce power must respect our system of dual sovereignty, including States’ rights.⁶³

⁵⁴ *United States v. Lopez*, 514 U.S. 549, 577 (1995).

⁵⁵ *Silkwood*, *supra*, 464 U.S. at 255.

⁵⁶ *BMW*, *supra*, 517 U.S. at 568.

⁵⁷ *Campbell*, *supra*, 121 S.Ct. at 1523.

⁵⁸ *Id.* at 1522.

⁵⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

⁶⁰ See, e.g., N.H. Rev. Stat. § 507:16 (outlawing punitive damages).

⁶¹ Craig S. Bonnell, *Back and Forth with the I.R.S.: Taxation of Wrongful Death Damages in Alabama*, 17 CUMB. L. REV. 53, 68 (1987).

⁶² 529 U.S. 598 (2000).

⁶³ *Id.* at 608 (citations omitted).

Punitive damages are similar in that they are “quasi-criminal,”⁶⁴ and thus, “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”⁶⁵ To fall within the commerce power, the law must regulate an economic activity that substantially affects interstate commerce. *Morrison*, the VAWA case, involved noneconomic, criminal conduct.⁶⁶ Punitive damages similarly involve some egregious and reprehensible acts that are quasi-criminal and not economic in nature. The Court’s evaluation of the type of conduct being regulated turns on whether the underlying conduct constitutes “some sort of economic endeavor.”⁶⁷ Thus, the Court considered whether possession of a gun in a school zone in *Lopez* or the violent sexual assault on a woman in *Morrison* constituted an economic activity within the commerce power. Neither qualified.

The conduct that engenders punitive damages also cannot be regarded as economic activity. There is no commercial market for willful, fraudulent or malicious acts that merit the community’s moral condemnation—for that is what punitive damages punish. No one can seriously claim that encouraging such acts aids economic development or contributes to a stable national economy.

Obviously, punitive damages also affect considerable tortuous conduct utterly unconnected to any commercial enterprise, such as particularly malicious intentional torts like assault and battery or injuries that result from a drunk driver’s reckless conduct. Because of that, the Supreme Court requires those laws premised on the Commerce Clause to contain jurisdictional restrictions that limit the reach of the regulation to those activities that have “an explicit connection with or effect on interstate commerce.”⁶⁸

Here, as was claimed in *Lopez*, one can imagine proponents of legislation alleging that the costs of punitive damages are spread throughout the economy and would adversely affect national productivity and, thus, interstate commerce. The Court, however, rejected those justifications in both *Lopez* and *Morrison*, “because they would permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.’”⁶⁹ With respect to punitive damages, the same could be said of all civil sanctions for reprehensible misconduct.

The *Morrison* Court then tellingly quoted the *Lopez* decision for its holding that “[u]nder the[se broad aggregate-effect] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.”⁷⁰ The Court refused to travel down that path, as it undoubtedly would with respect to punitive damages.

The *Morrison* Court’s decision also overrode numerous findings by Congress. Anticipating criticism for that action, the Court said that just because Congress deems that an “activity substantially affects interstate commerce does not necessarily make it so.”⁷¹ Consider the findings the Court found insufficient to sustain VAWA. Congress found gender-motivated violence affects interstate commerce

by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce, . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products.⁷²

One would imagine that proponents of punitive-damage legislation would advocate quite similar findings. Yet, the findings were rejected because it would allow “the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority.”⁷³ One could also easily imagine the Court concluding that the “punishment of [egregious and reprehensible acts of wanton, reckless or willful misconduct] is not directed at the instrumentalities, channels, or goods involved in interstate commerce [but] has always been the province of the States.”⁷⁴ Punitive damage regulation does not fall within the Commerce Power.

⁶⁴ Cooper, *supra*, 532 U.S. at 432.

⁶⁵ Lopez, *supra*, 514 U.S. at 561, quoted in Morrison, *supra*, 529 U.S. at 610.

⁶⁶ Morrison, *supra*, 529 U.S. at 610.

⁶⁷ *Id.*

⁶⁸ Lopez, *supra*, 514 U.S. at 562, quoted in Morrison, *supra*, 529 U.S. at 612.

⁶⁹ Morrison, *supra*, 529 U.S. at 612–13, quoting Lopez, *supra*, 514 U.S. at 564.

⁷⁰ *Id.* at 613, quoting Lopez, *supra*, 514 U.S. at 564.

⁷¹ *Id.*, quoting Lopez, *supra*, 514 U.S. at 577 n.2.

⁷² *Id.* at 614 (citation omitted).

⁷³ *Id.*

⁷⁴ *Id.* at 618.

A second flawed argument would invoke Section 5 of the Fourteenth Amendment. That section gives Congress the authority to enforce the rights preserved through the Fourteenth Amendment by appropriate legislation. The argument in favor of legislative authority here would assert that legislation was needed to restrain States from violating the due process rights of punitive-damage defendants. However, to make such an assertion of need, proponents must bear a particularly heavy evidentiary burden, one that they simply cannot sustain. After all, VAWA was also justified on grounds that there was a “pervasive bias in various state justice systems against victims of gender-motivated violence,” which a “voluminous congressional record” set out in detail.⁷⁵

The Court, however, found that it was not uniform across the country. It noted that broad remedial measures cannot pass constitutional muster when the due-process violation does not “exist in all States or even most States.”⁷⁶ Thus, for example, the Voting Rights Act’s preclearance provisions are confined in operation to those regions of the country where voting discrimination was most flagrant. It is difficult to imagine Congress segregating out States for Section 5 punitive damage reasons for coverage in a regulatory scheme.

In fact, with respect to punitive damages, no compelling case can be made that all or most States violate a defendant’s due process rights. States have enacted laws carefully delineating the necessary proof and level of misconduct to permit a valid punitive damage verdict. States have implemented special and specific jury instructions. Each state requires, should a defendant elect, mandatory appellate review, often, if not uniformly, *de novo*. Criminal sentencing does not receive as much scrutiny and due process. Perhaps the biggest *coup de grace* to allegations of widespread due-process violations comes from the Supreme Court’s *TXO* decision:

Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so.⁷⁷

A case for widespread and longstanding due process violations cannot be made.

V. MULTIPLE PUNITIVE DAMAGE AWARDS

Although I have already expressed the strong constitutional reasons why Congress may not regulate when a State may require punitive damages for the same pattern of conduct that may have merited punitive damages in another State, it is worth examining somewhat further the flawed logic of the anti-multiple punitive damage position.

If a State could punish a defendant for its nationwide conduct, a result foreclosed by *Campbell*, there might be merit to limits on multiple awards. However, *Campbell* makes clear that each punitive award can only be sufficient to punish and deter for what harms the defendant visited upon that State’s citizenry. Thus, if an organization that operates nationally engaged in an egregious fraud, the Illinois courts may award punitive damages based on the harm or potential harm the fraud had in Illinois, as well as the illicit Illinois-based profits generated by the fraud. The award may not consider the harms or profits generated by the same illicit fraud in Wisconsin, which alone may exact punishment for that in-state misconduct.

Still, the law of most States would allow the defendant to introduce evidence of the first punitive award, show that it has effectively caused the defendant to mend its ways, and seek to avoid or limit any subsequent punitive damages because of the earlier award.⁷⁸ The problem of multiple damages has been effectively treated by these provisions.

Given that the *Campbell* Court endorsed the multiple punitive damage concept by limiting awards to in-state harms, Congress clearly cannot claim that it is implementing *Campbell* or responding to potential due-process violations.

VI. REDISTRIBUTION OF AWARDS IS A STATE MATTER

I understand there is some interest on the Subcommittee in considering whether an award-splitting bill should be enacted. A number of states have adopted similar statutes that appropriate a percentage of any punitive damage judgment to the

⁷⁵ *Id.* at 619–20.

⁷⁶ *Id.* at 626.

⁷⁷ *TXO*, *supra*, 509 U.S. at 457 (citations omitted).

⁷⁸ See, e.g., Restatement (Second) of Torts §908, Comment e (1977); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998); *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921 (N.D. 1994); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987).

state or a public purpose. Utah was the first to enact such a law; there, 50 percent of any award goes to the State.⁷⁹ Other states take a higher percentage. For example, Indiana takes 75 percent.⁸⁰ Other states have similarly high percentages.⁸¹ In addition, one state supreme court, Ohio's, has imposed a similar regime by judicial decision.⁸² And another state supreme court has found that such a reallocation law constitutes a taking of property without just compensation.⁸³

Enacting such a law, to the extent permitted by the State's constitution, is a sovereign choice that a State alone is entitled to make. The federal government cannot require such a choice. Nor may it, outside the tax laws, seek to share in the award, which, after all, exists to vindicate an individual State's interest.

VII. TAX LAW TREATING PUNITIVE DAMAGES NEEDS TO BE CHANGED

There is one area where Congress can do something about the unfair operation of the law on punitive damages. Punitive damages are taxable. When a state claims a portion of the punitive damages, the federal government still taxes the portion that goes to the State, even though those proceeds are never seen by the plaintiff. Also, under the majority view in the courts, the lawyers' fee is not netted out against the recovery, so the plaintiff must pay taxes on that amount as well. The result, remarkably enough, is that the successful punitive-damage plaintiff may sometimes owe more in taxes than he or she receives from the judgment.

Earlier this year, Senator Hatch offered an amendment to the tax bill to rectify this situation. It was not included in the final bill. I have attached a copy of his proposal, as well as several articles detailing the plight of plaintiffs here. This is one area where Congress does have power to remedy an injustice. I urge that it be passed along to the appropriate committee.

VIII. CONCLUSION

Congress has little authority to regulate punitive damages or enact legislation that might control State authority in the realm of punitive damages. Moreover, the empirical evidence on punitive damages strongly suggests that there is no appropriate concern to be pursued here. The *Campbell* decision not only presents no new reason for Congress to act, but actually forecloses areas that once might have been appropriate. The Court endorsed a multiple punitive damage approach; Congress may not change the law in the opposite direction. Still, there is one area where Congress could and should act. It should fix the tax laws, which currently hold the prospect that a punitive damage awardee will end up owing the government more than he or she receives.

Mr. CHABOT. Mr. Schwartz.

STATEMENT OF VICTOR SCHWARTZ

Mr. SCHWARTZ. Chairman Chabot, Mr. Nadler, thank you for inviting me here today. I was just out in Cincinnati, in Findlay Market, and I mentioned your name, and they like you out there, which is a nice thing.

Mr. Nadler, I am from your neighborhood. They like you there, too. So it is nice to have people that the voters like. I have been in hearings where they don't.

Mr. CHABOT. You are doing great so far.

Mr. SCHWARTZ. On a serious note which affects our testimony, Mr. Nadler, for years you have been a defender of the Constitution, a defender of people's rights, however unpopular. That is very relevant in what we are going to talk about today—what some of us are going to talk about, anyway.

⁷⁹ Utah Code Ann. § 78-18-1(3).

⁸⁰ See *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

⁸¹ See, e.g., Or. Rev. Stat. § 18.540 (60 percent).

⁸² *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Oh. 2002).

⁸³ *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991) (statute designating one-third of punitive damage award as due to state general fund violated state and federal constitutions' taking clauses).

Punitive damages for years really presented no problem. They were awarded for intentional wrongdoing, for trespass, for things that we learned in the first year of law school about intentional torts.

But it changed in the 1970's, and then they started to be awarded for things that were not intentional. And then, because it was not intentional, they were awarded against product manufacturers.

I won a case in Ohio, and the 6th Circuit sustained it, where I won a punitive damage against a company. And I remember Judge McCree said to me, "Professor Schwartz"—whenever they said Professor Schwartz, I knew that I was in trouble—how can we award punitive damages here where the Admiral Television Company makes hundreds of sets and it can be awarded again and again and again? And I said, "Well, it is fair at least to award it in this case."

But there is a problem once you change the fundamental nature of punitive damages, and they are not awarded for intentional torts, and they are awarded again and again for the same conduct. And that does occur.

Another change was in the amount. Until the 1970's, you had no awards over a million dollars. Now they are commonplace. The studies that my colleagues refers to are—some are 10 years old. In one of them, the *Rustad* study, Professor Rustad says in his study nobody knows how many punitive damages there are and nobody ever will.

One thing that is clear, though, is that multimillion dollar awards occur; and if they occur in 6 percent of the cases—if I had a gun to my head and it would only fire 6 percent of the time, I don't think I would fire it. It is the threat of them that has actually reduced the number of cases that go to trial, because people can get whacked with very outlandish high awards.

Now the Supreme Court more than once has said that punitive damages have run wild in this country, and the Court has tried to put some constraints on punitive damages. They are sound restraints. They have put up three factors in the *Gore* case—reprehensibility, ratio and comparison with criminal conduct—that are good.

But I disagree, and I am going to put some stuff in the record to show that lower courts have failed to follow what the Supreme Court has said, as recently as a few weeks ago when in a case called *Key Pharmaceuticals*, in which we filed the principal amicus brief, was remanded to an Oregon court.

They got it half right. They applied the 9-to-1 ratio, which the Court did say was the rule, except if you have that unusual case where there is very little compensatory damages and there is very serious wrongdoing. There the 9-to-1 doesn't fit, but in the rest of the time it does.

If you read the opinion and read it as a legislator, as a matter of policy—anyway, they remanded it. The Court said, we will follow the ratio, no more than 9-to-1, but then they didn't read the rest of the opinion and they allowed in, to inflate that award, evidence that was not directly dealing with the plaintiffs in the key case, some of it out-of-State evidence.

I would say for this Committee and in the record, there is not a doubt in the world that some lower courts are going to, some of them, thumb their nose at the Supreme Court.

If people are interested in protecting constitutional rights—and this body has done it with voter rights, civil rights, all over the place, and I am going to submit an article written by a very good professor, not moi, not anybody on the panel about this—those constitutional rights need to be protected against rogue courts that have ignored the Supreme Court.

This body can and should consider implementing the rules of *State Farm* and do it in a way that is easy to understand so that lower court judges understand what the rules are and higher court judges follow the rules, even though we are talking about unpopular defendants.

The second thing this body can consider is multiple imposition of punitive damages for the same thing. And I take—and I have read very carefully my colleague's testimony, but there is no—absolutely no warranty that people will not be punished again and again for the same thing.

I found it interesting that he said, and I will conclude, that, well, you can go in front of a jury, and Mr. Peck is a litigator, and tell the jury that—you are just the jury now—I am not sure my client—they had one bad verdict against them, so I said, ladies and gentlemen—this is the way I begin my case—another jury has already punished you for punitive damages, my client, but you should just not think about that.

So you are put in this dilemma of either telling them that your client has already been punished by another jury or not telling them and letting them think that they are the sole punisher and this is the only body that really can address that problem.

I really thank you for holding hearings on this topic and for allowing me to present these remarks today.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

Mr. Chairman, I welcome your kind invitation to participate in this oversight hearing on "Potential Congressional Responses to *State Farm Mutual Automobile Insurance Co. v. Campbell*: Checking And Balancing Punitive Damages." You have shown wisdom and good judgment in holding this hearing. Congressional action is needed to assure that fundamental due process rights, both substantive and procedural, are respected in order to protect citizens against unconstitutional punitive damage awards.

Let me begin with a brief background about punitive damages.

BACKGROUND ON PUNITIVE DAMAGES

Punitive damages began in England with a very legitimate purpose. They were used to help supplement the actions of state law enforcement to assure that wrongdoers were punished.¹ When punitive damages began to be utilized by some of our states, they were similar to the laws of England in their scope and purpose. They were confined to intentional wrongdoing, such as battery, assault, false imprison-

¹See *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763) (first case to use the term "exemplary damage,"); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 1 (1982).

ment and trespass.² Their amounts were limited, rarely being greater than actual damages.³

Punitive damages standards remained the same for more than two centuries. Beginning in the 1970s, however, they started to change.⁴ Judges, not legislators, made these changes and because judges did so, they made their application retroactively.

First, the fundamental concept of intentional or purposeful wrongdoing was muted. Reckless or even gross negligence was deemed enough to punish.⁵ This was a significant change, because the standards of gross negligence and recklessness are more amorphous than intentional, purposeful conduct.

Second, there was an increase in the number of cases in which punitive damages were sought and the types of conduct that might fall under their web.⁶ Damages were assessed for failure to have a correct warning, a mistake in a surgical procedure, or a failure to have discovered a particular risk before a product was put on the market. These now come within the scope of punitive damage awards.

Third, the size of the awards increased astronomically. Prior to 1970, there was no punitive damage verdict of more than one million dollars. Today, multi-million or even multi-billion dollar verdicts shock no one.⁷ This change caused the Supreme Court of the United States and its Members to “time and again”⁸ express their concern about “punitive damages awards that run wild” in this country.⁹

Finally, punitive damages for the same conduct began to be assessed a multiplicity of times. In early common law, this was virtually impossible, as punitive damages were assessed against individuals for harm they caused to one person.¹⁰ Once punitive damages were extended to product manufacturers or hospitals, or any entity that engaged in similar conduct with potentially multiple plaintiffs, the scepter of multiple punishment was possible and was often used. Decades ago, Henry Friendly, one of the most distinguished judges of the Twentieth Century warned against this,¹¹ but his warnings were ignored.

THE SUPREME COURT RECOGNIZES THAT PUNITIVE DAMAGE AWARDS MAY TRAMPLE ON THE CONSTITUTION

There have been many debates about punitive damages: Are they worthwhile? How should they be confined? The Supreme Court of the United States was not part of these debates. The Court only entered the fray when punitive damages trespassed on the Constitution. The Supreme Court has now visited the issue seven times, for-

²See Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1007–08 (1999).

³See *Southern Kan. Ry. v. Rice*, 38 Kan. 898 (1888) (\$35 costs and fees, \$10 injury to feelings, \$71.75 punitive); *Woodman v. Town of Nottingham*, 49 N.H. 387 (1870) (\$578 actual, \$100 exemplary). See also R. Blatt et al., *Punitive Damages: A State By State Guide To Law And Practice* § 1.2, at 5 (1991) (“[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves”); Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982) (For most of their history, punitive damages were “rarely assessed and likely to be small in amount.”).

⁴J. Ghiardi & J. Kircher, *PUNITIVE DAMAGES LAW & PRACTICE* § 21.01, at 1 (1985).

⁵See, e.g., *Rubeck v. Huffman*, 374 N.E.2d 411, 413 (Ohio 1978) (“caused by intentional, reckless, wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances”); *Seals v. St. Regis Paper Co.*, 236 So. 2d 388, 392 (Miss. 1970) (gross negligence and “reckless indifference to the consequences”). See also J. Sales & K. Cole, *Punitive Damages: A Relic That has Outlived Its Origins*, 37 Vill. L. Rev. 1117, 1130–38 (1984) (discussing standards of conduct giving rise to punitive damages award).

⁶J. Ghiardi & J. Kircher, *PUNITIVE DAMAGES LAW & PRACTICE* § 21.01, at 1 (1985).

⁷This trend has led one commentator to suggest that “[p]unitive damages have replaced baseball as our national sport.” Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, Wall St. J., Oct. 5, 1994, at A17. See also Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989) (“Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case.”).

⁸*TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 475 (1993) (Kennedy, J., concurring) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 9–12, 18 (1991) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

⁹*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

¹⁰See Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1007 (1999).

¹¹*Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (“The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.”).

mulating rules for both procedural and substantive due process.¹² The Court has recognized that unrestricted punitive damages violate fundamental rights of our citizens. They can be destructive of property interests, cause economic chaos, including loss of jobs, and be palpably unfair.

While the Supreme Court decisions have been welcome, a brand-new phenomenon has occurred since their decisions were rendered. In some states, lower courts either have either not grasped the meaning of these decisions or have ignored them. Those lower courts include, among others, the Supreme Court of Utah,¹³ the Court of Appeals of Oregon,¹⁴ and the Supreme Court of Alabama.¹⁵

If this phenomenon had occurred with important Supreme Court decisions, such as *Brown v. Board of Education*,¹⁶ *Miranda v. Arizona*,¹⁷ *Roe v. Wade*,¹⁸ and perhaps most on point, *New York Times v. Sullivan*,¹⁹ the mainstream media would have been outraged. Until a recent *Wall Street Journal* editorial, which is appended to this testimony, the willful failure of some courts to follow Supreme Court guidelines have been ignored.²⁰

Now, a number of state supreme courts have and will continue to assiduously follow the Supreme Court's constitutional guidelines that protect people from the imposition of excessive and unconstitutional punitive damage awards. For that reason, some have suggested that action by Congress is unnecessary. This perspective, however, misconstrues the impact that just a few maverick courts can have when they do not follow Supreme Court guidelines on the Constitution.

Consider an example with some similarities that can be especially appreciated by the media. Almost forty years ago, the Supreme Court of the United States decided *New York Times v. Sullivan*, which provided protection under the First Amendment of the Constitution in a defamation case brought by a public official seeking to impose liability as well as punitive damages.²¹ The Court held that the media could not be subject to a successful defamation action unless it was shown that it had engaged in actual malice. Fortunately, virtually every court in the United States followed the *New York Times* decision. What if some lower courts had decided not follow it, in the same way some courts have not followed the Supreme Court's mandate on punitive damages? The very policy concern of the Supreme Court in *New York Times*—a chilling effect on reporters writing about public figures—would still remain. This is because many newspapers and broadcast outlets are distributed throughout the United States. Many manufacturers, distributors and others operate in all fifty states. Unconstitutional punitive damage awards chill their benign actions. They could have a detrimental effect on jobs, costs, innovation and other activities that society wants. A few courts who do not follow these guidelines should not infringe upon the protections adhered to by a majority of courts.

This phenomenon prompts the need for Congress to consider model constitutional guidelines for punitive damage awards in legislation. The case of *State Farm v. Campbell* makes the need for such legislation even greater, because the *State Farm* decision specifically spelled out outer constitutional limits on punitive damages. Unfortunately, already, at least one lower court, in a case in which we were directly involved, *Key Pharmaceuticals, Inc., v. Edwards*,²² has ignored a portion of the *State Farm* decision—even though the Supreme Court of the United States had vacated a very large punitive damages award in that case under the auspices of *State Farm*.²³

¹² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

¹³ See *Campbell v. State Farm Auto. Mut. Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd* 123 S. Ct. 1513 (2003).

¹⁴ See *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106 (Or. App. 2001), vacated by 123 S. Ct. 1781 (2003).

¹⁵ See *BMW of N. Am. v. Gore*, 646 So. 2d 619 (1994), *rev'd*, 517 U.S. 559 (1996).

¹⁶ 347 U.S. 483 (1954).

¹⁷ 384 U.S. 436 (1966).

¹⁸ 410 U.S. 113 (1973).

¹⁹ 376 U.S. 254 (1964).

²⁰ The Sept. 10, 2003 editorial, *Punitive, Schmunitive*, also is available online at <http://www.wsj.com> (subscription only).

²¹ 376 U.S. at 279–280. The Court extended its rule some time later to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

²² 123 S. Ct. 1781 (2003).

²³ On remand from the U.S. Supreme Court, the lower court allowed out-of-state lawful conduct to be considered as a basis to sustain the punitive damages award. *Bocci v. Key Pharmaceuticals, Inc.*, 2003 WL 22097104 (Or. App. Sept. 10, 2003).

The American Legislative Exchange Council (ALEC) has adopted a Model Constitutional Guidelines for Punitive Damages Act, created for state legislation. The Act, which is appended to this testimony, could also serve as a model for federal legislation.²⁴

ALEC'S MODEL CONSTITUTIONAL GUIDELINES FOR PUNITIVE DAMAGES ACT

The Model Act assures procedural due process in punitive damage cases. It is not intended to establish punitive damages in any state, or supplement tort reforms that may limit when punitive damages should be awarded, or the amount of those damages. Its purpose is to incorporate the Supreme Court's decision in *Cooper Industries v. Leatherman Tool Group*,²⁵ which required appellate courts to provide a de novo review of the constitutionality of punitive damages. This means that lower courts cannot make discretionary, subjective and non-reviewable decisions about whether punitive damages award are constitutional. It is our understanding that in some jurisdictions, the *Leatherman* decision has been given lip service at best.

Perhaps of greater importance, ALEC's Model Act spells out fundamental, substantive due process guidelines for punitive damage awards. It makes clear what evidence a court may consider, as well as evidence that a court may not consider; for example, evidence of general wrongdoing on the part of a defendant. As the Supreme Court of the United States in *State Farm v. Campbell* made clear, "Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct. . . ." ²⁶

We also suggest that the Congress consider legislation that directly addresses the problem of multiple imposition of punitive damages.

CONGRESSIONAL ACTION TO STOP MULTIPLE IMPOSITION OF PUNITIVE DAMAGES FOR THE SAME CONDUCT

There is only one civil justice tort reform agreed to by liberal, moderate and conservative judges: to place reasonable limits on multiple imposition of punitive damages for the same or similar conduct. Respected Senior Federal District Judge William Schwarzer of California has written: "Barring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs."²⁷ Judicial scholars realize that individual states cannot resolve the problem of multiple imposition of punitive damages. While some states, for example, Georgia, have successfully tried,²⁸ they can only prevent multiple imposition of punitive damages within their borders. All a plaintiff lawyer need do is to shop for another forum that is still available, and hit a company again for the same wrongdoing.

²⁴ The Model Act is also available online at <http://www.alec.org>.

²⁵ 532 U.S. 425 (2001).

²⁶ 123 S. Ct. at 1523.

²⁷ William Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW 116 (Oct. 1991). See also *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 ("[T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labeled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment"), *vacated*, 718 F. Supp. 1233 (D. N.J. 1989), *rev'd on other grounds sub. nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990); *In re N. Dist. Of Calif. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 889 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act"), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. Denied*, 459 U.S. 1171 (1983); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("we agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle"); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting) (unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process"), *cert. Denied*, 459 U.S. 988 (1982); *Magallanes v. Superior Ct.*, 167 Cal. App. 3d 878, 888 (1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the first case is tried should be punished again when the second, or the tenth, or the hundredth case is tried."); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1031 ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."), *reh'g denied*, 914 F.2d 251 (5th Cir. 1990), *cert. Denied*, 500 U.S. 942 (1991); *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct").

²⁸ Ga. Code Ann. 51-12-5.1(e)(1) (West 2003).

Since a company may have injured many people, some have suggested that there would be nothing wrong with multiple hits, but there is. Multiple imposition of punitive damages for the same basic conduct has and will drive companies into bankruptcy before people receive their compensatory damages.²⁹ Moreover, a jury may not appreciate that the defendant has already been punished for the same basic wrong. Some have suggested that defense lawyers can control this by telling the jury that their client has already been punished. Anyone who understands basic trial tactics knows, however, that if a lawyer tells a jury during a trial that the defendant has not only been found liable, but has already been punished by another jury, the door would be closed on his or her defense. A defense lawyer is placed in a true dilemma: if he or she does not tell a jury about a prior award, the jurors would assume that they are the only ones to punish the defendant. If the lawyer tells the jury about a prior award, he or she has conceded the case.

Senator Hatch, Senator Lieberman, and others have worked in the past on the problem of multiple imposition of punitive damages. I have attached a copy of a bill on the subject that was developed by Senator Hatch in a prior session of Congress.³⁰ There has been scholarship on the issue, showing the extent of the danger of multiple imposition of punitive damages.

CONCLUSION

The Supreme Court of the United States has spoken loud and clear in *State Farm Mutual Automobile Insurance Co. v. Campbell* that substantive constitutional limits must be placed on punitive damages. There is a very real danger that these limits will be ignored or not understood by courts. That is why this oversight hearing is of particular importance, because this body can assure that basic, fundamental constitutional rights are protected with respect to outrageous punitive damage awards. No other body can do so. Consideration should be given to sound legislation to address this issue.

²⁹ See *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [defendant's] liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence.")

³⁰ Senate Bill No. 78 (105th Cong. (1997)) also is available online at <http://www.thomas.gov>.

ATTACHMENT 1

MODEL CONSTITUTIONAL GUIDELINES FOR PUNITIVE DAMAGES ACT***Summary***

The Constitutional Guidelines for Punitive Damages Act is intended to help the courts of this state conform punitive damages awards to the requirements of the United States Constitution. The guidelines are based on the punitive damages jurisprudence of the United States Supreme Court. Because the laws governing punitive damages vary so much among the states, a legislator planning to introduce a punitive damages bill based on the Model Act should first consult his or her state's laws to determine which reforms embodied in the Model Act should be adopted, or adopted with modifications. These guidelines are supported by the Due Process Clause of the Fourteenth Amendment and the Supremacy Clause of the Constitution of the United States.

Model Legislation**{Title, enacting clause, etc.}**

Section 1. {Title.} This Act shall be known and may be cited as the Constitutional Guidelines for Punitive Damages Act.

Section 2. {Legislative Finding.} The legislature finds and declares that:

- (A) the specter of unlimited punitive damages encourages needless litigation and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to victims;
- (B) the public interest has been hampered unduly by the threat of unreasonable punitive damages awards, with the consumer paying the ultimate costs in higher prices and insurance costs;
- (C) punitive damages are private punishments in the nature of fines awarded in civil cases;
- (D) when warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;
- (E) the Supreme Court of the United States has established that there are constitutional procedural and substantive limitations on punitive damages awards;
- (F) it is in the public interest to assure that all courts in the state review punitive damages awards in a manner consistent with the constitutional protections established by the Supreme Court of the United States; and
- (G) it is in the public interest to establish guidelines for the review of the constitutionality of punitive damages in accordance with the jurisprudence of the Supreme Court of the United States.

Section 3. {Procedural Due Process Review Guidelines.}

- (A) Appellate review of the constitutionality of a punitive damages award shall be available as a matter of right.
- (B) On appeal, a reviewing court shall determine the excessiveness of a punitive damages award without according any weight or deference to the decision of the lower courts concerning the award's excessiveness.

Section 4. {Substantive Due Process Review Guidelines.}

- (A) Generally. In determining whether a punitive damages award is grossly excessive so as to violate this Act, the following guideposts shall be considered:
 - (1) the reprehensibility of the defendant's misconduct that caused the plaintiff's harm;
 - (2) the ratio of the punitive damages award to the harm actually suffered by the plaintiff as a result of the defendant's punishable misconduct, as measured by the amount of compensatory damages; and
 - (3) the difference between the punitive damages awarded and the civil statutory or administrative penalties imposed in comparable cases.
- (B) Reprehensibility. In determining the reprehensibility of the defendant's conduct under subsection (A)(1) of this Section, the following provisions apply:
 - (1) The court may consider:
 - (a) evidence of the wrongful acts of the defendant directly against the plaintiff;
 - (b) evidence of closely similar acts of wrongful conduct towards others, to the extent such evidence is probative of the defendant's state of mind.
 - (2) The court may not consider:
 - (a) evidence of acts of general wrongdoing on the part of a defendant;
 - (b) evidence of dissimilar acts of wrongful conduct of the defendant; or
 - (c) evidence of conduct of the defendant that was lawful in the jurisdiction where it occurred.
 - (3) A defendant may not be punished for acts of similar misconduct that affected only non-parties, or for acts that were lawful in the jurisdictions in which they occurred.

- (C) Ratio. In considering the ratio between the plaintiff's harm and the punitive damages award under subsection (A)(2) of this Section, the following provisions apply:
- (1) Punitive damages shall be proportionate to the compensatory damages awarded, but in no case, except as stated in subsection (2) below, shall the ratio of punitive to compensatory damages exceed 9 to 1.
 - (2) In cases where the compensatory damages award is less than \$50,000, and for good cause shown, a larger ratio is permitted, but in no case shall the ratio of punitive to compensatory damages exceed 15 to 1.
 - (3) In cases where the compensatory damages award is \$10 million or greater, the ratio of punitive to compensatory damages shall not exceed 1 to 1.
- (D) Comparable Civil Penalties. In determining the comparable civil penalties for purposes of subsection A(3), the court shall consider only those statutory or administrative penalties that were in effect at the time of the plaintiff's misconduct and that actually have been imposed for acts comparable to the wrong done by the defendant to the plaintiff. The court shall not consider civil penalties for acts comparable to general wrongdoing by the defendant. The court shall not consider criminal penalties.

Section 5. {Severability Clause.}

Section 6. {Repealer Clause.}

Section 7. {Effective Date.} This Act shall be effective immediately upon its enactment. It shall apply to any review of the constitutionality of a punitive damages award pending or commenced on or after the date of enactment, regardless of whether the claim arose prior to the date of enactment.

SECTION BY SECTION ANALYSIS

The purpose of the Model Constitutional Guidelines for Punitive Damages is to assist state courts in conforming punitive damages awards to the requirements of the Constitution of the United States. As the United States Supreme Court has observed, punitive damages have “run wild” in this country. *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). They have been arbitrary, erratic, and sometimes unfair in their application. Excessive punitive damage awards may not only be unfair to defendants. They can bankrupt defendants before injured persons receive compensatory damages.

In a series of cases, the United States Supreme Court has set forth a number of guideposts for courts to follow in determining whether a punitive damages award is so “grossly excessive” that it furthers no legitimate purpose and constitutes an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (limiting reprehensibility review to harms with a specific nexus to the individual plaintiff; ruling that single-digit ratio of punitive to compensatory awards applies in most cases; and barring the use of irrelevant out-of-state conduct to support a punitive award); *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring *de novo* appellate review of constitutionality of punitive damages awards); *BMW of N. America v. Gore*, 517 U.S. 559 (1996) (setting forth three guideposts for the analysis of the constitutionality of punitive awards under the Due Process Clause of the Fourteenth Amendment); *Honda Motor Company v. Oberg*, 512 U.S. 415 (1994) (emphasizing the common-law role of judicial review in assuring that punitive awards were not arbitrary or excessive); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (emphasizing that substantive due process limits the amount of punitive awards); *Pacific Mutual Insurance Co. v.*

Haslip, 499 U.S. 1 (1991) (ruling that punitive damages are subject to Due Process Clause of the Fourteenth Amendment).

Unfortunately, some state courts have had difficulty in construing and applying the United States Supreme Court's rulings in these cases. Some courts have not followed the rules, possibly because the rules were not brought to the attention of the court. The net result has been excessive appeals, unnecessary legal costs, and confusion in the law as to the proper application of constitutional principles. This Model Act seeks to clarify defendants' rights with respect to state punishment through the award and enforcement of punitive damages, and will assist in implementing fundamental constitutional principles in the future.

Section 1

This Section sets forth the title of the Act.

Section 2

This Section sets forth legislative findings regarding the need for the Act.

Section 3

This Section establishes that appellate review of the constitutionality of a punitive damages award is available as a matter of right, rather than at the discretion of the appeals court.

This Section also establishes that appellate review of the constitutionality of a punitive damages award shall be *de novo*. In other words, the appeals court shall give the issue a "thorough, independent review," *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 441 (2001). While giving deference to the trial court's factual findings, the appeals court shall not give any weight or deference to the decision of the lower courts when passing on the constitutionality of the punitive damages award. The United States Supreme Court has explained that *de novo* appellate review of the constitutionality of punitive damages

awards is appropriate. “The question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.” *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). This helps assure that due process protections are enforced and that the law is appropriately developed and consistently applied.

This provision of the Model Act clarifies that the Supreme Court’s requirement of *de novo* appellate review applies at both the federal and state levels, thus replacing the “abuse of discretion” standard of review available in some states. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, -- U.S. --, 123 S. Ct. 1513, 1521 (2003) (“*Cooper Industries* ... mandated appellate courts to conduct *de novo* review of a trial court’s application of [the *Gore* guideposts] to the jury’s award.”).

Section 4

Section 4(A) codifies the factors announced by the United States Supreme Court in *BMW of N. America v. Gore*, 517 U.S. 559 (1996) for determining the constitutionality of punitive damages awards: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (citing *Gore*, 517 U.S. at 575).

Section 4(B) explains, in accordance with United States Supreme Court jurisprudence, that punitive damages should be tied to the specific harm to the plaintiff. In determining the reprehensibility of the defendant’s conduct, closely similar acts toward other persons may be considered. “Lawful out-of-state conduct may be probative when it demonstrates the

deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.” *Campbell*, 123 S. Ct. at 1522. However, punitive awards are not to be based on a defendant’s general misconduct, or on dissimilar acts toward other persons, or on acts outside the jurisdiction that are lawful where they occurred. Courts may not consider such evidence in analyzing the reprehensibility guidepost. The United States Supreme Court explained in *Campbell*: “The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period.” 123 S. Ct. at 1524. Moreover, as the Supreme Court explained, “A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.” *Id.* at 1523. In *Gore* and *Campbell*, the Supreme Court also emphasized that punitive damages cannot be used to punish extraterritorial conduct. In *Gore*, the court forbade punishment for extraterritorial misconduct that was *lawful* in the state where it occurred. *See* 517 U.S. at 572. In *Campbell*, the Court further stated that, as a general rule, a State does not have “a legitimate concern in imposing punitive damages to punish a defendant for *unlawful acts* committed outside of the State’s jurisdiction.” 123 S.Ct. at 1522 (emphasis added).

Some courts already have applied the reprehensibility analysis set down by the Supreme Court. In *Diamond Woodworks, Inc. v. Argonaut Insurance Company*, 2003 WL 21361143 (Cal. App. June 13, 2003), the court ruled a \$5.5 million punitive damages award to be

unconstitutional. The action was brought by Diamond Woodworks, the client of an employee leasing company against the company and its workers' compensation insurer, Argonaut, to recover for breach of contract, bad faith, and fraud in connection with denial of benefits for a leased employee injured during the employee's first day of employment. Diamond Woodworks argued that Argonaut's reprehensibility should be measured by Argonaut's conduct toward the world at large, rather than as directed at Diamond alone. *Id.* at *18. Diamond argued that Argonaut lied to government agencies including the state's Workers' Compensation Insurance Bureau; it used unlicensed agents to write insurance in violation of state law; it denied other claims, in the same way it denied Diamond's; it treated all client companies as one insured under the policy; and it engaged in other conduct that was part and parcel of "the exact transaction and circumstances of fraud perpetrated on the plaintiff." *Id.* The California court noted that while Diamond's conduct toward the plaintiff was reprehensible and justified an award of some punitive damages, the *Campbell* case made clear that conduct toward the world at large could not provide support for the punitive damages award. *Id.*

Section 4(C) explains to courts how to apply the United States Supreme Court's "ratio" guidepost for the review of the due process implications of a punitive award, which was set forth in *Gore* and further interpreted in *Campbell*. The Supreme Court has declined to impose a "bright-line" ratio which a punitive damages award cannot exceed, although it has previously indicated that, in the usual case, a ratio of 3-to-1 or 4-to-1 will be the upper boundary, *see Haslip*, 499 U.S. at 23-24, and *Gore*, 517 U.S. at 581. The Supreme Court also has referred to traditional sanctions of double, treble and quadruple damages. *Id.*, *see also Campbell*, 123 S. Ct. at 1524. In *Campbell*, the Court explained that the principles established by its jurisprudence "demonstrate ... that in practice, few awards exceeding a single-digit ratio between punitive and

compensatory damages, to a significant degree, will satisfy due process.” *Id.*

The outlier ratio of 9-to-1 set forth in Section 4(C)(1) is intended to provide maximum flexibility while reflecting the United States Supreme Court’s concern that “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in ranges of 500 to 1, or, in this case, of 145 to 1.” *Id.* The 15-to-1 ratio set forth in Section 4(C)(2) is included to address the unusual situation in which a small amount of compensatory damages may be awarded but egregiously reprehensible misconduct by the defendant merits a larger punitive award. *See Gore*, 517 U.S. at 582 (positing that a higher ratio than 4-to-1 *might* be necessary where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine”). Courts should appreciate that the converse is also true. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *Campbell*, 123 S. Ct. at 1524. This is reflected in the Model Act’s ratio of 1-to-1 in cases where compensatory damages are \$10 million or greater.

Section 4(D) explains how to apply the third *Gore* factor, the “comparable civil penalties” guidepost. Lower courts have had particular difficulty applying this factor, possibly because it requires courts to go beyond the particular facts of the case in considering whether an award is excessive. Some courts have sought to apply legislative penalty schemes appropriate for wide-ranging misconduct, rather than the specific misconduct at issue in the case. Some courts have gone beyond legislative determinations regarding appropriate sanctions for the behavior in question, and compared the punitive damages award with jury verdicts in civil cases. Comparing a punitive damages award to other jury verdicts divorces this factor from its connection to the policy judgments of the legislature. Also, jury verdicts are retroactive

judgments based on the specific facts in a case. As such, they are less appropriate for comparison than statutory penalties, which are intended to apply to a broad range of situations.

Because the “comparable civil penalties” guidepost more than any other embodies due process notice requirements, it is appropriate to limit consideration of “comparable penalties” to those civil penalties in effect at the time of the defendant’s alleged misconduct. Both statutory and administrative civil penalties should be available for consideration, as administrative penalties may be the best source of comparable penalties, particularly where defendants are in regulated industries. The fact that a penalty theoretically could have been imposed for conduct is not sufficient; the only relevant penalties are those that actually have been imposed in practice for comparable conduct. See *Cooper Industries*, 532 U.S. at 442-43; *Campbell*, 123 S. Ct. at 1526; *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320 (3rd Cir. 1999). Furthermore, consideration of criminal penalties is inappropriate; “[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.” *Campbell*, 123 S. Ct. at 1526.

Section 5

This Section provides a severability clause.

Section 6

This Section provides a repealer clause.

Section 7

This Section provides that the provisions of the Act apply to all cases in which appellate review is pending on the date of enactment, as well as all future cases, regardless of when the circumstances giving rise to the claim occurred.

Punitive, Schmunitive

A high point of the Supreme Court's last term was its 6-3 decision to draw the line on outrageous punitive-damages awards. But a large section of the nation's plaintiffs' bar and even some judges have been working hard ever since to undermine the ruling.

*The tort bar does
some damages control.*

To the shock and awe of the tort bar, the Court held in *State Farm v. Campbell* that excessive punitive-damages awards violated the Constitutional guarantee of due process. The High Court indicated that the proper ratio between punitive and compensatory (or actual) damages should be in the single digits, meaning no more than 9 to 1. That was in April.

Within a month, the Wisconsin Supreme Court took it upon itself to redefine compensatory damages in a way that guts the ruling. In 1995, a teacher for Trinity Evangelical Lutheran Church was involved in a \$490,000 car accident. Tower Insurance refused to pay the bills for three years because of a dispute over coverage. Midway through litigation, Tower reversed its position and paid the claim, as well as \$17,000 in compensatory damages for the church's legal fees.

But Trinity pressed on for a punitive award and a jury ultimately hit Tower with one for \$3.5 million—200 times the \$17,000 in actual damages. The case was appealed up to the Wisconsin Supreme Court, which ruled that the “compensatory” damages should also include the \$490,000 accident bill. Presto, the ratio was 7 to 1—and therefore creatively constitutional.

And that's just the beginning of the fuzzy math. Last month, the Ninth Circuit Court of Appeals struck down an infamous \$4 billion punitive award against Exxon for the 1989 Valdez oil spill—an award that was 14 times Exxon's actual damages of \$287 million. The Court cited *State Farm* and sent the case back to an Anchorage trial judge for another try. But the plaintiffs' lawyer in the case is now arguing that the

lower-court judge should take into account not just the damages in his case, but *all* of Exxon's jury verdicts and settlements. That would bring Exxon's “actual” damages to \$500 million, and a \$4 billion punitive-damages ratio of 8 to 1—and a much larger payday for the lawyers.

But the prize for sheer nerve goes to the plaintiffs' lawyers in *Romo v. Ford Motor*. In May, the Supreme Court vacated a \$290 million punitive award (63 times actual damages) against Ford “in light of *State Farm*,” and remanded it back to a California court. The *Romo* lawyers turned around and told the California court it should reaffirm the whole award since (in what is surely news to the High Court) *State Farm* “created no new constitutional guidelines or standards by which to evaluate the constitutionality of the punitive damage award in this case.”

In fairness, many courts are dutifully following the letter and spirit of the law. A California appellate court recently applied *State Farm* to reduce a \$5 million punitive award against a company to \$1 million. An Illinois court likewise cut a \$2 million punitive-damages award against two police officers to \$45,000. And a Florida appeals court relied on *State Farm* in reversing a \$145 billion punitive award (the largest in history), archly noting that “awarding the GNP of several European countries is error.”

While those cases are encouraging, they don't offer much consolation to companies that are still receiving a due-process drubbing by trial lawyers and judges who think they are above the law of the land. Some of this will get fixed as defendants appeal these awards back up to the Supreme Court, but not every case makes it that far. A better solution would be for state legislatures to pass laws limiting punitive-damages awards. Better yet, lawyers and judges could decide to follow the law.

105TH CONGRESS
1ST SESSION

S. 78

To provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 21, 1997

Mr. HATCH (for himself and Mr. THOMAS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Multiple Punitive
5 Damages Fairness Act of 1997”.

6 SEC. 2. DEFINITIONS.

7 For purposes of this Act:

8 (1) CLAIMANT.—The term “claimant” means
9 any person who brings a civil action and any person
10 on whose behalf such an action is brought. If such

1 an action is brought through or on behalf of an es-
2 tate, the term includes the claimant's decedent. If
3 such action is brought through or on behalf of a
4 minor or incompetent, the term includes the claim-
5 ant's legal guardian.

6 (2) HARM.—The term “harm” means any le-
7 gally cognizable wrong or injury for which punitive
8 damages may be imposed.

9 (3) DEFENDANT.—The term “defendant”
10 means any individual, corporation, company, associa-
11 tion, firm, partnership, society, joint stock company,
12 or any other entity (including any governmental en-
13 tity).

14 (4) PUNITIVE DAMAGES.—The term “punitive
15 damages” means damages awarded against any per-
16 son or entity to punish or deter such person or en-
17 tity, or others, from engaging in similar behavior in
18 the future.

19 (5) SPECIFIC FINDINGS OF FACT.—The term
20 “specific findings of fact” means findings in written
21 form focusing on specific behavior of a defendant.

22 (6) STATE.—The term “State” means any
23 State of the United States, the District of Columbia,
24 Puerto Rico, the Northern Mariana Islands, the Vir-
25 gin Islands, Guam, American Samoa, and any other

1 territory or possession of the United States, or any
2 political subdivision thereof.

3 **SEC. 3. MULTIPLE PUNITIVE DAMAGES FAIRNESS.**

4 (a) FINDINGS.—The Congress finds the following:

5 (1) Multiple or repetitive imposition of punitive
6 damages for harms arising out of a single act or
7 course of conduct may deprive a defendant of all the
8 assets or insurance coverage of the defendant, and
9 may endanger the ability of future claimants to re-
10 ceive compensation for basic out-of-pocket expenses
11 and damages for pain and suffering.

12 (2) The detrimental impact of multiple punitive
13 damages exists even in cases that are settled, rather
14 than tried, because the threat of punitive damages
15 being awarded results in a higher settlement than
16 would ordinarily be obtained. To the extent this pre-
17 mium exceeds what would otherwise be a fair and
18 reasonable settlement for compensatory damages, as-
19 sets that could be available for satisfaction of future
20 compensatory claims are dissipated.

21 (3) Fundamental unfairness results when any-
22 one is punished repeatedly for what is essentially the
23 same conduct.

24 (4) Federal and State appellate and trial
25 judges, and well-respected commentators, have ex-

1 pressed concern that multiple imposition of punitive
2 damages may violate constitutionally protected due
3 process rights.

4 (5) Multiple imposition of punitive damages
5 may be a significant obstacle to comprehensive set-
6 tlement negotiations in repetitive litigation.

7 (6) Limiting the imposition of multiple punitive
8 damages awards would facilitate resolution of mass
9 tort claims involving thousands of injured claimants.

10 (7) Federal and State trial courts have not pro-
11 vided adequate solutions to problems caused by the
12 multiple imposition of punitive damages because of
13 a concern that such courts lack the power or author-
14 ity to prohibit subsequent awards in other courts.

15 (8) Individual State legislatures can create only
16 a partial remedy to address problems caused by the
17 multiple imposition of punitive damages, because
18 each State lacks the power to control the imposition
19 of punitive damages in other States.

20 (b) GENERAL RULE.—Except as provided in sub-
21 section (c), punitive damages shall be prohibited in any
22 civil action in any State or Federal court in which such
23 damages are sought against a defendant based on the
24 same act or course of conduct for which punitive damages

1 have already been sought or awarded against such defend-
2 ant.

3 (c) CIRCUMSTANCES FOR AWARD.—If the court de-
4 termines in a pretrial hearing that the claimant will offer
5 new and substantial evidence of previously undiscovered,
6 additional wrongful behavior on the part of the defendant,
7 other than the injury to the claimant, the court may award
8 punitive damages in accordance with subsection (d).

9 (d) LIMITATIONS ON AWARD.—A court awarding pu-
10 nitive damages pursuant to subsection (c) shall—

11 (1) make specific findings of fact on the record
12 to support the award;

13 (2) reduce the amount of the punitive portion
14 of the damage award by the sum of the amounts of
15 punitive damages previously paid by the defendant
16 in prior actions based on the same act or course of
17 conduct; and

18 (3) prohibit disclosure to the jury of the court's
19 determination and action under this subsection.

20 (e) APPLICABILITY AND PREEMPTION.—

21 (1) IN GENERAL.—Except as provided in para-
22 graph (3), this section shall apply to—

23 (A) any civil action brought on any theory
24 where punitive damages are sought based on
25 the same act or course of conduct for which pu-

1 nitive damages have already been sought or
2 awarded against the defendant; and

3 (B) all civil actions in which the trial has
4 not commenced before the effective date of this
5 Act.

6 (2) APPLICABILITY.—Except as provided in
7 paragraph (3), this section shall apply to all civil ac-
8 tions in which the trial has not commenced before
9 the effective date of this Act.

10 (3) NONAPPLICABILITY.—This section shall not
11 apply to any civil action involving damages awarded
12 under any Federal or State statute that prescribes
13 the precise amount of punitive damages to be award-
14 ed.

15 (4) EXCEPTION.—This section shall not pre-
16 empt or supersede any existing Federal or State law
17 limiting or otherwise restricting the recovery for pu-
18 nitive damages to the extent that such law is incon-
19 sistent with the provisions of this section.

20 **SEC. 4. EFFECT ON OTHER LAW.**

21 Nothing in this Act shall be construed to—

22 (1) waive or affect any defense of sovereign im-
23 munity asserted by any State under any law;

24 (2) supersede any Federal law;

1 (3) waive or affect any defense of sovereign im-
2 munity asserted by the United States;

3 (4) affect the applicability of any provision of
4 chapter 97 of title 28, United States Code;

5 (5) preempt State choice-of-law rules with re-
6 spect to claims brought by a foreign nation or a citi-
7 zen of a foreign nation;

8 (6) affect the right of any court to transfer
9 venue or to apply the law of a foreign nation or to
10 dismiss a claim of a foreign nation or of a citizen
11 of a foreign nation on the ground of inconvenient
12 forum; or

13 (7) create a cause of action for punitive dam-
14 ages.

○

Mr. CHABOT. Now each of the Members up here, we have an opportunity to address questions to the panel for 5 minutes; and I will begin with myself.

Mr. Owen, I will start with you first.

Given that the Supreme Court takes up an extremely small percentage of the cases it is requested to hear each year, many lower courts may not fear being overturned by the Supreme Court in any given case. Does that strengthen the argument for Congress' stepping in to at least codify the outermost constitutional boundaries of punitive awards that Congress can discern from the Supreme Court's decisions?

Mr. OWEN. Yes, Mr. Chairman, I think it most certainly does.

Following up on Mr. Schwartz's observations, enforcement of constitutional rules is very slight and expensive and takes many years and is unusual. It is really only the rarest case that ever really gets a fair, full constitutional hearing. But, if I can just change the direction on that a little bit, I think, since there are constitutional implications, very definite ones in the punitive damages area, and there are certain due process prohibitions that would be very helpful to enact by legislation, I think this Committee would be doing a disservice if it tried to limit its scope of punitive damages reform to those that are constitutionally required. I would suggest that you begin with the constitutional core but then add in other fair and appropriate reforms, whether demanded by the Constitution or not.

Mr. CHABOT. Thank you very much.

Mr. PECK, let me go to you next, if I can. Justice Ginsburg, who did not agree with the *State Farm* case, nevertheless stated that—this is her quote: "Damage capping legislation may be altogether fitting and proper."

I would assume, based upon your testimony, that you disagree with that point of view. Why do you disagree with Judge Ginsberg on that?

Mr. PECK. Well, first of all, she was referring to State legislation. She was not at all suggesting that Congress had any authority here.

Mr. CHABOT. But we are essentially the same thing as a legislature that is at the Federal level.

Mr. PECK. No, you are not, because you have the restriction of the 10th amendment. You cannot invade something that is of State concern. And it is part of the State's interest to award punitive damages, as the *Campbell* case says itself, to determine what the amount of that punishment is. It is clearly outside of the Federal jurisdiction here.

Mr. CHABOT. So your allegation is, if we act upon this, it itself would be declared unconstitutional or declared as such?

Mr. NADLER. With respect to the States. You may be thinking of Federal Courts.

Mr. PECK. To the extent that you are talking about Federal causes of action.

I argued a case this term in the Supreme Court called *Jinks v. Richland County*. What it validated—I was defending a congressional enactment in that particular case. This was a supplemental jurisdiction tolling provision that operated on the State statute of

limitations. What saved it and what my successful argument was was that the underlying cause of action began as a Federal cause of action. If it had only been a State cause of action, the Court, which unanimously ruled in my favor, would have unanimously ruled the other way.

But let me say that, in the *Cooper* case, the Court noted that there were four instances in which States enacted caps on punitive damages since the *BMW v. Gore* case: Ohio, Alabama, North Carolina, and Alaska.

In Ohio, that cap was struck down by their State Supreme Court under their State constitution.

In Alabama, a previous cap had been struck down. That case has now been abrogated, but no one has challenged the current statute. But, as Professor Owen's testimony shows, there is a compensatory element to Alabama punitive damages, so, therefore, there is a real question about its constitutionality.

Alaska was challenged. It was upheld by a 2-2 vote in their Supreme Court, having no precedential value as a result.

And, finally, the North Carolina cap was argued by me two weeks ago in the North Carolina Supreme Court. As I argued there, the fact is that the only branch of Government that has the authority to set aside a jury verdict or a judge's judgement as excessive is the judiciary.

Mr. CHABOT. My time is winding down. So let me ask one more question, if I can.

Mr. Schwartz, do you have any comments on the empirical research of Dr. Daniel Kahneman, who won the 2002 Nobel Prize in economics? He wrote, and I will quote, "Judges should decide on the appropriate level of punitive damages just as they do criminal punishment, subject in both cases to guidelines laid down in advance." Do you have some comment?

Mr. SCHWARTZ. I think it would be constitutional to do that, because judges decide sentences in criminal cases. It is not a reform that I think will dramatically change the current situation. It will cut down on outlier verdicts, in other words very, very extreme verdicts.

I do want to suggest that your question about Justice Ginsberg was never answered. The answer is that she favors it, and there are caps on punitive damages in a number of States that have been sustained. The issues where it has been held unconstitutional are under provisions of State constitutions; and State constitutions, as you may know, are 3 or 400 pages. And if a particular judge has a particular ideological view, he has or she has a lot of room to strike down anything.

So I just want to mention that in response to the question you asked.

Mr. CHABOT. Thank you very much.

I now recognize the gentleman from New York for 5 minutes.

Mr. NADLER. Let me ask first Mr. Peck. I was intrigued by what you were saying a moment ago. Only the judiciary can limit a jury verdict constitutionally, is that what you are saying?

Mr. PECK. The determination that a jury's verdict is excessive is one that by practice and precedent for 200 years we have said belongs within the judiciary as part of the fair administration of jus-

tice. Separation of powers prevents the legislation from overriding it.

Mr. NADLER. So you think that a congressional limit, even in a Federal case, would be unconstitutional for that reason, violation of separation of powers?

Mr. PECK. I agree that it does, and so does Justice Scalia who wrote to that point on the *Plaut* case.

Mr. NADLER. Certainly a—this is on punitive damages?

Mr. PECK. Regardless.

Mr. NADLER. On compensatory damages the same?

Mr. PECK. Yes.

Mr. NADLER. So you think that all the proposals in Congress that we have been debating for the last God number of years are unconstitutional?

Mr. PECK. I do.

Mr. NADLER. Thank you. And it would be more so were we to attempt, with respect to the 10th amendment, to legislate a limit on State court punitive damages, I would assume?

Mr. PECK. Absolutely.

Mr. NADLER. Mr. Owen, you said that theoretically you want punitive damages as a deterrent to wrongdoing, as a punishment for egregious misconduct, but in real world it doesn't work. In two sentences, please, why doesn't it work in the real world? What is the problem with it?

Mr. OWEN. The problem, Congressman, is that there are the outlying verdicts.

Mr. NADLER. The problem is it is abused, is what you are saying?

Mr. OWEN. Yes.

Mr. NADLER. Let me ask you a different question. Given—well, first of all, do you accept the propriety of the idea of punitive damages as a deterrent to egregious misconduct so that people can't say, all right, we will kill a number of people or injure them and pay damages as a cost of doing business?

Mr. OWEN. I agree that it is a deterrent. I think there is a real question of how empirically—

Mr. NADLER. Fine, you agree theoretically that that is a good purpose.

Mr. OWEN. Oh, yes.

Mr. NADLER. Let me ask you the final question. Why should there be any limitation—I shouldn't say limitation. Why should there be any connection between the amount of damages someone actually suffered, compensatory damages, actual damages, and punitive damages? If punitive damages are a deterrent, shouldn't it really be determined by the size of the pocket of the tort-feasor, so that the mom and pop that is deliberately putting something out in front that someone is going to trip over, because he just likes people to trip, \$10,000 punitive damages might deter that.

But, General Motors, that has a few billion dollars in the bank, you might, in order to stop them from doing whatever it is they might have done once or might in the future do again, without casting any aspersions against General Motors or anyone else at this point, but with a large tort-feasor, you might need very large punitive damages, not because of the actual damage suffered by the guy who was injured by the car turning over but by the fact that

you want them not to manufacture cars that they know are going to turn over all of the time.

So why is that—if you are going to put a limit on—any limit on punitive damages, why shouldn't that limit have some relevance to the pocket of the tort-feasor, rather than to the actual damage of the individual plaintiff, who after all is getting compensated? But what you really want to do with punitive damages is make sure that there aren't a lot of other victims in the future.

Mr. OWEN. I do think that is one reasonable way to limit punitive damages, although not as effective as a multiplier.

Mr. NADLER. But a multiplier has no reference to how effective that is going to be. My problem with the multiplier is that you may suffer \$10,000 worth of damages from your injury when your car turned over. The next guy suffers a hundred thousand. The third guy suffers a hundred thousand. The 500th guy suffers a hundred thousand. And \$90,000 damage is nine times your actual damages, is a cost of doing business to the guy manufacturing the car that flips over all of the time. Whereas, if you take a look at them and you say—well, let's take someone else. Daimler-Benz has billions of dollars. We should have a very large damage to prohibit them from doing this. Isn't that a more fair and effective way of measuring it than a nonexistent connection with the actual damages by a particular plaintiff?

Mr. OWEN. Yes. In an individual case it is definitely more fair and logical. It is a question then of—

Mr. NADLER. Which is more fair and more logical?

Mr. OWEN. Your approach, that is, unlimited punitive damages measured by wealth, reprehensibility and—

Mr. NADLER. Deterrence.

Mr. OWEN. Deterrence and also the plaintiff's harm.

Mr. NADLER. Thank you.

Would you comment on this, Mr. Peck?

Mr. PECK. Yes. Since it is supposed to vindicate the State's interests it is not supposed to be measured by what damage was to the individual plaintiff. I think it is far more logical. And most States have that in there not only for that reason but also to make sure that you don't bankrupt a defendant and to make sure that it is proportionate to their wealth.

Mr. NADLER. Most States have a relationship to—

Mr. PECK. Yes.

Mr. CHABOT. The gentleman's time has expired.

Mr. NADLER. Can I have one additional minute, please?

Mr. CHABOT. Without objection.

Mr. NADLER. Thank you.

Given that and the fact that the Court said that in *State Farm*, how do you deal with the courts also talking about a relationship to multiple of actual damages for a particular plaintiff?

Mr. PECK. The fact is that they are talking about harm and potential harm, and that is only supposed to be one of the factors. So you are not looking at this individual plaintiff's compensatory damages, but you are looking at the harm to the whole.

Mr. NADLER. Thank you.

So any so-called codification which said X dollars would be against what the Supreme Court is really saying?

Mr. PECK. It would not only be against it, but the fact is due process is a two-edged sword. It is supposed to work for the plaintiff as well.

Mr. NADLER. So it would be unconstitutional in your opinion?

Mr. PECK. Yes.

Mr. CHABOT. The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I thank the panel for their testimony here this afternoon. A series of things are on my mind about it, but I would initially like to go to Mr. Schwartz and ask you if you believe it would be unconstitutional for Congress to establish caps on punitive damages.

Mr. SCHWARTZ. Absolutely not. I would submit for the record our paper in the Harvard Journal of Legislation which outlines all of the case law as wide support. This body has acted to limit and restrict people's rights to sue. The General Aviation Recovery Act of 1994, which Mr. Peck's group said was unconstitutional, was upheld, has been upheld. It has been law since 1994. It has produced about 25,000 jobs.

I am not going to turn this into a legal debate, but our cases are strong, and this is absolutely valid law. This body has the right, under the commerce clause and also under the 14th amendment, to put in place restrictions on punitive damages.

Mr. KING. Thank you, Mr. Schwartz.

Mr. Peck, given that your position prevailed and the caps would be unconstitutional in your view, in the event that we had multiple punitive damages that were awarded by multiple States in a massive fashion that impacted upon our economy in such a negative way that we couldn't sustain our infrastructure, how might we then provide a solution for that problem in your view?

Mr. PECK. There are tax laws that can provide different kinds of ways in which Congress can address the economic position of those companies.

But let's remember that in the *Campbell* decision, by saying that you can only punish for in-State harms, they have basically endorsed multiple punitive damage awards. They have said that you can only punish in Utah. Someone in Illinois who suffers the same thing, they can seek punitive damages for the harms that occurred in Illinois, and so they have multiple punitive damages here.

Mr. KING. Yet the judgment of the State court might be excessive to the damage within that particular State, and then your view that it's outside of the purview of the Supreme Court?

Mr. PECK. No. If it is excessive on a constitutional basis, then the U.S. Supreme Court can reverse it. In fact, the State courts take what the U.S. Supreme Court does very, very seriously. On Friday of this past week I was in Salt Lake City and served on a panel with the two people who are arguing the remand of the *Campbell* case. They are arguing on the basis of a 1-to-1 or 1-to-9 ratio. That is essentially what the debate is going to be before the Utah Supreme Court.

Mr. KING. Thank you. And I tend to concur with Mr. Nadler and his consideration of that ratio and the validity or lack of validity thereof.

But back to Mr. Schwartz. Do you have a sense of what litigation is costing this country as, say, a percentage of our gross domestic product?

Mr. SCHWARTZ. There was a report called Trial Lawyers, Inc. that came out this morning; and there is also a telling House report that can give better information than I of the billions of dollars that it costs, and we will see that you have copies of the report.

Mr. KING. I look forward to seeing that report.

And then might you also have some ideas on how we could rein in the punitive damages portion of this litigation that haven't been delivered here this afternoon? What would be—if you had to put out the menu of how we might address this, what else is on the menu that we haven't spoken about this afternoon?

Mr. SCHWARTZ. Well, I think the principal menu has been covered. But I would emphasize—and since Mr. Peck has said here today—because since we need to pass legislation, not just go in the world of ideas that go nowhere, if I understand him, he has said that the Supreme Court of the United States has held that you cannot consider in State A activities that occurred in another State. It will help a lot simply to have that framed in law and deal with the problem of hitting a company again and again for the same thing.

My testimony has quotes from judges all over this country calling upon this body to deal with multiple imposition of punitive damages, and I think that is something around which a consensus can be built. There are many other ideas on the punitive damages, but we want to have ones that can be enacted into law, and that one I believe can develop a consensus of people from both parties.

Mr. KING. Do you believe that unnecessary litigation is being driven by contingency fees?

Mr. SCHWARTZ. No, I don't. I think that the unnecessary litigation is dealt with because we don't have strong rules—and Mr. Peck will disagree. But I believe that we do not have strong rules against frivolous suits. If we had strong penalties on lawyers who brought baseless litigation, they wouldn't bring them. But right now they know it is heads I win, tails you lose. If they bring a baseless lawsuit, some of them—and I respect how they figure—calculate exactly what defense's costs are going to be almost to the nearest thousand dollars, make an offer of settlement that is under that cost, and the case is settled. If you have strong, vigorous rules against baseless lawsuits where the attorney who brought that lawsuit had to pay, that is the way to go with that problem, not the contingency fee which provides a vehicle for people who may not have money to have a lawyer.

Mr. KING. Might you also provide that in print for me if it is possible?

Mr. SCHWARTZ. Yes, sir.

Mr. KING. Thank you, Mr. Schwartz and Mr. Peck; And I want to thank you, Mr. Chair.

Mr. CHABOT. Thank you very much.

The gentleman from Alabama, Mr. Bachus, is recognized for 5 minutes.

Mr. BACHUS. I thank the Chairman, and I appreciate all of your testimony.

My first question, I guess I will start with all of you who believe that punitive damages are appropriate and serve a valid purpose in our judicial system?

Mr. PECK. Professor Owen testified to that. Let me put myself on the record believing that as well, yes.

Mr. BACHUS. All right.

Mr. SCHWARTZ. Punitive damages can deter wrongful conduct, and that is the good side. The bad side is that they are out of control. They can deter good things that they need. They can cost jobs. They can hit pension funds. They can stop work when our country needs full employment, not less employment because of excessive punitive damages.

Mr. BACHUS. So a legitimate purpose, but they can be abused?

Mr. SCHWARTZ. Yes, sir.

Mr. BACHUS. Okay. I know when this subject comes up we all hear of runaway juries. You know, you also hear of frivolous lawsuits or, you know, lawsuits are outrageous in some fact situations. What you don't hear is a practice on the other side of plaintiffs, people that have been harmed where it takes a long time to compensate them or where they are not compensated. You know, insufficient compensation. Would you agree that if the judges review cases to decrease damages, would they also be appropriate to let them increase damages?

Mr. PECK. I would like to address that. In the courts we have concepts called remittitur and additur.

Mr. BACHUS. That is right.

Mr. PECK. The fact is that if a judge does have the authority and it is not a function of the jury to determine the amount of damages, then they have the authority for additur. But it has been the history of this country, too, that juries have the authority to determine the amount of damages, which is why when a judge orders a remittitur you have to offer a new jury trial. That is the substance of the 7th amendment, and it is the substance of the cognate right to trial by jury in every State constitution.

Mr. BACHUS. Would either—

Mr. NADLER. Excuse me. Would the gentleman yield for a moment? Would the gentleman yield for a moment to clarify something?

Mr. BACHUS. Without losing any of my time.

Mr. NADLER. With the Chairman's indulgence.

Mr. CHABOT. For an additional 1 minute.

Mr. NADLER. Were you saying that—I thought I heard you saying this. But were you saying that if a judge decreases the amount of jury award, it has got to go to another jury?

Mr. PECK. That is what the remittitur is. Unless you accept the decreased amount, you have the right to opt for a new jury trial and have a new jury come up with a new determination, because that is the substance of the right to trial by jury. And the Supreme Court said that in 1996 in an opinion written by Clarence Thomas for the unanimous court.

Mr. NADLER. I suppose I am glad to hear that. But I always took for granted—I always thought—you read all the time about the

jury awarded X dollars and the Court thought it inappropriate and reduced it to Y.

Mr. PECK. What happens is that a lawyer will often accept the reduced amount rather than go to the expense of a new trial.

Mr. BACHUS. I have accepted reduced amounts. They encourage in a lot of cases settlements of cases, which I think it is in the interest of all of us to speed justice. Now, it can be a gun to your head, but would you comment on that?

Mr. OWEN. I will comment on it, Mr. Congressman, from a more theoretical view. I am not in the courtrooms, but I have read considerably about their use in court. And, yes, I am sure, as Mr. Schwartz said—although I think he was suggesting that in a negative way—that it does encourage settlement. In cases where there is a fair argument for punitive damages there is usually fair evidence of reprehensibility, and I think then that what is likely to happen is that the case is likely to settle for full value of compensatory damages including perhaps attorney's fees, and so it serves a very, in my judgment, a positive role there.

Mr. SCHWARTZ. I don't think they are positive in a lot of roles today, if you have and are threatened with an unlimited amount of punishment. A. B, punitive damages in most States are not covered by insurance, which is an important thing to note in this record. So that has an effect in the terms of settlement that can create irrational behavior on both the part of the insurer that worries about a case against it if it doesn't settle, by its insured, and the result may not be justice at all. If there were reasonable limits on punitive damages and it was not out of control, as the Supreme Court has said, then they would serve a proper function.

And forgive me for this one, but two of my young colleagues are here and I tell them, at every hearing I learn something; and I have—to hear Mr. Peck, who is a dear friend, quote both Justices Thomas and Scalia to Mr. Nadler is something new to me. So I just would share that with the Committee.

Mr. CHABOT. It is a new experience for all of us.

Mr. PECK. And I do it all the time in court.

Mr. BACHUS. Can I close with one question? And this is to me what my concern in all this is. These panelists, obviously you all are much more qualified than any of us. You know, you have specialized in these things, and you have come to sort of different conclusions. And this is my basic question.

You know, the problem, to the extent that there is a problem, with punitive damages, and I think we all admit that there are problems, should it be addressed by the judicial branch? And would it be more appropriate for it to be addressed there? Would it not be a less political disposition?

Mr. SCHWARTZ. Well, the others have spoken. I will be very brief.

Mr. Peck and I have a fundamental disagreement about this. I believe the legislature has the right to make laws on damages, and they have had that right since the very beginning. Because you don't—

Mr. BACHUS. And I am not arguing. I believe I agree with you and probably disagree with Mr. Peck in that I think that we have the right. What I guess I am saying is would it be more appro-

priate or could the judicial branch not do a more expertise or a better job?

Mr. SCHWARTZ. That is a very good point. If the judicial branch acted in some harmony, we would be fine. I cite a number of Supreme Court opinions in my text where all courts have really followed them—*Brown v. Board*, *Miranda*. With punitive damages, I submit they haven't done that. So a few courts, five, six courts, can up-end the public policy of the whole Nation.

If you have, for example, with a Supreme Court case that dealt with first amendment rights and libel, *New York Times v. Sullivan*, five States that simply didn't follow it, the New York Times, I have to worry about those States.

So I think this body, with this subject, to protect this constitutional right, should act; and we cannot leave it to random action by the judiciary.

Mr. CHABOT. The gentleman's time has expired.

Mr. BACHUS. If we might let the other two respond?

Mr. CHABOT. If you both want to respond.

Mr. PECK. Let me briefly add that if *Brown v. Board of Education* had been followed, we wouldn't have had *Cooper v. Aaron*. Where the Supreme Court forced compliance with *Brown v. Board of Education*, we wouldn't have had many other subsequent cases.

The judiciary is very good at policing itself, and here we are talking about something that you have to evaluate the individual evidence that has been put into that case about how reprehensible an act is. No mathematical formula can do that. That is why you have to leave it to the courts, and the courts are constantly refining those formulas.

Mr. CHABOT. Mr. Owen, did you want to respond to that?

Mr. OWEN. You know, just briefly, that here again I am in the middle, that from a theoretical perspective I would much prefer that it be left with the courts on an individualized case basis and rule basis. But as a practical matter I think treble damages will do pretty good rough justice in a complicated world. It works in anti-trust. It works in consumer protection statutes. It punishes. It gives retribution. And that would be my recommendation as a second-best solution.

Mr. CHABOT. The gentleman's time has expired.

Mr. BACHUS. Thank all the panel.

Mr. CHABOT. The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman; and thank all of you for your testimony.

I guess I want to focus on what we are empowered to do under the Constitution. I think Mr. Owen gave us great testimony. We appreciate that. And the bottom line is, your conclusion is the old saw problem: The old saw works in theory; it just doesn't work in practice. And we can debate that, and probably Congress is the best place to have those old saw debates.

But with respect to what we are empowered to do, I am very interested, because part of Mr. Owen—I would like to hear especially from Mr. Peck and Mr. Schwartz. Part of what Mr. Owen has taught us, and of course we remember from our Prosser on Torts, is that punitive damages are quasi-criminal.

As we look at how we deal with the criminal juris prudence on Federal crimes as opposed to regulating State issues, there are some interesting differences there. But we did enact the sentencing guidelines in 1984, and we do expect increasingly judges to follow those guidelines. It will remind I think everybody, because, Mr. Peck, you didn't say what you thought we could do with respect to Federal punitive damages awards.

But the bottom line is, we establish the courts, other than the Supreme Court, we establish their jurisdiction, and impliedly both with respect to Federal sanctions and civil sanctions, we ought to have the complete, unfettered power. Whether we ought to exercise it is a different question.

The second thing that I would like you to talk a little bit about is the 10th amendment argument, because I am very interested in the fact that the 10th amendment, as Mr. Peck suggests, may prohibit us from basically interfering with a power reserved unto the States. But it occurs to me that the 10th amendment implies equally, no greater or lesser, to both Congress and the Federal court system.

The 10th amendment is not a proscription against what Congress may or may not do, unlike other amendments. It is proscriptional to Federal Government. And to the extent that the Federal Government has told us, for example, in decisions like *Campbell* and *Alliance Resources*, that there is an absolute Federal obligation to protect people's property interests and substantive due rights interests under the 14th amendment and elsewhere, the Federal courts, the Supreme Court has already decided that there is not just a power but an obligation to limit certain things that occur in the State court realm. It seems to me that undermines Mr. Peck's argument that we are not empowered to do what the Supreme Court has insisted that they must do in spite of the 10th amendment.

I guess, finally, the question here is, what is the difference between what we may do with respect to Federal punitive damage awards and what we may do getting to practical problems like the fact that people can forum shop in multijurisdictions the repetitive nature of punitive damages? I would like you to delineate for us as best you can what parts of the Constitution and the amendments are implicated by these questions.

Mr. Schwartz, maybe you can tell us, if we were really draconian here, how far you think we were empowered to go. Mr. Peck, you have already sort of set out the boundaries; and, Mr. Owen, I am happy—you said you were not particularly expert in the constitutional arguments, but thank you for setting up the history of all this.

Mr. SCHWARTZ. First, I would like to submit for the record an article from the Virginia Law Review by Professor Lupo, Statutes Revolving in Constitutional Orbits. With a fancy title, it shows that the 14th amendment empowers this body to enact legislation based on the Supreme Court's decision. The article is the best scholarship I have seen on point, and it makes clear that you have that power.

[The information referred to follows in the Appendix]

Mr. SCHWARTZ. Second, when you talked about guidelines, yes, most people who would be concerned about a defendant's rights would say you can't have a system where there is absolutely no

guidelines. Jury, decide how bad they are, and let it go. Somehow something happens when we get over to the tort side. And——

Mr. Conyers is here. Good afternoon, sir.

When you get over to the tort side, guidelines are unnecessary. They are needed. You have unfavorable, unfavored defendants, and some guidance is needed. There is no guidance now in most of our States. Most of our States have no statutes on punitive damages.

And, third, you talked about the impact on commerce from repetitive awards. Yes, the commerce clause is directed just that, this type of situation where no one State can pass legislation that will help and stop multiple imposition of punitive damages for the same thing. And the Supreme Court ruling cannot control that.

So your questions are very relevant to this hearing and the power of this body to act.

Mr. PECK. Let me very quickly——

Mr. FEENEY. One last thing before I lose my time, because I do want Mr. Peck to respond. But you didn't answer the 10th amendment question about why we ought to mandate States. States may not have punitive damage awards because they don't want them. Now if California wants to tax and regulate and punitive damage itself into despondency and bankruptcy, why is that the business of the Federal Government?

Mr. SCHWARTZ. Because you are empowered to act under the 10th amendment when you are considering well-grounded interests in interstate commerce. Otherwise, this body would be paralyzed. If the action of one State, California, affects the whole Nation by bankrupting a company that is providing jobs throughout this Nation, you have the power to act; and we have cases in our Harvard Journal of Legislation article that support that position.

Mr. PECK. My testimony indicates that I think that you do have power over Federal causes of action, because in the *Cooper v. Leatherman* case, the courts said that the reexamination clause of the seventh amendment does not apply to punitive damages. That does not mean that the right to jury trial does not apply in the States and they are free to decide that it does or doesn't, as States have come to different conclusions about it. So you do have authority within the Federal system because you are creating the cause of action.

The causes of action that apply to punitive damages at the Federal level were statutorily created. Because they are not matters of the common law that had been committed to the jury prior to 1791, they are within your jurisdiction to do. That is the measurement that the Court does. It is enunciated in the case of *Markman* written by Justice Souter.

On the other hand, the argument that my friend Victor here makes about the commerce clause and section 5 of the 14th amendment was rejected by the Supreme Court in the *Morrison* case, *United States v. Morrison*, where they struck down the Violence Against Women Act. There, this Congress held voluminous hearings on the connection with commerce. They made findings that said that it deters potential victims from traveling interstate, from engaging in employment in interstate business, from transacting with business in places involved in interstate commerce, by diminishing national productivity, increasing costs, decreasing the supply

and demand of interstate products. And the Court said, no, that is insufficient, because it has to be the underlying conduct, the assault on the woman that has to be commerce.

Here, the willful, wanton, malicious conduct that gives rise to punitive damages is not something that is part of a commercial enterprise. There is no market for it. That cannot be commerce.

Second, the Court said that the section 5 of the justification here also did not apply. Why didn't it apply? Because, again, there are ways. The fact is that not all or even a majority of States engage in a violation of due process. There is no finding that that is necessary, that the courts are inadequate to deal with that. And, indeed, as a result of that, they are pointing to the Voting Rights Act as an example where you focus on a particular region where there is a history and a continuing transgression of constitutional rights. Here, you can't do that. And Morrison said it is necessary.

Moreover, this Committee should be particularly mindful of the Religious Freedom Restoration Act. This was an act passed by Congress almost unanimously to vindicate religious freedom, and the courts struck that down saying that was no right to try to vindicate rights under section 5 of the 14th amendment. This is a court that takes federalism very seriously and will not accept this kind of a judgment.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers, the distinguished Ranking Member of the full Judiciary Committee, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Chairman Chabot.

I have a statement to enter into the record.

[The prepared statement of Mr. Conyers follows in the Appendix]

Mr. CONYERS. One of the things that bothers me, is this a get punitive damages beginning of a movement in the Congress? The *State Farm* case is not all that much of a breakthrough. As a matter of fact, the Court reiterated what I think is known, that there is no mathematical formula for determining punitive damages and there is no ratio for compensatory damages and punitive damages.

So, Mr. Owen, who recommends a rule of treble damages, I ask Mr. Schwartz if that meets with his approval.

Mr. SCHWARTZ. Well, there are two separate things, sir. One would be what the Constitution requires. And people debate about cases, as you know, sir. The Court laid down as a general rule that nine to one was the maximum amount. And I will submit the precise language to this Committee.

The only exception that they talked about—and this is the Constitution—would be in cases where a defendant's conduct was reprehensible and the compensatory damages were very little. A person throws acid at another individual and—

Mr. CONYERS. So the answer is yes.

Mr. SCHWARTZ. But three to one is a policy issue.

Mr. CONYERS. All right. So the answer is no.

Mr. SCHWARTZ. One is constitutional; one is just a matter of policy.

Mr. CONYERS. Well, one of your answers is yes and the other is no.

Mr. SCHWARTZ. Okay.

Mr. CONYERS. Is that right?

Mr. SCHWARTZ. If I connect with your questions, yes, sir.

Mr. CONYERS. Because, you know, of all the subjects we have got, punitive damages has been a part of the tort law for as far as all of us can recall. They punish defendants for egregious conduct. It is designed to deter others from engaging in similar conduct. They are awarded only in cases where the defendant's conduct has been willful and malicious. What is wrong with that? It is not a perfect system. There has been—I know everybody has memorized all the few instances of excessive awards. But look at the Department of Justice study. Only 3 percent of the trials won by plaintiffs involved punitive damages. Does that present a problem? Mr. Peck?

Mr. PECK. I do not believe it presents any problem at all.

Mr. CONYERS. Well, I yield my time, if there is any left, to the Ranking Member, Mr. Nadler.

Mr. NADLER. Thank you. I have two questions, one for Mr. Schwartz, to follow up on what the distinguished Ranking Member of the full Committee was asking.

Since punitive damages is a deterrent purpose, which everybody agrees to, and since you think that it can be, it is abused and we ought to limit it greatly, Mr. Owens was saying that he thought the same purpose could be served—forget constitutionally whether it is mandated, it is a matter of policy now. Mr. Owens said, well, if you got—I think, if I am not misquoting him, I hope—that, well, if you could do away with punitive damages, the standard treble damages wherever you found reprehensibility would serve the same purpose.

My question to you is, would you support, would you think it a good idea, sir—forget about punitive damages—but wherever we find gross negligence or deliberate tortious conduct, apply across the board treble damages? Would that be a good idea?

Mr. SCHWARTZ. No.

Mr. NADLER. Why not?

Mr. SCHWARTZ. Because I think you are talking about a ceiling versus a floor. And when—you use two terms there. Gross negligence, if I heard Mr. Conyers correctly, was not the standard he used for punitive damages. He talked about willful conduct.

Mr. NADLER. How about willful conduct?

Mr. SCHWARTZ. With respect to, if you are talking about purposeful, willful conduct where somebody intends a result, I can see having that type of punishment.

Mr. NADLER. Let me specify again with the famous case. Somebody is manufacturing automobiles. They find out that the way they manufacture them is one out of every hundred is going to flip over and injure somebody, and they figure, well, the damages are cheaper than changing it, so we will let that happen, and we will pay the damages whenever they occur. That is my definition of willful: It is reasonably foreseeable that continuing in this course of conduct is going to injure people and we are going to do it anyway. Are automatic treble damages okay?

Mr. SCHWARTZ. With due respect, sir, our definitions of willful are different.

Mr. NADLER. In such a case. Never mind the legal definition of willful. I just defined a situation. In that type of situation, would you say, all right, as a matter of policy, eliminate punitive damages

and we will deter such conduct by having—if you proved this kind of conduct, that kind of mindset—automatic treble damages.

Mr. SCHWARTZ. Okay. If you did it in a limited number of times and you didn't punish people again and again for the same thing, I could subscribe to what you are saying. But if you are going to—if they make 100,000 cars and you are going to punish them three to one for every single incident that occurs, I don't agree with that. If you are talking about one particular case or two particular cases, I do agree. But I think if you do it again and again, that is not right.

Mr. NADLER. If that was in the confines of each jurisdiction, once.

Mr. SCHWARTZ. What will come in evidence is what they did nationally. You have tried cases, sir, and you know—

Mr. NADLER. No, I haven't.

Mr. SCHWARTZ. All right. Well, if you had that opportunity, the way evidence goes in front of a jury is not in neat little boxes. And the picture of what the company did on a national basis will arise. But if you had some way of limiting the incident to what Ford did or what Buick did or what any of the car companies did with a specific wrongdoing and that was the punishment, three to one, if it was adequate enough would be enough. But I wouldn't hit them again and again 50 times.

Mr. CHABOT. The gentleman's time has expired, but he can ask one more question.

Mr. NADLER. Let me just comment before I ask Mr. Peck the question that I would think if they kept doing it they ought to be hit again and again. But that is a different—that is beside the point right now.

Mr. Peck, going back to an earlier part of this hearing, the proposal has been made that punitive damages, since you want a deterrent, it should be limited by any reference to the actual damages because, after all, the deterrence impact on a large tortfeasor may have no reference to the actual damages to one particular victim who might not have a lot of damages, but the next guy might have a lot of damages, and never mind the next hundred thousand victims. So you want a big deterrent. On the other hand, that might be an unjust enrichment for a particular plaintiff.

So the proposal's been made, as you know, that perhaps we ought not to cap the damages, the punitive damages for the tortfeasor, but cap the amount that the defendant gets. Now—not the defendant, that the plaintiff gets, so as to have no unjust enrichment.

Now, an objection to that proposal has been that you have to allow adequate punitive damages so it is worthwhile for the attorney in terms of his costs of proving the egregious conduct. I mean, if he can't get a very large award, it is just not affordable to bringing in the extra evidence to prove the egregious evidence.

What would you say to a proposal that said, all right, we will not limit the size of a—there will be no caps on size of punitive damages. The more egregious, the more hysterical the jury gets, the more they can do—the more justifiably hysterical the jury gets, I mean. And we will specifically—we will limit how much the plaintiff can get, but the contingency fee of the attorney bringing it will have some relationship to the total cost so that he will have the

incentive or she will have the incentive to try to get the punitive damages where society as a matter of deterrence would want this done.

Mr. PECK. Well, let me say, a number of the States have passed laws like this. They regard punitive damages essentially as performing a private Attorney General function, encouraging the exposure of bad actors. And, you know, that means also those instances where the harm was not easily detected, which the Supreme Court, in addition to what Mr. Schwartz said, said it is a higher ratio, too. But in almost all of the statutes, as Professor Owens' testimony indicates, what they do is allow the contingency fee to be taken over out of the whole amount, and then they split up the remaining amount between the State and the plaintiff, and sometimes 75 percent of it going to the State for that function.

Now I think that when you reach a certain level in punitive damages, when you are not talking about your median award of 38,000, but when you are talking about large awards, there is some merit to this. Although I would think that the defense side would object to that, because you have now given the State an interest in the award. They may want their judges to award higher punitive damages because each of these cases get de novo review by the judges; and, therefore, they have an incentive to promote punitive damages in the State, which leads to the possible argument that this is a taking.

Mr. CHABOT. The gentleman's time has expired.

I would like to thank the panel for very enlightening testimony here this afternoon. I think all of us that had an opportunity to hear it and question definitely gained something from this, and it will certainly enter into our consideration as to whether it is proper and appropriate for Congress to act on this or not.

Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I also thank the panel.

Mr. Chairman, I ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks, to submit additional materials for the record, and to submit questions in writing for the witnesses.

Mr. CHABOT. Without objection.

If there is no further business to come before the Committee, we are adjourned.

[Whereupon, at 3:25 p.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF CONGRESSMAN STEVE KING

Thank you, Mr. Chairman, for holding this hearing today. Runaway punitive damages are hurting our national economy. It is up to Congress to do something about this drag on our national economy. We cannot rely on the Supreme Court to step in every time a grossly excessive punitive damages award is made.

We must do something to end the danger of multiple punitive damages imposed in multiple cases for the exact same conduct. We must restore justice and equity to the system. Among other ideas, I support reducing or eliminating the contingency fees on punitive damages awards. In addition, currently, federal judges sentence criminal defendants uniformly using the U.S. Sentencing Guidelines. We should explore the option of allowing judges to set punitive damages with guidance from Congress in order to insure uniformity and reasonableness.

Thank you Mr. Chairman. I look forward to hearing from the witnesses.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR.

Ever since the Republicans have been in control of the House they've tried to limit or eliminate punitive damages in many different areas, including medical malpractice, products liability, and other personal injury cases—areas that have traditionally been within the province of the States. Because the title of this hearing includes the words "Potential Congressional Responses" to the *State Farm* case, I'm worried that the majority is about to embark on yet another mission to eliminate punitive damages in tort law.

Punitive damages are an important part of tort law. They punish defendants for egregious conduct and are designed to deter others from engaging in similar conduct. They are awarded only in cases where the defendant's conduct has been wilful and malicious.

Without punitive damages in tort cases, verdicts such as those involving the Dalkon Shield would never have been rendered and corrupt defendants wouldn't have been punished for their bad acts. In fact, the Dalkon Shield IUD is an excellent example of how the system worked to protect the lives of millions of women. Eight punitive damage awards were made before A.H. Robins recalled the product. If they faced no accountability for punitive damages, manufacturers and others would have no reason to fear and would be less likely to act prudently to improve the safety of their products by better design and clear warnings about possible hazards.

While the system is not flawless, and while there have been instances of excessive awards, overall our society has achieved the right result. In fact, excessive punitive damage awards are quite rare. A new study by the Justice Department, which reviewed 10,278 tort trials in 1996 in the nation's 75 largest countries, found that punitive damages were awarded in only 162 cases, or 3.3% of the 4,879 trials won by plaintiffs. The study also found that the median award from a jury was \$27,000 and that most punitive damage awards were for less than \$40,000—hardly a number one could call "excessive."

So when we say we are holding an oversight hearing into the potential Congressional responses to the *State Farm* case, I get a little worried. I question whether Congress even has a role in this debate to begin with. Principles of federalism require that Congress not intrude into matters that are traditionally of state concern. Punitive damages have long been part of state tort law—they serve the state's interests in punishing unlawful conduct and deterring its repetition. Some states have

limits on punitive damages and some don't have any. But the point is that it is the states, not Congress, deciding these issues.

But even if I agreed that Congress had any kind of role following the Supreme Court's decision, I still don't see what the big deal is. Those who don't like to see plaintiffs recover punitive damages have been chomping at the bit since the *State Farm* decision. But the decision was hardly a breakthrough, as some tort reform advocates claim.

Rather, the Supreme Court reiterated what we all already know: there is no mathematical formula for determining punitive damages and there is no set ratio for compensatory damages and punitive damages. Lower courts must consider factors such as the reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded by the jury and those in other similar cases. The only thing the Court did that was new was limit the use of out-of-state conduct to determine punitive damages. Big deal.

Don't we have better things to do with our time?

MATERIAL SUBMITTED FOR THE HEARING RECORD
MATERIAL SUBMITTED BY MR. VICTOR SCHWARTZ

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Victor E. Schwartz
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October 1, 2003

BY HAND DELIVERY AND ELECTRONIC MAIL

Paul Taylor, Esquire
Majority Counsel
Subcommittee on the Constitution
House Judiciary Committee
H-2 362 Ford House Office Building
300 D Street, S.W.
Washington, D.C. 20515

Dear Paul:

During the Oversight Hearing on "Potential Congressional Responses to *State Farm Mutual Insurance Co. v. Campbell*: Checking and Balancing Punitive Damages," held on September 23, 2003, I offered certain documents for the record, and have enclosed them for that purpose. They include:

1. An article authored by Mark Behrens, Leavy Matthews and me entitled, "Federalism and Federal Liability Reform: The United States Constitution Supports Reform," 36 Harv. J. Legis. 270 (1999).
2. Washington Legal Foundation monograph authored by Mark Behrens, Lori Bean and me entitled, "Multiple Imposition of Punitive Damages" published in 1995.
3. A law review article authored by Professor Ira C. Lupu entitled, "Statutes Revolving in Constitutional Law Orbits," 79 Va. L.R. 1 (1993).

I am also including new material with respect to the issue of the power of Congress to enact legislation on punitive damages, and why such legislation is constitutional under the Tenth Amendment to the United States Constitution. We also will send this to you by electronic mail.

Paul Taylor, Esquire
October 1, 2003
Page 2

SHOOK, HARDY & BACON LLP

With deep appreciation for your including my thoughts in this hearing, I am,

Sincerely,



Victor E. Schwartz

Enclosures

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ARTICLE

FEDERALISM AND FEDERAL LIABILITY
REFORM: THE UNITED STATES
CONSTITUTION SUPPORTS REFORM

VICTOR E. SCHWARTZ*
MARK A. BEHRENS**
LEAVY MATHEWS III***

Three recent Supreme Court decisions have bolstered the arguments and efforts of opponents of federal tort reform initiatives. This Article contends that these decisions do not stand in the way of liability reform at the federal level. The authors maintain that courts in the modern era have reversed economic legislation with great deference and should continue to do so. Accordingly, neither the Commerce Clause nor the Tenth Amendment impose limitations on Congress's ability to enact tort reform measures.

Virtually every American has heard the conservative call to protect "states' rights." It is a political staple of conservative causes.¹ Ironically, however, in recent debates about federal tort reform legislation, the call to respect states' rights has been trumpeted by some very unlikely sources—liberal members of Congress² and consumer advocates who have traditionally sup-

* *Stacie Prunier, Crowell & Moring LLP, Washington, D.C.; co-author of PROSSE, W.V., ON THE RECENT DEVELOPMENTS IN CREDITORS' REMEDIES AND MATERIALS ON TORTS* (9th ed. 1994); author of *THE FIDUCIARY'S GUIDE TO THE UNIFORM PROBATE CODE* (1994) member, Advisory Committee of the American Law Institute's RESTATEMENT OF THE LAW OF TRUSTS; PROTECTIVE LIABILITY, APPROPRIATION OF LIABILITY, AND GENERAL PRACTICES PROJECTS, B.A., Boston University, 1962; J.D., Columbia University, 1965.

* *Of Counsel, Crowell & Moring LLP, Washington, D.C.; Adjunct Professorial Lecturer of Law, The American University, Washington College of Law, B.A., University of Wisconsin-Madison, 1987; J.D., Vanderbilt University, 1990. Comments about this article may be sent by electronic mail to <mchubert@camor.com>.*

The authors wish to thank Clifton S. Elgert for his constructive suggestions during the preparation of this Article.

¹ See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995).

³ See H.R. Rep. No. 105-702, at 25-28 (1998) (minority views in House Judiciary Committee Report on Class Action Fairness Act of 1998); S. Rep. No. 105-32, at 74-80 (1997) (minority views in Senate Commerce Committee Report on Product Liability Reform Act of 1997); S. Rep. No. 104-69, at 64-66 (1995) (minority views in Senate Commerce Committee Report on Product Liability Fairness Act of 1995); H.R. Rep. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Consumer Sense Product Liability Reform Act of 1995); H.R. Rep. No. 104-64, at 33-36, 40-41 (1995) (minority views in House Judiciary Committee Report on Consumer Sense Product Liability Reform Act of 1995).

ported federal regulation of everything from food package labeling³ to local activities like used car sales⁴ and funeral home practices.⁵ Both Presidents Ronald Reagan and George Bush, on the other hand, supported federal product liability reform legislation, notwithstanding their ideological preference for an expanded role for state governments.⁶

Civil justice reform has turned the world of states' rights upside down. A basic explanation for this phenomenon is political. Opponents of federal liability reform legislation enjoy pointing out an apparent inconsistency in conservative philosophy.⁷ They can show that the ascent to power of the Republican-controlled Congress early in 1995 was based, in part, on a pledge that members would reduce the role of the federal government and give more policymaking authority to the states.⁸ Various federal initiatives sought to "devolve power to the states."⁹ Various federal welfare, school lunch programs, legal services for the poor, speed limits on interstate highways, and other spheres in which the federal government had played a dominant role for decades.¹⁰ Federal civil justice reform was and continues to be an exception to this pattern.

Standards Reform Act of 1995).

³ See 21 C.F.R. § 101 (1995) (requiring uniform labeling of all packaged food products with ingredients and specific nutritional information).

⁴ See 15 M.V.R. § 201 (1995) (requiring disclosure of odometer readings and misrepresentation of the mechanical condition of a used vehicle); 49 U.S.C. § 380 (1995) (requiring disclosure of odometer readings and misrepresentation of the mechanical condition of a used vehicle); 49 U.S.C. § 380 (1995) (requiring disclosure of odometer readings and misrepresentation of the mechanical condition of a used vehicle).

⁵ See Funeral Industries Practice Rule, 16 C.F.R. § 453 (1995).

⁶ See 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism); 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism).

⁷ See 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism); 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism).

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Another explanation for the prominence of federalism in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and such legislation is enacted, the U.S. Constitution may provide the only mechanism to nullify the law. Our experience in working on tort reform at the state level has taught us that, once legislation is enacted, it is likely to be challenged on constitutional grounds by the Association of Trial Lawyers of America ("ATLA") and the political allies of the organized plaintiffs' bar.¹¹

We believe that there are certain rational goals of civil justice reform that, as a practical matter, can only be accomplished at the federal level.¹² The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

For example, Congress is uniquely suited to enact a national solution to provide predictability in the product liability system.¹³ Predictability reduces unnecessary legal costs and allows consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, as a practical matter, cannot achieve this goal on a national level.¹⁴ For that reason, the National Governors' Association ("NGA") has adopted resolutions on several different occasions calling for Congress to enact federal product liability legisla-

371 (1996) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states); Robert L. Rubin, *Federalism And The Tort System*, 50 BUREAU OF THE CONSUMER COMPLAINTS DIVISION SURVEY 1-7, 38 (1997) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states); Robert L. Rubin, *Federalism And The Tort System*, 50 BUREAU OF THE CONSUMER COMPLAINTS DIVISION SURVEY 1-7, 38 (1997) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states).

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³⁴ See 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism); 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism).

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³⁷ See 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism); 115 CONG. REC. 10,443 (1995) (statement of Sen. Orrin Hatch, R-Utah, explaining the Reagan administration's record for federalism).

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tion.¹⁴ The American Legislative Exchange Council, a bipartisan organization of more than 3000 state legislators from all fifty states formed in principal part to protect states' rights, also supports the enactment of federal product liability reform legislation.¹⁵

Further, as we argue in this Article, federal liability reform has ample basis for support in the Constitution. We address arguments to the contrary¹⁶ based on three recent decisions by the Supreme Court—*New York v. United States*,¹⁷ *United States v. Lopez*,¹⁸ and *Printz v. United States*.¹⁹ While these decisions provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level.

This Article does not advocate any particular bill in the matrix of federal tort reform legislation. Rather, it responds to questions that may be raised in general about whether civil justice reform is constitutional and comports with basic principles of federalism. By focusing on such general principles, this Article is intended to have a long "shelf life" that can contribute to constitutional debates and legal challenges in the courts for many years to come.

Part I of this Article argues that Congress has the power under the Commerce Clause of the Constitution to enact federal liability reform legislation and that state courts are bound to en-

¹⁴ The NSA's recent recent resolutions stated in part: "The National Center for Product Liability Reform believes that the current patchwork of U.S. product liability laws is too costly, inconsistent, and counterproductive, resulting in a severely adverse effect on American economic growth and employment. . . . The Center believes that a national product liability code will provide a more uniform state commerce. The Governors urge Congress to adopt a federal uniform state product liability code." *Statement of the National Center for Product Liability Reform*, S. Rep. No. 105-32, at 14 (1997) (quoting NSA policy statement).

¹⁵ See Jeffrey White, *Does Product Bill Collide with Tenth Amendment?*, *Texas, New York, and California Legislators Urge Federal Product Liability Reform: A Warning Not Heeded*, 64 *THOMSON* 1, 1 (1997) (quoting White, *How by One's Own Hand: When a Conservative Commerce Clause Interpretation Is a Bill a Bed Is Made*, 64 *THOMSON* 1, 1 (1997); Andrew F. Poppen, *A Federal Tort Law Is Bill a Bed Is Made*, 64 *THOMSON* 1, 1 (1997); J. Payne & Thomas Lusk 105 (1994); Beth Rogers Note, *Legal Reform—At the Expense of the States?*, 105 *Harvard Law Review* 105 (1994); *Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability*, 105 *Harvard Law Review* 105 (1994); *Product Liability*, 105 *Harvard Law Review* 105 (1994).

¹⁶ 502 U.S. 144 (1992) (discussing the Low-Level Radioactive Waste Policy Amendments Act).

¹⁷ 514 U.S. 469 (1995) (discussing the Gun Free Zones Act).

¹⁸ 521 U.S. 898 (1997) (discussing the Brady Handgun Violence Prevention Act).

force that law under the Supremacy Clause. Part II shows that, for almost a century, Congress has enacted legislation altering state tort law, and that these laws have been held constitutional time after time. Finally, Part III maintains that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the States and, therefore, is not inconsistent with the Tenth Amendment.

I. THE COMMERCE CLAUSE EMPOWERS CONGRESS TO ENACT FEDERAL LIABILITY REFORM LEGISLATION

A. The Commerce Clause

The Commerce Clause of the Constitution gives Congress the power to regulate commerce.²⁰ As the Supreme Court has said, "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."²¹

The Supreme Court has identified "three broad categories of activity"²² that Congress may regulate pursuant to its Commerce Clause authority: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce, regardless of whether the activity is local or extends across state boundaries.²³ The Supreme Court has ruled that, while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In *Wickard v. Filburn*,²⁴ for example, the Court upheld Congress's regulation of

²⁰ See U.S. CONST. art. I, § 8, cl. 3.

²¹ *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)) (affirming that, although the Commerce Clause represents a grant of federal authority, that authority is not plenary, but subject to other limits).

²² *Lopez*, 514 U.S. at 558.

²³ *Lopez*, 514 U.S. at 558; *United States v. Darby*, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce . . . is not limited to the regulation of commerce which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress over interstate commerce").

²⁴ 317 U.S. 111 (1942).

the consumption of homegrown wheat because of its aggregate economic effect on the interstate wheat market. The Court explained that, "even if [the] activity [is] local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce."²² The Court also concluded that Congress may regulate activity "irrespective of whether [the] effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"²³

B. Federal Tort Laws

Consistent with its power to regulate commerce pursuant to the Commerce Clause, Congress has enacted a number of laws that preempt state tort law.²⁴

1. The Early Laws

As far back as 1908, Congress enacted a "fort substitute" for workers' compensation in the railroad field. The Federal Employers' Liability Act ("FELA"),²⁵ a misleadingly named federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employers, was upheld by the Supreme Court as a constitutional exercise of congressional power.²⁶

Similarly, in 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA").²⁷ a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States.²⁸ Congress enacted LHWCA both to provide injured employees with more

²² *Id.* at 125.

²³ *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277 (1981)). This activity thus is purely interstate in character may be regulated by Congress, where the activity itself is not interstate but the consequences of the activity affect commerce among the States. . . .

²⁴ *Id.* (quoting *Wickard v. Filburn*, 339 U.S. 689, 703 (1950)). Congress has been, though beyond the scope of this Article, in another field in which it has exercised its power to regulate interstate commerce. See generally *Osbert-Gilmore & Co. v. Black, Jr.*, 76 U.S. 100, 101 (1869).

²⁵ See *infra* notes 78-82 and accompanying text.

²⁶ 33 U.S.C. §§ 901-944 (1984).

²⁷ See generally *Kane v. United States*, 43 F.3d 1446, 1449 (Fed. Cir. 1994) (describing workers' compensation act).

immediate and less expensive relief than that available in a common law tort action²⁹ and to provide employers with liability that was "limited and determinative."³⁰ Again, the Supreme Court held that Congress had the constitutional power to enact this piece of federal tort legislation.³¹ These are just two examples among many that illustrate Congress's active, longstanding participation in setting national tort liability rules.³²

2. Recent Laws Setting National Tort Policy Rules: 1993-1998

Almost nine decades after the enactment FELA, the 103d Congress enacted the General Aviation Revitalization Act of 1994 ("GARA"),³³ which established an eighteen-year statute of repose, or outer time limit on bringing litigation, for accidents involving general aviation aircraft.³⁴ GARA was predicated on Congress's power to regulate interstate commerce. Enough time has passed to conclude that GARA has been successful in its goal of revitalizing the light aircraft industry, which could not have been accomplished by state action alone.

A March 1997 hearing of the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects.³⁵ John Moore, senior vice president of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986, but as a result of

²⁹ See *Blakeworth Shipyard, Inc. v. Lutz*, 700 F.2d 1046, 1051 (5th Cir. 1983) (holding that, although the LHWCA was enacted to help injured employees, the Act was not intended to provide compensation to injured employees for expenses that are the direct result of an injury). See also *Smith v. United States*, 988 F.2d 1001, 1004 (9th Cir. 1992) (quoting *Smith v. United States*, 507 U.S. 222 (1993)).

³⁰ *Smith v. United States*, 507 U.S. 222, 232 (1993).

³¹ *Id.* at 232.

³² Numerous other congressional tort policy enactments that have been declared constitutional are described in this Article. See discussion *infra* Part II.

³³ 108 Stat. 1752 (1994). See generally *David Maffitt, Note, The Implications of Tort Reform: For General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGAL & POL. 215 (1995).

³⁴ GARA may now serve as a basis for federal court jurisdiction cases that would have been decided by state courts. The Supreme Court has held that federal tort liability GARA also did not preempt shorter state statutes of repose that may apply to products liability cases.

³⁵ See S. REP. NO. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997). See generally Geoffrey A. Campbell, *Study: Product Liability Reform Act of 1997*, 28 J. AIRCRAFT 11, at 28 (Jan. 1996) ("This light aircraft industry is taking off as reduced liability encourages technological innovation.")

GARA, is now back in the single engine aircraft business.³⁹ At the time of the subcommittee's hearing, Cessna's small aircraft division had more than 650 employees and had plans to double employment in 1998.⁴⁰ John Peterson of the Montgomery County Action Council of Coffeyville, Kansas—the home of Cessna's new small aircraft plant—testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators.⁴¹ The county's population was dropping, employment was on the decline, per capita income was dropping, and property values were depressed.⁴² After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county.⁴³ Similarly, Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1000 workers.⁴⁴ Likewise, John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their right to sue.⁴⁵ AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes—aircraft that had flown safely for more than two decades.⁴⁶

The 104th Congress enacted a number of other tort and civil justice reform measures:

The Small Business Job Protection Act of 1996⁴⁷ included a provision that: (1) holds punitive damages received in personal injury suits subject to federal income tax by eliminating the possibility for an exclusion from taxable gross income; (2) eliminates the possibility of an exclusion for personal injury or illness; and (3) provides that emotional distress is not by itself a physical injury or sickness.

³⁹ See S. Rep. No. 105-32, at 41.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ 26 U.S.C. § 104 (Supp. II 1996).

The Federally Supported Health Centers Assistance Act of 1995⁴⁸ extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers;

The Aviation Disaster Family Assistance Act of 1996⁴⁹ limited unsolicited contacts from lawyers and insurance company representatives with airline crash victims or their families;

The Bill Emerson Good Samaritan Food Donation Act of 1996⁵⁰ provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals; and

The Private Securities Litigation Reform Act of 1995⁵¹ placed limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934.⁵²

The 105th Congress continued the trend toward greater federal involvement in deciding liability rules by enacting several other tort reform laws:

The Volunteer Protection Act of 1997⁵³ provided limited immunity for volunteers acting on behalf of a nonprofit organization. The act eliminated the federal government's liability for volunteers and abolishing joint liability for noneconomic damages in tort actions involving volunteers;

The Antrak Reform and Accountability Act of 1997⁵⁴ created a federal fund for the cleanup of hazardous waste in cases brought against Antrak by its passengers and capped Antrak's tort liability at \$200 million for each rail accident;

⁴⁸ 42 U.S.C. §§ 201, 231 (Supp. II 1996).

⁴⁹ 49 U.S.C. § 1901 (Supp. II 1996).

⁵⁰ 42 U.S.C. § 1791 (Supp. II 1996).

⁵¹ 15 U.S.C. § 77 (Supp. II 1996) (enacted over the veto of President Clinton).

⁵² A product liability reform bill cleared both the House and Senate in the 104th Congress. The bill would have eliminated the federal government's capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or \$250,000, abolished joint liability for noneconomic damages; limited the liability of product sellers to their own negligence or failure to comply with an existing federal safety standard; and eliminated the federal government's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product (e.g., machine tools). See H.R. Comm. Rep. No. 104-481 (1996). President Clinton vetoed the bill on May 2, 1996. See John F. Harris, *Clinton Vetoes Product Liability Reform*, N.Y. LEGAL J. 144 (Oct. 1996).

⁵³ 42 U.S.C. § 28103 (Law. Co-op. 1998).

The Biomaterials Access Assurance Act of 1998⁴² provided suppliers of new materials and component parts used to make implantable medical devices with a mechanism to obtain dismissal, without cost, of suits for recovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant.

The Year 2000 Information and Readiness Disclosure Act⁴³ banned, with a few exceptions, the use of Year 2000 readiness disclosure statements by plaintiffs as evidence in court to prove the truth or accuracy of a company's assertions about dealing with the Year 2000 computer problem and protects companies from liability for Year 2000 statements they made that are alleged to be false, inaccurate, or misleading. It is proven that the company knew the statement was false, fraudulent, or misleading and made it with an intent to deceive or mislead, and

The Securities Litigation Uniform Standards Act of 1998⁴⁴ made federal courts the sole venue for most securities class action fraud lawsuits involving fifty or more parties. The law was enacted to close a loophole that permitted the Securities Litigation Reform Act of 1995.⁴⁵ That law raised the standard for filing such suits in federal courts, but was undermined when lawyers shifted their filings to state courts.⁴⁶

C. The *Lopez* Decision Does Not Undermine the Authority of Congress to Enact Liability Reform Legislation

Despite the long history of congressional involvement in matters having an effect on interstate commerce, opponents of federal liability reform have questioned whether Congress has the authority to enact liability reform legislation in light of the holding of *United States v. Lopez*.⁴⁷

In *Lopez*, the Court considered whether Congress's enactment of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to

⁴² 21 U.S.C.S. § 1605 (Law Corp. 1998).

⁴³ Pub. L. No. 105-271, 112 Stat. 2386, 2389 (1998) (to be codified at 15 U.S.C. § 7703).

⁴⁴ 15 U.S.C.S. §§ 77-78 (Law Corp. 1998).

⁴⁵ See *supra* note accompanying note 51.

⁴⁶ See S. Rep. No. 105-182, at 3 (1998); H.R. Rep. No. 105-640, at 8 (1998); H.R. Rep. No. 105-182, at 3 (1998).

⁴⁷ 514 U.S. 549 (1995). See, e.g., Phillips, *supra* note 16.

believe, is a school zone,"⁴⁸ was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "[t]he Act neither regulat[ed] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."⁴⁹

Conceptually, *Lopez* was not a Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁵⁰ Moreover, "re-spondent was a local student at a local school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm ha[d] any concrete tie to interstate commerce."⁵¹

The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce. These cases directly support Congress's Commerce Clause authority over liability law.⁵² In fact, rather than limiting Congress's Commerce Clause authority, the *Lopez* decision can be read to support legislation that would regulate the firearms industry in a manner more explicitly connected with interstate commerce, such as a limit on the liability of gun manufacturers in order to promote the development of the firearms industry or

⁴⁸ Pub. L. No. 101-547, § 1702(b), 104 Stat. 4789, 4844 (1990) (current version at 18 U.S.C. § 922(q)(2)(A)) (1998).

⁴⁹ *Lopez*, 514 U.S. at 551. See also *Brazzakis v. Virginia Polytechnic Inst. and State Univ.*, 104 F.3d 1011, 1013 (4th Cir. Mar. 5, 1999) (holding that the Violence Against Women Act, which criminalizes acts of violence against persons who commit acts of gender-motivated violence, exceeded Congress's Commerce Clause authority because the activity Congress sought to regulate—violent crime motivated by gender-motivated violence—was not a commercial activity and the statute "lack[ed] a meaningful connection with any particular, identifiable economic enterprise or transaction"). See generally Herbert Hovenkamp, *Judicial Restraint And Commerce Clause Jurisprudence*, 70 *Conn. L. Rev.* 1091 (1998).

⁵⁰ *Lopez*, 514 U.S. at 551.

⁵¹ *Lopez*, 514 U.S. at 551.

⁵² *Id.* at 557.

⁵³ See *supra* notes 22-26 and accompanying text. See also Patrick Hooper, *Tort Re-*

form After the Case of United States v. Lopez, 24 *HARRISON CORNELL L.Q.* 785 (1997) (dis-

*cussing the impact of the *Lopez* decision on the Commerce Clause and the poten-*

tially expansive interpretation of Congress's authority under the Commerce Clause).

an imposition of requirements on gun manufacturers to promote firearms safety.⁶⁶

II. FEDERAL TORT LAWS HAVE BEEN AND SHOULD BE DECLARED CONSTITUTIONAL

A. Courts Have Respected the Role of Congress in the Development Of Tort Law

For almost a century, the Supreme Court and the lower courts have upheld numerous federal tort law statutes against constitutional challenges. The courts have uniformly held that such economic legislation comes clothed with a presumption of constitutionality that is subject to a highly deferential rational basis standard of review. In every modern case, the legislation has been found to pass constitutional muster.

1. Limitation of Shipowners' Liability Act

The Limitation of Vessel Shipowners' Liability Act and the Harter Act (collectively "the LSLA")⁶⁷ were the first major federal tort policy statutes to be challenged in the Supreme Court. The LSLA, enacted to promote commercial shipping, exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of the ship owner.⁶⁸ In addition, the LSLA limited ship owners' liability for any loss or destruction of goods aboard their ships.⁶⁹

The Supreme Court upheld the constitutionality of the LSLA in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*⁷⁰ The case arose when the Providence Company, a defendant in state tort suits filed by the Hill Company to recover damages

⁶⁶ See *Lopez*, 514 U.S. at 563 (indicating that Congress has the power to enact legislation regulating firearms possession explicitly connected with or having an effect on interstate commerce). See also Scott M. Richmond, Note, *Pritz v. United States: If Be Able to Force State Executives?*, 7 WISCONSIN L. J. 325 (1997). Congress has the power, under the Commerce Clause, to regulate handgun sales involved in interstate commerce.

⁶⁷ 46 U.S.C.A. §§ 181-196 (1994).

⁶⁸ 46 U.S.C.A. § 182.

⁶⁹ 46 U.S.C.A. § 183.

⁷⁰ 109 U.S. 576 (1883).

arising from a fire aboard one of Providence's ships, sought to limit its liability and suspend the state suits in accordance with the LSLA.⁷¹

The Supreme Court held that there was "no doubt that Congress had [the] power to pass the [LSLA]."⁷² Quoting from an earlier decision, *The Lottawana*,⁷³ the Court reaffirmed Congress's "authority under the commercial power . . . to introduce such changes [in maritime law] as are likely to be needed,"⁷⁴ and indicated that it "perceiv[ed] no reason for entertaining any serious doubt" that Congress's power under the Commerce Clause "may be extended to the securing and protection of the rights and title of all persons dealing [in shipping]."⁷⁵ The Court added that because Congress acted within its lawful authority to regulate interstate commerce, the LSLA was "binding on all courts and jurisdictions throughout the United States."⁷⁶ The Court went on to hold that the purpose of the LSLA would be frustrated unless the institution of proceedings in a federal district court superseded the prosecution of claims for the same losses and injuries in other courts.⁷⁷

2. Federal Employers' Liability Act of 1908

In *Mondou v. New York, New Haven & Hartford Railroad Co.*,⁷⁸ the Supreme Court upheld the constitutionality of the Federal Employers' Liability Act of 1908 ("FELA"),⁷⁹ which established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce.⁸⁰ Federal and state courts were given concurrent jurisdiction to decide FELA cases.⁸¹

⁷¹ See *id.* at 579-80.

⁷² *Id.* at 589.

⁷³ 58 U.S. (21 Wall.) 558 (1874) (addressing Congress's power to make changes to maritime law).

⁷⁴ *Id.* at 590 (quoting *The Lottawana*, 88 U.S. at 577).

⁷⁵ See *id.* at 587.

⁷⁶ 223 U.S. 1 (1912).

⁷⁷ 42 U.S.C. §§ 51-60 (1994).

⁷⁸ 223 U.S. 1 (1912).
⁷⁹ 45 U.S.C. § 51 (1994).
⁸⁰ The Supreme Court, in *Illinois Central Railroad Co. (the Employers' Liability Cases)*, 207 U.S. 463, 496-97 (1908), the Court struck down a 1906 version of FELA, finding that the 1906 Act extended Congress's Commerce Clause power to "regulate interstate commerce" to "matters and things domestic (or intrastate) in their character" because it "embod[ed] . . . matters and things domestic (or intrastate) in their character."
⁸¹ See 45 U.S.C. § 56; The Jones Act, 46 U.S.C.A. § 688 (1994), a FELA-like statute

In *Mondou*, railroads unsuccessfully challenged the constitutionality of the legislation on several grounds. The Court in *Mondou* held that Congress had not exceeded its Commerce Clause authority by enacting tort rules which deviated from the common law. In an oft-quoted passage, the Court held that:

A person has no property, no vested interest, in any rule of the common law. That is only one of the rules which municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the purpose of statutes is to remedy defects in the common law as they exist, and to adapt it to the changes of time and circumstances.¹⁴

The Court also noted that despite the fact that employer liability had traditionally been a matter of state law, Congress had a legitimate interest in replacing the patchwork of state laws with uniform national legislation "to promote the safety of the [railroad] employees and to advance the commerce in which they are engaged."¹⁵

Furthermore, the Court held that the "classification" created by FELA (i.e., the distinction it makes between interstate railroad carriers, which are subject to liability, and all other parties, which are not) did not doom the statute under the Due Process Clause of the Fifth Amendment,¹⁶ even though it could "occasion some inequalities."¹⁷ The Court held that tort law classifications are constitutionally permissible under the Fifth Amendment as long as the classification has a rational basis.¹⁸ Tested by that standard, the Court held, FELA was "not objectionable."¹⁹ The Court pointed out that it had repeatedly sustained "[l]ike classifications of railroad carriers and employees for like pur-

¹⁴ That persons, sources injured in the course of employment to maintain an action for damages at law, also had no vested interest in the common law rules which govern current jurisdiction to decide Jones Act cases. See *Engel v. Davenport*, 271 U.S. 35 (1926).

¹⁵ 309 U.S. at 134 (1934).

¹⁶ *Id.* at 51.

¹⁷ *Id.* at 51.

¹⁸ *Id.* at 51.

¹⁹ See *Mondou*, 223 U.S. at 23.

²⁰ *Id.*

poses" under the Equal Protection Clause of the Fourteenth Amendment.²⁰

After resolving FELA's constitutionality, the Court moved to settle FELA's preemptive effect over state laws covering railroad employer liability. The Court explained that although Congress had chosen not to regulate the field of railroad carrier liability in the past, and although the subject fell within the police power of the states in the absence of congressional action, Congress was not therefore precluded from acting.²¹ To the contrary, once Congress acted, "the laws of the states, in so far as they cover the same field, [were] superseded, for necessity that which is not supreme must yield to that which is."²²

The Court went on to explain that FELA did not present federalism problems because Congress was not setting state policy. Rather, Congress was establishing federal policy to be implemented by the states in accordance with the Supremacy Clause. The Court held:

[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure.²³

The Court added that it did not perceive that FELA would cause any appreciable inconvenience or confusion for state courts, and that in any case, such inconvenience or confusion would not change its holding:

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not negate the implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules

²¹ *Id.*

²² See *Id.* at 54-55.

²³ *Id.* at 55.

²⁴ *Id.* at 56-57.

of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger.²

3. The Longshore and Harbor Workers' Compensation Act

In *Crowell v. Benson*,³ the Supreme Court was asked to decide the constitutionality of the Longshore and Harbor Workers' Compensation Act ("LHWCA").⁴ The LHWCA created a no-fault compensation scheme that provided fixed awards to employees injured upon the navigable waters of the United States.⁵

The Court began by holding that the federal power to alter, amend, or revise the maritime law gave Congress the authority to define the substantive rights of employees under the LHWCA (in this case, by providing for recovery in the absence of fault, establishing classifications based on type of injury, fixing the range of compensation for disability or death, and designating the classes of beneficiaries).⁶

Next, the Court addressed whether the substantive rights created by the LHWCA violated the Due Process Clause of the Fifth Amendment.⁷ The Court, applying a deferential rational basis test, held that neither the classifications created by the statute nor the extent of compensation provided were unreasonable.⁸ In light of the difficulties associated with determining actual damages in maritime cases, the Court held, Congress was justified in providing for the payment of damages in amounts that would reasonably approximate a claimant's probable damages.⁹ The Court also noted that the plaintiff's Fifth Amendment objections were substantially similar to those which the Court had rejected in challenges to state workers' compensation laws under the Due Process Clause of the Fourteenth Amendment.¹⁰

² *Id.* at 58-59.

³ 285 U.S. 22 (1932).

⁴ 33 U.S.C. §§ 901-950 (1994) (originally entitled "Longshoremen's and Harbor Workers' Compensation Act").

⁵ See *supra* notes 30-33 and accompanying text.

⁶ See *Crowell*, 285 U.S. at 39.

⁷ *Id.* at 41.

⁸ *Id.*

⁹ *Id.*

¹⁰ See *id.* at 42.

After upholding the constitutionality of the LHWCA's substantive provisions, the Court turned to the LHWCA's procedural requirements. The plaintiff's procedural objections to the LHWCA focused on the administrative authority conferred by the Act.¹¹ The Court held that the use of the administrative method to assess the cause, character, and effect of claimants' injuries fell "easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments,"¹² and did not constitute an unconstitutional invasion of judicial power.¹³

4. The Drivers Act

In 1961, Congress enacted the Drivers Act¹⁴ to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring in the course of their employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the-job accidents.¹⁵ "Moved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ,"¹⁶ Congress decided to forbid suits against federal drivers, but to permit suits against the United States for tort liability arising out of accidents caused by a driver's negligence.¹⁷

a. *Private citizen and federal driver.* The Drivers Act was challenged on constitutional grounds in *Mistandirk v. McGee*,¹⁸ a personal injury action arising out of an automobile accident between a private citizen and a federal employee (in this instance, a rural mail carrier). The plaintiff initially brought a negligence action against the mail carrier in Missouri state court. The

¹¹ See *id.* at 42-45 (detailing the significant amount of discretion granted to a single official to determine whether a claimant is entitled to compensation under the Act).

¹² *Id.* at 47.

¹³ See *id.* at 54 (holding that the LHWCA's reservation of the judiciary's power to deal with matters of law appropriately preserved the exercise of the judicial function).

¹⁴ 49 U.S.C. § 10101 (1994).

¹⁵ See *Carr v. United States*, 422 F.2d 1007, 1009 (4th Cir. 1970).

¹⁶ *Id.* at 1012.

¹⁷ 49 U.S.C. § 10103 (1994).

¹⁸ 225 F. Supp. 881 (W.D. Mo. 1963).

United States removed the case to federal court and was substituted as the defendant pursuant to the Drivers Act.¹⁰⁹ The plaintiff, seeking to obtain full damages and wanting to avoid trying the case under the Federal Tort Claims Act, moved to remand the case to state court on the ground that the Drivers Act violated the Fourteenth Amendment of the United States Constitution.¹¹⁰

The court rejected plaintiff's argument that the Drivers Act violated the Fourteenth Amendment by replacing a common law remedy with a statutory one.¹¹¹ The court noted that, in *Silver v. Silver*,¹¹² the Supreme Court, in sustaining the abolition of a non-paying passenger's right to sue his host for negligence, had held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."¹¹³ The court concluded that because Congress had a legitimate interest in insulating federal drivers from liability, the Drivers Act constituted a valid exercise of legislative power under the Necessary and Proper Clause of Article I.¹¹⁴

b. *Federal employee and federal driver cases.* Most of the litigation involving the Drivers Act has involved claims by federal employees injured by government drivers, since prior to passage of the Act, civilian government workers injured in the course of employment as a result of the negligence of a fellow employee were not limited to claims against the United States under the Federal Employees' Compensation Act ("FECA").¹¹⁵ They also had the right to bring a common law tort action

¹⁰⁹ See *id.* at 881.

¹¹⁰ See *id.* at 882. Plaintiff also argued that the Act violated the Seventh Amendment and the jury trial provision of the Missouri Constitution. See *id.* The court quickly disposed of Plaintiff's Seventh Amendment challenge, holding that "the guarantees of the Seventh Amendment are not violated by the removal of a case from state to federal court." See *id.* See also *Quadrone v. Peck*, 216 F. Supp. 764, 765 (E.D.N.Y. 1963) (holding that the Seventh Amendment does not guarantee a right to a trial by jury against a collector of internal revenue). The court dismissed the plaintiff's argument that the Drivers Act violated the Missouri Constitution's jury trial guarantee, noting that the Missouri Constitution was not binding on the federal government. See *id.*

¹¹¹ See *Nitzendörfer*, 725 F. Supp. at 882.

¹¹² 360 U.S. 155 (1959).

¹¹³ *Nitzendörfer*, 725 F. Supp. at 882 (quoting *Silver*, 280 U.S. at 122).

¹¹⁴ See *id.*

¹¹⁵ 5 U.S.C. §§ 8101-8195 (1994).

against the negligent co-worker.¹¹⁶ Congress, however, did not "specifically consider whether or not this cause of action against a fellow government employee should survive" passage of the Drivers Act.¹¹⁷ That issue was addressed by a number of courts, which uniformly held that the Drivers Act abrogated the traditional common law rule.¹¹⁸ Those decisions, in turn, produced litigation challenging Congress's authority to do so.¹¹⁹

The Fourth Circuit addressed the constitutionality of the Drivers Act in *Carr v. United States*.¹²⁰ The plaintiff, a government employee injured by a federal driver, argued that the abrogation of a government employee's common law action against a fellow employee for negligence violated the Due Process Clause of the Fifth Amendment, because the Drivers Act did not create a new benefit as a *quid pro quo*.¹²¹ Furthermore, the plaintiff argued, the Drivers Act violated the Equal Protection Clause of the Fifth Amendment, because it created an impermissible distinction between federal employees injured in vehicular accidents caused by fellow employees and federal workers injured in other job-related activities. Only Drivers Act plaintiffs were specifically barred from bringing tort actions against negligent co-employees.¹²²

The Fourth Circuit rejected the plaintiff's due process argument, noting that it had already been rejected by the Supreme Court.¹²³ Moreover, even though a common law action could no longer be brought against the United States, the Fourth Circuit said, the Drivers Act itself provided an adequate *quid pro quo*, because it provided plaintiff with "valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible."¹²⁴

The court rejected the plaintiff's equal protection challenge on the ground that the classification created by the Drivers Act did not penalize the exercise of any constitutional right.¹²⁵ Therefore,

¹¹⁶ See *Noga v. United States*, 411 F.2d 943, 944 (9th Cir. 1969).

¹¹⁷ See *Quadrone v. Peck*, 216 F. Supp. 764, 765 (E.D.N.Y. 1963).

¹¹⁸ See *Van Houten v. Ball*, 411 F.2d 453 (6th Cir. 1969); *Noga*, 411 F.2d at 943; *Van Houten v. Ball*, 411 F.2d 940 (9th Cir.); *Beechwood v. United States*, 264 F. Supp. 522 (D. Mont. 1967).

¹¹⁹ See *id.* at 1010.

¹²⁰ See *id.* at 1011.

¹²¹ See *id.* at 1011.

¹²² See *id.* at 1011.

¹²³ See *id.* at 1011.

¹²⁴ See *id.* at 1011.

¹²⁵ See *id.* at 1011.

the court held, the statutory classification did not have to be justified by a compelling governmental interest. Rather, it came upheld as long as Congress had a rational basis for enacting the legislation.¹²² The court concluded that "the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem."¹²³

The Third Circuit reached a similar conclusion in *Thomason v. Sanchez*.¹²⁷ The plaintiff, a serviceman, was injured when he was struck by an automobile operated by another serviceman. He had no remedy at all against the United States, because of the so-called "Feres doctrine,"¹²⁸ and thus presented a highly compelling appeal.¹²⁹ The plaintiff in *Thomason* argued that he should be allowed to proceed against the defendant and the defendant's automobile insurer.¹³⁰

The Third Circuit, however, rejected the plaintiff's argument that common law tort actions against fellow government employees had survived passage of the Drivers Act.¹³¹ The Third Circuit also rejected the plaintiff's argument that the Drivers Act as applied to him, deprived him of all remedies at law and, therefore, constituted a denial of due process under the Fifth Amendment.¹³² Adopting the reasoning of the Fourth Circuit in *Carri*,¹³³ the Third Circuit held that Congress was justified in passing the Drivers Act to relieve the heavy automobile insurance burden on federal drivers.¹³⁴

5. Black Lung Benefits Act of 1972

In *Usery v. Turner Elkhorn Mining Co.*,¹³⁵ the Supreme Court upheld the constitutionality of Title IV of the Federal Coal Mine

¹²² *Id.* at 1012.

¹²³ 539 F.2d 955 (2d Cir. 1976).

¹²⁴ In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to persons while the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

¹²⁵ See *Thomason*, 539 F.2d at 956.

¹²⁶ *Id.* at 957.

¹²⁷ 539 F.2d at 958.

¹²⁸ See *id.* at 959-60.

¹²⁹ See *supra* notes 123-126 and accompanying text.

¹³⁰ See *Thomason*, 539 F.2d at 959-60.

¹³¹ 428 U.S. 1 (1976).

Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972.¹³⁶ The black lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease.¹³⁷ Coal mine operators challenged a number of the black lung benefit provisions as unconstitutional.

First, the operators contended that the Black Lung Benefits Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former miners who terminated their work in the industry before the Act passed. The operators argued that "the Act spreads costs in an arbitrary manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business."¹³⁸

The Court made it clear that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality."¹³⁹ It then held that Congress was justified in its decision to provide for the retroactive application of liability under the Black Lung Benefits Act.¹⁴⁰ The Court stated that, whether it would have been wiser for Congress to have chosen a cost-spreading scheme that was broader or more practical under the circumstances was "not a question of constitutional dimension."¹⁴¹

Second, the coal mine operators challenged the two alternative methods set forth by Congress for proving "total disability" due to black lung disease, a prerequisite for compensation under the Act.¹⁴² The Court held, however, that the standards adopted by Congress could not be deemed to be "purely arbitrary" and, thus, were constitutionally valid.¹⁴³

Third, the operators argued that a provision of the Act which provided that no claim for benefits could be defeated based solely on the results of a chest x-ray violated due process. The operators argued that x-ray evidence was frequently the only

¹³⁶ 30 U.S.C. §§ 901-905 (1994). See generally Allen R. Prunty & Mark E. Solomons, *The Feres, Black Lung Benefit Program, Its Evolution and Current Status*, 31 W. Va. L. Rev. 665 (1989).

¹³⁷ See 30 U.S.C. § 901 (1994).

¹³⁸ *Id.* at 15.

¹³⁹ *Id.* at 15.

¹⁴⁰ See *id.* at 16.

¹⁴¹ See *id.* at 20.

¹⁴² *Id.* at 20.

evidence that they could put forth to rebut a black lung claim.¹⁴⁴ The Court noted, however, that Congress was presented with "significant evidence" that x-ray testing was not an accurate indicator of the absence of disease.¹⁴⁵ Thus, "Congress was faced with the problem of determining which side should bear the burden of the unreliability."¹⁴⁶ The Court held that the fact that Congress ultimately determined "to resolve doubts in favor of the disabled miner" [did] not render the enactment arbitrary under the standard of rationality appropriate to [the] legislation.¹⁴⁷

6. The Price-Anderson Act

The Price-Anderson Act,¹⁴⁸ as amended in 1975, limited the aggregate liability for a single nuclear incident to \$560 million to be paid from contributions from nuclear power plant operators, private insurance, and the federal government. In addition, the amended Act required operators to waive certain legal defenses in the event of an extraordinary nuclear incident.¹⁴⁹

The Price-Anderson Act was critical to the development of the private nuclear power industry in the United States.¹⁵⁰ Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, "the potential liability dwarfed the ability of the nuclear power industry and private insurance companies to absorb the risk."¹⁵¹ Without reasonable and defined limits on liability, there might not be a nuclear power industry as we know it today.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,¹⁵² individuals who lived close to proposed nuclear power plants and two organizations sought to prevent construction of the planned facilities by obtaining a declaration that the Price-

¹⁴⁴ See *id.* at 31.

¹⁴⁵ *Id.* at 31-32.

¹⁴⁶ *Id.* at 32.

¹⁴⁷ *Id.* at 32.

¹⁴⁸ 295 Stat. 34 (quoting 8 Stat. No. 92-743, at 11 (1972), reprinted in 1972 U.S.C.A.N.

¹⁴⁹ 42 U.S.C. § 2210 (1994).

¹⁵⁰ See *Duke Power Co. v. Carolina Env't. Study Group, Inc.*, 438 U.S. 59, 65 n.5

(1978) (discussing the "extraordinary" nature of the risk and the "unusually high" level of

many nuclear occurrences." *Id.*

¹⁵¹ See *id.* at 64.

¹⁵² 438 U.S. 59 (1978).

Anderson Act was unconstitutional.¹⁵³ After deciding that plaintiffs had standing to challenge the Act,¹⁵⁴ the Supreme Court addressed plaintiffs' argument that the Act violated the Due Process Clause, because of the "alleged arbitrariness" of the \$560 million statutory ceiling on liability.¹⁵⁵

The Court rejected plaintiffs' contention that the Act should be subjected to an intermediate standard of review, holding that the Price-Anderson Act was a "classic example of an economic regulation" that could only be overcome by a showing that Congress acted in an "arbitrary and irrational way."¹⁵⁶ In light of this standard, the Court held that the Act passed constitutional muster because the liability cap bore a rational relationship to Congress's desire to stimulate the private sector's involvement in nuclear power.¹⁵⁷ Importantly, the Court stated that, while any cap could be characterized as arbitrary in some sense, the decision to fix a \$560 million ceiling was not the "kind of arbitrariness" that would flout an otherwise constitutional law.¹⁵⁸

Plaintiffs' remaining due process objection was that the liability limitation failed to provide a satisfactory quid pro quo for the common law rights of recovery that the Act abrogated. The Court, however, expressed doubt whether the Due Process Clause requires that a statutory compensation scheme either duplicate the recovery available at common law or provide a reasonable substitute.¹⁵⁹ The Court cited earlier decisions which "clearly established" that "[i]f a person has . . . no vested interest in any rule of the common law,"¹⁶⁰ it also cited an earlier decision that held that the "Constitution does not forbid the . . . abrogation of old [rights] recognized by the common law, to attain a permissible legislative object."¹⁶¹ The Court went on to hold that, even if there were a quid pro quo requirement, the assurance of a

¹⁵³ See *id.* at 67.

¹⁵⁴ See *id.* at 81.

¹⁵⁵ *Id.* at 83.

¹⁵⁶ *Id.* at 83.

¹⁵⁷ See *id.* at 84. Cf. *Indemnity Ins. Co. of N. Am. v. Pan Am. Airways*, 58 F. Supp.

538, 340 (S.D.N.Y. 1944) (upholding against a due process attack the Warsaw Convention, which limited the liability of airlines for injuries or death to aircraft passengers).

¹⁵⁸ *Duke Power*, 438 U.S. at 86.

¹⁵⁹ See *id.* at 86.

¹⁶⁰ *Id.* at 83-84 (quoting *Morison*, 223 U.S. at 50 (quoting *Mass. 94 U.S. at 134*)).

¹⁶¹ *Id.* (quoting *Silver*, 286 U.S. at 122).

\$560 million fund provided a "just substitute" for the common law rights replaced by the Act.¹⁵⁵

Finally, the Court held that the Price-Anderson Act did not violate the Equal Protection Clause because the "general rationality" of the Act's liability ceiling provided "ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes."¹⁵⁶

7. Swine Flu Act

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act")¹⁵⁷ was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial decisions holding polio vaccine manufacturers strictly liable for vaccine-related injuries.¹⁵⁸ In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season.¹⁵⁹ Motivated after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries.¹⁶⁰

The constitutionality of the Swine Flu Act was first addressed in *Sparks v. Wyeth Laboratories, Inc.*¹⁶¹ Plaintiff, who had suffered serious injuries following a swine flu immunization, alleged that the Act violated the Due Process Clause of the Fifth Amendment, because it abrogated common law causes of action against program participants.¹⁶² The court held, however, that plaintiff had "no vested interest in any rule of the common

¹⁵⁵ *Id.* at 93.

¹⁵⁶ *Id.* at 94.

¹⁵⁷ Act of Aug. 12, 1976, 90 Stat. 1113 (repealed 1978). See generally Colleen Con-tade, et al., 27A Am. Jur. 2d Negligence § 540 (1989).

¹⁵⁸ See *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968) (holding a polio vaccine manufacturer strictly liable for vaccine-related injuries to individuals receiving the vaccine); *Reyes v. Wyeth Laboratories, Inc.*, 499 F.2d 1264 (5th Cir. 1974) (holding a vaccine manufacturer strictly liable for vaccine-related injuries to individuals receiving the vaccine).

¹⁵⁹ See *Sparks v. Wyeth Laboratories, Inc.*, 431 F. Supp. 411, 415 (W.D. Okla. 1977) (quoting the Swine Flu Act's legislative history to explain why it was enacted in haste).

¹⁶⁰ See Act of Aug. 12, 1976, 90 Stat. 1113, 1114 (repealed 1978).

¹⁶¹ 431 F. Supp. 411 (W.D. Okla. 1977).

¹⁶² *See id.* at 416.

law."¹⁶³ Moreover, while a replacement or substitution of remedies was "perhaps not technically necessary for due process," Congress did provide "an alternative, efficacious remedy against the United States."¹⁶⁴ The court noted that federal statutes similar to the Swine Flu Act had "always been found to be constitutional when challenged," including the Drivers Act upon which the Swine Flu Act was modeled.¹⁶⁵

Plaintiff also alleged an equal protection violation.¹⁶⁶ The court noted, however, that "such routine equal protection considerations as 'compelling governmental interest' or 'suspect' classifications or 'fundamental' interests [were] simply not involved" in challenges to economic legislation.¹⁶⁷ Thus, the court dismissed plaintiff's challenge.¹⁶⁸

Finally, the court addressed plaintiff's argument that the Swine Flu Act violated the Tenth Amendment.¹⁶⁹ The court pointed out that plaintiff's argument rested "mainly upon cases declaring early pieces of New Deal legislation to be unconstitutional . . . [and that] the spirit if not the letter of those cases ha[d] been overruled in subsequent decisions."¹⁷⁰ The court stated that the Swine Flu Act simply allowed the federal government to work with the states and imposed no coercion on them.¹⁷¹

Sparks was influential in leading other courts to reject similar constitutional challenges to the Swine Flu Act. In *Wolfe v. Merrill National Laboratories, Inc.*,¹⁷² plaintiff's "unarticulated major premise" was that the Swine Flu Act unconstitutionally compelled her participation in the program, causing her to suffer serious injury.¹⁷³ The court easily dismissed plaintiff's claim,

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* at 417.

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* *See also* *DiPietro v. United States*, 687 F.2d 14 (3d Cir. 1982) (holding that Swine Flu Act did not violate the Due Process Clause of the Fifth Amendment). The court also rejected a Seventh Amendment challenge raised by plaintiff, stating that the Swine Flu Act was not a contract. Plaintiff also argued that the Swine Flu Act violated the Tenth Amendment, but the court rejected this argument, noting that the Seventh Amendment had never been held to apply against the States under the Fourteenth Amendment. *See Sparks*, 431 F. Supp. at 418-19. *See also* *Du-maine v. Merrill-Nar Laboratories*, 574 F.2d 1307 (5th Cir. 1978) (holding that Swine Flu Act did not violate the Tenth Amendment).

¹⁷⁰ *See Sparks*, 431 F. Supp. at 418.

¹⁷¹ *Id.*

¹⁷² *Id.* at 420.

¹⁷³ 433 F. Supp. 231, 236 (M.D. Tenn. 1977).

¹⁷⁴ *Id.* at 237.

noting that she voluntarily chose to accept the benefit of the federally administered vaccine.¹⁴⁹ The court also discussed plaintiff's allegation that the Swine Flu Act violated the Tenth Amendment.¹⁵⁰ The court stated that, as a grant program, the Swine Flu Act fell within the power of Congress to spend funds for the "general welfare."¹⁵¹ Accordingly, "Congress acted within its constitutionally ordained powers in passing the Act."¹⁵²

8. Atomic Weapons Testing Liability Act

In *Hammond v. United States*,¹⁵³ the First Circuit upheld the constitutionality of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985 ("Atomic Weapons Testing Liability Act")¹⁵⁴ against a challenge brought by a widow for the death of her husband, a civilian employee of the Department of Defense and observer at several atomic weapons tests, from radiation poisoning. The Atomic Weapons Testing Liability Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries.¹⁵⁵

The First Circuit noted that Congress had previously passed laws (the Drivers Act and the Swine Flu Act) that substituted the federal government as the defendant for particular types of tort suits and required plaintiffs to seek relief through the Federal Tort Claims Act.¹⁵⁶ The court also noted that when those statutes had been challenged for alleged due process violations, they were consistently evaluated under the rational basis test and declared constitutional.¹⁵⁷ The court then evaluated the Atomic Weapons Testing Liability Act under a rational basis standard and concluded that Congress's desire to shield government con-

¹⁴⁹ See *id.* at 238.

¹⁵⁰ See *id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 786 F.2d 8 (1st Cir. 1986).

¹⁵⁴ Pub. Law No. 99-163 (1986) (repealed 1990).

¹⁵⁵ See *id.*; *Hammond*, 786 F.2d at 9.

¹⁵⁶ See *Hammond*, 786 F.2d at 12-13.

¹⁵⁷ See *id.* at 13.

tractors from public embarrassment arising from litigation was rationally related to its decision to abolish common law tort claims against the contractors.¹⁵⁸ In addition, the court reasoned that, since the government was required to pay the judgments obtained against the contractors, it was neither irrational nor arbitrary for Congress to subject all potential plaintiffs uniformly to Federal Tort Claims Act limitations.¹⁵⁹ Accordingly, the court held that the Atomic Weapons Testing Liability Act did not violate the Due Process Clause.¹⁶⁰

The court also rejected plaintiff's Tenth Amendment challenge to the Act.¹⁶¹ Plaintiff relied on *National League of Cities v. Usery*¹⁶² to argue that, by abolishing the state common law actions against government contractors, Congress "invaded rights reserved to the states."¹⁶³ The court, however, determined that plaintiff's argument was without merit, because *National League of Cities* had been overruled.¹⁶⁴

The Ninth Circuit Court of Appeals dismissed additional constitutional challenges to the Atomic Weapons Testing Liability Act in *In re Consolidated United States Atmospheric Testing Litigation*.¹⁶⁵ Plaintiffs, military and civilian participants in the United States atmospheric nuclear weapons testing program and their families, alleged that the Act constituted a "taking" for purposes of the Fifth Amendment, because it substituted a remedy against the government under the Federal Tort Claims Act for state tort law causes of action against government contractors who participated in the federal weapons testing program.¹⁶⁶ In addition, plaintiffs alleged that the Act violated the Due Process

¹⁵⁸ See *id.* at 13-14.

¹⁵⁹ See *id.* The court also held that the Atomic Weapons Testing Liability Act did not violate equal protection for the same reasons. See *id.* at 15.

¹⁶⁰ For further discussion of Tenth Amendment challenges to federal tort reform legislation, see *infra* notes 255-260 and accompanying text. See also *Hammond*, 786 F.2d at 15.

¹⁶¹ 426 U.S. 833 (1976), overruled by *Clark v. West*, 456 U.S. 264 (1982). See *Hammond*, 786 F.2d at 15.

¹⁶² 426 U.S. 833 (1976). See *Hammond*, 786 F.2d at 15.

¹⁶³ See *Hammond*, 786 F.2d at 15.

¹⁶⁴ See *Hammond*, 786 F.2d at 15.

¹⁶⁵ 469 U.S. 528 (1985). See *infra* notes 267-287 and accompanying text.

¹⁶⁶ See *Hammond*, 786 F.2d at 15.

¹⁶⁷ See *Hammond*, 786 F.2d at 15.

¹⁶⁸ See *Hammond*, 786 F.2d at 15.

¹⁶⁹ See *Hammond*, 786 F.2d at 15.

¹⁷⁰ See *Hammond*, 786 F.2d at 15.

¹⁷¹ See *Hammond*, 786 F.2d at 15.

¹⁷² See *Hammond*, 786 F.2d at 15.

¹⁷³ See *Hammond*, 786 F.2d at 15.

¹⁷⁴ See *Hammond*, 786 F.2d at 15.

¹⁷⁵ See *Hammond*, 786 F.2d at 15.

¹⁷⁶ See *Hammond*, 786 F.2d at 15.

¹⁷⁷ See *Hammond*, 786 F.2d at 15.

¹⁷⁸ See *Hammond*, 786 F.2d at 15.

Clause of the Fifth Amendment and the separation of powers doctrine.¹⁹⁹

The court began its takings analysis by noting that courts had found it "well settled" that a "plaintiff has no vested right in any tort claim for damages under state law."²⁰⁰ Accordingly, denial of plaintiffs' state tort law cause of action did "not translate into a cognizable taking claim."²⁰¹ The court also pointed out that the Act did not abrogate claims arising from atomic weapons tests, but instead subjected claimants to a statutory procedure that plaintiffs could reasonably expect to apply to them.²⁰²

Next, the court held that, because Congress had acted within its war powers and Commerce Clause authority, and no fundamental right or suspect classification was involved, the rational basis standard of due process review applied to plaintiffs' due process claim. Under that standard, the court held, plaintiffs had not met their burden of proving that the Act was "wholly arbitrary and irrational in purpose and effect, i.e., not reasonably related to a legitimate congressional purpose."²⁰³ According to the court, the weapons testing program had been a crucial government function from its inception, and Congress reasonably believed that relieving contractors of liability would encourage their participation in the program.²⁰⁴

Finally, the court rejected plaintiffs' separation of powers claim. The court said that legislation does not run afoul of the separation of powers doctrine unless Congress "presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'" ²⁰⁵ Those limitations did not exist with respect to the Atomic Weapons Testing Liability Act, because Congress did not direct courts to make certain findings or fact or require them to apply an unconstitutional law.²⁰⁶

¹⁹⁹ See *id.* at 989-92.

²⁰⁰ *Id.* at 988.

²⁰¹ *Id.*

²⁰² See *id.*

²⁰³ *Id.* at 990 (quoting *Hammond*, 786 F.2d at 8).

²⁰⁴ See *id.* at 992 (citations omitted).

²⁰⁵ See *id.* The court also held that the Act did not violate the Seventh Amendment, because "[t]here is no right to jury trial against the sovereign." *Id.*

9. National Childhood Vaccine Injury Act of 1986

The National Childhood Vaccine Injury Act of 1986²⁰⁷ was enacted to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies.²⁰⁸ The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons are required to file a petition in the United States Court of Federal Claims demonstrating, among other things, harm including "unreimbursable expenses . . . in an amount greater than \$1,000."²⁰⁹

In *Black v. Secretary of Health and Human Services*,²¹⁰ plaintiffs challenged the constitutionality of the \$1,000 threshold requirement on Fifth Amendment equal protection grounds. They argued that by making eligibility for the program turn on incurring \$1,000 of unreimbursable expenses, Congress made it more difficult for indigent persons to qualify for compensation, because indigents often have their medical expenses defrayed by government programs such as Medicaid.²¹¹ The court held, however, that the Act's eligibility requirement "was not designed to disadvantage poor persons, and the fact that it may disproportionately disqualify certain groups, including indigents and persons who enjoy the benefits of other medical programs, [did] not give rise to an equal protection violation."²¹²

The court explained that drawing lines to create distinctions for eligibility in social programs was "peculiarly a legislative task" that "may be rational even if it does not do a perfect job of selecting those cases that appear to be appropriate subjects of congressional concern."²¹³ The court then held that "it was rational for Congress to conclude, that as a general matter, those

²⁰⁷ 42 U.S.C. §§ 300aa-1 to 300aa-34 (1994).

²⁰⁸ See Report of the Select Committee on Labor and Human Resources, *National Childhood Vaccine Injury Act of 1986*, 100th Cong., 1st Sess. (1987), reprinted in 116 CONG. RECD. 13,387 (1987); David A. Canon, Note, *Striking A Balance: Between Product Liability and Product Safety: Lessons from the Vaccine Act*, 44 AM. U. L. REV. 1853 (1994).

²⁰⁹ 42 U.S.C. § 300aa-11(e)(1)(D)(i).

²¹⁰ 93 F.3d 781 (Fed. Cir. 1996).

²¹¹ *Id.* at 787.

²¹² *Id.* at 788.

who incur only modest expenses or whose expenses are reimbursed from other sources present less compelling cases for compensation than those who incur large, unreimbursed expenses.¹³¹ Thus, there was no constitutional flaw in the \$1,000 threshold requirement, "particularly in light of the strong presumption of constitutionality" that attaches to legislation conferring monetary benefits.¹³²

10. Price-Anderson Act Amendments of 1988

The 1988 Amendments to the Price-Anderson Act ("1988 Amendments")¹³³ created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal.¹³⁴ After the 1979 Three Mile Island incident near Harrisburg, Pennsylvania, plaintiffs who wished to have their tort claims remain in state court challenged the jurisdictional and removal provisions of the 1988 Amendments in *In re TMI Litigation Cases Consolidated II*.¹³⁵ They argued that the legislation violated Article III of the Constitution¹³⁶ because the public liability actions subject to the Act did not "arise under" the laws of the United States.¹³⁷

The Third Circuit began its analysis with a close examination of the scope of Congress's power to authorize federal courts to decide nondiversity cases turning on state law rules of decision. The court noted that the Supreme Court had distinguished between "pure jurisdictional statutes" and those mixing elements of federal and state law.¹³⁸ The central teaching of those cases, the Third Circuit said, was that a nondiversity case "cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant."¹³⁹ On the other hand, courts evaluating mixed federal and state schemes have focused upon

¹³¹ *Id.*

¹³² 42 U.S.C. §§ 2014, 2210 (1994).

¹³³ *See id.*

¹³⁴ 940 F.2d 832 (3d Cir. 1991).

¹³⁵ 940 F.2d 832 (3d Cir. 1991), cert. denied, 503 U.S. 1034 (1992). The Court, in *Law and Equity*, 503 U.S. 1034, 1035 (1992), held that the Act, "Treaties made, or which shall be made, under their Authority."

¹³⁶ *See In re TMI Litig.*, 940 F.2d at 835.

¹³⁷ *See In re TMI Litig.*, 940 F.2d at 835 (citing *Ortiz v. United States*, 461 U.S. 446 (1983); *Whitely*, 738 (1824); *Verlinden B.V. v. New York*, 461 U.S. 480 (1983); and *Mesa v. California*, 489 U.S. 121 (1989)).

¹³⁸ *Id.* at 849.

congressional intent and have formulated their decisions with flexibility "in order to honor the presumption in favor of a statute's constitutionality."¹⁴⁰

Turning to the 1988 Amendments at issue, the Third Circuit examined the legislative history and held that Congress had clearly expressed its intention that state law provide the content of and operate as federal law governing public liability cases resulting from nuclear incidents.¹⁴¹ By federalizing state substantive law, Congress established the constitutional foundation for the Act's jurisdictional and removal provisions. The court then said that it would have reached the same conclusion even if state law itself, rather than state law operating as federal law, formed the basis for decision, because the level of federal involvement in the field of nuclear energy and the need for "uniformity, equity, and efficiency in the disposition of public liability claims" provided sufficient "federal elements" to support the legislation.¹⁴²

The Third Circuit then turned to plaintiffs' collateral constitutional arguments that the retroactive application of the 1988 Amendments to cases already pending in state court violated principles of "federalism, state sovereignty, due process, and equal protection."¹⁴³ The Third Circuit's survey of relevant law led it to conclude that the legislation survived each of these challenges, because the provision for retroactivity was rationally related to Congress's desire to avoid inefficiencies and inconsistent outcomes in claims resulting from a single nuclear incident.¹⁴⁴

11. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act")¹⁴⁵ amended the Federal Tort Claims Act to provide for the substitution of the United States as

¹⁴⁰ *Id.* at 855.

¹⁴¹ *See id.* at 855-56.

¹⁴² *See id.* at 856-57.

¹⁴³ *See id.* at 860-61.

¹⁴⁴ *See id.* at 861. *See also In re TMI*, 80 F.3d 1106 (3d Cir. 1996) (holding that retroactive application of the 1988 Amendments did not violate due process); *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (upholding constitutionality of the 1988 Amendments against an Article III challenge).

¹⁴⁵ 28 U.S.C. § 2679 (1994).

a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment. Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in *Westfall v. Erwin*,²⁴⁷ which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and discretionary in nature."²⁴⁸ Congress saw the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees.²⁴⁹

The Westfall Act was challenged in *Sowell v. American Cyanamid Co.*,²⁵⁰ involving a government employee who was seriously injured at work and sought to bring a negligence action against his co-employees. The Eleventh Circuit held that "the great weight of authority" supported the constitutionality of the statute.²⁵¹ The court also held that the statute's retroactive application did not render it unconstitutional, because "a legal claim affords no definite enforceable property right until reduced to a final judgment."²⁵² The court concluded that Congress's desire to preserve employee morale, maintain federal agencies' ability to carry out their missions, and sustain the vitality of the Federal Tort Claims Act provided a rational basis for the Westfall Act.²⁵³

12. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA"),²⁵⁴ which created an eighteen-year statute of repose for general aviation aircraft, is the most recent congressional tort policy statute to withstand constitutional scrutiny. At least three courts have declared GARA to be constitutional "economic legisla-

²⁴⁷ 484 U.S. 292 (1987).

²⁴⁸ *Id.* at 300.

²⁴⁹ See, e.g., *David A. Martin, Federal Employees' Liability: Since The Federal Employees Liability Reform & Tort Compensation Act of 1990 (The Westfall Act)*, 25 *Emory L. Rev.* 73 (1991).

²⁵⁰ 835 F.2d 1182 (11th Cir. 1989).

²⁵¹ *Id.* at 865, 867.

²⁵² *Sowell*, 838 F.2d at 865.

²⁵³ *Sowell*, 838 F.2d at 865.

²⁵⁴ Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101) (1994).

²⁵⁵ See *Rosen v. Smith*, No. 96-714 (W.D. Pa. Jan. 6, 1997) (holding that GARA can

B. Federal Tort Laws Should Be Upheld: The Mistake of Lochner Should Not Be Repeated

It is important for courts to follow the significant body of case law discussed above supporting the authority of Congress to enact laws setting national tort policy objectives. Any new decision overturning federal liability legislation would create a precedent that courts in the future could utilize to nullify a wide array of federal legislation, even outside the context of tort reform.

It may be unnecessary to raise this point in light of the very strong record of success that federal liability statutes have had against constitutional challenges. Lest anyone forget, however, it is worth reflecting on a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "Lochner era" (after the unsound constitutional law decision, *Lochner v. New York*²⁵⁶), the Court nullified state and federal legislation that it disagreed with as a matter of public policy, using the Constitution as a cloak to cover its highly personalized decisions.²⁵⁷

Just as plaintiffs during the *Lochner* era implored the Supreme Court to utilize an expansive view of the Constitution to override legislation, claimants in the future may seek to convince courts to utilize an expansive view of the Constitution to impose their economic policy views upon the nation. Courts should reject this invitation, as they have done for almost a century in the field of federal tort law.

be constitutionally applied retroactively); *Pallick v. Agusta, S.P.A.*, No. 94-7709, 94-7770 (C.D. Cal. Dec. 5, 1995) (GARA did not violate the due process clause of the Fifth Amendment); *Schneider v. Cessna Aircraft Co.*, No. 542243 (Super. Ct. Sacramento Co., Cal. July 29, 1996) (GARA does not violate due process).

²⁵⁶ 198 U.S. 45 (1905). The Court held that the law that limited the number of hours bakers could work "Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not pretend to do so. I have only to say that I think the law before me is within the power of Congress to enact. I think it is within the power of Congress to enact any law which it thinks proper, or disagreement has nothing to do with the right of the majority to enact their opinions in law.

²⁵⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁵⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁵⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁶⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁷⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁸⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

²⁹⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁰⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³¹³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³¹⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³¹⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³⁴¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁴² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁴³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁴⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁴⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³⁴⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁵⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³⁵⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁵⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁵⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁶⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁶¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³⁶⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁶⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁶⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁶⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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³⁷⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷⁶ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷⁷ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷⁸ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁷⁹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸⁰ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸¹ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸² See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸⁴ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸⁵ See *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³⁸⁶ See

The need for courts to respect Congress's authority to enact legislation setting tort policy rules is reinforced by the doctrine of *stare decisis*, and by the importance of the statutes themselves. For example, because of the National Childhood Vaccine Injury Act, diseases which once threatened to end the lives of American infants prematurely are now prevented with a routine series of childhood vaccinations.²⁶ Without the Price-Anderson Act, the private nuclear power industry in the United States might not have developed.²⁷ The General Aviation Revitalization Act of 1994 breathed life back into an important American industry. Instead of continuing on the path toward extinction, the general aviation industry is now booming.²⁸ The Biomaterials Access Assurance Act of 1998 will help ensure the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints, that are needed by millions of people each year.²⁹

C. The Supremacy Clause Requires States to Enforce Federal Liability Reform Legislation

Once Congress enacts legislation pursuant to the Constitution, the Supremacy Clause²⁴ prohibits the states from enforcing any local laws that conflict with the statute. To the extent the various states have liability laws that interfere with, or are contrary to, federal laws enacted by Congress, the state laws are preempted.²⁶ As Chief Justice Marshall explained:

[T]o such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the Constitution, . . .

³⁰ See Denis I. Hauptley & Mary Mason, *The National Childhood Vaccine Injury Act*, 37 Fed. B. News & J. 452 (1990) (stating that the Act effectively controlled liability costs for vaccine manufacturers, preventing the withdrawal of crucial vaccines from the market, and averting epidemics of certain childhood illnesses in the United States); see also *Duke Power*, 438 U.S. at 64 (discussing congressional passage of the *Anderson Act* in response to concerns that the private sector would be forced to withdraw from nuclear power production).

²⁴² See *supra* notes 38-43 and accompanying text.

³⁰⁴ U.S. CONST. art. VI, § 2.
³⁰⁵ See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding California's Franchise Investment Law unconstitutional because it directly conflicted with federal legislation).

[i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not conferred, must yield to it.²⁴⁶

The Supremacy Clause also requires state courts to enforce federal laws, even though that requirement is in a sense a federal command requiring state court action.⁵⁶ In *Texas v. Katt*,⁵⁷ the Supreme Court addressed the Rhode Island Supreme Court's refusal to enforce the Federal Emergency Price Control Act of 1942.⁵⁸ The Act provided a treble-damages remedy for persons who bought goods for more than the amount of the federal ceiling price and gave jurisdiction over claims under the Act to state as well as federal courts. The Supreme Court upheld the federal program, stating that the position of the Rhode Island Supreme Court "if [it] in the face of the fact that the States of the Union constitute a nation" and "disregard[ed] the purpose and effect" of the Supremacy Clause,⁵⁹ state courts were directed to heed the federal Act as "the prevailing policy in every state."⁶⁰ More specifically, the Court explained:

[This Court took occasion in 1876 to revisit the phase of the controversy concerning the relationship of state to the Federal Government. *Ciffin v. Housman*, 93 U.S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the States as though they were laws emanating from a foreign sovereign. Its teaching is that *The Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon States, courts, and the people, "any Thing in the Constitution or Laws of any State to the contrary notwithstanding."* It asserted that the obligation of the enforcement of federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.

²⁴⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

³⁷ See *New York*, 505 U.S. at 178-79 (noting that the Supremacy Clause directs state courts to take action to enforce federal law, but that no comparable constitutional provision allows Congress to force state legislators to act); *Mondou*, 223 U.S. at 57-58 (1912) (stating that, in some instances, action must be taken by state courts to enforce a federally established penalty).

²⁴ 330 U.S. 386 (1947).

230 *Testa*, 330 U.S. at 389.

²⁵⁰ *Id.* at 390–91 (emphasis added).

III. RECENT TENTH AMENDMENT DECISIONS DO NOT UNDERMINE CONGRESSIONAL AUTHORITY TO ENACT TORT POLICY LEGISLATION

The United States Constitution grants certain powers to the Federal Government. Where federal legislation is authorized by one of those powers, "Congress may impose its will on the States."²⁴ All other powers are reserved for the States under the Tenth Amendment, which provides that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.²⁵

A. The Traditional View: Judicial Deference to Congressional Authority

Historically, the Supreme Court has recognized Congress's "extraordinary power" to enact legislation and has been reluctant to invoke the Tenth Amendment to limit that authority.²⁶ *Maryland v. Wirtz*²⁷ is the archetypal case adopting the traditional view that courts should not apply substantive limits on federal authority under the Tenth Amendment if Congress is exercising one of its enumerated powers and has a rational basis to do so. In *Wirtz*, the Court upheld the constitutionality of amendments to the Fair Labor Standards Act ("FLSA")²⁸ that required the states to adopt federal minimum wage and overtime standards for state employees of hospitals, institutions, and schools.²⁹ The Court refused to distinguish economic activity engaged in by

private persons from that engaged in by states,³⁰ and declared that courts should not use the Tenth Amendment to "carve up the commerce power to protect enterprises . . . simply because those enterprises happen to be run by the States."³¹

In 1976, the Court departed briefly from its longstanding reluctance to invoke the Tenth Amendment and attempted to devise affirmative limits on Congress's Article I powers. In *National League of Cities v. Usery*,³² the Court declared that the Tenth Amendment prohibited Congress from interfering with the core sovereign functions of the states, even where those functions affected interstate commerce.³³ That case challenged the validity of the 1974 amendments to the FLSA. The Court held that, insofar as the amendments operated directly to displace the states' ability to structure "integral operations" in areas of "traditional government functions" (i.e., employee-employer relationships in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation), they were not within Congress's Article I authority.³⁴

Nine years later, however, the Court overruled the *National League of Cities* case in *Garcia v. San Antonio Metropolitan Transit Authority*.³⁵ The *Garcia* case and a 1988 case, *South Carolina v. Baker*,³⁶ showed the Court's return to its previous position on the Tenth Amendment.³⁷

1. *Garcia v. San Antonio Metropolitan Transit Authority*

In *Garcia v. San Antonio Metropolitan Transit Authority*,³⁸ the Court revisited the question of whether the Commerce Clause empowered Congress to enforce the federal wage and overtime

²⁴ See *Wick*, 397 U.S. at 197.

²⁵ *Id.* at 196-99.

²⁶ 425 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

²⁷ 407 U.S. 49 (1972), overruled by *National League of Cities*, 426 U.S. at 840-52.

²⁸ *Id.* at 852.

²⁹ 469 U.S. 528 (1985). See generally Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 1031 (1986). The Court's decision in *Garcia* was based on the view that the Commerce Clause empowered Congress to regulate interstate commerce and that the Tenth Amendment imposes no constitutional limitation as a constraint on Congress's use of its delegated powers.

³⁰ 487 U.S. 505 (1988).

³¹ 487 U.S. 505 (1988). See also *South Carolina v. Baker*, 485 U.S. 275 (1988), overruled by *Garcia*, 469 U.S. 528 (1985). *Garcia* held that the Tenth Amendment does not prevent Congress from passing laws that preempt state regulations. *FERC v. Mississippi*, 456 U.S. 742, 747 (1982) (en banc).

³² 407 U.S. 524 (1985).

³³ *Gregory v. Ashcroft*, 501 U.S. 427, 460 (1990) (discussing how the Supreme Court has been reluctant to grant the federal government power over the states in the U.S. system of federalism).

³⁴ U.S. CONST. amend. X. See also THE FEDERALIST No. 45, at 292 (James Madison) (Charlottesville, Va., 1788) ("The powers delegated by the proposed Constitution . . . are few and defined. Those which are to remain in the State governments are numerous and indefinite.")

³⁵ See *Gregory*, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally reserved to the States, and it may exercise extraordinary power in a federalist system. It is a power that we must assume Congress has exercised since 1789. See also LAURANCE II TURN, AMERICAN CONSTITUTIONAL LAW § 5-20.02, at 198-200 (1983).")

³⁶ 392 U.S. 183 (1968).

³⁷ 29 U.S.C. §§ 203-218 (1994).

³⁸ See 29 U.S.C. § 203(d).

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	requirements in the 1974 amendments to the FLSA against the states in areas of "traditional governmental functions." ²⁰ The San Antonio Metropolitan Transit Authority ("SAMTA") challenged the Act's validity after "the Department of Labor formally amended its [FLSA] interpretive regulations to provide that publicly-owned mass-transit systems were not entitled to immunity under <i>National League of Cities</i> ." ²¹	
	The Court began its analysis by restating the well-settled principle that Congress's Commerce Clause authority extends to interstate economic activities that affect interstate commerce. ²² The Court noted that, were SAMTA privately owned, it would unquestionably be obligated to follow FLSA's requirements. ²³ Therefore, any constitutional exemption SAMTA could obtain from FLSA's requirements had to rest on its status as a governmental entity rather than on the nature of its operations. ²⁴	
	The Court went on to outline the prerequisites for governmental immunity set forth in <i>National League of Cities</i> , focusing in particular on the exception for "traditional governmental functions." ²⁵ The Court said that its own attempts to articulate affirmative limits on congressional authority had failed to establish a workable standard for defining "traditional governmental functions." ²⁶ Moreover, attempts by federal and state courts to distinguish "traditional" functions from "nontraditional" functions had proven to be "impracticable and doctrinally barren." ²⁷ The Court also expressed skepticism that a case-by-case approach would eventually establish a workable standard, citing its own poor experience in the related field of state immunity from federal taxation. ²⁸	
	Next, the Court explored alternative ways to define state immunity, but rejected those as unmanageable as well. It conceded that making immunity turn on a "traditional" standard would prevent courts from accommodating changes in the historical functions of states. ²⁹ In addition, the Court said that it had pre-	
	²⁰ <i>Id.</i> at 530. ²¹ <i>Id.</i> at 534-35. ²² <i>Id.</i> at 535. ²³ <i>Id.</i> at 537. ²⁴ <i>Id.</i> at 538. ²⁵ <i>Id.</i> at 537-38. ²⁶ <i>Id.</i> at 539. ²⁷ <i>Id.</i> at 540. ²⁸ <i>Id.</i> at 543.	
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	viously rejected the idea of determining a nonhistorical standard for immunity based on the identification of "uniquely" governmental functions. ³⁰	
	The Court also expressed concern that any rule that would establish judicially imposed definitions of "traditional," "integral," or "necessary" state governmental functions would "inevitably invite[] an unelected federal judiciary to make decisions about which state policy it favors and which ones it dislikes." ³¹ Accordingly, the Court held:	
	We, therefore now reject, as unsound in principle and unworkable in practice, a rule for state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it deserves principles because it is divorced from those principles. ³²	
	The Court then turned to the underlying issue that confronted it in <i>National League of Cities</i> —the manner in which the Constitution insulates states from the reach of Congress's power under the Commerce Clause. The Court said that it had "no license to employ freestanding conceptions of state sovereignty" ³³ in deciding when the Constitution protects "the States as States," ³⁴ because the Framers had chosen to ensure a role for the states in the federal system through the structure of the federal government itself. ³⁵ The Court stated:	
	[W]e are convinced that the fundamental limitation that the Framers placed on the Commerce Clause to protect the "States' Spheres" is one that is not subject to more than one result. Any substantive restraint on the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the political process	
	²⁹ <i>See Garcia</i> , 469 U.S. at 545. ³⁰ <i>Id.</i> at 546. ³¹ <i>Id.</i> at 547. ³² <i>Id.</i> at 550. ³³ <i>Id.</i> at 554. ³⁴ The Court pointed out that "the composition of the Federal Government was determined by the Framers to be a creature of the States." <i>Id.</i> at 550. ³⁵ The Framers thus gave the states a role in selecting the executive and judicial branches, provided for the equal representation of states in the Senate, and prohibited Congress from passing laws that would abridge a state of equal representation in the Senate without the state's consent. <i>Id.</i> at 551.	

rather than to dictate a "sacred province of state autonomy."²⁴

The Court reinforced its conclusion that the federal political process effectively preserves the interests of the states by pointing out the high level of funding that states receive from the federal government in the form of general and program specific grants in aid.²⁵

The Court then held that the federal wage and overtime requirements in the FLSA, as applied to SAMTA, were not "destructive of state sovereignty or violative of any constitutional provision."²⁶ SAMTA was simply being placed in the same position as other employers. The Court also pointed out that, while the FLSA would raise costs for mass-transit systems, Congress had provided countervailing financial assistance—thus reinforcing the Court's "conviction that the national political process systematically protects States from the risk of having their functions in [the area of mass-transit] handicapped by Commerce Clause regulation."²⁷

2. *South Carolina v. Baker*

In *South Carolina v. Baker*,²⁸ the Court was asked to decide the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Act").²⁹ The Tax Act removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were issued in registered form.³⁰ Congress believed that

²⁴ *Id.* at 554 (quoting *BHO v. Wyoming*, 460 U.S. 226, 236 (1983)). See also Thomas H. Oliver, *State Sovereignty and the Federal Government: Process-Based Presidential Protectionism*, 135 U. Pa. L. Rev. 1657, 1666 (1987) ("The Court's decision in *Garcia* is significant because it 'calls for the development of new theories of federalism-based limitations on the federal government's power . . .')."

²⁵ *Garcia*, 469 U.S. at 552-553. See also John E. Dinklage, *Commerce, State Immunity From Federal Regulation—Before and After Garcia: How Accurate Was the Court's Prediction in Garcia v. SAMTA that the Political Process Inherent in Our System of Federalism Would Protect the States Against Unduly Burdensome Federal Regulation?*, 31 Duq. L. Rev. 391 (1983).

²⁶ *Id.* at 555. See also William A. Franzen, *Garcia v. San Antonio Metropolitan Transit Authority: Antifederalism Revisited*, 21 U. Tol. L. Rev. 141 (1986) ("The Court's decision in *Garcia* is a landmark in the history of federalism because it is the first time the Supreme Court has taken account of the Constitutional Convention and arguing in support of the holding of *Garcia*.").

²⁷ 469 U.S. 505 (1988).

²⁸ 468 U.S. 31 (1984).

²⁹ See *id.*

the registration requirement would prevent tax evasion that was being facilitated through the exchange of unregistered bearer bonds.³¹ South Carolina, joined by the National Governors' Association as intervenor, challenged the Tax Act, contending that it violated the Tenth Amendment because it compelled States to issue bonds in registered form.³²

The Court began its analysis by restating its holding in *Garcia* that the Tenth Amendment provides structural rather than substantive limits on Congress's legislative authority—i.e., that states must find their protection from overreaching congressional acts through elected Members of Congress.³³ The Court acknowledged that *Garcia* left open the possibility that the Tenth Amendment could be invoked to invalidate congressional regulation of state activities where there were "extraordinary defects in the national political process," but held that those defects did not exist with respect to the Tax Act.³⁴ South Carolina, the Court said, did not "even allege[] that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."³⁵

The Court then addressed the states' contention that the Tax Act coerced them into enacting legislation permitting bond registration and into administering the registration scheme.³⁶ In support of their contention, the states cited *FERC v. Mississippi*,³⁷ which left open the possibility that the Tenth Amendment might limit Congress's power to compel states to regulate on behalf of federal interests.³⁸

In *FERC*, the Court had upheld a federal statute requiring state utility commissions to: (1) adjudicate and enforce federal standards; (2) either consider adopting certain federal standards or cease regulating public utilities; and (3) follow certain federally

³¹ Ownership of a registered bond is recorded on a central list and a transfer of ownership requires entering the change on that list. Bearer bonds, on the other hand, have no paper trail. Congress believed that bearer bonds facilitated tax evasion, and that the Tax Act would reduce the number of such bonds and thus reduce the amount of tax evasion. See *Bull. Cong. & Admin. News*, 1982-2 CB 498-499.

³² The Court treated the Tax Act as banning the issuance of bearer bonds, because it would force States to increase the interest paid on bearer bonds to exceptionally high levels. However, since the Act became effective, no State had issued a bearer bond. See *id.* at 511.

³³ See *id.* at 512.

³⁴ *Id.* at 512-13.

³⁵ See *id.* at 513.

³⁶ 465 U.S. 742 (1982).

³⁷ See *id.* at 751-54.

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mandated procedures. ³⁰ The Court had concluded that, whatever constitutional limitations might exist on the federal power to compel state utility regulatory activity, Congress had the power to require state utility regulatory commissions to adjudicate federal issues and to require that states regulating in a field open to pre-emption consider suggested federal standards and follow federally mandated procedures. ³¹		
The Court in <i>Baker</i> did not accept South Carolina's invitation to define whether the Tenth Amendment claim left open in <i>FERC</i> survived <i>Garcia</i> or posed constitutional limitations independent of those discussed in <i>Garcia</i> . It was able to avoid the issue by finding that the Tax Act presented the same type of legislation that was upheld in <i>FERC</i> : both statutes regulated state activities, neither sought to control or influence the manner in which states regulated private parties. ³²		
The <i>Baker</i> Court concluded its Tenth Amendment analysis by rejecting the states' contention that the Tax Act impermissibly commandeered the state legislative and administrative process by requiring many state legislatures to amend their statutes in order to issue registered bonds, and state officials to devote substantial effort to determine how best to implement a registered bond system. The Court observed that being compelled to take administrative and legislative actions to comply with federal law was a common and often inevitable consequence faced by states wishing to engage in activities subject to federal regulation. ³³ Furthermore, the Court bluntly pointed out that the states' theory of commandeering would "not only render <i>Garcia</i> a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled <i>National League of Cities</i> line of cases." ³⁴		
B. <i>Judicially Imposed Limitations on Congressional Authority</i>		
The Supreme Court has signaled in two recent cases that the Tenth Amendment may once again return from its basic dor-		
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B. <i>Judicially Imposed Limitations on Congressional Authority</i>		
The Supreme Court has signaled in two recent cases that the Tenth Amendment may once again return from its basic dor-		
³⁰ See Public Utility Regulatory Policies Act of 1978, 15 U.S.C. § 2001, 16 U.S.C. § 2611 (1994). ³¹ See <i>FERC</i> , 458 U.S. at 759-67. ³² See <i>FERC</i> , 458 U.S. at 514. ³³ See <i>id.</i> at 514-15. ³⁴ <i>Id.</i> at 515.		
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mancy. In those decisions— <i>New York v. United States</i> ^{35a} and <i>Printz v. United States</i> ^{35b} —the Court addressed the federal government's ability to force states to implement or administer federal regulatory schemes.		
I. <i>New York v. United States</i>		
<i>New York v. United States</i> ^{35a} involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Waste Policy Act"). ^{35c} That Act sought to address a looming national shortage of disposal sites for low-level radioactive waste by directing each state to assume responsibility "for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State" within seven years. ^{35d} The State of New York and two counties in which disposal facilities were planned in the state sought a declaratory judgment that the Waste Policy Act was inconsistent with the Tenth Amendment. ^{35e}		
Petitioners' challenge focused on three sets of "incentives" that Congress included in the Act to encourage states to comply with their statutory obligation to attain local or regional self-sufficiency in the disposal of low-level radioactive waste. ^{35f} Monetary incentives allowed states with disposal sites to impose a surcharge on radioactive waste received from other states. The Waste Policy Act also established an escrow account from which the Secretary of Energy allocated a portion of the monies generated by this surcharge to states that complied with the federal timetable. ^{35g} Next, access incentives allowed states with disposal sites to increase the cost of access to the sites substantially; and then to deny access altogether, to radioactive waste generated in states that failed to meet the federal timetable. ^{35h} Finally, the most severe incentive, the "take title" provision, required states		
^{35a} 505 U.S. 144 (1992). ^{35b} 521 U.S. 898 (1997). ^{35c} 505 U.S. 144 (1992). ^{35d} 505 U.S. 144 (1992). ^{35e} 42 U.S.C. § 20116(a)(1)(A) (1994). ^{35f} See <i>New York</i> , 505 U.S. at 154. Petitioners also charged that the Act violated the Guarantee Clause of the Constitution, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. The Court easily dismissed this claim. See <i>id.</i> at 183-86. ^{35g} See <i>New York</i> , 505 U.S. at 152-54. ^{35h} See <i>id.</i> at 153-55. ³⁵ⁱ See <i>id.</i> at 153.		

that failed to make arrangements for radioactive waste disposal to take title and possession of waste generated within their borders and to accept liability for all damages directly or indirectly incurred by waste generators as a consequence of the state's failure to make arrangements by the federal deadline.³³³

The Court began its discussion by noting that the powers conferred in the Constitution "were phrased in language broad enough to allow for the expansion of the Federal Government's role,"³³⁴ and that allows for enormous changes in the "scope of the federal government's authority with respect to the States."³³⁵ The Court cited its "broad construction" of the Commerce and Spending Clauses, along with the Necessary and Proper Clause and the Supremacy Clause, as particularly important.³³⁶ Nevertheless, the Court held, Congress is subject to the limitations contained in the Constitution. Those limitations, the Court explained, are "not derived from the text of the Tenth Amendment itself,"³³⁷ but are found elsewhere in the Constitution (i.e., in Article I).³³⁷

The Court then distinguished the Waste Policy Act from statutes at issue in recently decided cases that involved the authority of Congress to subject state governments to generally applicable laws (e.g., *Garcia*).³³⁸ Unlike the statutes at issue in those cases, the Court held, the Waste Policy Act did not seek to subject a state to the same legislation applicable to private parties, but instead attempted to "direct or otherwise motivate the States to regulate in a particular field or a particular way."³³⁹

The Court observed that, while it had "never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations,"³⁴⁰ the "question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers."³⁴¹ The Court noted that the Constitutional Convention was convened, in part because the Articles of Confederation did not give Congress the authority in most respects to govern the

³³³ *New York*, 505 U.S. at 153-54.

³³⁴ *Id.* at 157.

³³⁵ *Id.* at 157.

³³⁶ *Id.* at 158.

³³⁷ *Id.* at 158.

³³⁸ See *id.* at 160-61.

³³⁹ See *id.* at 160-61.

³⁴⁰ *Id.* (quoting *FERC*, 456 U.S. at 761-62).

³⁴¹ *Id.* at 163.

people directly.³⁴² The Convention generated many proposals for the structure of the new government, "but two quickly took center stage."³⁴³ One plan, the "Virginia Plan," allowed Congress to regulate individuals "without employing the States as intermediaries."³⁴⁴ The "New Jersey Plan," on the other hand, continued to require Congress to obtain the approval of the states to legislate, as had the Articles of Confederation.³⁴⁵ This plan was criticized, however, because it "might require the Federal Government to coerce the States into implementing legislation."³⁴⁶ Ultimately, the Framers opted to provide for a central government in which Congress "would exercise its legislative authority directly over individuals rather than over States."³⁴⁷ The Court concluded, therefore, that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."³⁴⁸

On the other hand, the Court explained that, while Congress cannot compel state regulation, it is not prohibited from encouraging a state to regulate in a particular way or attempting to influence a state's policy choices through noncoercive incentives.³⁴⁹ The Court identified two tangible methods by which Congress "may urge a State to adopt a legislative program consistent with federal interests."³⁵⁰ First, under its spending power, Congress can attach conditions on the receipt of federal funds as a means of influencing a state's policy.³⁵¹ Second, Congress can establish a "program of cooperative federalism" in which states may choose to regulate an activity according to federal standards or to have state law preempted by federal regulation.³⁵²

Under these noncoercive approaches to achieving state regulation, the Court pointed out, state governments can remain responsive to the local electorate's policy preferences and accountable to the people.³⁵³ In contrast, if the federal government

³⁴² See *New York*, 505 U.S. at 163.

³⁴³ *Id.* at 164.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 165.

³⁴⁷ *Id.* at 166.

³⁴⁸ *Id.* at 166.

³⁴⁹ See *id.* at 167.

³⁵⁰ See *id.* at 168.

³⁵¹ See *id.* at 168.

were able to compel states to regulate, political accountability would be diminished. For instance, if members of Congress could impose unpopular policy decisions on state legislators the state officials would "bear the brunt of public disapproval," while the federal officials who devised the program would "remain insulated from the electoral ramifications of their decision."³³⁴

The Court then proceeded to determine whether the Waste Policy Act's monetary, access, and take-title incentives impermissibly commandeered the states' legislative processes. The Court held that the monetary incentives included in the Act, in which Congress conditioned grants to the states upon the states' attainment of certain milestones, fell "well within the authority of Congress under the Commerce and Spending Clauses."³³⁵ The Court also held that the access incentives in the Act, which ultimately authorized states to deny access to low-level radioactive waste generated in other states, represented a permissible exercise of Congress's commerce power.³³⁶ Because both sets of incentives were supported by affirmative constitutional grants of power to Congress, neither was inconsistent with the Tenth Amendment.³³⁷

The Court found the Waste Policy Act's "take title" provision to be of a "different character" than the monetary and access incentives.³³⁸ The "take title" provision offered states a "choice" of either regulating according to Congress's instructions or accepting ownership of waste and becoming liable for all damages waste generators suffered as a result of failure to meet the federal timetable.³³⁹ The Court characterized the forced transfer component, standing alone, as no different than a congressionally compelled subsidy from state governments to radioactive waste producers.³⁴⁰ Likewise, the requirement that states assume the liabilities of waste generators within their borders constitutionally directed the states to assume the liabilities of certain state residents.³⁴¹ Both types of federal actions commandeered the states for federal regulatory purposes and were inconsistent

³³⁴ *New York*, 505 U.S. at 169.

³³⁵ *Id.* at 173.

³³⁶ *See id.* at 173.

³³⁷ *See id.* at 173-74.

³³⁸ *See id.* at 174-75.

³³⁹ *See id.* at 175.

³⁴⁰ *See id.*

³⁴¹ *See id.*

with the Constitution's division of authority between federal and state governments.³⁴²

Significantly, the Court drew a sharp distinction between permissible federal legislation that directs state courts to enforce federal laws and unconstitutional legislation, such as the Waste Policy Act, that directs state officials to create and enforce a congressionally mandated regulatory scheme.³⁴³ The Court wrote:

Some of the cases cited by the United States in favor of the Waste Policy Act discuss the *well established power of Congress to pass laws enforceable in state courts*. See *Testa v. Kat*, 330 U.S. 386 (1947); *Palmore v. United States*, 411 U.S. 389, 402 (1973); see also *Second Employer's Liability Cases*, 223 U.S. 1, 57 (1912); *Clafflin v. Houseman*, 93 U.S. 130, 136-37 (1876). *These cases involve no more than an application of the Supremacy Clause's provision that federal law "shall be the supreme Law of the Land" to cases involving every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.*³⁴⁴

The Court's clarification is particularly relevant to the constitutionality of federal liability reform legislation, because these reform proposals have frequently called upon state courts to enforce federal law. Recently, some opponents of federal tort reform legislation have expansively interpreted the Court's general holding in *New York* that Congress cannot compel state legislatures to suggest that Congress may lack the power to direct state judges to enforce federal liability reform legislation.³⁴⁵ As the Court's opinion in *New York* demonstrates, however, federal liability reform legislation that compels state court enforcement of federal law is not in violation of the Tenth Amendment. It is

³⁴² *See id.* at 177. See generally *Evan H. Caminker, State Sovereignty and Subordinating May Congress Commander State Officers to Implement Federal Law?*, 95 *Columbia Law Review* 1031 (1985); *John C. Yoo, The Limits of Federalism: A Response to Va. L. Rev.*, 79 *Va. L. Rev.* 633 (1993); *Saleem B. Prakash, Field Office Federalism*, 79 *Va. L. Rev.* 1927 (1993); *Martin H. Redish, Doing It with Mirrors: New York v. United States and Congress's Power to Regulate Federal Power to Require State Legislation*, 21 *Harvard Journal on Legislation* 593 (1998).

³⁴³ *Id.* (emphasis added).

³⁴⁴ *See* *Willie*, *supra* note 16, at 34; *Lebow*, *supra* note 16, at 690.

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constitutionally permissible. This is how FEIA has worked for almost a hundred years. Congress's power to act in this regard is still intact.		
The concerns the Court had with the Waste Policy Act's "take title" provision in <i>New York</i> simply do not exist with respect to federal liability reform legislation. Most importantly, federal liability reform efforts seek to "exercise . . . legislative authority directly over individuals rather than over States." ¹⁵⁴ Like the legislation upheld in <i>Garcia</i> , and unlike the Waste Policy Act's take title provision that was struck down in <i>New York</i> , federal liability reform bills have been "generally applicable laws." ¹⁵⁵ They have never compelled state legislation or required state legislatures to enact legislation limiting tort liability.		
In addition, when Congress enacts federal tort policy legislation, there is no potential for a breakdown in the national political process due to a lack of accountability. Clearly, if Congress enacts tort reform legislation, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." ¹⁵⁶ This fact strongly supports the constitutionality of federal liability reform legislation.		
2. <i>Printz v. United States</i>		
<i>Printz v. United States</i> ¹⁵⁷ involved a challenge to the 1993 Brady Handgun Violence Prevention Act amendments to the Gun Control Act of 1968 ("Brady Act"). ¹⁵⁸ The Brady Act required the Attorney General to establish a national system for instant background checks on prospective handgun purchasers and commanded the "chief law enforcement officer" ("CLEO") of each local jurisdiction to conduct the background checks and perform related tasks until the national system became operative. ¹⁵⁹ The CLEOs for counties in Arizona and Montana objected to being "pressed into federal service" and contended that		
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the Act impermissibly compelled them to execute a federal law. ¹⁶⁰		
The Court opened its opinion by noting that no constitutional text directly addressed the extent to which Congress may force state officials to execute a federal law. ¹⁶¹ Accordingly, the Court concluded that the answer to the CLEOs' challenge would have to come from historical understanding and practice, the structure of the Constitution, and the Court's jurisprudence. ¹⁶²		
In support of the Brady Act's validity, the Government cited acts of Congress which required state courts to record applications for citizenship, transmit naturalization records, order deportations, and perform other miscellaneous duties. ¹⁶³ The Court held that Congress's power to compel enforcement of federal law by state judges was well settled, but only "establish[ed] . . . that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." ¹⁶⁴ The Court explained:		
It is understandable why courts should be viewed distinctively in this regard. The original design of the executive, they applied the law of other sovereigns, all the while preserving the Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. ¹⁶⁵		
The Court then said that its acceptance of statutes imposing obligations on state courts did not imply that Congress could impose obligations on state executives. ¹⁶⁶ Moreover, the Court observed that the "uter lack of statutes" imposing obligations on state executives suggested that Congress assumed it did not have the authority to compel state executive officers to carry out federal laws. ¹⁶⁷ To complete the historical record, the Court acknowledged that "a number of federal statutes enacted within the past few decades [require] the participation of state and local officials," ¹⁶⁸ but that the persuasive force of these recent statutes		
¹⁵⁴ See <i>Printz</i> , 521 U.S. at 904-05.		
¹⁵⁵ See <i>id.</i> at 905.		
¹⁵⁶ See <i>id.</i> at 905-10 (citations omitted).		
¹⁵⁷ <i>Id.</i> at 907 (emphasis in original).		
¹⁵⁸ <i>Id.</i> (citations omitted).		
¹⁵⁹ <i>Id.</i> at 907-08.		
¹⁶⁰ <i>New York</i> , 505 U.S. at 165.		
¹⁶¹ <i>Id.</i> at 177.		
¹⁶² <i>Id.</i> at 168.		
¹⁶³ <i>Id.</i> at 168-69.		
¹⁶⁴ 18 U.S.C. §§ 921-925A (1994).		
¹⁶⁵ See <i>id.</i>		

was far outweighed by the almost 200 years of congressional avoidance of the practice.³⁶

Next, the Court turned to the structure of the Constitution. Pointing to its detailed discussion of the Constitutional Convention in *New York*,³⁷ the Court reinforced its earlier conclusion that, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."³⁸ The *Printz* Court further concluded that, with respect to the Brady Act, the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."³⁹

The Court also evaluated whether the Brady Act violated the separation of powers doctrine.⁴⁰ The Court noted that, under Article II, Section 3, the responsibility for administering federal laws rests with the Executive Branch of the federal government.⁴¹ The Court declared that the Brady Act effectively transferred this function to thousands of state CLEOs by requiring them to administer the federally mandated background checks "without meaningful Presidential control."⁴² The Court viewed Congress's transfer of the federal executive power to state officials as a constitutionally impermissible reduction of the Executive Branch's power by another co-equal branch of the federal government.⁴³ The Court indicated that allowing such a transfer would shatter the unity of the federal executive envisioned by the Framers, because "Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."⁴⁴

Finally, the Court turned to its prior decisions on the ability of the Federal Government to commandeer state governments to administer federal laws. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*⁴⁵ and *FERC v. Mississippi*,⁴⁶ the

³⁶ *Id.* at 917-18.

³⁷ 505 U.S. 144 (1991).

³⁸ *New York*, 505 U.S. at 166.

³⁹ *Id.* at 321 U.S. at 922.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *Id.* at 923.

⁴³ 452 U.S. 264 (1981).

⁴⁴ 450 U.S. 142 (1982).

Court held, it sustained statutes against constitutional challenge only after establishing that they did not require the states to enforce federal law. Accordingly, the Court held, its decision in *New York*⁴⁷ striking down a provision of the Waste Policy Act that "unanimously required the States to enact or administer a federal regulatory program . . . should have come as no surprise."⁴⁸ After rejecting the Government's attempts to distinguish the *New York* decision, the Court wrote:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers to perform tasks in the area of federal regulation. And we refuse to extend the State's role in the federal system to the point that it becomes a mere instrument of the federal government. The Federal Government's weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.⁴⁹

The *Printz* decision does not provide a constitutional basis to nullify federal liability reform legislation. The decision makes clear that Congress cannot compel state legislatures or executives to participate in a federal regulatory or administrative scheme,⁵⁰ but it suggests no constitutional prohibition against legislation that asks state courts to enforce a federal liability law.⁵¹ To the contrary, state courts have always been and continue to be obligated to honor such legislation. That role is entirely consistent with the Tenth Amendment and the constitutional mandate found in the Supremacy Clause.

⁴⁷ 505 U.S. 144 (1991).

⁴⁸ *Printz*, 521 U.S. at 926.

⁴⁹ *Id.* at 926.

⁵⁰ *See* Shawn E. Tuma, Note, *Preserving Liberty: United States v. Printz and the Vigilent Defense of Federalism*, 10 ROBERT U. L. REV. 193 (1998) (discussing the federal government's obligation to preserve individual liberties).

⁵¹ *See* Victor C. Young, *State and Local Courts and the Limits of Law: Printz and Principle?* 111 HARV. L. REV. 2180, 2185-86 (1998) (indicating that the *Printz* and *New York* decisions set forth a "clear-cut rule against federal 'commandeering' of state judges and executive officials," but do not alter the responsibility of state courts to enforce federal laws).

3. Driver's Privacy Protection Act Cases

Recent federal appellate and district court decisions striking down a federal law regulating the disclosure of information contained in motor vehicle registration records have been heavily influenced by the *Printz* and *New York* decisions.

In *Condon v. Reno*,²⁹ the Fourth Circuit permanently enjoined federal enforcement of the Driver's Privacy Protection Act of 1994 ("DPPA").³⁰ The DPPA restricted the states' dissemination and use of personal information contained in state motor vehicle records and imposed criminal and civil liability on state officials who failed to comply with the federal restrictions.³¹ The court concluded that the DPPA exclusively regulated the disclosure of information contained in state motor vehicle records, and therefore could not be categorized as a law of general applicability permissible under *Garcia*.³² Instead, the DPPA violated the Supreme Court's holding in *New York* that the federal government cannot compel state executives to administer a federal regulatory program.³³

Similarly, in *Oklahoma v. United States*,³⁴ the court enjoined federal enforcement of the DPPA on Tenth Amendment grounds. Contrary to the provisions of the federal DPPA, Oklahoma law made motor vehicle records a matter of public record.³⁵ Relying primarily on *New York* and *Printz*, the court held that the DPPA impermissibly sought to "treat the Oklahoma Department of Public Safety as a subdivision of the United States" by requiring the Department to "create and maintain systems" to enforce the DPPA's provisions.³⁶

²⁹ 155 F.3d 453 (4th Cir. 1998). See also *Tarvis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wa., 1998).
³⁰ 116 F.3d 1317 (4th Cir. 1998) (holding that the Driver's Privacy Protection Act violated the Tenth Amendment by requiring state and local employees to administer and enforce a federal regulatory scheme). *See also* *Printz v. United States*, 521 U.S. 898 (1997) (striking down the federal law that required state judges to administer the federal law enforcement system).
³¹ 155 F.3d at 453.
³² 155 F.3d at 453.
³³ 155 F.3d at 453.
³⁴ 155 F.3d at 463.
³⁵ 155 F.3d at 463.
³⁶ 155 F.3d at 463.

³⁷ 18 U.S.C. §§ 2721-2725 (1994).

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

Like the *New York* and *Printz* cases, the reach of the DPPA cases is limited to situations where state executives (as opposed to state courts) are forced to implement federal policy or where Congress escapes political accountability by forcing state legislators to enact a regulatory scheme. They have no bearing, directly or indirectly, on congressional enactment of a tort law that would be applicable in both federal and state court proceedings.

CONCLUSION

For almost a century, Congress has enacted legislation setting national tort policy rules, and these laws have been declared constitutional time and time again as legitimate exercises of Congress's Commerce Clause authority. Future challenges to federal tort legislation are bound to fail as well, unless courts unwisely choose to abandon that substantial body of well-reasoned precedent. The United States Supreme Court's decisions in *New York*, *Lopez*, and *Printz* do not change this conclusion.

The *Lopez* opinion discussed the Commerce Clause, but it is not truly a Commerce Clause case. As the Court explained, the Gun-Free School Zones Act at issue was a criminal statute that regulated handgun possession. "[B]y its terms," the statute "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms."³⁴ The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce—cases that directly support Congress's Commerce Clause authority over liability law.

The *New York* and *Printz* decisions provide limits on the federal government's power over the states, but they do not preclude the enactment of civil justice reform at the federal level. In fact, the opinions make clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states. They expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state

³⁴ *Lopez*, 514 U.S. at 561.

executive officials to administer a federal regulatory scheme. While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not.

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The Legal Studies Division of the Washington Legal Foundation (WLF) is dedicated to expanding the pro-free enterprise legal idea base. It does this by conducting original research and writing; delivering a diverse array of publication products to businessmen, academics, and government officials; briefing the media; organizing key policy sessions; and sponsoring occasional legal policy conferences and forums.

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The views expressed here are those of the authors and do not necessarily reflect those of the Washington Legal Foundation. They should not be construed as an attempt to aid or hinder the passage of legislation.

EXECUTIVE SUMMARY

- This WORKING PAPER argues that reform is necessary to stem a major problem in our liability system — that of repeated punitive damage awards imposed upon the same corporate defendant for the same act or course of conduct.
- The dual purposes of punitive damage awards are to punish defendant wrongdoing, and to prevent others from engaging in similar wrongdoing. Compensatory, not punitive damages, are meant to recompense a plaintiff; however, punitive damages are commonly applied more than once to the same defendant by various plaintiffs for the same act.
- This type of multiple "windfall" payments hurts the ability of future claimants to collect true compensatory damages by depleting a corporate defendant's resources. Other damages imposed by such awards include injury to the company, its employees, associated industries, and consumers. Due process may also be violated by repeated punitive damage awards. Uniform federal action may be the best way to stop this "lottery" system of awards.
- Since single states are unable to control the problems of multiple punitive damage awards in other jurisdictions, they cannot effectually provide a remedy to this problem.
- As courts, federal or state, cannot prohibit subsequent punitive damage awards in other courts, they are also powerless to provide a remedy.
- A solution to the problem of multiple imposition of punitive damages exists in the proposed Multiple Punitive Damages-Fairness Act. This proposal allows punitive damages to be awarded *only once* for harms based on a single act or course of conduct, tempered by two exceptions. First, plaintiffs in subsequent actions may be awarded punitive damage awards if they offer new evidence of wrongdoing; and second, they may be awarded subsequent punitive damages if the court determines that the prior damages award was insufficient to punish the defendant's conduct or to deter others from behaving similarly.

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Crowell & Moring

INTRODUCTION

A major problem in our liability system is that people and companies can be punished again and again for the very same act or course of conduct. This is unfair — state and federal judges and other policy makers agree, and have called upon Congress to solve the problem. A fair solution was introduced in the Senate in the closing days of the 103rd Congress by Senator John C. Danforth of Missouri. As Senator Danforth explained when he introduced the Multiple Punitive Damages Fairness Act, S.2537, the proposal would "reform abusive punitive damages awards by disallowing the repeated sanction of punitive damages against the same defendant for one act."¹ "By doing so [the bill would] protect[] the due process rights of corporate defendants as well as the rights of injured

¹140 Cong. Rec. S14835-6 (daily ed. Oct. 7, 1994) (statement of Sen. Danforth).

plaintiffs to be compensated, rather than see money which is rightfully theirs be distributed as a windfall."²

A uniform, federal solution would not only protect defendants, but would also save jobs, protect investments and assure that future victims will be compensated for their injuries.

I. THE PURPOSE AND HISTORY OF PUNITIVE DAMAGES

Punitive damages are often misunderstood, although much has been written about them. Primarily, confusion exists about the purposes of punitive damages. Punitive damages are awarded solely to punish a wrongdoer and to deter others from engaging in similar misconduct in the future. Punitive damages have nothing to do with "making the plaintiff whole." That purpose is served by compensatory damages, which provide recovery for both out-of-pocket expenses (*e.g.*, lost wages and medical costs) and "pain and suffering." Most damages in our tort and liability system are compensatory, not punitive.

Punitive damages developed in the English common law as an auxiliary, or "helper," to the criminal law system. They existed to ferret out and impose a public sanction against antisocial conduct that was

²*Id.*

otherwise undeterred by the criminal law. Their English and American origins confined punitive damages to a narrow category of claims called intentional torts, such as assault and battery or trespass. These cases ordinarily involved only *one* plaintiff and *one* defendant.

Beginning in the 1970's, however, several significant legal developments led courts to depart in two significant ways from these historical "intentional tort" moorings. First, courts weakened the requirements for the imposition of punitive damages by allowing punishment for less than intentional misconduct (*e.g.*, gross negligence). Second, courts began to apply punitive damages more than once against the same defendant, for example, in the developing field of products liability.

As a result, defendants began to be punished repeatedly for what was essentially a single act or course of conduct.³ This result was foreseen by distinguished Federal Circuit Judge Henry Friendly who, as

³While some have suggested that punitive damages are an insignificant problem, a respected commentator has noted that, "[t]oday, hardly a month goes by without a multi-million dollar punitive damages verdict" Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989). Furthermore, in a study published by the Washington Legal Foundation comparing punitive damages awarded in two periods, 1968 to 1971 and 1988 to 1991, in five representative states (New York, Texas, California, Illinois, and Florida), the authors found an extraordinary increase in total punitive damages from \$1.1 million in the first period to \$343 million in the more recent period. See Stephen M. Turner *et al.*, *Punitive Damages Explosion: Fact or Fiction?* Washington Legal Foundation WORKING PAPER, No. 50 (Nov. 1992).

long ago as 1967, recognized the problems of multiple imposition of punitive damages: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."⁴ This "overkill" can occur whenever a large group of claims arise including, for example, claims against blood banks and hospitals, the Boy or Girl Scouts, and accountants.

Uniform, federal legislation would remedy the problems caused by these unfair and destructive "multiple" punitive damages awards.

II. ACTION NEEDED TO STOP THE MULTIPLE IMPOSITION OF PUNITIVE DAMAGES

Multiple punitive damage awards present significant problems for plaintiffs and defendants which can best be solved through uniform national legislation. For instance, multiple "windfall" recoveries of punitive damages can deplete a defendant's limited resources, endangering the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering. As a Maryland judge has recently commented: "[T]his court is deeply concerned about the fact that

⁴*Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

the simultaneous payment of punitive damages and compensatory damages will hurt crucially those claimants who are found to be entitled to fair compensation in the future."⁵ Similarly, a federal court of appeals has noted: "If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims"⁶

Moreover, excessive imposition of awards may drive a company out of business.⁷ When this occurs, the devastating "ripple" effect can extend far beyond the defendant company and injured persons who are thereafter unable to recover compensation for their injuries. There are concomitant losses suffered by the company's employees, who may lose their jobs, as well as by those other businesses that rely on the company or its employees for income. Economic harm to the company also affects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings.

⁵*Abate v. A.C. & S., Inc.*, No. 89236704, slip op. at 23-24 (Cir. Ct. Baltimore Cty., Md., Dec. 9, 1992).

⁶*Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990).

⁷*See generally Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J., concurring) ("[I]t cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality").

The detrimental impact of multiple punitive damages exists even in cases which are settled, rather than tried. A judge on the U.S. Court of Appeals for the Third Circuit recently recognized this problem when he wrote:

[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.⁸

Multiple imposition of punitive damages also poses a significant obstacle to global settlement negotiations in repetitive litigation and blocks the ability of claimants to recover quickly for their injury or the loss of a loved one. Respected Senior Federal District Judge William Schwartz of California has written: "Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs."⁹

⁸*Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied*, 114 S. Ct. 650 (1993).

⁹William Schwartz, *Punishment Ad Absurdum*, 11 CAL. LAW. 116 (Oct. 1991).

Furthermore, federal and state courts have expressed strong concerns that multiple punitive damages awards may violate constitutionally protected rights such as due process.¹⁰ Commentators in the field have expressed the same constitutional concerns.¹¹

¹⁰See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 ("[T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment"), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds sub nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990); *In re N. Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act"), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle"). See also *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting) (unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process"), *cert. denied*, 459 U.S. 988 (1982); *Magallanes v. Superior Ct.*, 167 Cal. App. 3d 878, 888 (1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the case is first tried should be punished again when the second, or the tenth, or the hundredth case is tried"); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1031 ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context"), *reh'g denied*, 914 F.2d 251 (5th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct").

¹¹See Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 ADELPHI L.J. 101 (1992); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Dennis Jones et al., *Multiple Punitive Damages Awards For A Single Course of Wrongful Conduct: The Need For A National Policy To Protect Due Process*, 40 ALA. L. REV. 1 (1991).

Lastly, multiple punitive damage awards undermine the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary "wins" at the expense of everyone else — the company, its employees, its shareholders and investors, and other consumers. As Senator Danforth noted when he introduced his 1994 bill: "With the exception of those lawyers who reap the windfall millions from repeat punitive damages, nobody seriously argues that repeatedly punishing the same company for one act makes sense or benefits society."¹²

These are the precise problems for which a federal solution would provide relief.

III. A FEDERAL SOLUTION IS THE ONLY PRACTICAL REMEDY

A federal solution is the only practical remedy to the unfairness and overall negative effects of multiple punitive damages awards. The states do not have the power to act and the Supreme Court, despite articulating concerns recently that punitive damages have "run wild," has *proven unwilling* to agree to hear a case that could provide a solution.

¹²140 Cong. Rec. S14836 (daily ed. Oct. 7, 1994) (statement of Sen. Danforth).

A. The States Are Powerless to Provide a Remedy

Since one state cannot dictate judicial or legislative policies to another state, the states are powerless to provide a remedy. Thus, even though a state may act to control the problems of multiple punitive damages awards within its borders, it cannot control the imposition of punitive damage awards in other jurisdictions.¹³

This fact was recently described in a study conducted by tort scholars of the prestigious American Law Institute. In their "Reporters' Study," the scholars concluded:

*[S]ingle-state action . . . is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators.*¹⁴

¹³Two states have enacted legislation to deal with the problem of multiple punitive damages. Georgia passed a statute limiting punitive damages in product liability cases to a single award. See GA. CODE ANN. § 51-12-5.1(e) (Michie Supp. 1991). A federal court, however, subsequently overturned the statute, in part, because the Act created an unreasonable classification between product liability plaintiffs and other tort plaintiffs. See *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990). But see *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 312 (Ga. 1994) (Georgia statute allowing only one award of punitives "was not unreasonable and rationally served the purpose of punishing and deterring"). Missouri also passed a statute, applicable in most tort actions, that allows a defendant to file a post-trial motion requesting a credit for prior awards arising out of the same conduct. See MO. ANN. STAT. § 510.263.4 (Vernon 1992).

¹⁴AMERICAN LAW INSTITUTE, 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY--REPORTERS' STUDY 261 (1991) (emphasis added).

Recognizing that a uniform remedy can only be achieved at the federal level, the ALI Reporters' Study recommended Congressional action.

B. State and Federal Courts Are Powerless to Provide a Remedy

State and lower federal courts also are powerless to provide solutions to the problems caused by the multiple imposition of punitive damages, because they lack the power or authority to prohibit subsequent awards in other courts. The clearest evidence of this weakness is described in an opinion written by then-New Jersey Federal District Judge H. Lee Sarokin, who many believe to be empathetic with plaintiffs. In *Juzwin v. Amtorg Trading Corp.*, which involved claims against an asbestos manufacturer, Judge Sarokin vacated an earlier order striking plaintiffs' punitive damages claims on the ground that multiple imposition of punitive damages imposed without guidelines violated due process, in part, because he believed that he was powerless to limit other courts from imposing punitive damages awards against the same defendant.¹⁵ Judge Sarokin wrote:

¹⁵*Juzwin v. Amtorg Trading Co.*, 718 F. Supp. 1233 (D.N.J. 1989) *rev'd on other grounds sub nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990).

[T]his court does not have the power or the authority to prohibit subsequent awards in other courts, notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants Until there is uniformity, either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.¹⁶

C. The Supreme Court Has Left the Solution with Congress

As the much respected Federal Circuit Judge Joseph Weis, Jr., has said, "[u]nquestionably, a national solution is needed" to the problem of multiple punitive damages awards.¹⁷ Unfortunately, the Supreme Court, which has recognized that punitive damages awards have "run wild,"¹⁸ and has twice indicated in recent years that the Due Process Clause of the United States Constitution places substantive limits on punitive damages awards,¹⁹ has proven unwilling to solve the problem of multiple punitive

¹⁶*Juzwin*, 718 F. Supp. at 1235 (emphasis added). See also *Davis v. Celotex Corp.*, 420 S.E.2d 557, 566 (W. Va. 1992) (noting that, because punitive damages can be awarded "nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions"); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) ("At the state court level, we are powerless to implement solutions to the nationwide problems created by [multiple punitive damage awards]"). See generally Note, *Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages In Toxic Tort Litigation*, 8 PACE ENVTL. L. REV. 647, 665 (1991) (concluding that the problem of multiple punitive damage awards "cr[ies] out for congressional action").

¹⁷*Dunn v. Hovic*, 1 F.3d at 1399.

¹⁸*Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

¹⁹*Id.*; *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

damages and appears unlikely to do so at any time soon.²⁰ In fact, as recently as 1994, the Court denied review of a case which presented an opportunity for the Court to rule on the constitutionality of multiple punitive damages.²¹

D. State and Federal Courts and State Legislators Have Called for Immediate Congressional Action to Solve the Problem

Courts, frustrated by their own inability to provide a needed solution, have cried out for federal action. For example, judges of the U.S. Court of Appeals for the Fifth Circuit have called for remedial legislation on this issue, specifically noting that only Congress can provide a policy or a theory that extends beyond any particular case at bar.²² Indeed, as recently as June 1994, the Florida Supreme Court asserted that "[a]ny

²⁰See generally *TXO Prod. Corp.*, 113 S. Ct. at 2727 (Scalia and Thomas, J.J., concurring in the judgment) (indicating a belief that "any perceived 'unfairness' in the common-law punitive damages regime" should be fixed by legislatures).

²¹*Dunn v. Hovic*, 1 F.3d at 1371 (3d Cir.) *modified in part*, 13 F.3d 58, *cert. denied*, 114 S. Ct. 650 (1993).

²²See *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir.) (en banc) (Clark, C.J., joined by Garza, Gee, Politz and Jolly, JJ., dissenting) ("[T]he court is frustrated by the lack of congressional action [to solve the multiple punitive damages problem]. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the greatest good for society"), *cert. denied*, 478 U.S. 1022 (1986). See also *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1466 (D. Haw. 1989) ("Only a legislature is in the position to weigh whether the deterrent effect of punitive damages is effective in mass tort litigation, and . . . implement a solution . . .").

*realistic solution to the problems caused by [multiple punitive damage awards] in the United States . . . can only be effected by federal legislation."*²³

State legislators have also called for Congress to take action. Recently, the American Legislative Exchange Council, a very large bipartisan coalition of state legislators and a leading proponent of states' rights, called for federal legislation to correct the problem of multiple punitive damage awards in recognition of the states' inability to resolve the important issue.²⁴

It is a unique situation where federal and state judges, as well as state legislators, have called upon Congress to remedy a problem in our nation's liability system.

²³*W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994) (emphasis added). See also *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865-66 (Iowa 1994) ("[T]he problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one. [Nevertheless,] [w]e believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation").

²⁴The American Legislative Exchange Council has approximately 2,400 members nationwide.

IV. A FAIR AND RATIONAL SOLUTION TO THE MULTIPLES PUNITIVE DAMAGE PROBLEM

The Multiple Punitive Damages Fairness Act provides a fair, balanced, and rational solution to the problem of multiple imposition of punitive damages. The Act establishes the general rule that punitive damages may be awarded *once* for harms based on a single act or course of conduct. In doing so, the Act recognizes that "when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct."²⁵ The Act would *not* in any way limit the ability of injured victims to obtain full compensation for their injuries.

To achieve uniformity, the proposal would apply in all civil actions, whether filed in federal or state court. The general rule would apply where a federal or state law permits punitive damages to be imposed up to a fixed monetary level or in proportion to the claimant's actual damages.

Nevertheless, the proposal anticipates that in some special circumstances a single punitive damages award may be insufficient to punish the defendant or to deter the defendant or others from undertaking

²⁵*In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), cert. denied, 100 F.R.D. 735 (1984).

similar wrongful behavior in the future. Accordingly, it contains two exceptions to the general rule limiting multiple punitive damages awards.

First, the proposal allows plaintiffs in cases tried after punitive damages have already been awarded in a previous case to obtain punitive damages if the court determines in a pre-trial hearing that the plaintiff will offer "new and substantial evidence of previously undiscovered, additional wrongful behavior on the part of the defendant." This exception preserves a way to augment punishment if it is later discovered that the original punishment was based on inadequate information. This situation may occur, for example, where the investigatory process reveals previously undiscovered documents showing a very substantial cover-up of a product hazard pointing to the need for further punishment, or where it is found that the defendant has hidden or destroyed material documents. In such cases, the legislation would allow *full* punishment of the defendant. To avoid the possibility of overkill, the law would require the court to reduce the "new" award by the sum of prior awards.

Second, the proposal allows plaintiffs in cases tried after punitive damages have already been awarded in a previous case to obtain punitive damages if the court determines in a pre-trial hearing, pursuant to specific findings of fact, that "the amount of prior punitive damages were

insufficient to either punish the defendant's wrongful conduct or to deter the defendant and others from similar behavior in the future." Again, to protect future claimants and be fair to innocent employees and shareholders of the defendant, the proposal will require the court to reduce the "new" award by the sum of any prior awards.

CONCLUSION

The Multiple Punitive Damages Fairness Act represents good public policy. It helps those who have filed claims by facilitating settlement and it serves future claimants by helping to assure recovery for their injuries. It also avoids overkill against defendants. In general, one punitive award for a single act or course of conduct is enough to punish and deter. The Act would *not* in any way limit the ability of individuals who have been tortiously injured to obtain compensation for their injuries. The Act would promote fairness — who could seriously maintain that, having been punished adequately for a bad act, a wrongdoer should be punished again and again and again?

Congress alone is responsible to remedy this problem, which has frustrated courts and commentators alike. State and lower federal courts are powerless. State legislatures cannot provide a remedy. A federal solution is the only remedy to the unfairness of multiple punitive damage awards.

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*1 STATUTES REVOLVING IN CONSTITUTIONAL LAW ORBITS

Ira C. Lupu [FNal]

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Introduction

The constitutional legacy of the past thirty years is at risk. Recent Supreme Court decisions have relaxed once-strenuous enforcement of the Constitution's protections against government. [FN1] Rights *2 that Americans have regarded as fundamental now hang by a thread, [FN2] and the lower federal courts are thickly populated with judges who defer to government as a matter of constitutional creed. [FN3]

In response to these developments, a number of scholars have called for a new public law. [FN4] Indeed, it has become a commonplace refrain among political progressives that law reform must arrive through legislative, administrative, and executive action rather than through constitutional litigation. [FN5] The burgeoning field of "legisprudence" [FN6] is in no small measure an attempt to develop intellectual underpinnings for a movement that will strive, as much as possible, to achieve results through nonconstitutional means of legal change.

The recent legislative activity designed to overturn a series of 1989 Supreme Court decisions [FN7] and culminating in the Civil Rights Act of *3 1991 [FN8] has already served to focus lawyers' and scholars' attention on the intriguing phenomenon of legislating where the courts have been but are no longer. [FN9] When reform efforts turn from responses to judicial construction of statutes to attempts to revoke or restore constitutional interpretations, however, the legal and political dynamics may change considerably.

Attempts to legislate constitutional norms--that is, to enact statutes revolving in constitutional law orbits--raise particularly perplexing issues that have not been explored. [FN10] What, for example, is the relationship between statutes that purport to advance a set of norms rooted, or once-upon-a-time rooted, in the Constitution and the content of constitutional law itself? How do we expect courts to view statutory language that the Supreme Court has repudiated in its constitutional interpretations? To what extent should approaches to statutory interpretation be tailored to circumstances in which legal understandings have been previously established in the "superior" context of constitutional interpretation?

These questions must be focused more sharply. All statutes revolve in constitutional law orbits in one sense. All are subject to the Constitution's legal force and must be consistent with it, or be at risk of invalidation. This Article focuses on a much more specialized subset of statutes: those that utilize the language of the Constitution *4 itself, [FN11] or, what is more typical of recent examples, the language of judicial gloss on the Constitution. These statutes may 1) extend a constitutional concept to a level of government, or to a government entity, to which courts had not previously extended it; [FN12] 2) extend application of constitutional limits beyond state action to private activity; [FN13] 3) restore a constitutional concept that courts have abandoned; [FN14] or 4) respond to an authoritative judicial pronouncement concerning the constitutional boundaries of permissible regulation. [FN15] Whether or not this list

exhausts the field, it suggests that the phenomenon exists and may arise repeatedly.

Moreover, the occurrence of statutes in constitutional law orbits is in no way limited to the field of civil rights and liberties. In many different fields of law--including areas as disparate as the law of evidence, civil procedure, taxation, and torts--lawmaking agencies enact policies that revolve tightly in orbits created by the Constitution and its judicial glosses. [FN16] Whether or not Judge Richard Posner is correct in saying that the law lacks substantive autonomy, [FN17] or Professor Laurence Tribe rightly claims that lawyers can learn generally from modern *5 physics, [FN18] American law does reveal an internal astrophysics that public lawyers ignore at their peril.

Each example of this phenomenon of course has its own context, history, and unique interpretive problems. This Article nevertheless attempts to unify consideration of such statutes by identifying common themes. Part I catalogues, along various analytical routes, some standard illustrations of orbiting statutes. This Part demonstrates that the orbiting phenomenon is far more common than might be expected. Part II moves to the legislator's perspective and identifies the strengths, weaknesses, hopes, and dangers of drafting in constitutional terms.

Part III applies the broad themes of Part II to three prototypical orbit schemes: 1) the Equal Access Act of 1984, [FN19] in which Congress expanded First Amendment guarantees of equal access for religious expression into public elementary and secondary schools; 2) the proposed Freedom of Choice Act, [FN20] designed to preserve the regime of *Roe v. Wade*; [FN21] and 3) the proposed Religious Freedom Restoration Act, [FN22] designed to overturn the Supreme Court's opinion in *Employment Division v. Smith*. [FN23] Analysis of these three schemes reveals problems of both constitutional legitimacy and statutory interpretation that frequently attend drafting in tight constitutional law orbits. Finally, Part IV attempts to set the discussion of statutes revolving in constitutional orbits in the larger context of two ongoing debates, one *6 concerning legisprudence and the other focused on the process of constitutional evolution. This Part inquires into the relationship between interest group theories of legislation and orbiting statutes, [FN24] explores notions of statutory interpretation in this special context, [FN25] and locates orbiting statutes among various models of constitutional change. [FN26]

I. An Astral Taxonomy

Authoritative legal decisions revolve in constitutional law orbits more frequently, and across a wider range of subject matters, than lawyers might expect. [FN27] The sources of law that may strongly embody constitutional concepts are not limited to statutes. Common law decisions in fields in which constitutional norms play a strong role also may revolve in constitutional law orbits. If state courts extend the First Amendment privilege of *New York Times Co. v. Sullivan* [FN28] or *7 *Hustler Magazine, Inc. v. Falwell* [FN29] beyond the point required by the federal Constitution, the orbiting phenomenon is present. Judge-made rules of court, such as the Federal Rules of Evidence, may show strong signs of the Constitution's gravitational force. [FN30] Agency decisions, both regulatory and adjudicative, may be formulated in terms closely derived from the Constitution and its doctrines. [FN31] This Part attempts to further define the orbiting phenomenon by discussing and categorizing additional examples.

A. Degrees of Legal Force

Like the differing degrees of gravitational force exerted by celestial objects, the extent of influence exerted by areas of constitutional law on orbiting statutes may vary from strong to weak. Some statutes reside in a legal context in which muscular constitutional constraints directly impinge on policy choices. In such settings, orbiting statutes may appear because anything but an orbiting statute will be constitutionally questionable. Other statutes are enacted in contexts in which constitutional constraints,

though not binding, nevertheless exert normative *8 influence. Here, nonorbiting statutes are entirely lawful, but they do tend to raise questions of social justification for departures from constitutionally inspired social norms. A third set of statutes, limited to circumstances in which the legislature is a branch coequal with the relevant constitutional court, is a hybrid of these two. These statutes appear in contexts in which constitutional law bears upon a problem primarily at the level of statutory construction.

1. Obligation

The most obvious, and phenomenologically least interesting, case is that of obligation. I use this term to describe statutes that closely track constitutional formulations because there is precious little room in the field for any regulation that does not do so.

In the period begun by *Roe v. Wade* [FN32] and concluded by *Webster v. Reproductive Health Services*, [FN33] most statutory abortion law best exemplified this category. [FN34] *Roe* and its progeny established highly specific standards, both substantive and procedural, to govern a variety of regulatory matters. More significantly, perhaps, *Roe* and its progeny also manifested extreme intolerance for regulatory overbreadth. Thus, for example, in the *Roe* to *Webster* period, states seeking to maximize parental involvement in abortion decisions made by their minor children were obliged to track very closely the particulars of Supreme Court pronouncements on the subject. [FN35] The same was true of prohibitions on abortion. Unless they coincided perfectly with the trimester formula of *Roe*, with all regulatory overbreadth squeezed out, any such prohibitions were doomed. [FN36]

*9 Statutory embodiment of rules enacted under obligation to any particular decision, including *Roe*, has significant inertial consequences. Even if the leading decision upon which these statutes had been built were to be overruled, the statutes would live on unless and until political forces successfully mounted a campaign to reform them. In this sense, garden variety statutes in substantive orbit--those that simply track the necessary rules at the time of enactment--may play a significant role in the continued life of constitutional principles that are otherwise defunct.

2. Analogy

For a variety of reasons, jurisdictions may borrow constitutional standards by which they are not bound. The best example suggested by recent controversies is that of the prohibition on forms of "hate speech" in the behavior codes of private universities. Such institutions are not state actors and are not obligated to follow the strictures of the First Amendment. Nevertheless, these campus codes frequently have tracked the limitations suggested by First Amendment law--prohibiting, for example, "fighting words" of the sort excluded by *Chaplinsky v. New Hampshire* [FN37] but not outlawing provocative and hurtful campus discussions of race or gender. [FN38]

Considerations of efficiency, [FN39] as well as concerns of legitimacy, often motivate private institutions to regulate in constitutional orbits. Because the functional distinction between public and private analogues is not always completely persuasive, the rules that govern choices of fundamental value in the public sector carry great normative force in the private sector as well. It is thus no surprise to find private universities, indistinguishable from state universities save for sources of financing, focusing closely on First Amendment concerns in the regulation of speech on campus, or on Due Process Clause considerations *10 in designing procedural components of codes of campus discipline.

This correspondence is about to be sorely tested in the wake of *R.A.V. v. City of St. Paul*. [FN40] In *R.A.V.*, a majority of the Supreme Court invalidated a "hate speech" ordinance on the ground that it constituted forbidden content-based discrimination

against the expression of certain ideas. The Court intimated that a content-neutral "fighting words" restriction would be constitutional both on its face and as applied to expressions of race hatred that constituted "fighting words." St. Paul's more limited proscription, however, could not stand. [FN41]

The Court's holding poses a significant dilemma for private institutions that had attempted to keep their speech regulation in constitutional orbit. Before R.A.V., the general perception among academic commentators [FN42] was that reflected in the R.A.V. concurrences [FN43]--that is, that some "hate speech" ordinances went too far, but that such an ordinance limited to "fighting words," narrowly defined, was constitutionally acceptable. Now, in order to remain in the orbit of constitutional law, some ordinances and campus codes must be rewritten to satisfy the standards outlined by the set of R.A.V. opinions. To be consistent with the current dictates of constitutional law, such codes must both be narrowly limited to "fighting words" of the sort likely to cause immediate violence [FN44] and refrain from singling out speech based on its tendency to reinforce patterns of discrimination. [FN45] It remains to be seen whether private universities, accountable to and under pressure from constituencies that will divide bitterly over both elements of the R.A.V. squeeze, will seek to retain the legitimacy once perceived to flow from regulations residing in constitutional orbits. [FN46]

*11 3. Inviting the Use of Constitutional Law as a Guide in Construction.

Ordinarily, signs do not purport to tell us how they should be read. On occasion, however, statutes contain specific instructions to future interpreters concerning rules of construction. [FN47] A prominent example of this is contained in the War Powers Resolution of 1973. [FN48] The Resolution requires the President to report to Congress on the use of American armed forces in hostilities and purports to authorize Congress to require withdrawal of such forces in cases in which they have been committed to hostilities without congressional approval. In an unusual bow to the constitutional doubts attending the substance of the Resolution, section 8(d)(1) provides that "[n]othing in this chapter is intended to alter the constitutional authority of the Congress or of the President." [FN49]

In a sense, section 8(d)(1) is legally gratuitous. Congress presumably lacks the power to "alter the constitutional authority of the Congress or of the President." [FN50] Nevertheless, section 8(d)(1) represents, *12 among other things, legislative acknowledgment of a conservative rule of construction--the Resolution is to be construed as consistent with pre-Resolution understandings of the scope of each branch's authority. Well-known doctrines of interbranch restraint, of the sort enunciated by Justice Brandeis in his concurrence in *Ashwander v. Tennessee Valley Authority*, [FN51] support the policy reflected in section 8(d)(1) but hardly require its inclusion in the Resolution. A more aggressively inclined Congress--that is, one determined to alter the constitutional orbit as much as it could--might well have omitted the section and hoped that the political and legal culture would change sufficiently to induce future interpreters of the Resolution to conclude that Congress had indeed altered the respective roles and powers of the political branches. [FN52]

B. The Functional Context of Orbiting Statutes

In identifying the functions of constitutional law, rights-minded constitutional lawyers at times focus myopically on the first section of the Fourteenth Amendment and on the Bill of Rights. The Constitution speaks, however, to a wide array of legal functions, including crucial matters of jurisdictional, remedial, and procedural law as well as matters of substance. Statutes in orbit can be found spinning throughout the universe of constitutional function.

1. Jurisdictional, Remedial, and Procedural Orbiting Statutes

In a number of respects, the Constitution delimits power to adjudicate. Some of these limits are in the text of Article III itself, which specifies the kinds of matters to which the federal judicial power *13 extends. [FN53] Not surprisingly, the jurisdictional statutes of the United States sometimes track the language of Article III by extending adjudicatory power, for example, to cases "arising under the Constitution, laws, or treaties of the United States" [FN54] as well as to matters within the "admiralty and maritime Jurisdiction." [FN55] The 1984 revision of the federal bankruptcy law, [FN56] responding to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, [FN57] authorizes Article I bankruptcy judges to hear and decide "core proceedings" without consent of all parties. [FN58] The "core proceedings" notion is derived from the Court's constitutional concepts as outlined in *Northern Pipeline*. [FN59] On questions of jurisdiction over persons, state statutes are frequently drafted in terms derived from decisions construing the Due Process Clause as a limit on the power of state courts to adjudicate. [FN60]

Remedial statutes also have unique constitutional orbits. Such schemes frequently refer to the Constitution without tying themselves to particular formulations of a substantive right. The remedial statutes of the Reconstruction era include the most prominent examples of this phenomenon. These enactments establish general protection, through criminalization or the creation of civil causes of action, of *14 both constitutional and statutory federal rights against persons acting privately or under color of state law. [FN61] Similarly, state law concerning the enforceability of civil judgments often tracks constitutional requirements concerning the respect states owe to one another's legal proceedings. [FN62]

The Constitution is thick with procedural limitations on the government. Consequently, a wide variety of both federal and state statutes travel in tight orbit around federal constitutional guarantees of fair procedure. Such statutes include state death penalty statutes, [FN63] federal and state statutes that codify the right to counsel in administrative adjudications, [FN64] evidentiary rules that track the requirements of the Confrontation Clause, [FN65] and sections of the Federal Rules of Civil Procedure that tie standards for directed verdicts and judgments notwithstanding the verdict to the Seventh Amendment right to a jury trial in civil cases. [FN66]

2. Substantive Orbiting Statutes

The most intriguing of the orbiting schemes are those that closely track judicial interpretations of the Constitution's substantive requirements. One of the earliest and most prolific sources of statutes in orbit was judicial interpretation of the scope of congressional power *15 to regulate interstate commerce. [FN67] Congress has employed the language of Supreme Court decisions interpreting the Commerce Clause on a number of occasions, beginning with the Packers and Stockyards Act of 1921, [FN68] which built upon the "current of commerce" formulation created by Justice Holmes in *Swift & Co. v. United States*. [FN69] This pattern was repeated in the wake of *Wickard v. Filburn*, [FN70] which established the broad contours of the modern doctrine under which Congress can regulate intrastate matters which, when aggregated, affect interstate commerce. Congress has explicitly legislated in "affecting commerce" terms in the public accommodations sections of the Civil Rights Act of 1964, [FN71] the loansharking prohibitions in the Consumer Credit Protection Act, [FN72] and a variety of other statutes.

Concepts spawned in First Amendment adjudication also have been a prolific source of orbiting statutes. The Model Rules of Professional Conduct include provisions in the orbit of First Amendment doctrines concerning commercial speech by lawyers. [FN73] Prior to this past term's decision in *R.A.V. v. City of St. Paul*, [FN74] campus and community-wide prohibitions on virulent expressions of bigotry frequently tracked the Chaplinsky fighting words doctrine, [FN75] and disorderly conduct statutes *16 did likewise. [FN76] Incitement statutes are sometimes written in the precise terms of *Brandenburg v. Ohio*. [FN77] Post-1973 state obscenity statutes regularly track the test of *Miller v. California*. [FN78] In drafting parade or demonstration permit ordinances, local governments may rely on decisions charting the relationship between the First

Amendment and local regulatory power. [FN79] The most prominent recent illustration of a statute in First Amendment orbit is the Equal Access Act, [FN80] which extends *Widmar v. Vincent* [FN81] to the secondary school context. [FN82]

*17 Two highly controversial and dramatic proposals, both now pending in Congress, further illustrate the unique opportunities and dangers of substantive schemes that revolve in tight constitutional orbits. The proposed Freedom of Choice Act [FN83] purports to create a federal statutory basis for the legal significance of viability, first recognized in *Roe v. Wade*, [FN84] as well as for the standard of judicial review for state abortion regulation as established in *Roe* and its pre-*Webster* progeny. The Act is designed to render substantively nugatory any judicial narrowing or overruling of *Roe*. The proposed Religious Freedom Restoration Act [FN85] purports to overturn the Supreme Court's highly controversial decision in *Employment Division v. Smith*; [FN86] the Act would do so by adopting elements of pre-*Smith* doctrine under the Free Exercise Clause.

C. Levels of Constitutional Specificity

Statutes drafted in constitutional terms may track the Constitution's language and requirements on a continuum of particularity. At the most general level, one can imagine the statutory, or regulatory, invocation of the most open-textured constitutional provisions without elaboration. For instance, an agency might promulgate rules requiring its personnel to afford due process of law before depriving any person of liberty or property.

Such schemes are rare. [FN87] Legislatures do not ordinarily instruct agencies to afford to parties before them "due process" or "a meaningful opportunity to be heard." Nor are antidiscrimination statutes ordinarily framed in the unglossed language of equal protection or comparable generalities from state constitutions. In instances of constitutional obligation, this avoidance of the most general kind of orbiting statute can be explained on grounds of redundancy. In cases of both obligation and analogy, statutes so general are highly likely to create inadequate constraint on discretion and insufficient guidance to *18 those administering or those affected by the rule. [FN88] In all instances, moreover, orbiting statutes tethered to the Constitution's own language are vulnerable to the "accordion" phenomenon, explored in greater detail below, [FN89] by virtue of which the enactment may expand and contract in conformity with changes in judicial statements of constitutional law.

On the other end of the continuum, one does find statutes that coincide precisely with constitutional minutiae. For instance, the Supreme Court, in a series of cases in the 1970s, fashioned precise constitutional rules concerning the length of durational residency requirements for voting in state elections. *Dunn v. Blumstein* [FN90] held that a state may not impose a one-year requirement. *Marston v. Lewis* [FN91] and *Burns v. Fortson* [FN92] upheld fifty-day requirements of residency and strongly intimated that the Constitution will not tolerate a longer durational residency requirement. As one might expect, a number of states have responded to those decisions by enacting residency requirements of thirty days--the longest simple calendar unit that conforms to the rule of those decisions. [FN93] Rigid constitutional "rules" such as the residency requirements, however, are relatively rare. In any event, because most changes at the more general, theoretical level of constitutional law will not affect such schemes and because these statutes are easily repaired when a specific constitutional rule is judicially revised, statutes revolving in the tightest, rulebound orbit are of the least jurisprudential interest.

In the continuum's center are statutes that incorporate doctrinal terms that have acquired meaning in the process of constitutional adjudication. These terms are defined by prior interpretation, yet are fluid enough to suggest significant and continuing judicial discretion in their application. This most important subset of statutes revolving in constitutional law orbits consists primarily of those that employ constitutional law concepts in terms either identical to, or strongly resembling, those currently or recently used by courts. These terms *19 operate as standards for guidance,

rather than as precise, detailed rules or as mere restatements of constitutional language. [FN94] With the field so marked, the legislative perspective on the utility of such statutes can be fleshed out in more general terms.

II. The Merits of Drafting Statutes in Tight Constitutional Law Orbits

When a legislature confronts a problem--even a problem that seems to have arisen as a result of the features or shortcomings of constitutional law-- why would it borrow preexisting judge-made language? After all, statutory drafters are themselves wordsmiths, and they might indeed improve on the language of courts if they tried. This Part attempts to answer this question by exploring the advantages and dangers of drafting statutes in tight constitutional law orbits.

A. The Advantages of Drafting in Tight Orbits

A variety of considerations explain a legislature's explicit reliance on judicially crafted language. For starters, note that the drafter might simply be sloppy or unimaginative and, therefore, willing to borrow an apparently useful phrase from any source readily at hand. This is not an admirable or interesting motivation--we all know that such habits in a professional lead to embarrassment [FN95]--and it need not detain us. A number of more professionally sensible explanations come to mind, however, and each deserves attention.

1. Considerations of Economy and Efficiency

Drafting in a tight constitutional orbit may produce continuity of legal conception with an economy of effort. The reduction of transaction *20 costs that attend the creation and elaboration of enacted law may occur at two levels. First, enactors may squabble less over the particulars of drafting if ready-made judicial concepts seem available and substantively attractive. Second, if and when orbiting choices are made, the corpus of law around the borrowed concept will reduce uncertainty about the enactment's meaning. Any such reduction should, other things being equal, help minimize litigation and otherwise more efficiently promote resolution of disputes spawned by the enactment.

Suppose, for example, that a state court has ruled that a state official is immune from money damages for state constitutional violations only if the officer demonstrates that she actually believed, and had good reason to believe, that the state constitution did not forbid her conduct. If the state legislature wishes to address this question and to expand the immunity, it might be tempted to enact the judicially formulated rule of federal officer immunity, which protects officers from personal liability unless their conduct violates clearly established constitutional rights of which a reasonable person should have known, [FN96] and the officer did not have an objectively reasonable view that the conduct was permissible. [FN97]

Such a selection offers several distinct benefits. It provides for prospective and actual litigants, and for subsequent courts that are asked to interpret and apply the immunity, a pre-existing and elaborate body of case law to guide them. Although federal precedent would not be binding, application of immunity standards tends to be highly fact-bound. Accordingly, a corpus of analogous federal decisions would be far more helpful to lawyers and judges than other aids to interpretation, such as abstract statements of policy in the legislative history. Thus, with an economy of language, the state legislature would have expanded the immunity, suggested a reference to the body of federal cases employing a comparable standard, and taken a step toward unity of federal and state law.

*21 2. Delegation

Other, more subtle explanations might attend such a drafting choice. Drafters might be experiencing difficulty in resolving the difficult policy questions that surround the drafting task. To return to the previous example, we know that the problem of determining where to draw the line between compensating the victims of official wrongdoing and stifling the exercise of official discretion has long been a dilemma in American law. [FN98] A choice of preexisting judicial language might persuade contending legislative interests that the statutory reform had avoided extremes in either direction. [FN99]

Furthermore, a time-honored way for legislatures to finesse hard judgments is to adopt generalities and delegate implementation to others. [FN100] In the immunity example, state legislative selection of the federal immunity rule effectively delegates implementation to courts and does so in a way that guarantees judicial predominance in the development of immunity rules. Were a state legislature to depart from pre-existing judge-made law on this subject and choose language that highlighted that departure, courts would be far more likely to search for legislatively determined meaning in the new approach and far less likely to draw openly and heavily on the existing corpus of judge-made immunity law.

This concern about political accountability, however, hardly exhausts the systemic implications of legislative delegation. Such delegation often increases the possibility of the law developing in a unified, harmonious, consistent and principled way. Courts free to construe interactively statutes in orbit and the Constitution may be enviably positioned to advance a constitutional agenda with a legislative partner. Statutes in orbit and the Constitution need not necessarily *22 be in tension with one another. Rather, under the control of an authoritative and unifying decisionmaker, these sources of law may interrelate in socially optimal and constitutionally constructive ways. [FN101]

3. The Search for Safe Harbors

Legislative selection of judge-made concepts of constitutional law helps to minimize the risk of subsequent invalidation on constitutional grounds. Just as private parties frequently structure business transactions within the guidelines provided by controlling legal interpretations, [FN102] governmental parties too may depend on techniques of discovering and utilizing safe legal harbors within which to confine their activities.

Consider the question of the circumstances under which states may require minor females seeking abortions to notify or to obtain the consent of their parents or guardians prior to the procedure. In a series of abortion decisions in the 1970s and early 1980s, the Supreme Court crafted a controlling rule. To satisfy the Constitution, any state policy on the subject had to provide for a judicial bypass of the parental notification requirement. The bypass had to be expedited to account for the time-sensitivity of the abortion decision. In addition, it had to be substantively focused on whether the minor was sufficiently mature to make her own decision and, even if she were not so mature, on whether terminating the pregnancy was in her best interests. [FN103]

In addition to the substantive controversy over this highly emotional subject, these opinions provoked some of the same methodological criticism as *Roe v. Wade* itself. Through its expressed desire to guide the enactment of constitutionally valid legislation, the Court arguably overstepped bounds of judicial propriety and usurped the legislative function. Nevertheless, one quality of this sort of detailed guidance from an authoritative court is the creation of safe legislative harbors. So long as the enacting legislature stays fairly close to the described limits, it can be confident that its enactments will survive constitutional review. In an area as fraught with constitutional controversy *23 as abortion policy has been since *Roe*, safe harbors are valuable resources. [FN104]

B. The Dangers of Drafting in Tight Orbits

Thus far, I have concentrated on the benefits that might be produced by this sort of drafting choice and have only alluded to the detriments. In law as in life, however, strengths usually come packaged with weaknesses. Having described and analyzed some of the former, this Section begins, in general terms, to unpack the latter.

1. Legislative Process Problems

Judge-made formulae may yield the best possible drafting choice for a particular statute, but there is no guarantee of an optimal result. One negative consequence of the availability of judge-made constitutional terminology is the repression of debate and careful consideration of alternatives. The dynamics of this phenomenon are not difficult to understand. Whether a legislature is focused on "restoring" some doctrine, extending it to a new setting, or building upon constitutional concepts in a related field, precrafted judicial language may arrive with an aura of respectability, precise reflection, continuity of thought, and professional recognition. Moreover, questioning the language closely may expose new controversy or bring to light conflict buried in the existing formulation. Thus, a rush to adopt prefabricated constitutional concepts may undermine the processes of debate and deliberation and result in drafting choices being made too quickly and without reflection.

2. Substantive Wisdom

Regardless of what process produces its selection, a judge-made concept may be less suited to the legislative context than initially appears. The more a legislative proposal is divorced from the setting that called forth the relevant constitutional doctrine, the greater the risk. For example, rules of officer immunity for liability for violation of federal civil rights may turn out to ill fit the problem of state law *24 immunity. [FN105] The relevant state duties may be less accessible or otherwise sufficiently different to undercut the analogy. Similarly, the fighting words doctrine may be useful in the public streets, but too narrow or too limited to the concern for physical violence to solve the problem of campus bigotry and its effect upon learning and academic discourse.

Even in those cases in which the judicially crafted concept fits reasonably well, the safe harbor phenomenon has its potential costs. A legislative choice to follow the orbit described in a judicial opinion may limit the danger of invalidation on constitutional grounds, but it might do so at the expense of policymaking wisdom or innovation. To return to the minors' abortion context, one can imagine a legislature failing to specify the factors relevant to a determination of maturity or best interest for fear of venturing too far from the constitutional orbit. The result may be a scheme that gives inadequate guidance to lower court judges, lawyers, and litigants and thereby allocates power among them in unproductive or invidious ways.

The context in which constitutional rules and doctrines have emerged is also important for deciding whether they can be transplanted wholesale into enacted law. At one time, much of constitutional law had a common-law flavor. That is, it consisted of relatively narrow pronouncements, uttered in the context of particular cases, about the limits of official power. [FN106] Ripping a doctrine loose from the specific facts that produce it may be a high risk drafting strategy. Of late, fewer and fewer areas of Supreme Court decisionmaking have manifested this common-law quality. Nevertheless, as the analysis below of the Religious Freedom Restoration Act will demonstrate, doctrinal pronouncements torn free of their case law moorings may be both untrue to the "law" they purport to represent and inadequate to the task of translating policy objectives into positive law.

*25 3. Power Allocation Consequences

The most profound and far-ranging issues raised by drafting statutes in tight

constitutional law orbits are the power allocation consequences that such choices may produce over time. First, the lesson of codification of the common law suggests that judges jealously guard their lawmaking prerogatives and will not surrender them lightly in the face of ambiguous enacted instructions. The once-popular canon of statutory construction that counseled strict construction of statutes that derogate from the common law exemplified this attitude. [FN107] Judges may be inclined by institutional habit or temperament to ignore the precise language of codifications of common law principles and continue their preexisting path of development of the common law. [FN108] Enacting constitutional concepts in the form of statutory language may produce similar dangers. A judge who perceives that a legislature has chosen her institutional path rather than its own may erroneously interpret such an enactment as more of an affirmation of judicial discretion than it is meant to be. [FN109]

Second, statutory provisions that incorporate live constitutional concepts may present accordion problems--that is, the statute may change in its meaning each time courts expand or contract the constitutional concept. The accordion problem occurs whenever one body of law incorporates another by reference, and the authoritative decisionmakers for the two bodies of law are not identical. [FN110] This problem *26 is the most ubiquitous and potentially pernicious of those associated with statutory incorporation of existing constitutional concepts. Although the accordion problem is in one sense simply an illustration of what Professor Eskridge has called "dynamic statutory interpretation," [FN111] in this context it may have unique qualities. The legislature may be trying to move faster or farther than the courts. In such circumstances, use of the judge-made language describing the relevant concept may act as a brake on the advancement of the statutory policy itself. [FN112] Moreover, as bodies of constitutional and statutory law begin to act reciprocally upon each other, it may become difficult to know which is the tail and which is the dog. [FN113]

Put differently, the image described above of delegation-fostered partnership in the development of constitutional norms will not always capture the dynamics of statutes in orbit. At times, the constitutional culture becomes quite fractured, with decisional law heading one way and orbiting statutes another. [FN114] In such circumstances, a relatively unconfined delegation to the courts in an orbiting statute will lead to harmony and unity only at the price of ceding a great deal of directional control to the delegatee.

Finally, and most dramatically, reliance by legislators on judge-made concepts of constitutional law creates a tension between judicial supremacy in constitutional matters and judicial obedience to legislative instructions as enacted. This problem is especially acute when Congress and the Supreme Court clash over the scope of federal constitutional limitation on the power of the states, and when Congress restricts rights to less than those afforded by the courts. Several prominent Justices have expressed doubt concerning the power of Congress to make wholesale revisions of the content of constitutional *27 rights, [FN115] and a wide variety of distinguished commentators have offered similar views. [FN116] Such doubts arise from the core separation of powers principle, pronounced in *Marbury v. Madison*, [FN117] that the judicial branch is the final arbiter of the Constitution's meaning, as well as from considerations of federalism. Part III examines in more detail three recent orbiting statutes that illustrate these dangers.

III. Three Testing Cases

The general analysis offered above can be enriched by close study of particular instances in which legislatures have confronted drafting choices of the sort that I have described. I have chosen three such illustrations--the Equal Access Act, [FN118] the Freedom of Choice Act, [FN119] and the Religious Freedom Restoration Act. [FN120] The Equal Access Act presents the "model of cooperation," in which Congress built upon, and resolved conflicts among, existing judicial decisions. The Freedom of Choice Act, in its current form, presents the "model of substantive confrontation," in which Congress seeks to erase the past four years of judicial withdrawal from aspects of *Roe*. The Religious Freedom Restoration Act, in its current form, presents yet a third model, involving an

institutional rather than substantive override of the judicial view of how the Free Exercise Clause is to be enforced.

A. A Funny Thing Happened in Defining the Forum--Public Schools and Student Prayer Groups

Consider the drafting problem presented by the federal Equal Access Act of 1984. [FN121] Described most generally, the Act responded *28 to a series of decisions by school boards and courts to exclude student religious clubs and prayer groups from the status and opportunities afforded to other student organizations. [FN122] The constitutional law context in which Congress considered the Act contained conflicting messages. A series of Supreme Court cases involving public school prayer, [FN123] Bible reading, [FN124] and religious instruction on public school premises [FN125] suggested that public school sponsorship of religious activity violated the Establishment Clause. In turn, lower courts relied upon these cases in invalidating school decisions to permit extracurricular prayer clubs and in upholding school decisions to exclude such clubs.

On the other hand, Congress recognized that permitting student-initiated religious clubs to gather on a parity with other student groups might not constitute forbidden state sponsorship of religion. In the setting of a state university that maintained an expansive policy of permitting student-initiated expression and association, the Court had already held in *Widmar v. Vincent* [FN126] that religiously oriented student groups were entitled to access to university facilities equal to that provided to groups with a social, political, or other nonreligious character.

Four linked problems attended reliance on *Widmar* as the precedent that would ultimately open the door to religious group access to public secondary schools. First, the Court in *Widmar* itself had suggested that the presumed difference in impressionability between college age and high-school age students might justify a more stringent prohibition at the high school level. [FN127] This assumption had been challenged in the commentary, [FN128] but no signs had yet appeared that the Court was receptive to that criticism.

*29 Second, the facts in *Widmar* were extremely favorable to an equal access claim. The University of Missouri had a very generous policy of approval and access for student groups. This policy permitted highly partisan political groups, such as the Young Socialist Alliance, to organize and meet on campus. [FN129] Although this sort of expansive policy is presumably typical of state universities, it is atypical of public secondary schools, in which political controversy is downplayed and matters of curriculum, athletics, service, career interest, and school spirit are emphasized. As a result, claims of "equal access" by religious groups against secondary schools were less persuasive than the *Widmar* claim. If the secondary school excluded all partisan or controversial groups, then the Socialists, the Klan, and the Christians could equally be excluded.

Third, closely related to this factual disparity is the tradition of strong local administrative control over public school activities. To be sure, constitutional law had intruded considerably on this control in the previous forty years, most notably on questions of racial segregation [FN130] and, secondarily, on matters of student freedom. [FN131] Nevertheless, themes of local control over school policy continued to compete with recognition of student rights more strenuously in the secondary school setting than in the context of a state university.

Finally, and most critically for the drafters of the Equal Access Act, the Supreme Court had been retreating, rather than advancing, on the free expression fronts relevant to the disposition of this problem. First Amendment rights for students had been scaled back in several contexts. [FN132] Most significantly, between *Widmar* in 1980 and the drafting of the Equal Access Act in 1984, the Court had emitted strong signals that its doctrine of access to "the public forum" was *30 becoming more deferential to government. *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, [FN133] decided in 1983, had defined three types of government-owned property--traditional public fora, limited public

fora, and nonpublic fora--and had strongly intimated that most access claims in the latter two categories were unlikely to prevail. [FN134]

The movement toward making access claims more difficult to maintain dovetailed with the factual and legal differences between colleges and secondary schools in such a way as to suggest that the Supreme Court was unlikely to require a high school with a typical mix of clubs to provide access to a political or religious club. This depiction of the constitutional law world as of 1984 sheds special light on the drafting problems faced by the sponsors of the Equal Access Act and, more generally, on the phenomenon of statutes in constitutional law orbits.

The drafters might have responded to this constitutional uncertainty concerning access to public secondary schools by religious groups in a number of different ways. First, Congress might have codified *Widmar* by case reference. The Act, quite literally, might have been limited to a one-sentence declaration that public secondary schools receiving federal financial assistance [FN135] should heretofore follow the rule of *Widmar v. Vincent* in dealing with religiously oriented student groups. This was the view expressed by Senator Levin in floor debate on precisely what he believed the Equal Access Act accomplished. [FN136] Such an approach would have served the goals of efficiency and delegation, [FN137] but, because it would have left little room for nuanced adjustment to the secondary school setting, this approach would have frustrated the goals of legislative deliberation and substantive optimality. [FN138] Furthermore, this approach might have led to accordion problems, depending on future expansions and contractions of *Widmar*. [FN139]

Second, Congress might have codified *Widmar* by "rule" reference. In other words, the Act might have attempted to restate the rule of *Widmar* in generic terms, so as to foreclose the possibility that a subsequent Court would cut back on the scope of *Widmar* and thereby cut back on the scope of the Equal Access Act. Such an effort might have taken many forms because any restatement of the "rule" in *Widmar* is dependent upon the view one takes of which of its facts are essential. Thus, for example, attempts to codify *Widmar* might have focused on the permitted access of politically controversial organizations as the equal access trigger, or, alternatively, might have focused more generally on the concept of the public forum. In direct contrast to the "case reference" approach, this "rule reference" approach would have served the goal of legislative deliberation but might have frustrated the goals of efficiency and harmonious development of the law. In particular, this approach would have created the possibility that future courts would interpret *Widmar* in ways quite different from the congressional interpretation reflected in the Act. This could produce results as anomalous as greater access to high schools under the Act than to universities under the Constitution.

Third, Congress might have chosen to consciously and explicitly depart from *Widmar* in one of two directions. One approach would emphasize that secondary school authorities traditionally exercise far more discretionary power over the formation and operation of student groups than has been the case at state universities. A drafting effort in this direction would have been mindful of the problem of unreasonable, *32 perhaps unconstitutional, exclusion of religious speech, but would not have forbidden the exclusion if doing so meant a substantial invasion of the prerogatives of local administrators. Alternatively, the drafters might have departed from *Widmar* in an antibureaucratic, pro-expression direction, going as far as politically feasible to guarantee access for religious groups at the expense of administrative discretion. To an even greater extent than an approach that codified *Widmar* by rule reference, an approach that consciously departed from that decision would have served legislative process values but frustrated the goal of efficiency and undermined the positive features of delegation.

These three general approaches for resolving the relationship between the Act and the constitutional case law around which it revolves reveal the tradeoffs present in drafting statutes in constitutional orbits. Should the legislator tie herself tightly to evolving judicial interpretation by choosing option one, restate the constitutional rule as she understands it by choosing option two, or deliberately depart from it by choosing option three so as to reach a result different from that which "simple extension" of the

constitutional rule will produce?

In a classic example of legislative fudging, Congress resolved this problem by selecting a formula that teetered exquisitely between options two and three. [FN140] In order to trigger the Act's substantive requirement that a school may not discriminate based on the "religious, political, philosophical, or other content" of the student speech, the school must be found to have created a "limited open forum." [FN141] Elsewhere, the Act declares that a "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." [FN142]

The use of the concept "limited open forum," coupled with this particular statutory definition, created a unique interpretive problem. *33 Was the concept coextensive with the constitutional concept of "limited public forum," a notion that did not appear in *Widmar* but that had appeared in restrictive form in *Perry*? [FN143] This would constitute an option two statute, in which the provision embodied a particular interpretation of prevailing law. Or was the statutory definition of "limited open forum" sufficiently different from the judicial definition of "limited public forum" so as to cut the Act loose from the orbit of the constitutional law field in which it appeared to reside? This would constitute an option three enactment, in which Congress forged a new path in resolving the competing concerns.

In *Board of Education v. Mergens*, [FN144] the Supreme Court ruled by an 8-1 majority that Congress had chosen the pro-expression version of option three. In an opinion by Justice O'Connor, the Court construed the definition of "limited open forum" in a way that substantially increased the quantity of existing public school policies that would trigger the Act's nondiscrimination requirements. Focusing on the ambiguity of the phrase "noncurriculum related" in the statutory definition of what constituted a limited open forum, [FN145] the Court reasoned that the phrase should be interpreted to serve the statute's broad purpose of stopping unreasonable discrimination against religious organizations. [FN146]

Accordingly, the Court construed the definition to exclude only those organizations: *34 directly relate[d] to the body of courses offered by the school.... [] [A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition ... is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements. [FN147]

Applying this standard, the *Mergens* majority concluded that *Westside High School* had a limited open forum within the meaning of the Act. The school had approved a chess club, a photography club, a scuba-diving club, and several service-oriented groups. Because these groups were noncurriculum related within the Court's construction of the Act, the school was obliged to accept the presence of a Christian club as well. [FN148]

The Court explicitly rejected the argument, advanced by Justice Stevens in dissent, that the Equal Access Act revolved in a tight constitutional orbit. Under Stevens' interpretation, the Act would be construed as simply declaring that *Widmar* applied whenever a public secondary school's organization policy was sufficiently expansive to trigger the constraints of the First Amendment's public forum doctrine. [FN149] Justice Stevens acknowledged that the public forum doctrine was not altogether satisfactory. [FN150] He stated, speaking directly to the orbits problem, that "[l]awyers and legislators seeking to capture [the Court's] distinctions in legislative terminology should be forgiven if they occasionally stumble." [FN151] Nevertheless, he concluded that the legislative history of the "limited open forum" provision was too riddled with ambiguity to support a presumption that Congress had strayed from existing public forum principles in crafting the Act's triggering provisions. [FN152]

The interpretive problems of the Equal Access Act as presented in *Mergens* are classic illustrations of statutory drafting and construction *35 in tight constitutional law orbits. For years, the religious right had been struggling through litigation and legislative effort to gain access for prayer groups to public schools. Its arguments in court had frequently rested on the Free Exercise Clause as well as notions of speech, association, and the public forum. That is, it had argued that religious groups were privileged by the Free Exercise Clause to meet in public schools regardless of what other organizations the schools permitted. [FN153] These arguments, designed to support a claim of mandatory access, rather than equal access, had fared poorly in the courts. Moreover, legislative attempts to secure such a right of mandatory access had foundered. Liberals in Congress had no intention of creating a statutory right, solely for religious groups, of mandatory access to public school meeting facilities.

Thus, the stage was set for the compromise that led to the Equal Access Act and its ambiguous version of the crucial triggering provision. The compromise amendment attempted to harmonize, first, the desire for a sufficiently low threshold for the equal access requirement such that most existing school policies would trigger it; second, concerns about discrimination against progressive student groups and an unwillingness to allow religious groups an advantage over political groups; and third, the interest in allowing school administrators some discretion in determining the mix of student groups to which they were required to provide access. [FN154]

Had Congress explicitly remained in the orbit created by *Widmar* and the Supreme Court's evolving public forum doctrine--that is, had the Equal Access Act been drafted solely to counter the premise that secondary school students should be treated differently from college students for purposes of the relevant constitutional rules--the Act would have had little effect. Most schools would have been held not to have created a limited public forum and, therefore, would have remained free to exclude student religious groups. Because Congress moved outside those orbits by using the concept of "limited open forum" and by defining that concept in ways that deviated from *36 evolving judicial standards, the Act significantly altered the landscape for religious groups in public secondary schools.

An important question raised by the Equal Access Act and its construction in *Mergens* is whether issues arising outside the Act and concerning the creation of a public forum in public secondary schools will now be resolved differently by courts. Suppose a public secondary school receiving no federal financial assistance, thereby remaining outside the Act's coverage, [FN155] permits access to a student-sponsored Christian club and is sued for allegedly violating the Establishment Clause. Even though the Act does not apply, the congressional judgment concerning impressionability of high school students is likely to have strong force in the evaluation of the Establishment Clause argument that the school will be perceived as endorsing sectarian religion. This is so because of the strong tradition in our constitutional law that congressional factfinding is entitled to an unusual degree of respect. [FN156] If that doctrine has integrity, the legislative facts found should carry weight even outside of the precise statutory context in which the findings took place. Surely the impressionability of high school students does not vary with their school district's acceptance or rejection of federal funds.

Now suppose that the same school, similar to *Westside High* but not covered by the Act, has a chess club and a scuba club but refuses access to the Christian club. Will the low threshold for equal access claims in the Act affect the constitutional threshold for such claims? My intuitions are that the Act's gravitational force here will be much weaker, and that the force of the preexisting constitutional law will overcome it. [FN157] I predict this for several reasons. First, the "impressionability" *37 finding is empirical. In contrast, the issue of what triggers broad equal access obligations, both under the Act and under the Constitution, involves a normative choice. Long-prevailing notions of the allocation of constitutional power and expertise suggest far less deference to Congress at the level of rule choice than the level of what are typically described as "legislative facts." [FN158]

Second, widening the circumstances that trigger claims of equal access to expression on

government property conflicts with current judicial trends. [FN159] In contrast, limiting the scope of Establishment Clause strictures is consonant with those trends. [FN160] One would reasonably expect that statutes in constitutional orbits will have greater success in reshaping the constitutional law immediately outside them to the extent they capture rather than resist the direction of judicial forces operating in the field. [FN161] Thus, the Equal Access Act is unlikely to reverse the Court's general trend in the area of public forum doctrine.

B. Anticipating Roe's Demise--The Freedom of Choice Act

Despite the recent, and surprising, reaffirmation of *Roe v. Wade* [FN162] in *Planned Parenthood v. Casey*, [FN163] *Roe's* core principle hangs by a thread. As the regime that *Roe* established struggles to survive, political *38 forces that support the right to choose abortion have been pursuing a federal legislative solution, which they perceive to be more enduring than *Roe* itself. The proposed Freedom of Choice Act [FN164] is now at center stage as such a solution. Introduced in Congress originally in 1989 after the Supreme Court's decision in *Webster v. Reproductive Health Services*, [FN165] reintroduced in 1991, and ardently championed by its proponents in the summer and fall of 1992, the Act is, according to its sponsors, "designed to codify the holding of ... *Roe versus Wade*." [FN166]

The Act purports to codify principles of federal constitutional law established in *Roe* and a number of its pre-*Webster* progeny. [FN167] The Act does not prescribe any additional remedies for the violation of *Roe*-based rights and, therefore, adds nothing to the constitutional law on the subject as of the day before the Court announced *Webster* in 1989. Yet the Act's seeming simplicity--Senator Packwood told his Senate colleagues that "[w]hat you see is what the bill does" [FN168]--masks a series of complex questions concerning statutes revolving in constitutional orbits.

1. The Scope of Congressional Power to Displace State Law

In seeking to justify federal legislative authority over state abortion law, the Act's proponents have invoked the coercive authority of Congress under both the power to regulate interstate commerce [FN169] and the power to enforce by legislation the provisions of the Fourteenth Amendment. [FN170] As the analysis below reveals, these two power *39 grants rise and fall in their justificatory force in direct proportion to the continued validity of *Roe v. Wade*. If *Roe* were to be overruled, the claim under Section 5 of the Fourteenth Amendment would have to confront head-on the problem of which branch of the federal government determines the constitutional dimensions of restrictions on states, but the Commerce Power claim would be overwhelming. Under the law's current condition, however, the strengths and weaknesses of these power grants are inverted--the Commerce Power argument is diminished in force, whereas the problems of reliance on Section 5 are less severe. Be it *Roe* yea or *Roe* nay, the Freedom of Choice Act if enacted will inevitably revolve in several constitutional orbits.

Contemporary judicial constructions of the scope of the Commerce Power are expansive, [FN171] and the proposed legislative findings that accompanied S. 25 seemed designed to exploit the breadth of that power grant. [FN172] Congress could very credibly find that wide disparities in state regulation of abortion present a national problem with interstate commercial dimension. Congress might for example "find" that residential decisions by women of child-bearing age were being affected by the scope and content of state abortion law, and that such decisions taken in the aggregate had significant distorting effects in the labor market. [FN173] Although this proposition is empirically questionable, *40 under prevailing precedent it is a more than sufficient constitutional predicate for broad federal preemption of state-created abortion law. [FN174]

What complicates matters considerably, however, is that *Casey* indicates judicial intolerance of the sort of state regulation most likely to trigger substantial interstate consequences. No state may prohibit previability abortions. [FN175] The only differences among the states that current constitutional law will tolerate reside in regulations that

are not "unduly burdensome" in the sense of having the "purpose or effect [of placing] a substantial obstacle in the path of a woman seeking *41 an abortion before the fetus attains viability." [FN176] It is by no means clear that the disparity among states produced by "non-unduly-burdensome" regulations can plausibly be said to create the sort of interstate distortions required to justify the use of the commerce power. By definition, such regulations produce insubstantial obstacles to abortion choices. Why would anyone flee the state in the face of minor burdens upon the abortion decision?

Congress might nevertheless compile a record that reveals that regulations concerning waiting periods, informed consent, and family involvement in fact produce interstate consequences. [FN177] Indeed, one would expect that interstate effects of significant magnitude would overlap considerably with occasions of "undue burden." [FN178] In so finding, however, Congress would have to do what the Act's drafters apparently want to avoid--that is, explicitly confront and condemn various regulatory practices that the Court invalidated pre-Webster.

The Commerce Power theory underlying the Freedom of Choice Act would lift the scheme from one constitutional orbit to another. Like a charged electron, the Act so justified would jump from the Fourteenth Amendment orbit in which abortion law customarily resides to the "affecting commerce" orbit upon which Congress has relied so often in the past. Far more dramatic questions of institutional cooperation and confrontation, however, are raised by the alternative power theory on which the Act relies. The Act's proponents, in addition to their Commerce Clause claims, have asserted that "Congress has the authority, under Section 5 of the 14th Amendment . . . to enact legislation to restrain States from denying due process and equal protection rights to individuals or interfering with fundamental rights." [FN179] The findings that accompanied S. 25 attempted to *42 make this more precise by declaring that state restrictions on abortion operate cumulatively to:

(C) discriminate between women who are able to afford interstate and international travel and women who are not, a disproportionate number of whom belong to racial or ethnic minorities; and

(D) infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional. [FN180]

At the time when the views of Justice Brennan on this subject commanded a majority on the Court, these findings would have been more than adequate to justify this scheme under Section 5. Justice Brennan authored the Court's broadest pronouncement on the scope of Section 5 power in *Katzenbach v. Morgan*, [FN181] the theories of which permitted Congress both to find linkages between non-rights and the exercise of established rights, and to declare substantive Fourteenth Amendment rights beyond those declared by the courts. Subsequent decisions, such as *Oregon v. Mitchell* [FN182] and *City of Rome v. United States*, [FN183] while less expansive in their controlling theories, have reaffirmed that Congress may expand constitutional rights in a narrow margin beyond preexisting judicial formulations of those rights. [FN184]

Whether the current Court would be willing to follow these decisions to their logical extreme, however, is open to serious doubt. The leading decisions, unlike the Freedom of Choice Act, all involve voting rights. For the Court to permit a congressional override on a subject of much more disputable constitutional import might be thought to undercut the basic institutional principle that the judicial branch is *43 the final arbiter of the Constitution's meaning, [FN185] as well as the principle of federalism, to which the current Court is unusually sensitive. [FN186] If *Roe* were overturned, the Section 5 theory of the Freedom of Choice Act would constitute precisely such a dual assault. The Court would have remitted abortion questions to state legislatures for determination, whereas the Act would preempt state legislation and refederalize a right to be free of state law hostile to the abortion choice. Even the narrower inroads upon *Roe* and its progeny made by Webster and Casey suggest such issues, because these recent decisions create a regulatory space for states that the Freedom of Choice Act in significant respect denies. The question sharply focused by prevailing law is the extent to which Congress may outlaw particular abortion regulations that a current majority of the Supreme Court has upheld or would uphold. May the Congress, for example, legitimately

outlaw abortion waiting periods and so-called "informed consent" laws designed to encourage childbirth over abortion? [FN187]

Roe and its pre-Webster progeny were hostile to such regulation and, in general, extremely protective of the autonomy of patients and doctors in the abortion setting. The operative legal standard for regulation was "medical necessity," but even that standard was limited to the time after the end of the first trimester. During the first trimester, the then-prevailing law allowed virtually no regulation other than that requiring those performing abortions to have professional credentials. Furthermore, the "medical necessity" standard was applied with suspicion of, and a strong presumption against, all state regulation. [FN188]

The proponents of the Freedom of Choice Act are seeking to restore the pre- Webster regime. The Act permits only "medically necessary" regulation, [FN189] a clear incorporation of the pre-Webster law. *44 The prevailing standard for permissible regulation after Casey, however, is the test of "undue burden." This gap between prior and current law is the place in which the scope of congressional power to alter the substance of Fourteenth Amendment rights may be put to the test. The best argument in favor of congressional power is one that follows *McCulloch v. Maryland* [FN190] rather than *Marbury*--that is, that the gap involves matters of degree, not of kind, and that such questions of degree are appropriately left to political discretion. [FN191]

Taken to this extent, however, *McCulloch* swallows both *Marbury* and the general notion that Congress is a body of enumerated powers. As all constitutional lawyers know, the range among review standards is so expansive that moving significantly from one place to another within it dramatically affects the scope of state power. Even though review standards may only be an approximation of what the Constitution requires, choosing among them has come to be an essential feature of contemporary constitutional adjudication. Presented with any such legislative challenge to its interpretive supremacy, the Court may well preserve its own institutional power by declaring that Congress is not empowered by Section 5 to adopt a different, more stringent, and judicially rejected review standard applicable to all abortion regulation.

The danger of this should suggest to the Act's proponents an alternative legal strategy--to play by Justice O'Connor's rules and rely upon congressional expertise in factfinding to produce more progressive outcomes. The Freedom of Choice Act might be drafted to prohibit regulatory burdens on abortion that are undue--that is, that create substantial obstacles or impediments to the effectuation of the right. [FN192] The scheme might also be accompanied by precise findings that waiting periods, informed consent provisions, and other recently upheld or contemplated regulations create such obstacles. The O'Connor-Souter-Kennedy plurality in *Casey* effectively invited such *45 legislation with its reliance on the litigation record to determine whether the Pennsylvania regulations were unduly burdensome. [FN193] There is no reason why such records may be made only in judicial fora. Indeed, the precedent on literacy tests as an obstacle to minority voting rights is perfectly analogous. The Supreme Court initially upheld such tests on their face, while indicating that their use to discriminate intentionally would violate the Fifteenth Amendment. [FN194] Thereafter, the Congress outlawed such tests on the basis of extensive findings of invidious use, and the Supreme Court upheld that prohibition as legitimate enforcement of the Fifteenth Amendment. [FN195]

The drafters of the Freedom of Choice Act thus face a choice of profound constitutional moment. They can maintain their current strategy of attempting to "restore" *Roe* and its progeny in their full force. They may succeed at the enactment stage, but in so doing they invite a holding that any legislation that attempts to override the Court on the content of general Fourteenth Amendment principles is unconstitutional. Alternatively, the Act's drafters can build upon concepts created by the Court's emerging center and legislate on the basis of a purportedly weaker standard to reach strong results. To do this will take political courage, both in appearing to bend away from *Roe* and in expressly condemning some regulatory initiatives that the general public may approve. The Act so restructured would abandon the test of medical necessity and the current version's strategy of permission by proviso for particular state policies. [FN196] Instead, it

would adopt the test of undue burdens and explicitly condemn those practices that the Congress and the pre-Webster Court found to constitute such burdens. Such an approach, though it obviously increases the political cost of supporting the Act, dovetails perfectly with the Commerce Power analysis suggested above--that is, it relies upon explicit findings that particular practices constitute undue burdens and entail deleterious interstate commercial consequences.

More generally, this analysis highlights the problem faced by congressional attempts to legislate against the trend of Supreme Court *46 decisions. Unlike the case of the Equal Access Act, in which the orbiting statute in some respects matched up with judicial trends, the proposed Freedom of Choice Act would place Congress and the President in significant tension with the prevailing view on the Court. In such a setting, legislation is most likely to achieve its objectives if it appears cooperative rather than confrontational, and if it states its legislative judgments with clarity and particularity. Such a stance is both a bow to Marbury and an acceptance of the institutional responsibility for results that must inevitably accompany substantial involvement in elaborating our constitutional law.

2. Statutory Construction and the Freedom of Choice Act

For those not yet persuaded that the current version of the Act may be dangerously flawed, consider the likely scenario for statutory interpretation in the event that the Act is upheld. On the basic question of outright state prohibitions on abortion, the Act appears to invite a minimum of interpretation--it precludes a state from "restrict[ing] the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability." [FN197] Presumably, such a restriction bars a state from outlawing concededly previability abortions regardless of the reasons, or absence of reasons, offered to justify the woman's choice. At least for now, that restriction is perfectly consistent with the prevailing constitutional law and so presents no difficult issues of constitutionality or construction.

The Act does not, however, purport to provide explicit and direct answers to a whole series of questions that have arisen in Roe's wake. These include questions about the process and substance of drawing lines between pre- and postviability abortions; [FN198] the scope of permissible state regulation of the process of obtaining informed consent from a woman seeking to terminate a pregnancy; [FN199] and the range of permissible state regulation of medical aspects of abortions, including *47 clinical setting and obstetrical method. [FN200] On such matters, the Act simply asserts a boundary of fetal viability, without elaboration of the particulars of how that line will operate in close cases. More sweeping in its impact and yet equally vague is the Act's authorization of regulatory power, which permits state imposition of requirements on abortion procedures "if such requirements are medically necessary to protect the health of women undergoing such procedures." [FN201]

How would the judicial system, guided by a Supreme Court with a substantial majority in favor of more leeway for state regulatory power over abortion law, construe such an enactment? The judicial branch would have to choose between two obvious and opposing approaches to construction. [FN202] First, the Court might apply a canon of construction that favored harmonization of the Act with the body of judicial decisions that it is designed to preserve. Under such an approach, the Court would treat the Act, as the legislative history suggests, [FN203] as embodying all of the pre-Webster applications of Roe to problems of abortion regulation. This would minimize tensions between Congress and the courts and reduce the likelihood of congressional override of particular constructions. A court so construing the "medically necessary" language of section 3(a)(3) would, for example, hold that the state could impose health-related requirements only if they were consistent with acceptable medical practice, [FN204] and parental notice requirements for abortions of unmarried minors only if a judicial bypass were available. [FN205] Presumably, the Supreme Court would find waiting periods and informed consent laws, though constitutional *48 under Casey, to be preempted under this broad reading of the Freedom of Choice Act. [FN206]

A sharply competing approach to interpretation, however, is signalled by the Court's 1991 decision in *Gregory v. Ashcroft*. [FN207] Gregory held that state judges, initially appointed and subject to retention election, fall within a statutory exemption from the Age Discrimination in Employment Act (ADEA). The Court concluded that principles of federalism required that the otherwise ambiguous "appointee[s] on the policymaking level" exemption be construed to include state court judges. [FN208] In an opinion by Justice O'Connor, the Court emphasized the importance of preserving state power over the structure of state government and insisted upon a "plain statement" by Congress that it meant to restrict state authority to set retirement ages for judges. [FN209] Finding no such statement, the Court construed the ADEA exemptions to cover state court judges. [FN210]

To be sure, *Gregory v. Ashcroft* does not compel a similar stance toward the Freedom of Choice Act. Application of the Age Discrimination in Employment Act implicated the state's power to set qualifications for high-level officers of the government, a concern at the heart of state governmental autonomy. [FN211] In sharp contrast, the Freedom of Choice Act displaces state power in the far more conventional setting of state regulation of private conduct, in which state autonomy notions have much less force. [FN212]

*49 Nevertheless, there is reason to believe that the Gregory clear statement principle might well find its way into construction of the Freedom of Choice Act. First, it is fair to assume that no one will think that the Freedom of Choice Act presents a simple question at the constitutional level. Even if it is upheld against charges that it is in excess of congressional power, it will nevertheless be perceived as pushing the limits of that power. The Court might choose to minimize the constitutional vulnerability of particular applications of the Act by reading it narrowly, rather than broadly, in its preemptive force. [FN213]

Second, at the level of judicial *realpolitik* rather than constitutional theory, one cannot forget that the same Justices who have expressed hostility to *Roe v. Wade* or its progeny will be supplying the principles of construction that will govern the Act's reach. How likely is it that Justices determined to toss abortion back to the states for regulatory and prohibitory judgments will soon thereafter give the pro-choice forces dominant in Congress and the White House the benefit of the doubt on the scope of the Freedom of Choice Act? Professor Eskridge's judgment that an interpreting Court will be finely attuned to the override risk in the current Congress [FN214] may be accurate, but that tuning process may itself be dramatically altered by the intensity of ideological or substantive views on the Court. Certainly, those four Justices willing to overturn *Roe* despite the doctrine of *stare decisis* have such intense ideological views.

If a construing Court indeed looked at the Freedom of Choice Act through the lens of a Gregory-type presumption of minimum disturbance of state decision, what would be the likely result? Following Webster rather than earlier cases such as *Colautti v. Franklin* [FN215] as to the viability issue, the Court might give the state substantial leeway in measuring the possibility that a fetus is viable. Similarly, the Court *50 might construe "medically necessary" in section 3(a)(3) of the Freedom of Choice Act as reflecting a posture of some deference to reasonable state judgments that do not coincide perfectly with the accepted medical standards that earlier Courts had insisted upon as an independent validator of state regulation. All of these constructions would of course require line-drawing, but a state-sensitive, rather than abortion-choice sensitive, approach would result in lines far closer to those that the Webster majority of 1989, rather than the Akron [FN216] majority of 1983 or the Thornburgh [FN217] majority of 1986, would approve. [FN218]

The case of familial involvement in the abortion decisions of unemancipated minors [FN219] presents an important test of these competing approaches to construction of the Freedom of Choice Act and illuminates as well the issues raised by the so-called "Rules of Construction" provision in section 3(b) of S. 25. [FN220] Section 3(b)(3) effectively takes the Act out of play in such cases by declaring that "[n]othing in this Act shall be construed to ... prevent a State from requiring a minor to involve a parent, guardian, or

other responsible adult before terminating a pregnancy." [FN221] Such a provision suggests dynamism and redelegation to the judiciary, and essentially returns matters of this sort to an exclusively constitutional orbit. Current law on such involvement is thus preserved, as is the power of the courts to alter it.

That much, at least, seems certain. The more interesting question is that raised by the claim in the Senate Report on the Freedom of Choice Act that this, as well as the other rules of construction, is consistent with and not an exception to the otherwise applicable test of medical necessity. [FN222] The Report describes these "rules" as consistent *51 with the law as it evolved from 1973 to 1988. [FN223] Although this description is accurate, it begs the question of whether the law in that period had an internal consistency that the Act's general principles are designed to capture. To the extent that is not the case--as may be so in issues of abortion funding [FN224] and familial involvement with minors--the Act creates tension between the force of its general restrictions and the competing force of its construction rules.

This kind of tension conventionally is resolved by application of the general notion that statutory provisos representing actual or potential exceptions to a statute's general policy are to be strictly construed. [FN225] Like all such notions, however, this one can be overcome by competing policies. In the case of the Freedom of Choice Act, the competing policies would be the by now familiar ones of avoiding unnecessary confrontations between the Court and Congress and avoiding federal intrusions on the core of the state police power unless such intrusions are clearly authorized. Armed with such canons, a court might well seize upon the Rules of Construction as exemplars of some broader principle of state power to regulate some aspects of abortion. Section 3(b)'s "involvement with minors" proviso, for example, might be used as a platform to support a far-reaching principle of the permissibility of state regulation of intrafamily relations in the abortion context. This principle, in turn, might be elaborated so as to validate the sort of spousal notice provision disapproved in *Casey*. [FN226]

The possibility that the Rules of Construction could be used in this way once again highlights the advantage of explicit statutory identification and condemnation of those regulations that Congress wants to prohibit. This sort of clear statement approach requires active legislative monitoring of state law and federal judicial decision and will raise the political cost of protecting choice. Many more members of Congress, for example, are likely to vote for the generalities of the Freedom of Choice Act than will be prepared to vote for a federal requirement that minors have some opportunity to secure an abortion without their parents ever learning of it or a federal prohibition on testing a fetus to discover if it may be viable.

*52 This analysis of approaches to construction of the proposed Freedom of Choice Act reinforces the constitutional analysis above, and can be generalized in several respects. First, the open language of constitutional standards may be a convenient hiding place for legislators committed in principle to a constitutional cause yet uncomfortable with the details at the margin of application of those principles. Second, when Congress seeks to preserve constitutional law that the Court is trying to erase, the political and constitutional burdens on Congress are acute. In such a context, statutory interpretation may be "dynamic" in a backward-looking sense. Even as Congress endeavors to restore or preserve, the entity charged with responsibility for construing its instructions may be trying to limit and destroy. One cannot be sanguine about the results of a broad delegation to such an entity. In a setting of this kind, one is reminded of the obvious--it may require the formal processes of amendment, in which states effectively consent to federal restriction, to alter or maintain the meaning of the Constitution over the Supreme Court's determined objection. [FN227]

C. *Employment Division v. Smith* and the Religious Freedom Restoration Act

The final example offered to illustrate the orbiting phenomenon offers provocative variations on themes suggested by the proposed Freedom of Choice Act. In 1990, the Supreme Court's decision in *Employment Division v. Smith* [FN228] dramatically altered

the constitutional landscape of religious liberty. Smith rejected a claim that the *53 Free Exercise Clause forbade Oregon from disqualifying for unemployment insurance two members of the Native American Church who had lost their jobs because of their use of the hallucinogen peyote in a religious ritual. [FN229]

The Court in Smith rested its decision on the stunningly broad ground that the Free Exercise Clause, taken alone, would never support a judicially crafted exemption from generally applicable laws. [FN230] The Smith opinion paid virtually no attention to the text or history of the Free Exercise Clause and did violence to the precedential structure of Free Exercise law. [FN231] It is important to emphasize, however, that the Smith decision was not entirely a surprise. The Court had been tending strongly against the favorable treatment of Free Exercise claims for some years. [FN232] Except for *Wisconsin v. Yoder* [FN233] and, ironically, a series of pre-Smith cases involving unemployment compensation originating with *Sherbert v. Verner* [FN234] in 1962, the Court had been consistently unsympathetic to Free Exercise Clause claims for exemption from generally applicable laws. [FN235]

*54 Nevertheless, Smith produced the by now reflexive congressional cry for "restoration" of the pre-Smith law. Once again, drafters of a restoration bill faced a choice concerning the constitutional orbit in which to place their effort. They might have contented themselves with an attempt at simple erasure, condemning Smith by name and legislating the "principle" that the Free Exercise Clause would be interpreted as it had been on the day before Smith. This sort of strategy, however, faced several overwhelming obstacles. First, many legislative supporters of religious freedom may not have been comfortable with the drug-related connotations of Smith itself. What they probably desired was to embrace religious liberty while distancing themselves from approval of drug use. At the very least, it is likely that they wanted to be sure that others would be delegated the task of deciding whether religious use of peyote, or other socially controversial practices, would qualify under the statute. [FN236] Second, well-informed drafters would know that restoring the pre-Smith law would do little for religious freedom, because the tendency in that law had been heavily in the favor of government. [FN237] Third, the body of Free Exercise Clause doctrine would inevitably change as new cases came up. Erasing Smith could in no way guarantee that the Supreme Court would not reannounce Smith principles in another case, or in any event continue to treat Free Exercise Clause claims in ways that minimized the likelihood that any would prevail.

A second option was to completely refashion Free Exercise Clause principles. The field had long been riddled with problems, including whether the Clause protected action as well as expression and belief, [FN238] what quality of government activity constituted a burden on religion sufficient to trigger the clause, [FN239] the extent to which government *55 could probe the sincerity of believers, [FN240] the significance of whether the relevant belief was theologically central or peripheral, [FN241] the relevance of regulatory business burdens on religious institutions, [FN242] and the required content and force of government justifications of burdens on religious exercise. [FN243] The likelihood that drafters could create and Congress could approve legislation that explicitly addressed all of these matters no doubt appeared exceedingly small.

What remained as an option is essentially what emerged--an attempt to succinctly "restore" yet reliably protect religious freedom at its high water mark in the case law. Because the law had moved so far from that mark by 1990, however, what emerged in the political process was an unusually aggressive version of a "restoration" bill. To a far greater extent than had been the case in various civil rights restorations, [FN244] the proposed Religious Freedom Restoration Act barely fits its name. [FN245]

After a favorable report from the House Judiciary Committee, the Act died at the end of the 102nd Congress; its proponents, however, plan to reintroduce it early in the 103rd. If reintroduced in its mainstream version, [FN246] the Act would centrally provide that

*56 Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if [the Government] demonstrates that application of the burden to the person . . . (1) is essential to further a compelling governmental interest; and (2) is the least restrictive means of furthering that

compelling governmental interest. [FN247]

The Act is accompanied by proposed "Findings" and a "Declaration of Purposes." [FN248] Of greatest relevance to the orbits inquiry are those findings related to the "compelling interest" test that section 3(b) would codify. [FN249]

1. Revisiting the Scope of Congressional Power to Displace State Law

The Religious Freedom Restoration Act is much more expansive in its programmatic coverage than is the Freedom of Choice Act; accordingly, the analysis of whether Congress has the authority to so impose the regime of "strict free exercise scrutiny" upon the states is more complex. [FN250] Because the Act would apply in a number of different contexts, each with its own relation to interstate commerce, authority to enact the scheme pursuant to the Commerce Power would be tested as applied, not on the Act's face and in its entirety. For example, the Act may invite challenges to the choice of textbooks in public schools. [FN251] Arguably, an excessive and unnecessary secularity *57 in such book choices burdens both religious freedom and the interstate market in religiously enriched and pluralistic textbooks. To cite another example, a restriction upon state authority to burden the religious freedom of state employees would presumably pass constitutional muster under modern standards for what "affects commerce." [FN252]

What principally may limit reliance on the Commerce Power is a concern not present in the abortion context--the Court's willingness to protect states against direct regulation of their government operations. The Court held last term in *New York v. United States* [FN253] that Congress could not coerce state legislation by requiring states that did not legislate as Congress desired to accept title to privately generated radioactive wastes and to accept liability accompanying that title. [FN254] *New York v. United States* has in a limited way restored the state sovereignty barrier erected in *National League of Cities v. Usery* [FN255] and demolished in *Garcia v. San Antonio Metropolitan Transit Authority* [FN256] a decade later, and may create obstacles to enforcement of the Religious Freedom Restoration Act against the states.

Section 3(c) of the Act would authorize all appropriate judicial relief against violations. [FN257] Although an injunction or other order effectively requiring an exemption from a policy governing the operation of state or local government--for instance, forbidding the firing from state employment of a Native American who used peyote in a religious ritual--does not operate at quite the same wholesale level as *58 the congressional command invalidated in *New York v. United States*, the two are difficult to distinguish in principle. With or without the judicial discretion present in the Religious Freedom Restoration Act and absent in the "take title" provision, both schemes effectively require states and localities to shape their operations so as to conform to the federal will. To the extent that the Act's primary obligations and remedial burdens operate to pressure states to accommodate in ways they otherwise would not, the principles of *New York v. United States* may bar the Act unless it can fairly be said to be enforcing the Fourteenth Amendment itself. [FN258]

Thus, to a greater extent than in the case of the Freedom of Choice Act, the constitutional underpinnings for the Religious Freedom Restoration Act may be thrown back on the scope of congressional power to expand the substantive reach of the Fourteenth Amendment. [FN259] As noted in the prior discussion, that power has been validated repeatedly in the context of voting rights, [FN260] although such cases frequently involve power to enforce the Fifteenth as well as the Fourteenth Amendment and virtually always involve the Reconstruction Era's concern with racial discrimination. Moreover, courts have been generous in recognizing a broad remedial power under Section 5, even when the substantive violations being remedied were non-racial in character. [FN261]

Nevertheless, the Act's proponents have substantial reason to fear that the Supreme Court will not extend Section 5 power this far. [FN262] The Supreme Court in *Smith* held that courts were not equipped to *59 balance religious interests against governmental concerns and that the Free Exercise Clause henceforth would not support claims to be

exempt from state laws of general applicability. Unless the Court is now willing to expand the Section 5 power to that of complete substantive revision of judicial enforcement of the Bill of Rights as applied to the states, [FN263] Congress cannot substitute a stringent religion-protective doctrine for the Court's new hands-off approach to the Free Exercise Clause.

As in the analysis of the Freedom of Choice Act, however, the precise grounds on which the Supreme Court has relied may be of crucial constitutional import. Smith indicates that it is a decision about institutional arrangements more than about substantive merits. A significant portion of the Court's justification focuses on the difficulties that courts encounter in balancing interests in the fashion required by the pre-Smith law. [FN264] The opinion suggests that only the political branches possess the requisite competence and authority to make these judgments. [FN265] Thus, the opinion's glaring and much-criticized failure to analyze relevant constitutional text and history [FN266] may reflect a move from the merits to the question of justiciability. Under this view, Smith is a political question case, holding that judicially manageable standards for the resolution of Free Exercise exemption claims are lacking. [FN267]

*60 This "institutional" view of Smith creates its own problems for the validity of the Religious Freedom Restoration Act, but they are more manageable than those produced by the substantive view. The substantive view runs headlong into *Marbury v. Madison*, [FN268] as glossed in *Oregon v. Mitchell* [FN269] and *Katzenbach v. Morgan*. [FN270] That is, it suggests that Congress can simply override the Court on matters of substantive constitutional law. The "institutional view" suggests that courts, in the absence of focused legislative judgments about the impact of religious and government interests on each other, should not engage in the unpredictable and frequently unprincipled business of assessing incommensurables such as religious liberty and government need. The converse proposition, which Smith endorses, is that courts should accept such focused legislative judgments when they are in fact made. [FN271]

With the problem so conceptualized, the question that the Religious Freedom Restoration Act presents is whether a generalized religious freedom statute is the sort of enactment that the Smith Court envisioned when it rendered its institutional appraisal. Statutes accommodating religion or exempting it from rules of general applicability ordinarily are more precisely targeted. They single out religion in the context of a singular and highly particularized scheme, in which the costs and benefits of the exemption are usually foreseeable. All courts need do with such enactments is measure them against the Establishment Clause, [FN272] and, if they survive, apply them according to their terms.

*61 In contrast, the Religious Freedom Restoration Act includes no such narrow or context-specific focus. It says to courts, "Apply once again the Free Exercise Clause as you once did, across the governmental board and pursuant to stringent standards of review." By redelegating Free Exercise Clause decisionmaking in this way, the Act places the courts back in the position that they were in before the erosion of Free Exercise Clause standards in the 1980s. Such legislation would represent the institutional determination of Congress that Smith underestimates judicial competence--that is, that the courts are indeed capable of applying a rigorous version of pre-Smith standards.

A legislative directive of this character would be much like others upon which courts at times rely on matters of justiciability. Although justiciability doctrines have a constitutional core, they also have a well-recognized prudential component that Congress can overcome by legislation. [FN273] Unless post-Smith courts view Smith's rule of restraint as etched in stone--a position hard to square with the recognition that in other areas of constitutional law courts already make judgments involving competing and logically incommensurable interests--the Religious Freedom Restoration Act may lie within Section 5 authority after all.

Constitutional analysis of the Religious Freedom Restoration Act once more permits some tentative lessons about statutes in constitutional orbit. If we take the Smith opinion at its word, the context of *62 religious liberty has produced a conflict between Congress and the Supreme Court that is not about the substance of constitutional rights. Unlike

the abortion context, in which there is substantial interbranch conflict concerning whether the federal Constitution is implicated by state abortion policy, the tension in the religious liberty setting concerns which governmental institution will protect the undisputed federal constitutional right to the free exercise of religion. Institutional questions of this sort are highly significant, implicating serious questions of constitutional jurisprudence. Nevertheless, interbranch dialogue over institutional role does not have the combative air associated with similar dialogue on the substance of rights. Statutes that redelegate tasks rejected by the judiciary on institutional grounds seem far more likely to be cooperatively received by courts than schemes that rest openly on normative disagreements about the meaning of the Constitution.

2. Statutory Construction of the Religious Freedom Restoration Act

If the Act is enacted and upheld as a legitimate exercise of congressional power, it will present paradigmatic questions concerning modes of construction of statutes in substantive orbit. The most striking substantive feature of the Religious Freedom Restoration Act is its adoption of a highly stringent standard of review ostensibly borrowed from particular, named decisions of the Supreme Court. [FN274] This cannot fairly be construed as designed to restore Free Exercise Clause doctrine as of Smith's eve. Rather, it intends to move the field to as rigorous a religion-protective stance as has ever been the case in our constitutional law. The Act restores religious freedom, but that freedom is of a variety far more potent than most of the pre-Smith case law would support.

Second, the attempt to formulate the Sherbert-Yoder standard in enacted form, rather than as part of the contextual narrative represented by the Court's opinions in those cases, highlights the difficulty of "restoration," even in circumstances in which the relevant case law can be crisply identified. The Act would require that government demonstrate that burdening an individual's religious practice "is essential to further a compelling governmental interest" and "is the *63 least restrictive means of furthering that compelling governmental interest." [FN275] If construed literally--according to its plain meaning--this standard would be extremely difficult for the government to meet. [FN276]

A test so stringent as to require that government means be both essential to an interest of grave importance and the least possibly restrictive of a particular aspect of conduct is an engine of destruction for virtually any policy made subject to it. [FN277] Imaginative lawyers will typically have little difficulty in demonstrating that covering religiously motivated actions under rules of general applicability is not essential to achievement of overriding state interests; the highest needs of civil society will in most cases survive. Nor will there likely *64 be any shortage of arguments that less restrictive means are available. Less coercive and noncoercive means will always exist as potential substitutes for whatever coercion the claimant seeks to avoid by invoking the Act. So construed, the Act creates an unbreakable shield or unstoppable sword against any state policy that incidentally burdens religion. In matters of education, land-use control, state taxation, regulation of charitable solicitation, and elsewhere, religious exercise claims made under the Act may force most state policy to yield.

This analysis of the Act's central provision reveals a special dilemma for statutes designed to capture an orbit associated with particular court decisions. [FN278] Neither Sherbert nor Yoder are so tilted against the state as the Act's formulation makes it appear. Both are sensibly read as requiring a judicial evaluation of tradeoffs among the intrusion on liberty, the weight of the state's ends, and the relative effectiveness of the intrusion, as compared with other means, for reaching those ends. When reasonable options are available that would permit the state to reach its goal at somewhat higher expense, the Constitution may privilege certain behavior against regulation. When such options are not available, however, the state may intrude on the otherwise protected conduct. [FN279] Moreover, the more serious the harm the government seeks to prohibit, the more likely are courts to defer to state regulatory choices. [FN280]

The Religious Freedom Restoration Act, however, omits any such texture in its governing formula, and the reasons for the omission can be easily understood. First, the more refined, interest-balancing notion of "less restrictive means" is not easily reduced to a legislative formula. It is, after all, the contextual narrative of the cases in which^{*65} it is applied that gives the idea texture and life. Second, as noted above, [FN281] the Sherbert-Yoder test had been frequently ignored and significantly diluted since 1972. Rewriting the Act to reflect anything resembling the true state of the prior law would thus have watered down its protection of religious liberty considerably and undermined its political support among religious interests.

This analysis suggests the possibility, however, that the Act will be construed in light of the more recent case law concerning the "least restrictive means test" and not according to its "plain meaning" at all. Such a construction can easily be justified by the federalism-based principle of *Gregory v. Ashcroft*. [FN282] Indeed, application of that principle may dovetail with the sub silentio application of the "maxim" that statutes departing from preexisting constitutional law should be narrowly construed. Here again, Congress can protect against erosion by being more explicit and result-oriented in its legislative directions, but that task may be especially difficult in this setting, in which the range of potential applications is extremely wide and frequently controversial.

Construction of the Act, if it is left in general terms, may tend toward the weaker rather than the stronger version of the test of "less restrictive means." [FN283] Pursuant to this weaker version, the state may rely on its unwillingness to endure costly enforcement tradeoffs as a justification for imposing some burden on constitutionally protected concerns. The choice of the weaker test presumably would be the tendency one would expect from the very Court that decided *Smith* and other free exercise-limiting decisions in the first place. Were this to occur, it would reveal the difficulty of overcoming by statute--even a relatively clear one--a trend of constitutional decisions running to the contrary. At the very least, it would suggest that overstating the^{*66} law that one seeks to restore may perversely lead to a construction that understates it. [FN284]

Moreover, if the operative sections of the Religious Freedom Restoration Act were to be construed much more narrowly than its congressional sponsors might prefer, the result might have ripple effects beyond the limitation on the Act's coverage. If the Act's strict standards come to mean something like "the state may burden religious practices with general schemes unless exemptions for religious practice create only trivial costs to the government," the dilution of the standard under the Act might generate similar consequences in other areas of constitutional law. A watered-down approach for Free Exercise Clause claims under the Act might well influence the rigor of stricter constitutional standards in cases involving freedom of speech or constitutionally forbidden discrimination. It would be ironic if the Religious Freedom Restoration Act not only wound up doing little for religious freedom but also dragged other, once-preferred rights down with it.

However one compares the case for the constitutionality of the Religious Freedom Restoration Act to that for the constitutionality of the Freedom of Choice Act, the analysis of issues of constitutionality and likely statutory construction of both yields somewhat pessimistic results. This pair of judicial controls--review on grounds of constitutionality, buttressed with interpretation colored by constitutional norms--leaves in judicial hands some very powerful tools with which to resist legislative efforts to redirect the flow of decision. When courts are deeply resistant to turning the Constitution to a particular social end, or to employing judicial expertise to a given purpose, legislatures must rise to the occasion. Statutory explicitness, which reduces the discretion that these schemes delegate to the judicial branch, may be essential, and legislative monitoring of judicial results, followed by relegislation when necessary, may be unavoidable if the Congress truly seeks to alter the constitutional path.

^{*67} IV. Orbiting Statutes in Theoretical Perspective

Orbiting statutes do not recur often enough to justify an entirely distinctive theory of formation at the legislative level, or of interpretation at the judicial level. Nevertheless, examination of the phenomena described in this article suggests a variety of insights into extant theories of legislative activity. Moreover, because orbiting statutes are sometimes designed to achieve or forestall constitutional change, they must be analyzed in light of both conventional and unconventional understandings of such change.

Unsurprisingly, statutes in substantive orbits create the most intriguing set of questions for any such theory. The statutes revolving in jurisdictional, procedural, and remedial orbits tend to involve harmonious interaction between courts and legislatures. Courts lay down constitutional boundaries and, in the interest of efficiency, legislatures track those boundaries. Although some statutes in substantive orbit are products of similar harmonies, the most provocative examples of the genre are the result of judicial-legislative tension rather than cooperation. These illustrations tend to involve legislative efforts to extend constitutional concepts beyond the point to which courts have taken them, or, in the more extreme case, to preserve or restore concepts that courts have rejected.

A. Orbiting Statutes, the Madisonian Dilemma, and the Role of Interest Groups

As Dean Brest and Judge Bork forcefully argued ten and twenty years ago, respectively, constitutional law suffers from the ongoing problem of finding room for majorities to govern while simultaneously defining the appropriate space for minority rights. [FN285] The Madisonian dilemma, as Bork termed it, is that majorities can invade individual rights; individual rights claims, if accepted to excess, will unreasonably *68 impede majority power to govern; and "neither the majority nor the minority can be trusted to define the freedom of the other." [FN286]

The orbiting phenomenon in substantive cases illuminates the enduring debate surrounding the majoritarian versus minoritarian character of constitutional rights. Pundits are fond of pointing out the results of polls that show that Americans do not support the Bill of Rights. [FN287] As we all know, however, much turns on how questions are framed. Many more Americans are likely to support "freedom of speech" as a general proposition than to champion the right to negligently defame public figures without danger of tort liability, or the right to publish photographs of particular interest to pedophiles. The more one can identify one's own interests at stake in a measure concerning the scope of individual rights, the more one is likely to accept the necessity of supporting analogous interests of others as part of a larger arrangement in which the rights of all are secure.

Each of the testing cases explored in this Article represents an effort to persuade majoritarian institutions to protect or expand Constitution-inspired rights, some of which would inure to the benefit of unpopular minorities. The Equal Access Act, though driven by the desire to provide access to public schools for deeply religious Christians, is structured to protect equal access for all political, philosophical, and religious viewpoints. The Freedom of Choice Act would protect the interests of a very large number of women of child-bearing capacity, as well as the interests of the even larger number of men and women who are concerned about freedom of reproductive choice. Although those who might choose abortion for "bad" reasons, such as sex selection, are included in this substantial group, it is easy to lose sight of their inclusion under the larger umbrella that the Act would create. Similarly, the Religious Freedom Restoration Act would presumptively protect the religious liberty of all sects, fringe or otherwise, and therefore permits a broad coalition of support. A legislative attempt to overturn Smith more narrowly, focusing on peyote use by the members of the Native American Church, would presumably be far less politically attractive to members of Congress and mainstream religious interests.

*69 The role of competing interests in the political struggles that lead to orbiting statutes is also a fruitful subject for theoreticians of the legislative process. The

past several decades have witnessed a proliferation in positive and normative theories of legislation, ranging from the bleak assessments by those in the public choice school, who believe that self-interest is the only driving force in politics, [FN288] to the more optimistic accounts of those who speak for the possibility of republican discourse in pursuit of the common good, [FN289] with abundant theories that lie in a middle ground between these two positions. [FN290]

Statutes revolving in constitutional orbits present an infrequent yet important test for such jurisprudential theories. Such statutes may be far more ideologically than economically oriented. As a result, standard economic theories of formation and behavior of pressure groups may not fit the politics of such enactments. [FN291] Although some of the interests concerned with the Freedom of Choice Act and the Religious Freedom Restoration Act have economic aspects--for example, abortion clinic operators in the former case and institutional churches in the latter--much of the political support and opposition is essentially ideological. In addition, some of the opposition to the Religious Freedom Restoration Act is governmental and bureaucratic. Agencies, public schools, prisons, and military installations that do not want to be forced to accommodate religious freedom have campaigned *70 against it. Interest group theory cannot easily explain or predict the outcome of legislative fights over the Freedom of Choice Act or the Religious Freedom Restoration Act, in which highly diffused benefits and highly diffused costs are at stake, or in which intense noneconomic interests strenuously compete.

Compared to those two proposals, the Equal Access Act involved less diffuse costs and benefits. Public school officials fought those who supported prayer groups in school and who were most likely to gain immediately from the legislation. Here, as one would expect from some positive theories of legislation, [FN292] Congress compromised between the two and did so in ways that essentially delegated to the courts the ultimate task of mediating between the conflicting interests.

More generally, the choice of statutory language that tracks prior or current constitutional law language conflicts with other aspects of jurisprudential theory. For example, such a choice does not fit well with the Easterbrook-Posner view that statutes are deals among relevant private interests and should be construed in ways that enhance the predictability of the terms of the bargain. [FN293] Although it is of course possible that one or more parties to the legislative process perceives judge-made language as representing the best deal it can get, the choice of such language is uniquely likely to produce unpredictable judicial elaboration. It is, after all, language that judges have crafted in the crucible of litigation and that is likely to be construed in light of the rise and fall of its current value in the judge-controlled constitutional marketplace.

On the other hand, orbiting statutes do not seem to be the likely product of republican deliberation and dialogue. Why, after all, would a legislative process concerned with the quest for the common good latch on to linguistic formulations that happened to emerge in the course of adjudication? Moreover, it seems perverse for any product of widespread democratic participation and republican deliberation *71 to be framed in the language spawned by two professional elites, lawyers and judges.

Professor Eskridge's notion of dynamic statutory interpretation sheds light on the phenomenon of statutes revolving in constitutional law orbits but fails to describe it adequately. [FN294] In matters presenting a potential for congressional override of statutory interpretations issued by the Supreme Court, Professor Eskridge has argued that an interpreting court may be more concerned with the intentions of the current Congress than those of the enacting Congress. [FN295]

The politics of rights restoration, however, tends to produce precisely the reverse behavioral phenomenon on Congress' part. Instead of focusing on the current Court and what legislation will survive its review, drafters of schemes like the Freedom of Choice Act and the Religious Freedom Restoration Act zoom in on past Courts, [FN296] whose work Congress is trying to resurrect. Any such statute creates tensions between the attractive politics of restoration and the dangerous prospect of statutory construction and judicial

review at the hands of the current Court. [FN297]

*72 Statutes revolving in constitutional orbits may thus be understood best through the insights of the New Legal Process School. A number of scholars in this school have forcefully argued that no simple model of human behavior-- individual, collective, or institutional--can capture the complexity of political and legal interaction in the public sphere. [FN298] Orbiting statutes similarly cannot be understood and analyzed fruitfully unless one appreciates constitutional history and ideology, the nuances of constitutional doctrine, the rate and direction of constitutional change, the rich texture of legislative-judicial interaction over time, the incentives faced by public actors and institutions, and the role of organized interest groups. Whereas the Old Legal Process School paid insufficient attention to several of these variables, especially those focused on individual incentives, modern legisprudential theories overstate the role of interests at the public choice extreme, and participation and ideology at the republicanism extreme. [FN299] The case of statutes in constitutional orbits reinforces the necessity for theorists to remain eclectic in their approaches.

B. Orbiting Statutes and Approaches to Statutory Construction

The phenomenon of statutes in constitutional orbits also illuminates the contemporary debate over appropriate methods of statutory construction. Although there are many positions in that debate, the main contenders can fairly be reduced to three: 1) reliance on the "plain meaning" of statutory texts as a way to avoid the dangers of reliance on extrinsic sources of legislative meaning; [FN300] 2) focus on statutory purpose, discerned from whatever sources bear on the question, coupled with textual interpretation performed in light of that purpose; [FN301] and 3) aggressive and conscious reliance upon canons of construction, updated to match the contemporary condition of law, to resolve textual ambiguities. [FN302]

Plain meaning approaches seem the least useful in the case of orbiting statutes. Statutes that borrow language from judicial decisions, in which that language is both artful and contextually constituted, simply cannot be understood as possessing meaning that is plain. Moreover, the separation of powers arguments offered to support a plain meaning approach [FN303] fit the orbiting context awkwardly at best. In the conventional case of statutory interpretation, plain meaning approaches are sometimes defended as designed to limit judicial free-lancing and to protect the integrity of the law made by the legislature. When, however, the legislature references judge-made law in its enactments, it is expressly inviting a lawmaking partnership of the sort that cannot be reconciled with a theory of strict institutional role delineation and hermetically sealed departments exercising separate and distinct powers.

Purpose-driven theories of statutory interpretation are more consistent with the complexity of legal context and background presented by orbiting statutes. The problem of interpretation on which purpose-driven theory most frequently founders, however, is what constitutes evidence of purpose. Critics contend that interested parties try to manipulate legislative history in a way that will tilt the interpretation of ambiguous terms toward a particular view of statutory purpose. [FN304] Those who are successful at this game may wind up with a statute *74 interpreted in a manner that leans toward their interests far more than any language that the legislature would actually enact.

This criticism is telling in the ordinary case, although it may be overstating its weight to rely upon it to exclude all legislative history from the interpretive process. In the case of statutes revolving in constitutional orbits, however, the criticism is considerably weakened. The enacted language, however ambiguous it may be in the abstract, will by definition be the product of prior judicial decision. The best "legislative history" of such language will thus be the case law from which it is taken. Political actors cannot manipulate that law because it is preexisting and because courts will always consider themselves the ultimate authority on the meaning of the decided cases and the language that they employ. [FN305]

Nevertheless, political actors will try to put whatever spin they find useful on the language they propose to enact. There will frequently be political incentives to characterize judicial language in ways that seem untrue to its contextual use in adjudication or to its meaning over time or across areas of the law. When this occurs and courts are faced with enacted language from well-known constitutional orbits coupled with efforts in legislative materials to distort the meaning of that language, the problems of manipulation of legislative history will return to some extent. After all, legislatures might borrow judge-made language and give it a somewhat different meaning than the judges had given it. So long as legislators make their intentions to do this adequately known, no principle of statutory creation or construction forbids it.

It is at this point in the analysis of interpretation of orbiting enactments that presumptions, or canons of construction, play their most significant role. As Professor Sunstein has recently pointed out, such canons allocate the risk of ambiguity and so must be fashioned with a conscious eye to the policies and values implicated in the placement of that risk. [FN306]

In the context of orbiting statutes, the judgment of where to place the risk seems simple: the closer the statutory text is to the precise '75 language of judicial decision, the heavier the presumption should be that the language has the same meaning as in the decision or decisions from which it is derived. The policy here is the straightforward one of encouraging legislative accuracy and honesty. When legislators claim to be restoring or codifying judge-made law on a subject, they should be taken at their word. Thus, for example, the Freedom of Choice Act's language that a state may not "restrict the freedom of a woman to choose whether or not to terminate a pregnancy" [FN307] should be taken to incorporate by reference the case law concerning parental vetoes over the abortion decisions of unmarried minors. If legislators want to reject that piece of the existing law, they should be required to do so explicitly and not pretend for political gain that their restoration or codification only picks up whatever aspects of judicially created law are most politically saleable.

Conversely, enacted language that departs from judicial language should be presumed to reflect a conscious variation from preexisting judicial doctrine. The Equal Access Act trigger of a "limited open forum" represented such a departure, and the Supreme Court in *Mergens* quite properly construed the language in a way that reflected the gap between the statute and the constitutional law on which it built. [FN308]

The problem presented by this analysis is that judge-made law may be in active flux at the time of enactment. Indeed, it is this very flux that may signal the need for the statute. Judges may have begun to give "old" language a new meaning, as illustrated by the refashioning of the "undue burden" formulation in *Planned Parenthood v. Casey* [FN309] and the dilution of the Free Exercise Clause standard since *Wisconsin v. Yoder*. [FN310] In such circumstances, it would be unsurprising if courts began to fill gaps with pro-federalism presumptions, like that adopted in *Gregory v. Ashcroft*, [FN311] rather than the presumption that "restorations" will strenuously restore that which has been undermined by recent decision. In these cases, legislators must be unusually and carefully explicit about what is being restored, or must depart from '76 prior judicial formulations altogether. If legislators fail to take either of these steps, they imperil their enterprise.

C. Orbiting Statutes and Constitutional Change

Statutes revolving in substantive constitutional orbits test our prevailing notions of the methods of constitutional change. The conventional avenues of such change are the amendment process and the evolution of judge-made constitutional law. In addition, as federal constitutional law has become more conservative, commentators have stressed the development of state constitutional law by state courts as an alternative method for the maintenance and growth of progressive ideas. [FN312]

Statutes in substantive orbits share some characteristics of all these methods, yet

match none of them perfectly. Like the amendment process, such statutes involve legislative deliberation and choice and a particular, rule-based formulation of a standard. Like the process of evolution of judge-made law, orbiting statutes may involve choosing the views of the Court of one era over those of another Court at another time. When orbiting statutes involve restorations, they choose prior judicial views over current ones, reversing the normal pattern of evolution. And, like the development of state constitutional law by state judges, orbiting statutes may occur at the state or local level and thus may produce disparate results when compared across the nation.

A comparison of two alternative models of the development of constitutional law may provide the best method for locating orbiting statutes in the constitutional firmament. In the first of these models, the central institutional premise is the existence of an authoritative constitutional court, a "forum of principle." [FN313] Such a court, guided in its best times by judges of extraordinary learning and wisdom, creates a "77 constitutional law designed to achieve integrity, political morality, and coherence over time. In this model, the corpus of constitutional law, though never free of doubt and error, can be purified by high caliber judging. [FN314]

This model is what many lay observers, law students, and lawyers expect constitutional law to be. It is the repeated failure of this model--the widely perceived departures from coherence, integrity, and political morality--that causes widespread cynicism, disappointment, and the angry conclusion that constitutional law is just another form of politics. When confrontational orbiting statutes are viewed from this perspective, they confirm that cynical view. Orbiting statutes are seen as political acts by legislatures in combat with political judgments by courts.

The second model of the development of constitutional law is very different in its institutional premises from the first. This model is one of diffused and separated power, of fractured constitutional culture, and of struggle against the Court as well as within it. [FN315] In this fractured model, judicial decisions remain centrally important, but they are only one of a multitude of strands of constitutional thought and decision. Contemporary understandings of constitutional values and history, acts of Presidents, enactments of Congresses, and activities of state and local governments all constitute competing sources of norms for constitutional decision. This model is far less orderly than the first, but far safer in the long run for the Constitution because no institution monopolizes authority over its content.

Both models reflect significant aspects of our constitutional experience. In the everyday doings of constitutional adjudication, model *78 one is dominant. In our most momentous battles over the Constitution, however, model two almost always triumphs. The Civil War, Reconstruction, and the Thirty-Ninth Congress trumped Dred Scott. Franklin Roosevelt and the Depression Congress outlasted a cramped judicial view of the scope of economic regulation, both state and federal. A courageous Supreme Court stood up to southern segregationists, but ultimately could not control the impulses of many private citizens to resegregate their children's educational environment. In model two, Supreme Court decisions are the best evidence of what the Constitution's law is, but they cannot permanently bind the People.

When orbiting statutes are viewed as part of this kaleidoscope of constitutional decision, as one element in the conflicting institutional claims to speak for the Constitution, they take on a very different character than is the case under model one. In model one, confrontational orbiting statutes are a dangerous intrusion, an unprincipled slice of political will in an otherwise reasoned world of legal decision. In model two, however, such statutes are assertions of constitutional authority by a branch coequal with the Supreme Court, [FN316] and they therefore compete with judicial decisions for status and recognition in the constitutional culture.

Moreover, model two has important implications for any theory of stare decisis in constitutional law. [FN317] If one believes that only judicial decisions can represent resolutions of principle, and that statutes should be treated as judgments of policy or expedience only, then decisional law is the only candidate for stare decisis treatment.

If, *79 however, one recognizes that Congress may enact laws according to some version of constitutional principle, [FN318] one's thinking about the importance of continuity and respect for prior judgments in statutory law changes considerably. Enactment of the Freedom of Choice Act, for example, would cement the right to choose to terminate a pregnancy against future legislative repeal at least as solidly as Roe has protected the right against future judicial overruling. In addition, statutes in orbit may function in ways that dilute the stare decisis value of judicial decisions. Enactment of the Religious Freedom Restoration Act would constitute a judicially unavoidable "petition for rehearing" of the Supreme Court's controversial decision in Smith. [FN319]

Moreover, in model two, statutes in orbit may quite legitimately become a platform for reasoning about contexts analogous to those reflected in the legislation. The Freedom of Choice Act, if enacted, might thus be seen as a national declaration that reproductive autonomy generally--not just the right to choose to terminate a pregnancy--is a matter of special constitutional significance. Of course, Congress might be inhibited by this possibility, just as the Supreme Court is constrained by the possibility that lower courts and subsequent Supreme Courts may expand the scope of earlier decisions. If Congress nevertheless legislated in this fashion, would not the Freedom of Choice Act be better evidence of a principled commitment to a constitutional right of reproductive autonomy than, say, the opinions *80 in *Griswold v. Connecticut* [FN320] or the outcome of the Bork confirmation hearings? [FN321]

Finally, model two speaks to the dichotomy between law and politics that haunts constitutionalism and tends to subvert model one. Politics always precedes law and frequently follows it. This is true of constitutional law decisions by the Supreme Court, which are preceded and followed by spirited public debate and increasingly fractious battles over the confirmation of Justices. This same relation of politics and law exists with respect to statutes in orbit, which will also be preceded and followed by conventional political strategies and weapons.

Both judicial decisions and statutes in orbit, however, are operative, functioning sources and instruments of law itself. To be understood in the political culture, both must be seen against their political backdrop. To be applied, construed, legitimated or invalidated as legal authority, however, both must be abstracted from their political context and employed as discrete elements of the legal universe. Statutes in orbit and judicial decisions may differ in the procedures used in their creation and in the political accountability of their authors, but these distinctions do not undercut the conclusion that both are concrete manifestations of the social phenomenon we know as law.

Recognizing orbiting statutes as part of the process of constitutional change highlights important questions raised by Professor Bruce Ackerman's theory of constitutional dualism. In his recent and important work *We the People*, [FN322] Ackerman argues that American politics should be understood as operating on two tracks. For most of our history, normal politics, in which citizens pursue their material interests, is the order of the day. In rare and special moments, however, we transcend those interests and achieve constitutional change in the name of the People. [FN323] Professor Ackerman argues that there have been three such moments in our history: the framing of the Constitution *81 and Bill of Rights in the late 18th century, the Civil War and the Reconstruction Amendments which followed, and the New Deal transformation of the federal government into an activist instrument of planning and regulation. [FN324]

The last of these three is the most controversial [FN325] because it involved no formal constitutional change. Rather, the New Deal transformation was achieved by the Roosevelt Administration's popularity, force, and vision; its political support in the Congress; and its eventual persuasion, or perhaps capture, of the Supreme Court. The Court's role in the New Deal "moment" was crucial. During this period, the Court dramatically rewrote significant portions of federal constitutional law.

Accepting, for the sake of argument, Professor Ackerman's dualist analysis and his characterization of the New Deal as a "constitutional moment," what might we say about a period in our government's history in which the Supreme Court limited major

rights-protecting precedents such as *Roe* and *Sherbert v. Verner*, and Congress, either with the President's signature or over his veto, restored the principles of those cases? Quite arguably, such a political phenomenon would constitute an even plainer case of the People rising to assert a constitutional vision than can be said of the New Deal. [FN326] Like the continued efforts of the New Deal Congress to accomplish economic recovery in the face of a recalcitrant Supreme Court, the Freedom of Choice Act and the Religious Freedom Restoration Act both involve explicit rejection of the Supreme Court's view of the Constitution. Moreover, legislative overturning of particular judicial decisions is far more focused on the precise content of constitutional law than was New Deal recovery legislation.

On the other hand, various aspects of the rights-restoring movement suggest cause for hesitation before embracing Professor Ackerman's general theory or the conclusion that we may be about to *82 witness another "constitutional moment." First, as noted above, each of the orbiting enactments under consideration has its own constituency and supportive interests. The existence of a general civil liberties lobby, which is likely to support all these schemes, is not unique to this moment in our history. Thus, enactment of the Freedom of Choice Act and the Religious Freedom Restoration Act may be no more signs of a constitutional moment than were the political triumph in the early eighties of deregulation and reduction in the top rates of income taxation, two causes which long had been championed by some as at least quasi-constitutional in character. Second, both the Freedom of Choice Act and the Religious Freedom Restoration Act would enact prior constitutional law, in something like its own terms, rather than turning the clock forward to a new vision. Protecting once-settled expectations, whether ideological or economic, is an understandable impulse, but it is profoundly conservative and thus not the stuff of which constitutional transformations are made.

Finally, recognition of the interests at play in the debate over the Freedom of Choice Act and the Religious Freedom Restoration Act should make us wonder about Professor Ackerman's claim that the New Deal represented an unusually high mode of politics. In both the 1930s and the early 1990s, a pattern of change--economic/judicial in the 1930s, political/judicial in the 1990s--proved deeply threatening to wide segments of the population. In both eras, that threat led to political mobilization. That such political activity involves transcendence of personal interest, rather than a particularly intense form of pursuing such interest, however, is far from evident. Every "emergency" produces passionate responses, and political passion tests the Constitution as it simultaneously tries to change it. When such change occurs, because the interests in support of it are intense and widespread, we become witnesses to both constitutional politics and constitutional lawmaking by the political branches. In the absence of a formal amendment to legitimate such change, however, we remain with the fractures and fissures produced by interbranch battles over the content of the Constitution.

V. Conclusion

Statutes revolving in constitutional orbits are illustrations of *Marbury* and counter-*Marbury*, elitist and populist, elements in the American constitutional psyche. So long as judicial interpretations of the *83 Constitution do not outrage significant and widespread interests, those interpretations serve a useful boundary function. Like other forms of law, constitutional law may guide planning and other forms of government decisionmaking, and statutes embodying that law may facilitate these functions still further. When there is an uprising against the Supreme Court's revision of the Constitution, however, statutes may appear that challenge judicial hegemony in constitutional construction and implementation.

When, as now, we teeter on the brink of such an occasion, legislators face a profound choice. First, they can follow the "safe" course of "restoring" what they claim to be the prior and true, or superior, interpretation of the Constitution. If they do so, however, they run the risk of the very judiciary that they challenge, and that has been the agent of change of that prior law, undoing their work through narrow constructions or even an outright invalidation. Legislating in tight constitutional orbits will tend to stabilize

the law's overall course, but the center of stable equilibrium will tend to be closer to the prevailing judicial position than to any other point.

Second, legislators can restore some measure of what has been lost by recasting their statutes in less explicitly constitutional terms, as would be the case if the Freedom of Choice Act or the Religious Freedom Restoration Act were redesigned as commerce regulations or expenditure conditions. More importantly, perhaps, legislators can focus on results, minimizing the delegation to the courts and monitoring the outcome of what is left for judicial enforcement. Such a strategy may be less dramatic, yet more effective, than legislative efforts to overrule the Court directly on a matter of constitutional law.

Finally, legislators can endeavor to build a new constitutional world altogether by legislating in the name of the Constitution while utilizing terms, concepts, approaches, and understandings not heretofore spawned by judicial interpretations of the Constitution. It remains to be seen whether legislators possess the courage and vision to proceed in this manner, and whether this most aggressive strategy can prevail in the face of a Supreme Court that takes a narrow view of the Constitution's meaning. In the heat of the battles that any of these choices will inspire, the next generation's constitutional ethos will be forged.

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[FN1] See, e.g., *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992) (finding various state restrictions on the availability of abortions to be constitutionally permissible); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S.Ct. 2701 (1992) (holding that bans on fund solicitations in airport terminals are permitted by the First Amendment); *Rust v. Sullivan*, 111 S.Ct. 1759 (1991) (upholding "gag rule," which limited discussion of the abortion option between medical professionals and patients in federally financed clinics); *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991) (holding that nude dancing is not protected by the First Amendment); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (cutting back on free exercise protection); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (cutting back reproductive rights); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding that the Fourth Amendment does not bar drug testing of Customs employees who apply for sensitive positions).

[FN2] See *Casey*, 112 S.Ct. at 2809 (narrowly reaffirming *Roe v. Wade*, 410 U.S. 113 (1973)); *Lee v. Weisman*, 112 S.Ct. 2649 (1992) (invalidating graduation prayer on narrowest possible Establishment Clause grounds).

[FN3] See Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying On a Tradition*, 74 *Judicature* 294, 306 (1991); Neil A. Lewis, *Selection of Conservative Judges Insures a President's Legacy*, *N.Y. Times*, July 1, 1992, at A13.

[FN4] See, e.g., Cass R. Sunstein, *After the Rights Revolution* (1990); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich.L.Rev. 707 (1991); Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 Mich.L.Rev. 792 (1991).

[FN5] See Cass Sunstein, *How Independent is the Court?*, *The New York Rev. of Books*, Oct. 22, 1992, at 47 (arguing that Congress should legislate in the name of the Constitution about wealth distribution, access for diverse views to electronic media, and abortion rights, and that courts should defer to those judgments); Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich.L.Rev. 641 (1990) (suggesting that Congress should take the lead in interpreting the Equal Protection Clause); Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 Chi.-Kent L.Rev. 451, 478-79 (1990) (making similar suggestion); see also Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 Chi.-Kent L.Rev. 481, 481-83 (1990) (noting the call from progressive scholars for congressional action and expressing doubt that anyone in Congress will listen).

[FN6] "Legisprudence" describes "the systematic analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law." William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 240 n.a (1988) (citing Julius Cohen, *Towards Realism in Legisprudence*, 59 Yale L.J. 886 (1950)).

[FN7] See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

[FN8] Pub.L. No. 102-166, § 2, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. & 2 U.S.C.).

[FN9] The most comprehensive inquiry into the subject of overrides of court decisions interpreting statutes is William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991); see also Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 Temp.L.Rev. 425 (1992) (canvassing factors that lead Congress to override judicial interpretation of statutes, and assessing validity of canons of construction in light of empirical study of such overrides). Although the 1991 legislation relied on language from earlier Supreme Court statutory, rather than constitutional, interpretations, the episode in many ways may prove a watershed for orbiting statutes as well. As will be developed below, such schemes highlight questions of the tactical and legal desirability of resting new statutes on what may be obsolete legal formulae. Restoration is politically saleable because it is a way to make progressive policy while purporting to act conservatively in returning to the status quo ante. Yet it may prove to be self-destructive. See *infra* Part II.B.

[FN10] My inquiry is only a distant cousin to that reflected in California Supreme Court Chief Justice Roger J. Traynor's famous 1968 address at Catholic University, "Statutes Revolving in Common Law Orbits," published at 17 Cath.U.L.Rev. 401 (1968). Traynor examined those statutes that bore a close relationship to, or might stand as an important analogy for, some body of common law doctrine. My interest is in a species presumably rarer in occurrence than that of which Traynor spoke. I am obviously indebted to him for the title of this piece.

[FN11] See, e.g., 42 U.S.C. § 1985(3) (1988) (making actionable any conspiracies "for the purpose of depriving ... any person or class of persons of the equal protection of the laws"). The scope of this provision may be clarified in *Nat'l Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir.1990), cert. granted sub nom. *Bray v. Alexandria Women's Health Clinic*, 111 S.Ct. 1070, reargument ordered 111 S.Ct. 2006 (1991).

[FN12] The Equal Access Act of 1984, 20 U.S.C. §§ 4071-4074 (1988), which extends to public secondary schools requirements that the Court had seemed to reserve for state universities, is a prime example. For analysis of the Act as an orbiting statute, see *infra* Part III.A.

[FN13] So-called "hate speech" codes that import First Amendment doctrines such as "fighting words" into the behavioral rules of private universities are a good example. See *infra* text accompanying notes 41-47 (discussing the ways in which the Supreme Court's decision in *R.A.V. v. City of St. Paul, Minn.*, 112 S.Ct. 2538 (1992), may affect behavioral codes at both public and private universities).

[FN14] See *infra* Parts III.B. and C. (discussing proposed enactments designed to "codify" *Roe v. Wade*, 410 U.S. 113 (1973) and to overturn *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990)).

[FN15] For example, statutes concerning parental involvement in abortion decisions of unmarried minors frequently track very closely the Supreme Court's pronouncements on the subject. See *infra* text accompanying note 36.

[FN16] See *infra* notes 28-32 and accompanying text.

[FN17] Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-87*, 100 *Harv.L.Rev.* 761 (1987).

[FN18] Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 *Harv.L.Rev.* 1 (1989).

[FN19] 20 U.S.C. §§ 4071-4074; see *infra* Part III.A.

[FN20] S. 25, 102d Cong., 2d Sess. (1992). A copy of S. 25 is included in the Legislative Appendix provided at the end of this Article. The House version of the Freedom of Choice Act, H.R. 25, 102d Cong., 1st Sess. (1992), is as of this writing substantively identical to the Senate version, but for the House version's omissions of the sections on findings and purposes that are presently in § 2 of the Senate bill. The relevant House and Senate Committees each reported out the bill favorably in the second session of the 102nd Congress, but it died without a vote on the floor of either the House or the Senate. Its proponents plan to reintroduce it in the 103rd Congress.

[FN21] 410 U.S. 113 (1973); see *infra* Part III.B.

[FN22] H.R. 2797, 102d Cong., 1st Sess. (1991). A copy of H.R. 2797 is included in the Legislative Appendix provided at the end of this Article. The Senate version of the Religious Freedom Restoration Act, S. 2969, 102d Cong., 2d Sess. (1991), is as of this writing identical to H.R. 2797. At the very end of the 102nd Congress, the House

Judiciary Committee reported out the bill favorably, but it died without a floor vote in the House and without committee action in the Senate. Its proponents plan to reintroduce it in the 103rd Congress.

[FN23] 494 U.S. 872 (1990); see *infra* Part III.C.

[FN24] See *infra* Part IV.A.

[FN25] See *infra* Part IV.B.

[FN26] See *infra* Part IV.C.

[FN27] I want to make as clear as possible that I am not discussing the general case of statutes that happen to reside in a field in which significant constitutional constraints exist. A legislative proposal to reform libel law, for example, would of course have to take close account of the standards and policy concerns of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Such a proposal might do so, however, without relying directly upon the language of the *Sullivan* standard. One obvious illustration of this would be a proposal to eliminate the tort of defamation, establish an administrative tribunal to adjudicate complaints against alleged defamatory falsehoods published by the media, and limit the available remedies to a required retraction if the complainant prevails. Such a scheme would be thick with constitutional concerns, yet it might never mention anything resembling the First Amendment standard of "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not," *id.* at 279-80, a standard that may be inextricably tied up with the availability of money damages and the costs of protracted litigation. See, e.g., Rodney A. Smolla, *Suing the Press* 238-57 (1986); Jerome A. Barron, *The Search for Media Accountability*, 19 *Suffolk U.L.Rev.* 789 *passim* (1985); C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 *U.Mich.J.L.Ref.* 1, 2-5 *passim* (1989); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 *Cal.L.Rev.* 772, 835-36 (1985); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 *Harv.L.Rev.* 1287, 1292-93 (1988).

[FN28] 376 U.S. 254 (1964). State courts have at times extended the actual malice rule of *Sullivan* to contexts beyond those required by federal constitutional law--in particular, to defamation actions by individuals who are neither public officials nor voluntary public figures against media defendants, when the subject matter of the story is of legitimate public concern. See *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind.1975), cert. denied, 424 U.S. 913 (1976); *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo.), cert. denied sub nom. *Woestendiek v. Walker*, 423 U.S. 1025 (1975), overruled by *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo.1982); *Sisler v. Gannett Co.*, 516 A.2d 1083 (N.J.1986); *Gay v. Williams*, 486 F.Supp. 12 (D.Alaska 1979). These holdings reflect the varying course of the constitutional orbit itself in the early 1970s. Compare *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion) (extending the *Sullivan* privilege to claims by private figures involving media reports concerning matters of public interest) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that states may impose defamation liability in suits by private persons so long as liability is fault-based and so long as *Sullivan* limits the imposition of punitive and presumed damages).

[FN29] 485 U.S. 46 (1988). Such an extension was suggested in *Walko v. Kean College*, 561 A.2d 680 (N.J.1988).

[FN30] See *infra* note 66.

[FN31] For example, the rules formulated by the United States Department of Transportation for drug testing of transportation employees in safety-sensitive positions revolve in Fourth Amendment orbits. See, e.g., 49 CFR § 199 (1991) (drug testing rule for employees of oil and gas pipeline companies). This rule was upheld in *Int'l Brotherhood of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir.1990). Such rules typically require post-accident testing, see, e.g., 49 C.F.R. 199.11(b) (1991); random testing, see, e.g., 49 C.F.R. § 199.11(c) (1991); and testing for reasonable cause, see, e.g., 49 C.F.R. § 199.11(d) (1991). These requirements reflect the constitutional principles established in Supreme Court cases. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402 (1989) (upholding post-accident drug testing for railway workers); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding random stops at sobriety checkpoint); *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding stop-and-frisk for reasonable cause that is less than probable cause for a full search). But see *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (invalidating random inspections for OSHA safety violations).

[FN32] 410 U.S. 113 (1973).

[FN33] 492 U.S. 490 (1989).

[FN34] For a general review with citations to enactments of all the states, see B.J. George, Jr., *State Legislatures Versus the Supreme Court: Abortion Legislation in the 1980's*, 12 *Pepp.L.Rev.* 427 (1985).

[FN35] See *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502 (1990); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979); *Bellotti v. Baird (Bellotti I)*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

[FN36] The best illustration is *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating statutory duty of care imposed upon aborting physician to take steps to preserve the life of the fetus because of tension between that duty and the duty to the patient). But see *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding a requirement that physicians perform viability tests upon fetuses believed to be of twenty or more weeks gestational age).

[FN37] 315 U.S. 568 (1942).

[FN38] See, e.g., *Stanford University Regulations*, reprinted in Gerald Gunther, *Constitutional Law* 1134-35 & n. 2 (12th ed. 1991). For commentary encouraging the regulation of expression of racial animosity, see, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L.J.* 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich.L.Rev.* 2320 (1989). For commentary encouraging college officials to stay in preexisting constitutional orbits, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 *Duke L.J.* 484.

[FN39] See *infra* Part II.A.1.

[FN40] 112 S.Ct. 2538 (1992) (invalidating on First Amendment grounds city ordinance prohibiting public expression of views likely to arouse "anger, alarm or resentment" on the basis of race or other group characteristics).

[FN41] *Id.* at 2547-49.

[FN42] See, e.g., Strossen, *supra* note 39, at 507-08.

[FN43] See R.A.V., 112 S.Ct. at 2569-70 (Stevens, J., concurring).

[FN44] *Id.* at 2559-60 (White, J., concurring); *id.* at 2569-70 (Stevens, J., concurring).

[FN45] *Id.* at 2550.

[FN46] Public universities, subject to the direct force of R.A.V., have already begun to retreat from attempts to regulate speech reflecting certain forms of bigotry. The University of Wisconsin, for example, recently abandoned its "hate speech" code. Mary Jordan, U. of Wisconsin Repeals Ban Against Slurs by Students, *Wash. Post*, Sept. 12, 1992, at A1. For a creative and original attempt to justify some forms of hate speech regulation on Thirteenth as well as Fourteenth Amendment grounds, see Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 *Harv.L.Rev.* 124 (1992).

[FN47] A recent example of statutory reference to methodology of statutory construction is included in the Civil Rights Act of 1991, 42 U.S.C. § 1981, which purports to limit the legislative history on which interpreting courts can rely. Pub.L. No. 102-166, 105 Stat. 1071, § 105(b) (codified at 42 U.S.C. § 1981 (1992)) ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 ... shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act....") Such a limitation arguably violates separation of powers principles. The judicial branch, not Congress, has traditionally chosen the methods of statutory interpretation in the course of adjudication.

[FN48] Pub.L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1988)). See generally Louis Henkin, *Foreign Affairs and the Constitution* 102 *passim* (1972) (discussing the likely political ramifications of concurrent legislative and executive power during wartime, as embodied in the Resolution); Harold H. Koh, *The National Security Constitution* 38 *passim* (1990) (discussing the catalyst for and subsequent shortcomings of the Resolution); John H. Ely, *Suppose Congress Wanted A War Powers Act That Worked*, 88 *Colum.L.Rev.* 1379 (1988) (considering the political possibility of Congress' amending the Resolution so as to render it more efficacious).

[FN49] 50 U.S.C. § 1547(d) (1988).

[FN50] Moreover, the fact that no President has ever acceded to this authority of Congress undercuts any argument based on joint waiver or joint consent of Congress and the President to an alteration of the original balance of authority between the two branches over war powers. President Nixon vetoed the War Powers Resolution, *Weekly Compilation of Presidential Documents*, Vol. 9, No. 43, at 1285-87 (1973), but Congress overrode the veto. Arguments of joint consent or joint waiver in any event carry little

weight, and appropriately so. Congress and the President are not empowered to agree to swap roles. Such agreements--for example, grants of legislative rulemaking power to the Executive--must always be validated on grounds other than institutional consent. See *INS v. Chadha*, 462 U.S. 919 (1983) (holding that a legislative veto provision unconstitutionally infringes on executive power even though the President had signed the legislation including the provision).

[FN51] 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (cataloguing techniques for judicial avoidance of constitutional questions).

[FN52] The Resolution also purports to condition the circumstances under which inferences can be drawn by the Executive from congressional actions concerning war powers. The Resolution requires that inferences of congressional authorization of the use of force not be drawn from any law or treaty unless the law or implementing legislation specifically and intentionally indicates such authorization. 50 U.S.C. § 1547(a) (1988). For a discussion of the Resolution's clear statement of policy in relation to Congress' delegation of its nuclear war power, see Peter Raven-Hansen, *Nuclear War Powers*, 83 Am.J. Int'l Law 786, 791-92 (1989).

[FN53] See U.S. Const. art. III, § 2.

[FN54] 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). This language closely tracks U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority..."). Despite this similarity in language, statutory federal question jurisdiction does not go to the outer boundaries of congressional power to confer such jurisdiction pursuant to Article III. See *Osborne v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

[FN55] U.S. Const. art. III, § 2. Both the current jurisdictional statute, 28 U.S.C. § 1333 (1988), and the earlier version contained in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 23, 76-77, track Article III's language regarding "admiralty and maritime Jurisdiction."

[FN56] See 28 U.S.C. § 157 (1988).

[FN57] 458 U.S. 50 (1982).

[FN58] See 28 U.S.C. § 157 (1988).

[FN59] See *Arnold Print Works, Inc. v. Apkin*, 815 F.2d 165 (1st Cir.1987). For a discussion of *Arnold Print Works* and the relationship of the 1984 statute to the *Northern Pipeline* decision, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 853-56 (1992).

[FN60] See, e.g., N.C. Gen. Stat. § 1-75.4(1) (1983) (tracking the minimum contacts language and conceptual categories of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), in prescribing the statutory boundaries on personal jurisdiction to include persons "engaged in substantial activity within this State").

[FN61] See 18 U.S.C. § § 241, 242 (1988) (criminal provisions); 42 U.S.C. § § 1983, 1985(3) (1988) (civil provisions).

[FN62] Compare 42 Pa.Cons.Stat. Ann. § 4306(f) (West 1981) (extending Pennsylvania law on the collectibility of judgments to a judgment for money "which is entitled to full faith and credit in this Commonwealth") with U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the ... Judicial Proceedings of every other State.").

[FN63] See, e.g., Ga.Code Ann. § § 17-10-2, 17-10-30 (Michie 1990) (outlining procedure for imposition of the death penalty), which tracks the Supreme Court's judgment in *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating procedures in prior Georgia law concerning imposition of the death penalty).

[FN64] See, e.g., Administrative Procedure Act, 5 U.S.C. § 555(b) (1988) (providing a right to counsel for persons "compelled to appear in person before an agency").

[FN65] See, e.g., Fed.R.Evid. 412(b)(1) (limiting evidence of the sexual history of a rape victim to what is "constitutionally required to be admitted"). See also Fed.R.Evid. 401 (only relevant evidence admissible as a matter of due process in light of *Payne v. Tennessee*, 111 S.Ct. 2597 (1991), and *Darden v. Wainwright*, 477 U.S. 168 (1986)); Fed.R.Evid. 801(d)(2)(e) (hearsay exemption for statement of co-conspirators as exception to Confrontation Clause in light of *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Krulwitch v. United States*, 336 U.S. 440 (1949)); Fed.R.Evid. 804(b)(2) (hearsay exception for dying declaration as exception to Confrontation Clause in light of *Mattox v. United States*, 146 U.S. 140 (1892)).

[FN66] See Fed.R.Civ.P. 50.

[FN67] U.S. Const. art. I, § 8, cl. 3.

[FN68] 7 U.S.C. § § 182(11), 183, 191 (1988).

[FN69] 196 U.S. 375, 399 (1905). The Supreme Court, relying explicitly on the "current of commerce" theory, upheld the Packers and Stockyards Act in *Stafford v. Wallace*, 258 U.S. 495 (1922).

[FN70] 317 U.S. 111 (1942).

[FN71] 42 U.S.C. § 2000a(b), (c) (1988). The Supreme Court upheld these sections in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (lodging places) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants).

[FN72] 18 U.S.C. § § 891-896 (1988). The Supreme Court upheld the constitutionality of the loansharking provisions in *Perez v. United States*, 402 U.S. 146 (1971).

[FN73] Model Rules of Professional Conduct Rule 7.2(a) (1988), on lawyer advertising, revolves around *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Zauderer v.*

Office of Disciplinary Counsel, 471 U.S. 626 (1985). Rule 7.3, on direct contacts with and solicitations of prospective clients, revolves around *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[FN74] 112 S.Ct. 2538 (1992); see *supra* text accompanying note 47 for discussion of the effect of *R.A.V.* on private universities.

[FN75] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The University of California and Pennsylvania State University have enacted student codes containing a "fighting words" prohibition on certain forms of insulting speech. See Robin Wilson, *Colleges Take Two Basic Approaches in Adopting Anti-Harassment Plans*, *Chronicle of Higher Education*, Oct. 4, 1989, at A38; see generally Beth C. Boswell-Odum, Note, *The Fighting Words Doctrine and Racial Speech on Campus*, 33 S.Tex.L.Rev. 261 (1992) (discussing the application of First Amendment principles, such as the fighting words doctrine, to campus speech). Universities also have considered focusing their "hate speech" regulation on other, non-constitutional legal categories. See, e.g., Gunther, *supra* note 39, at 1134-37 (discussing tort theories of intentional infliction of emotional distress as the basis for hate speech codes).

[FN76] See, e.g., R.I.Gen.Laws § 11-45-1(c) (1981) ("A person commits disorderly conduct if he or she intentionally, knowingly or recklessly ... [d]irects at another person in a public place offensive words which are likely to provoke a violent reaction on the part of the average person so addressed....").

[FN77] 395 U.S. 444 (1969) (holding that state may not restrict advocacy of unlawful means of change unless advocacy is directed at producing imminent lawlessness and is likely to result in such activity). See, e.g., Cal.Penal Code § 151(b) (West 1988) (defining "advocacy" of killing or injuring a peace officer as "the direct incitement of others to cause the imminent willful and unlawful killing or injuring of a peace officer, and not the mere abstract teaching of a doctrine"); Okla.Stat Ann. tit. 21, § 850(B), (C) (West 1992) (outlawing the communication of messages intended to "incite or produce, and ... likely to incite or produce, imminent violence ... directed against another person because of that person's race, color, religion, ancestry, national origin or disability").

[FN78] 413 U.S. 15 (1973). See, e.g., Cal.Penal Code § 311(a) (West 1988); Del.Code Ann. tit. 10, § 7201(4) (1990 Supp.); Ga.Code Ann. § 16-12-80(b) (Michie 1992); Idaho Code § 18-4101(A) (1987); Ill.Rev.Stat. ch. 38, para. 11-21(b) (1979); Kan.Stat Ann. § 21-4301(3) (1988); Ky.Rev.Stat Ann. § 531.010(3) (Michie 1990); Md. Ann.Code art. 27, § 419(b) (4) (1992); Mass.Gen.Laws Ann. ch. 272, § 31 (West 1990); Minn.Stat Ann. § 617.241(a) (West 1992 Supp.); S.D.Codified Laws Ann. § 22-24-27(10), (11) (1988).

[FN79] See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). Of course, orbits may have to adjust to changing constitutional interpretations. See *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2399 (1992) (unconstitutional to charge demonstrators or paraders a fee designed to reflect the costs of "the maintenance of public order in the matter licensed.") The Forsyth County ordinance had been closely modeled on an ordinance upheld by the Supreme Court in *Cox v. New Hampshire*, 312 U.S. 569 (1941).

[FN80] 20 U.S.C. §§ 4071-4074. See *infra* Part III.A; see generally Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 *Nw.U.L.Rev.* 1 (1986) (discussing Equal Access Act in light of Supreme Court decisions interpreting the Constitution as requiring government neutrality toward

religion).

[FN81] 454 U.S. 263 (1981) (invalidating on Free Exercise Clause grounds the exclusion of a prayer club from a state university).

[FN82] The Supreme Court in *Board of Education v. Mergens*, 496 U.S. 226 (1990), upheld the Act against Establishment Clause attack.

[FN83] H.R. 25, 102d Cong., 1st Sess. (1991); see *infra* Part III.B.

[FN84] 410 U.S. 113 (1973).

[FN85] H.R. 2797, 102d Cong., 1st Sess. (1991); see *infra* Part III.C.

[FN86] 494 U.S. 872 (1990).

[FN87] They do exist, however. See, e.g., Neb.Leg. Bill 397, § 3 (Feb. 1, 1990) (requiring the National Collegiate Athletic Association to "comply with due process of law," as guaranteed by the constitution and laws of the state, in connection with any NCAA disciplinary procedures).

[FN88] See generally Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983) (noting the effects of the application of different levels of precision in administrative rules).

[FN89] See *infra* text accompanying note 111.

[FN90] 405 U.S. 330 (1972).

[FN91] 410 U.S. 679 (1973).

[FN92] 410 U.S. 686 (1973).

[FN93] See, e.g., Md.Ann.Code art. 33, § 3-4(b)(3) (1990).

[FN94] The classic work on the general distinction between rules and standards is Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv.L.Rev. 1685, 1689-90 (1976). For a recent development of the distinction in constitutional law, see Kathleen Sullivan, *The Supreme Court, 1991 Term--Forward: The Justices of Rules and Standards*, 106 Harv.L.Rev. 22 (1992); see also Diver, *supra* note 89 (comparing formulations of administrative rules that vary in their degree of precision); Pierre Schlag, *Rules and Standards*, 33 U.C.L.A.L.Rev. 379 (1985) (discussing the pervasiveness of the rules-standards dialectic in legal discourse).

[FN95] See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487 (1989) (noting that the Richmond contracting set-aside program included "Eskimos and Aleuts," apparently in

reliance on a federal scheme upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

[FN96] See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity rule, which the Supreme Court adopted in lieu of the absolute immunity rule proposed by the defendants, former aides to President Nixon, is rooted in constitutional concerns about protecting executive authority. Whether or not Congress is free to weaken the Harlow rule of immunity, this rule does not obligate states to protect the authority of their own executive officers by providing similar grants of immunity.

[FN97] *Anderson v. Creighton*, 483 U.S. 635 (1987).

[FN98] See Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongdoing* (1983); Ronald Cass, *Damage Suits Against Public Officers*, 129 U.Pa.L.Rev. 1110, 1120-33 (1981).

[FN99] In the Civil Rights Act of 1991, for example, Congress compromised between the competing formulations of the "business necessity" defense to disparate impact claims by requiring courts to consider case law prior to the 1989 *Wards Cove Packing Co.* decision. Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, § 3. See Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 Neb.L.Rev. 304, 313 (1992); *New Act Clarifies Disparate Impact Law*, Nat'l L.J., at 19 (March 9, 1992).

[FN100] There is an elaborate literature on legislative delegation to administrative agencies. See, e.g., Symposium, *The Uneasy Constitutional Status of the Administrative Agency*, 36 Am.U.L.Rev. 277 (1987). As will be shown in Part III, delegation of interpretative authority to courts over orbiting statutes raises special problems of institutional conflict of interests.

[FN101] The Equal Access Act may represent such an episode. See *infra* Part III.A.

[FN102] The Treasury Department's Revenue Rulings are the best example of such guidelines. See 26 C.F.R. § 601.601.

[FN103] See sources cited *supra* note 36.

[FN104] Of course, harbors sometimes erode. See *supra* note 80 (discussing *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395 (1992)).

[FN105] Cf. *Wyatt v. Cole*, 112 S.Ct. 1827 (1992) (holding that no qualified immunity protects private defendants sued under 42 U.S.C. § 1983 for invoking state creditors' remedy statutes later found unconstitutional).

[FN106] For a more elaborate analysis of what it means to be a true "common law constitutionalist," see Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L.Sch.L.Rev. 5 (1991).

[FN107] See Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 Vand.L.Rev. 438 (1950); Cass R. Sunstein, *Interpreting*

Statutes in the Regulatory State, 103 Harv.L.Rev. 405, 408 (1989).

[FN108] See Roscoe Pound, Common Law and Legislation, 21 Harv.L.Rev. 383, 385-86 (1908).

[FN109] See *infra* Part III.A. (discussing Justice Stevens' dissent in *Board of Education v. Mergens*, 496 U.S. 226 (1990)).

[FN110] For example, a number of state rules of civil procedure track or incorporate the similar federal rule. Compare Fed.R.Civ.P. 54(b) with Md.R.Civ.P. 2-602; compare Fed.R.Civ.P. 11 with Iowa R.Civ.P. 80(a); compare Fed.R.Civ.P. 41 with Ala.R.Civ.P. 41; compare Fed.R.Civ.P. 56 with Ill.Code Civ.P. § 2-1005 and with R.I.R.Civ.P. 56. On the substantive side, a number of states have trade regulation statutes modeled closely upon the Federal Trade Commission Act. For examples of these "little FTCAs," see Fla.Stat.Ann. ch. 501.204 (Harrison 1985); Me.Rev.Stat.Ann. tit. 5, ch. 10 (West 1989); Mass.Gen.Laws Ann. ch. 93A, § 2 (West 1984); N.Y.Gen.Bus.Law § § 349-350e (McKinney 1988). A number of these Acts contain express direction that they be interpreted consistently with the Federal Trade Commission Act. See, e.g., Mass.Gen.Laws Ann. ch. 93A, § 2(b); see generally Note on State Incorporation of or Reference to Federal Law, in Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 559-63 (3d ed.1988) (discussing cases involving state courts' reliance on federal law); Note on Federal Incorporation by Reference of State Law, *id.* at 566-67 (discussing cases in which the federal law at issue incorporates state law).

[FN111] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U.Pa.L.Rev. 1479 (1987).

[FN112] For an illustration, see *infra* Part III.A.

[FN113] For an illustration, see *infra* Part III.C.2.

[FN114] The Freedom of Choice Act and the Religious Freedom Restoration Act, see *infra* Parts III.B. and C., represent responses to fracturing of this sort. See also *infra* Part IV.C. (discussing model of fractured development of constitutional law as alternative to model centered on the existence of an authoritative constitutional court).

[FN115] See *Oregon v. Mitchell*, 400 U.S. 112, 204-05 (1970) (Harlan, J., concurring in part and dissenting in part); *City of Rome v. United States*, 446 U.S. 156, 209-11 (1980) (Rehnquist, J., dissenting); *infra* notes 260-61 and accompanying text.

[FN116] See, e.g., Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 Minn.L.Rev. 299 (1982); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U.Cinn.L.Rev. 199 (1971); Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 Va.L.Rev. 333 (1982).

[FN117] 5 U.S. (1 Cranch) 137 (1803).

[FN118] 20 U.S.C. § § 4071-4074; see *infra* Part III.A.

[FN119] S. 25, 102d Cong., 2d Sess. (1992); see *infra* Part III.B.

[FN120] H.R. 2797, 102d Cong., 1st Sess. (1991); see *infra* Part III.C.

[FN121] 20 U.S.C. §§ 4071-4074. The classic discussion of the Act is Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 *Nw.U.L.Rev.* 1 (1986), to which I am especially indebted. See also Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 *Nw.U.L.Rev.* 174 (1986) (challenging Professor Laycock's analysis).

[FN122] See *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3rd Cir.1984), vacated on other grounds, 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir.1982), cert. denied, 459 U.S. 1155 (1983); *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir.1985).

[FN123] See *Engel v. Vitale*, 370 U.S. 421 (1962).

[FN124] See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

[FN125] See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

[FN126] 454 U.S. 263 (1981).

[FN127] *Id.* at 274 n. 14.

[FN128] See William H. Rooney & Don Sparks, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 *Yale L.J.* 499 (1983).

[FN129] 454 U.S. at 274.

[FN130] *Brown v. Board of Education*, 347 U.S. 483 (1954), and its four decades of progeny have required substantial federal judicial supervision over local public schools.

[FN131] See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (outlining procedural due process rights for suspended students); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (holding that students could not be suspended for wearing black arm bands in protest of the Vietnam War). But see cases cited *infra* note 133.

[FN132] See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school district could limit what was published in school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that First Amendment did not prevent school district from disciplining student who gave a "lewd and indecent" speech at a school assembly); cf. *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (recognizing broad though not unlimited discretion in school boards to limit the contents of a school library).

[FN133] 460 U.S. 37 (1983).

[FN134] *Id.* at 45-46. This signal has proved accurate. See *International Soc'y for Krishna Consciousness v. Lee*, 112 S.Ct. 2701, 2705 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-15 (1984); see generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 U.C.L.A.L.Rev. 1713 (1987) (analyzing the public forum classification in *Perry* and suggesting that the Court should adopt an approach in which values are more openly balanced); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo.Wash.L.Rev. 109 (1986) (criticizing the Court's increased reliance on the public forum doctrine and proffering an interest-balancing approach as an alternative); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va.L.Rev. 1219 (1984) (same).

[FN135] The Act used federal grantee status as the trigger for federal power, presumably because of doubts concerning the scope of congressional power to enforce the Fourteenth Amendment through substantive legislation. See *infra* Parts III.B. and III.C.

[FN136] 130 Cong.Rec. 19,236 (1984) (The Act "merely extends a similar constitutional rule as enunciated by the Court in *Widmar* to secondary schools.") (statement of Senator Levin). In his *Board of Education v. Mergens* dissent, Justice Stevens identified other evidence in the legislative history supporting this view. 496 U.S. 226, 271-72, 274 & n. 4 (1990).

[FN137] See *supra* Parts II.A.1, II.A.2.

[FN138] See *supra* Part II.B.1.

[FN139] See *supra* text accompanying note 111.

[FN140] Congress' failure to easily and smoothly select a statutory formula is explicable in light of the number of parties interested in the legislation. Senator Hatfield, a principal legislative sponsor of the Act, claimed on the Senate floor that "as many as 1,000 people had been involved in the negotiations that produced the compromise version." Laycock, *supra* note 122, at 37 (citing 130 Cong.Rec. S8345 (daily ed. June 27, 1984)).

[FN141] 20 U.S.C. § 4071(a).

[FN142] *Id.* § 4071(b).

[FN143] The phrase "limited open forum" did appear in the Third Circuit's opinion in *Bender v. Williamsport Area School District*, 741 F.2d 538, 546 (3rd Cir.1984), vacated on other grounds, 475 U.S. 534 (1986). The use of the phrase in *Bender*, however, was consistent with the notion of "limited public forum" in *Perry* and in no way tracked the definition provided in the Equal Access Act.

[FN144] 496 U.S. 226 (1990).

[FN145] The problem presented by the phrase "noncurriculum related" is that the most obvious interpretations are either unacceptably broad or unreasonably narrow. If the phrase means "not perfectly coincidental with existing courses given for academic credit," every school would be covered just by having a football team, a yearbook staff, service clubs, or any of the other groups typically found at high schools in America. At the other extreme, if "noncurriculum related" meant "having no nexus or bearing in any respect to academic courses," no school would be covered, because some nexus exists between every student organization and some academic concern. The search was thus for a sensible middle ground. See Laycock, *supra* note 122, at 36-41; Frank R. Jiminez, Note, *Beyond Mergens: Ensuring Equality of Student Religious Speech Under the Equal Access Act*, 100 Yale L.J. 2149, 2157-63 (1991).

[FN146] *Mergens*, 496 U.S. at 237-39.

[FN147] *Id.* at 239-40.

[FN148] *Id.* at 243-47.

[FN149] *Id.* at 241-43 (Stevens, J., dissenting).

[FN150] *Id.* at 283 (Stevens, J., dissenting).

[FN151] *Id.* (Stevens, J., dissenting).

[FN152] *Id.* at 283-84 & n. 18 (Stevens, J., dissenting).

[FN153] See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3rd Cir.1984), vacated on other grounds, 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir.1982), cert. denied, 459 U.S. 1155 (1983); *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir.1985).

[FN154] See 130 Cong.Rec. 19,220-49 (1984) (containing Senate debate concerning the purposes and effects of the compromise version of the Equal Access Act).

[FN155] 20 U.S.C. § 4071(a) limits the Act's coverage to "public secondary school[s] which receive[] Federal financial assistance."

[FN156] This notion is prominent in Commerce Power cases, see, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); in affirmative action cases, see, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990); and in cases involving congressional power to expand voting rights, see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Rome v. United States*, 446 U.S. 156 (1980).

[FN157] For a striking illustration of this proposition in a context very close to that described in the text, see *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 386-89 (2d Cir.1992), cert. granted, No. 91-2024, 60 U.S.L.W. 3881 (U.S.

Oct. 5, 1992) (No. 91-2024), in which a Second Circuit panel held that a public school district need not make its school premises available outside of school hours to an evangelical Christian church for prayer or religious education, even though the school district had made the premises available to other, nonreligiously oriented community organizations. The court in *Lamb's Chapel* summarily rejected an argument based on Mergens and the Equal Access Act, characterizing that decision as resting "purely on statutory grounds." *Id.* at 389. Although technically correct, this assertion misses the connection between that statute and the relevant constitutional law. I believe that the Supreme Court will reverse the Second Circuit and hold such discrimination forbidden by the Free Exercise, Free Speech, and Equal Protection Clauses. Because the case involves adult groups and not school children, however, I do not believe that the Equal Access Act will play an important part in the analysis.

[FN158] The roots of this proposition lie in the claim of judicial supremacy, tracing back at least to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in the elaboration of constitutional norms. See sources cited *supra* note 117. But see *infra* Part IV.C. (suggesting that Congress is a coequal partner in expanding constitutional rights against the states).

[FN159] See *supra* note 135.

[FN160] See Ira C. Lupu, *The Trouble With Accommodation*, 60 *Geo.Wash.L.Rev.* 743, 762-68 (1992). The Supreme Court's recent decision in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), dependent as it is on the joint notions of state sponsorship of religious exercise and the coercion implicit in making prayer a part of a graduation ceremony, is sufficiently narrow that it requires no qualification of the statement in the text.

[FN161] See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331 (1991); *infra* Part IV.B.

[FN162] 410 U.S. 113 (1973).

[FN163] 112 S.Ct. 2791 (1992).

[FN164] H.R. 25, 102d Cong., 1st Sess. (1991); S. 25, 102d Cong., 2d Sess. (1992). A copy of the Senate's version of the Act is provided in the Legislative Appendix to this Article. As of this writing, S.25 differs from H.R. 25 only by the inclusion in S.25 of a "Findings and Purposes" provision.

[FN165] 492 U.S. 490 (1989).

[FN166] 137 Cong.Rec. S641 (daily ed. Jan. 14, 1991) (statement of Sen. Cranston).

[FN167] S. 25, § 2(b).

[FN168] 137 Cong.Rec. S643 (daily ed. Jan. 14, 1991).

[FN169] U.S. Const. art. I, § 3, cl. 3.

[FN170] U.S. Const. amend. XIV, § 5. Congress also might seek to preserve a semblance of state choice to accept or reject federal regulation by relying on its Spending Power. U.S. Const. art. I, § 8, cl. 1. *South Dakota v. Dole*, 483 U.S. 203 (1987), permits an expansive range of conditions on grants to states and generally signals judicial willingness to accept conditions that require a state to reshape its general laws to conform to the federal will.

Under the permissive standards of *Dole*, Congress would be free to condition state receipt of federal funds for Medicaid or Aid to Families with Dependent Children on compliance with the Freedom of Choice Act. Because the birth of more children sadly but inevitably entails more children in poverty, which in turn means more program expenditures, access to abortion affects state and federal budgets for both programs. Permitting abortions is thus obviously germane to the resource-protecting concerns of these programs. Thus far, however, no attempt has been made to so structure the Freedom of Choice Act. Conditioning grants for programs that aid the poor on compliance with the Act might be an especially bad political strategy because it would provoke fights in the states, pitting the interests of the poor against those of the unborn.

One additional possibility is that the Act might rest on the Thirteenth Amendment. If the Amendment's enforcement power extends to elimination of badges of servitude imposed upon women, Congress might reasonably determine that restrictive abortion law constitutes such a badge. Cf. *Jones v. Mayer*, 392 U.S. 409 (1968) (deferring to reasonableness of congressional determination that badge of servitude exists when blacks are not afforded the same right to buy property as whites); *Amar & Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992) (analogizing the position of abused children to that of slaves, and suggesting that Congress has power under the Thirteenth Amendment to make official neglect of such abuse actionable).

[FN171] See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[FN172] See S. 25, § 2(a)(2).

[FN173] Similarly, Congress might find that the supply of obstetricians and gynecologists was distorted by non-uniform state law on the subject of abortion. In testimony on May 13, 1992, before the Senate Committee on Labor and Human Resources, Professor Tribe tied an overruling of *Roe* to interstate movement in still another way:

Proposals to guarantee the reproductive freedom of women fit squarely within Congress' commerce power. There can be little doubt--and I am confident that the evidence before Congress would show--that restrictions by state or local governments on the ability of a woman to decide whether to become pregnant, or on her ability to decide whether to carry a pregnancy to term, would interfere with freedom of travel (which of course includes the freedom to decide whether and where to travel) and would generate significant burdens on interstate facilities. For example, local or statewide restrictions on reproductive freedom would likely force many women to travel from States that have chosen to erect legal barriers to contraception or to abortion, to States or foreign nations where safe and legal procedures are available. Indeed, the years preceding *Roe* and *Doe* saw precisely such a massive interstate migration, as hundreds of thousands of women travelled from restrictive States to those where abortions were more freely performed. In 1972, for example, almost 80 percent of all legal abortions in this country took place in just two States: New York and California. Tribe Testimony at 3-4; see S. 25, § 2(a).

[FN174] See cases cited *supra* note 172.

[FN175] Were *Roe* to be overruled, interstate consequences would likely materialize, but the problems of nonuniformity of state law and behavioral responses to those problems

would still take some time to appear and crystallize. The Commerce Clause theory on which the Freedom of Choice Act now relies is thus a prophylactic one. I know of no decisions upholding federal legislation on the grounds that it would forestall, rather than alleviate, burdens on interstate commerce. Were the Court to be truly confrontational, it might conceivably reject the Commerce Power justification as resting on interstate commercial effects too trivial to support the regulatory intrusion. See *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27 (1968).

The July 1992 Report of the Senate Committee on Labor and Human Resources on S. 25, quite obviously prepared prior to *Casey* though submitted thereafter, does not confront this problem. Rather, it seems to be premised on an expectation that *Roe* was about to be overruled in its core protection of the right to choose abortion. See *The Freedom of Choice Act of 1992*, S.Rep. No. 321, 102d Cong., 2d Sess. Consequently, most of the testimony recited in the Report, both factual and legal, dwells on the pre-*Roe* record of mistreatment of women. *Id.* at 14-23, 26-27. Horrendous as these tales are, they are not responsive to the constitutional issue that the Act presents under current law.

[FN176] *Casey*, 112 S.Ct. at 2821.

[FN177] I have no doubt that such regulations operate to discourage abortion. What requires some demonstration is that any interstate consequences follow from whatever discouragement the regulations create. For a provocative criticism of the results in *Casey* on normative, rather than empirical, grounds, see Jane M. Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 2 *Colum.J. Gender & L.* (forthcoming 1993) (arguing that state-created waiting periods and pro-birth informed consent requirements are unconstitutionally disrespectful of women's deliberative autonomy).

[FN178] See, e.g., Peter Appleborne, *Mississippi Law Fails to Reduce Abortion Strife*, *N.Y. Times*, Oct. 13, 1992, at A14 (describing burdens and interstate consequences arising from twenty-four hour waiting period).

[FN179] 137 Cong.Rec. S641 (daily ed. Jan. 14, 1991) (statement of Sen. Cranston).

[FN180] S.25, § 2(a)(2).

[FN181] 384 U.S. 641 (1966) (upholding congressional power under the Fourteenth Amendment to enfranchise persons educated in Puerto Rico and literate in Spanish).

[FN182] 400 U.S. 112 (1970) (upholding congressional power to enfranchise persons aged 18-21 in federal elections, but invalidating provisions that would have enfranchised those persons in state elections).

[FN183] 446 U.S. 156 (1980) (upholding congressional power under the Fifteenth Amendment to enact key enforcement sections of the Voting Rights Act of 1965). But cf. *EEOC v. Wyoming*, 460 U.S. 226, 259-65 (1983) (Burger, C.J., dissenting) (arguing that Congress could not, under the guise of enforcing the Fourteenth Amendment, outlaw age discrimination by states). Justices Powell, Rehnquist, and O'Connor joined this opinion.

[FN184] Congressional contraction of judicially declared rights raises problems of an entirely different dimension. *Katzenbach v. Morgan* carefully distinguished that situation and strongly intimated that the Section 5 power could only be used to expand rights. 384 U.S. at 651 n. 10.

[FN185] See *supra* notes 117-18 and accompanying text. But see *infra* Part IV.C.

[FN186] See *New York v. United States*, 112 S.Ct. 2408 (1992) (invalidating portion of federal scheme for controlling disposal of low-level radioactive wastes on the ground that the scheme unreasonably intruded on state legislative sovereignty).

[FN187] The Supreme Court upheld both in *Casey*, 112 S.Ct. at 2826. As currently drafted, the Freedom of Choice Act purports to outlaw both, by prohibiting all medical regulation not justified by the stringent test of medical necessity applied in the pre-Webster law. See S. 25 § 3(a)(3); S.Rep. No. 321 at 37-39 (describing effect of the Act on waiting periods and state-prepared anti-abortion counseling).

[FN188] See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

[FN189] S. 25, § 3(a)(3); see also S.Rep. No. 321 at 41-43 (discussing the stringency of the "medically necessary" standard).

[FN190] 17 U.S. (4 Wheat.) 316 (1819).

[FN191] Arguments of this sort trace their lineage to *McCulloch*: "[W]here [[the] necessity [of Congress' chosen means] less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity ... is to be discussed in another place." *Id.* at 423.

[FN192] Many of the proponents of the Freedom of Choice Act might find this to be politically distasteful. Having criticized the pre-*Casey* versions of the undue burden test, see Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U.Pa.L.Rev. 119 (1989), they might see legislative adoption of it as equivalent to sleeping with the enemy.

[FN193] See, e.g., *Casey*, 112 S.Ct. at 2824, 2825, 2833; see also *id.* at 2845 (Blackmun, J., concurring) ("The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it.").

[FN194] See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

[FN195] See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[FN196] S. 25, § 3(b). This provision is discussed further in the following Section.

[FN197] S. 25, 102d Cong., 2d Sess., § 3(a) (1992).

[FN198] Compare *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating viability determination requirements) with *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding similar requirements); see generally Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L.J. 639 (1986) (questioning whether fetal

viability should dictate the dimensions of the abortion right).

[FN199] Compare *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 442-44 (1983) (invalidating informed consent rules) with *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2826 (1992) (upholding similar rules).

[FN200] See e.g., *Acron*, 462 U.S. 416; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

[FN201] S. 25, § 3(a)(3).

[FN202] The two approaches that I discuss have their counterparts in competing adages concerning construction of common-law rules--strict construction of statutes in derogation of the common law versus liberal construction of remedial statutes. Compare *Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959) (invoking strict construction where statute is in derogation of common law) with *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (invoking liberal construction when interpreting remedial civil rights legislation).

[FN203] See S.Rep. No. 321, at 32 ("The numerous Supreme Court cases reviewing State laws between 1973 and 1988 [the date of Webster] apply the standard articulated in *Roe* and incorporated into the Act.").

[FN204] See *Acron*, 462 U.S. at 433-34.

[FN205] See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

[FN206] Prior to *Casey*, the Court had held such provisions unconstitutional. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Acron*, 462 U.S. 416.

[FN207] 111 S.Ct. 2395 (1991). The Court's recent decision in *New York v. United States*, 112 S.Ct. 2408 (1992) reinforces the notion that it is concerned with the role of the states in the federal system and prepared to intervene aggressively to protect states against federal overreaching.

[FN208] *Gregory*, 111 S.Ct. at 2399-2404; see 29 U.S.C. § 630(f) (1989) (setting forth exemption).

[FN209] 111 S.Ct. at 2401-04.

[FN210] *Id.* at 2404.

[FN211] See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum.L.Rev. 1, 52 (1988).

[FN212] Both *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), overruled by

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), and *New York v. United States*, 112 S.Ct. 2408, 2429-30 (1992), preserve this distinction between federal regulation of states qua states, which may raise constitutional concerns of state autonomy, and federal regulation of private conduct within the states, in which context the state has constitutionally inferior regulatory power. The latter circumstance presents no judicially cognizable issues of state sovereignty or autonomy.

[FN213] For recent efforts to analyze issues of harmonizing enacted law with the Constitution by way of rules of construction, see Guido Calabresi, *The Supreme Court, 1990 Term, Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv.L.Rev. 80 (1991); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 Chi.-Kent L.Rev. 481 (1990); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv.L.Rev. 405 (1989); see also *infra* Part IV.B (discussing the role of canons of construction in interpreting orbiting statutes).

[FN214] William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 397-403 (1991).

[FN215] 439 U.S. 379 (1979).

[FN216] *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

[FN217] *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

[FN218] The legislative history of the Act may well push strongly the other way--that is, to the effect that Congress is codifying pre-Webster decisional law. See S.Rep. No. 321, at 31. Recall, however, that Roe's leading foes include Justice Scalia, who rejects reliance on legislative history. See *infra* Part IV.B.

[FN219] See cases cited *supra* note 36.

[FN220] See S. 25 § 3(b). Rules of construction 3(b)(1) and (2), which make it clear that the Act does not prevent a state from protecting unwilling individuals from participation or from declining to pay for abortions, are not likely to present sharp controversy because they are consistent with post-Roe, pre-Webster law.

[FN221] S. 25, § 3(b)(3).

[FN222] S.Rep. No. 321, at 43.

[FN223] *Id.*

[FN224] Section 3(b)(2) removes the issue of abortion funding from the Act's general principles.

[FN225] See Norman J. Singer, 2A *Sutherland, Statutes and Statutory Construction*, §

47.08, at 156 (5th ed. 1992).

[FN226] 112 S.Ct. at 2829-30.

[FN227] See *infra* Part IV.C. The analysis in the text may be far too pessimistic, in the sense that it anticipates continued judicial struggle against the principles of *Roe*, whether embodied in that decision and its earlier progeny or embodied in the Freedom of Choice Act. It may well be that the Act will solve rather than create a constitutional confrontation. For example, the Court, as it did in 1937 with respect to economic legislation, might bow to popular and congressional will rather than continue to fight against aggressive federal prohibitions on state abortion law. But a number of current conditions make the institutional situation seem far different than it was in 1937. At that time, President Roosevelt had a very strong second-term mandate, Congress was enacting a continued series of economic recovery measures, Congress was more respected than at present, and the Court was less respected. Even so, the Congress rejected FDR's Court-packing plan. See generally Robert Jackson, *The Struggle for Judicial Supremacy* (1941); James MacGregor Burns, *Roosevelt: The Lion and the Fox*, ch. 15 (1956) (analyzing the Court-packing episode). The election of Bill Clinton might be the single most important element in defusing the controversy.

[FN228] 494 U.S. 872 (1990).

[FN229] *Id.* at 882.

[FN230] *Id.* at 881-82.

[FN231] Smith has been widely discussed and heavily criticized. For criticism of Smith, see, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup.Ct.Rev. 1; Ira C. Lupu, *The Trouble With Accommodation*, 60 Geo.Wash.L.Rev. 743 (1992); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U.Pa.L.Rev. 555 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U.Chi.L.Rev. 1109 (1990). But see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo.Wash.L.Rev. 915 (1992) (arguing that constitutional history does not support the concept of exemptions); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U.Chi.L.Rev. 308 (1991) (defending Smith's outcome, but not the opinion itself).

[FN232] See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-97 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 698-700 (1989); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-58 (1988); *O'Lone v. Estate of Shabazz*, 462 U.S. 342, 350-53 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 506-10 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983); *United States v. Lee*, 455 U.S. 252, 256-58 (1982). See generally Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Commentary 147 (1987) (arguing that the Court "has shown little enthusiasm," *id.* at 154, for strict scrutiny since *Sherbert* and *Yoder*).

[FN233] 406 U.S. 205 (1972).

[FN234] 374 U.S. 398 (1963).

[FN235] The background legal context in this field thus looked strikingly different at the time of Smith than the abortion field appears today. To make the fields perfectly analogous, one would have to imagine that the Supreme Court had retreated in almost every respect from its posture of limitation on abortion regulation, but had not yet overruled *Roe* itself.

[FN236] See *supra* Parts II.A.2. and II.A.3.

[FN237] See James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va.L.Rev. 1407, 1412-36 (1992) (arguing that pre-Smith law, as applied by the Supreme Court and the Federal Circuit Courts, routinely favored the government).

[FN238] See *Reynolds v. United States*, 98 U.S. 145 (1878).

[FN239] See generally Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv.L.Rev. 933, (1989) (criticizing the Court's pre-Smith Free Exercise Clause exemption test and suggesting an approach to burdens guided by common law principles); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U.Chi.L.Rev. 1, 38-45 (1989) (analyzing burdens in terms of substitution effects and disproportionate impact on believers).

[FN240] See *United States v. Ballard*, 322 U.S. 78 (1944); Lupu, *supra* note 240, at 954-57; Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U.L.Rev. 299, 325-31.

[FN241] Lupu, *supra* note 240, at 958-59.

[FN242] See *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-06 (1985). For opposing views on how such business burdens should be viewed, compare Douglas Laycock, *Toward A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum.L.Rev. 1373 (1981) (arguing for a broad doctrine of institutional autonomy for churches) with Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L.Rev. 391 (1987) (opposing such a doctrine).

[FN243] Lupu, *supra* note 240, at 948-53.

[FN244] See *supra* notes 9-10 and accompanying text.

[FN245] The Freedom of Choice Act thus would constitute far more of a true "restoration" of recent law than the Religious Freedom Restoration Act, which would provide far greater federal protection to religious freedom claims than has ever been the case.

[FN246] H.R. 2797, 102d Cong., 1st Sess. (1991) (sponsored by Representative Solarz and others). A copy of this version is contained in the Legislative Appendix to this Article. The House Judiciary Committee reported favorably on H.R. 2797 shortly before the end of the 102nd Congress. The Committee did not act on an alternative version, contained in H.R. 4040, 102d Cong., 1st Sess. (sponsored by Representatives Smith, Hyde, and others). The principal difference between the two was that the Smith-Hyde version expressly

excluded the use of the Act to challenge any abortion-related policy on religious freedom grounds. Id. § 3(c)(2)(c).

[FN247] H.R. 2797, § 3(a), (b).

[FN248] Id. § 2.

[FN249] Id. § 3(b). Section 2(a)(5) asserts the "finding" that "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* is a workable test for striking sensible balances between religious liberty and competing governmental interests." Section 2(b)(1) declares it among the Act's purposes "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."

[FN250] Under the broad principles of *South Dakota v. Dole*, 483 U.S. 203 (1987), Congress might safely condition block grants or program-specific grants upon the states' acceptance of a blanket condition, or a program-specific condition, of compliance with the Religious Freedom Restoration Act. The risk here is political and strategic. If Congress were to create mini-Religious Freedom Restoration Acts as conditions upon receipt of federal funds under various programs, rather than the more sweeping blanket condition of general compliance with the Act as a condition of receipt of any or all federal funds, opponents would likely try to divide and conquer the pro-Act coalition with program-specific bureaucratic opposition.

[FN251] Controversies over textbooks in public schools have produced substantial litigation. See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir.1987), cert. denied, 484 U.S. 1066 (1988); *Smith v. Board of Comm'rs of Mobile, Alabama*, 655 F.Supp. 939 (S.D.Ala.), rev'd 827 F.2d 684 (11th Cir.1987). For further discussion of this issue, see George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S.Cal.L.Rev. 864 (1988); Lupu, *supra* note 240, at 935, 943-44, 949-52, 980-81; Nadine Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 Ohio St.L.J. 333, 340-43 (1986).

[FN252] See sources cited *supra* note 172. Cf. *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding extension of federal wage and hour legislation to employees of state-operated schools and hospitals). One cannot be completely sanguine, however, about any of these results. All might be seen as relying on trivial commercial effects as an excuse for highly intrusive federal regulation of state operations. See *id.* at 187 n. 27 ("[T]he Court [has never] declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.") (Harlan, J.).

[FN253] 112 S.Ct. 2408 (1992).

[FN254] Id. at 2427-29; see generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va.L.Rev. (forthcoming April 1993) (analyzing from a historical perspective the Court's decision in *New York v. United States*).

[FN255] 426 U.S. 833 (1976).

[FN256] 469 U.S. 528 (1985).

[FN257] H.R. 2797, § 3(c).

[FN258] See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976) (stating that state sovereignty is no bar to enforcement of the Fourteenth Amendment, because Section 1 of the Amendment limits state sovereignty).

[FN259] If *Roe* were to be overruled, the Commerce Clause justification for the Freedom of Choice Act would soon become substantial, and state sovereignty concerns of the sort reflected in *New York v. United States* would not be relevant. Nothing comparable can save the Religious Freedom Restoration Act from those concerns.

[FN260] See *supra* note 74 and accompanying text.

[FN261] See, e.g., *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978) (construing 42 U.S.C. § 1988 to authorize an award of attorney's fees against a state official for inflicting acts of cruel and unusual punishment barred by the Eighth and Fourteenth Amendments).

[FN262] Chief Justice Rehnquist and Justice O'Connor are already on record as believing that state sovereignty and limits on the scope of the Section 5 power may bar federal legislation. *EEOC v. Wyoming*, 460 U.S. 226, 259-65 (1983). Justices Scalia, Kennedy, Thomas, and Souter have not yet participated in any major cases testing the limits of congressional power to enforce the post-Civil War Amendments. All four of them, however, joined Justice O'Connor's state-oriented opinion in *New York v. United States*.

[FN263] This is a move the Court has never made. For reasons outlined in the preceding Section on the Freedom of Choice Act, it is a move that threatens both the Marbury function of courts and concerns of federalism. See *supra* note 187 and accompanying text. As noted in that discussion, any effort to narrow, rather than expand, Bill of Rights provisions is subject to quite different considerations--most notably, the Bill of Rights itself. See Laurence Tribe, *American Constitutional Law*, § 5-14, at 350 (2d ed. 1988).

[FN264] *Smith*, 494 U.S. at 882-90.

[FN265] *Id.*

[FN266] See sources cited *supra* note 232.

[FN267] See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Coleman v. Miller*, 307 U.S. 433, 453-55 (1939). The Free Exercise Clause, so construed, would take on the same constitutional significance once associated with the Guarantee Clause. See U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government...."). For many years, the Supreme Court held claims under the Guarantee Clause to be nonjusticiable, see e.g., *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 46 U.S. (7 How.) 1 (1849); recently, however, it has signalled the Clause's possible reinvigoration, see *New York v. United States*, 112 S.Ct. 2408, 2432-33 (1992). See generally Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum.L.Rev. 1 (1988) (arguing that the Guarantee Clause should be judicially enforceable in order to shield state autonomy from certain types of federal regulation). *Smith* so viewed would thus be an extreme example of the thesis that some constitutional provisions are, for reasons of

institutional competence, underenforced by the judiciary. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv.L.Rev. 1212 (1978). For further development and critique of this view of Smith, see Lupu, *The Trouble With Accommodation*, *supra* note 232, at 754.

[FN268] 5 U.S. (1 Cranch) 137 (1803).

[FN269] 400 U.S. 112 (1970).

[FN270] 384 U.S. 641 (1966).

[FN271] Smith, 494 U.S. at 890.

[FN272] Measuring statutory accommodations of religion against the Establishment Clause is no simple task. Compare *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding that sales tax exemption for religious publications lacked sufficient breadth to pass scrutiny under Establishment Clause) with *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (rejecting Establishment Clause attack on provision exempting religious employers from prohibition on religious discrimination in Civil Rights Act of 1964). For the view that the Constitution should be generously construed to permit accommodations, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo.Wash.L.Rev. 685 (1992). For a contrary view, see Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U.Pitt.L.Rev. 75 (1990); Lupu, *The Trouble With Accommodation*, *supra* note 232; Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, *supra* note 232.

[FN273] See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972). But cf. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) (holding that citizen-suit provision in federal statute cannot make up for complete absence of concrete injury from challenged government action). Lujan would prove no obstacle to the Religious Freedom Restoration Act, under which suits would be brought presumably by persons themselves "object[ing] of the action ... at issue," rather than persons alleging injuries "aris[ing] from the government's allegedly unlawful regulation ... of someone else," *id.* at 2137. Moreover, section 3(c) of the Act would provide that "the general rules of standing under Article III" would govern Act claims or defenses. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich.L.Rev. 163 (1992); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 277-90 (1988) (recognizing that Congress may grant standing to enforce a constitutional or statutory right); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv.L.Rev. 603, 615 n. 61 (1992) (arguing that Congress should be permitted to exercise control over the scope of justiciability doctrines).

[FN274] The Act declares its purposes to include the restoration of "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." H.R. 2797 § 2(b)(1).

[FN275] H.R. 2797 § 3(b). The Supreme Court's opinions in *Yoder* and *Sherbert* do not contain the precise language proposed in section 3(b). Although both decisions require the state to serve important interests in order to overcome Free Exercise Clause claims, neither adopts a standard as stringent as the Act proposes. See *Sherbert*, 374 U.S. at 403 (burdens on free exercise may be justified by a "compelling state interest") (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *id.* at 406 ("We must ... consider whether

some compelling state interest ... justifies the substantial infringement of appellant's First Amendment right."); *id.* at 407 (Government must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *id.* at 221 ("[W]e must searchingly examine the [state] interests and the impediment to those objectives that would flow from recognizing the claimed ... exemption.").

Moreover, section 3(a) of the Act revolves in still another constitutional orbit. That section presumptively forbids government acts that "burden" a person's exercise of religion. H.R. 2797 § 3(a). This seems innocuous enough until one recalls that the Supreme Court has construed the concept of burden very narrowly. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Court excluded from the concept all Native American Indian claims that the public lands were being used or developed in ways that defile tribal holy places. See also *Bowen v. Roy*, 476 U.S. 693 (1986) (government insistence on assigning a Social Security number to Native American's infant daughter, as a condition of her eligibility for Aid to Families with Dependent Children, does not present a cognizable burden upon religious belief that such a practice will injure the child's spirit); see generally *Lupu*, *supra* note 240 (suggesting an approach to burdens guided by common law principles). Codifying the concept of burdens will put the Congress squarely behind religious insensitivity to Native American tribes.

[FN276] When the Act's provisions on attorney's fees, § 4(a), and burden of proof, § 5(3), are added to the mix, the brew would be toxic for any government policy that bumps into religious practice.

[FN277] As Chief Justice Rehnquist has pointed out in a different context, the search for less restrictive means, "when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 294-95 (1985) (Rehnquist, J., dissenting).

[FN278] See *supra* text accompanying notes 140-41 (discussing incorporation of *Widmar* by "rule reference").

[FN279] See, e.g., *United States v. Lee*, 455 U.S. 252, 256-59 (1982) (refusing to create Free Exercise Clause exemption from tax laws on ground that exemption would be too difficult to administer).

[FN280] This has an unfortunate resonance with Learned Hand's [in]famous version of the clear and present danger test in *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir.1950) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."). The Supreme Court plurality adopted this version of the test in *Dennis v. United States*, 341 U.S. 494, 510 (1951). Like it or not, however, judges are always inclined to treat the gravity of the suggested harm as an important and independent analytical variable.

[FN281] See *supra* text accompanying notes 233-36.

[FN282] See *supra* text accompanying notes 207-12.

[FN283] For examples of the weaker version, see *Barnes v. Glen Theatre*, 111 S.Ct. 2456

(1991) (holding that a state need not rely on means less drastic than banning nude dancing in bars in order to address concerns about prostitution and sexual assault); Lee, 455 U.S. at 256-59 (refusing to create free exercise exemption from tax laws on ground that exemption would be too difficult to police); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 473-74 (1981) (rejecting gender equality claim against statutory rape statute on ground that gender neutrality would undercut enforcement incentives).

[FN284] The Religious Freedom Restoration Act might of course be redrafted to clarify exactly what level of protection is being afforded to religious liberty, and to ensure that such protection is reasonable. Staying away from judicial terms of art in such drafting may help minimize judicial power to revise the statute by interpretation. I would propose something like "Except on a showing of extraordinary good cause, no person acting under color of federal or state law may take any action that seriously injures any person in his or her religious belief or practice."

[FN285] See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1065 (1981); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind.L.J. 1, 2-3 (1971); see also John Hart Ely, *Democracy and Distrust* 4-8 (1980) (discussing the tension between judicial review and majoritarianism); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U.L.Rev. 893 (1990) (articulating a "judgment-based" view of the Constitution's historic protection of antimajoritarian rights).

[FN286] Bork, *supra* note 286, at 3.

[FN287] See David Morris, *Throttling the Bill of Rights*, *The Atlanta Constitution*, July 22, 1991, at A11; Fred Strasser, *Poll: Americans Are Fuzzy on Rights*, *Nat'l L.J.*, Dec. 23, 1991, at 6.

[FN288] See Dennis C. Mueller, *Public Choice* (1979); Frank H. Easterbrook, *Statutes' Domains*, 50 U.Chi.L.Rev. 533 (1983). For critiques of this approach, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex.L.Rev. 873 (1987); Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum.L.Rev. 2121 (1990).

[FN289] See, e.g., Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 Yale L.J. 1713 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan.L.Rev. 29 (1985). For a partially sympathetic yet significantly skeptical account of this body of literature, see Richard H. Fallon, Jr., *Commentary, What Is Republicanism, and Is It Worth Reviving?*, 102 Harv.L.Rev. 1695 (1989).

[FN290] See, e.g., William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan.L.Rev. 321 (1990); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U.Pa.L.Rev. 1567 (1988); Rubin, *supra* note 5.

[FN291] See, e.g., Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 159-65 (1965) (noting that the author's theory of the formation and behavior of pressure groups cannot adequately account for groups whose members are motivated by religion or ideology).

[FN292] Positive, or distributive (as opposed to "normative" or "deliberative"), theories of legislation focus on the ability of well-organized interest groups to win legislative benefits at the expense of more diffuse groups. See Eskridge, *supra* note 10, at 353-56; Jonathan Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum.L.Rev. 223 (1986).

[FN293] See Richard A. Posner, *The Federal Courts*, 286-89 (1985); Easterbrook, *supra* note 289, at 540-44.

[FN294] See Eskridge, *supra* note 10, at 353-89; Eskridge, *supra* note 112.

[FN295] Eskridge, *supra* note 10, at 378-87. Dynamic interpretation presents, of course, the antithesis of the arrangement interest groups would prefer if they sought an enforceable and predictable bargain in the outcome of the enacting process. Incorporation by statutory reference of any body of law external to that statute seems presumptively unlikely to occur under a view that statutes are "deals." But see *supra* note 111 (discussing federal statutory incorporation of state law by reference and state statutory incorporation of federal law by reference).

[FN296] Such drafters are in this sense far more respectful of stare decisis than the Justices who joined in *Smith*, or those who would overturn *Roe*.

[FN297] Schemes like the Freedom of Choice Act and the Religious Freedom Restoration Act interact in the most provocative ways with themes advanced in Professor Henry P. Monaghan's analysis of constitutional common law in *The Supreme Court, 1974 Term--Foreword: Constitutional Common Law*, 89 Harv.L.Rev. 1 (1975). Monaghan argues that Congress should be given substantial leeway to revise judicial decisions on certain matters such as criminal procedure, in much the same way that the law of the dormant commerce clause permits Congress to revise judicial determinations of the validity of state laws that burden interstate commerce. *Id.* at 42-43. Monaghan's argument received sharp criticism, primarily on the ground that minority interests protected by the Bill of Rights should not be left to the vagaries of majoritarian politics. Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv.L.Rev. 1117 (1978). In today's political context, however, the respective sides of the debate may be about to be reversed. Progressives may be happy to encourage doctrines that place legislatures astride the Constitution and diminish the scope of the judicial role in declaring its meaning.

[FN298] See Eskridge, *supra* note 10, at 373; Eskridge & Frickey, *supra* note 291, at 345-62; William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S.Cal.L.Rev. 541 (1988); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 Geo.L.J. 353 (1989).

[FN299] See Fallon, *supra* note 290; Fitts, *supra* note 291.

[FN300] See, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 111 S.Ct. 2476, 2487-88, 2490-91 (1991) (Scalia, J., concurring); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 471, 473 (1989) (Kennedy, J., concurring); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); see also Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 Duke L.J. 371, 375-79 (1987) (arguing that because the detriments of reliance upon legislative history significantly outweigh the benefits, courts should be limited to the text when interpreting statutes).

[FN301] See, e.g., Reed Dickerson, *The Interpretation and Application of Statutes* 95-97 (1975); Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1156-57 (tent. ed. 1958).

[FN302] There has been a recent proliferation of attention to canons of construction. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U.Pa.L.Rev. 1007 (1989); Sunstein, *supra* note 108; Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 Vand.L.Rev. 529 (1992).

[FN303] See *West Virginia Univ. Hosps.*, 111 S.Ct. at 1148; *Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring); see also Easterbrook, *supra* note 289, at 544-52 (arguing that by restricting the applicability of a statute to cases actually contemplated by its framers, absent express statutory permission to "create" common law, courts can avoid illegitimate judicial "gap-filling").

[FN304] See, e.g., *Shapiro v. United States*, 335 U.S. 1, 48-49 (1948) (Frankfurter, J.); see also Starr, *supra* note 301, at 376-77 (arguing that the potential for abuse of legislative history in statutory interpretation counsels against its use); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv.L.Rev. 1005 (1992) (arguing that judicial use of legislative history allows interested parties to undemocratically influence the law).

[FN305] Lawyers will always try to manipulate the language of prior cases in arguing new ones, but the likelihood of deceiving a judge concerning the scope and meaning of the kind of legislative history reflected in case law seems relatively slim.

[FN306] Sunstein, *supra* note 108, at 411-12.

[FN307] S. 25, 102d Cong., 2d Sess., § 3(a)(1) (1992).

[FN308] *Board of Educ. v. Mergens*, 496 U.S. 226, 242 (1990); see *supra* text accompanying notes 145-49.

[FN309] 112 S.Ct. 2791, 2816-21 (1992) (plurality opinion).

[FN310] 406 U.S. 205 (1972).

[FN311] 111 S.Ct. 2395 (1991).

[FN312] Not all commentators have been sanguine about the enterprise. Compare William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977) (urging state courts to extend greater protection of individual rights via state constitutions than the Supreme Court has made applicable under the Bill of Rights) with James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich.L.Rev. 761 (1992) (arguing that state constitutionalism has largely failed as a means of protecting individual rights).

[FN313] See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U.L.Rev. 469, 516-18 (1981). This first model recurs frequently in Dworkin's work. See, e.g., Ronald Dworkin, *Law's Empire* (1986).

[FN314] This model of courts as fora of principle was also reflected in the once-popular view that encroachment by statutes that "derogated" from the common law should be resisted, because such statutes were political, interest-oriented intrusions on the purity and integrity of the common law system. See Cass R. Sunstein, *Lochner's Legacy*, 87 Colum.L.Rev. 873, 873-79 (1987).

[FN315] The work that best captures this quality of American constitutionalism is Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (1989). Chapter 1, "What About Brown?," is especially relevant. See id. at 1-26. Although I believe Professor Nagel's criticism of the judicial role in constitutional culture is overstated, see Ira C. Lupu, *When Cultures Collide*, 103 Harv.L.Rev. 951, 957-63 (1990) (book review), his account of the role of non-judicial actors in the maintenance of constitutional norms is quite valuable. See also Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (1992) (discussing, and illustrating in particular contexts, the roles of Congress and the Executive Branch in constitutional controversies).

[FN316] Professor Sunstein has recently suggested that the Court should defer to Congress when it legislates in the name of the Constitution. Sunstein, *supra* note 6, at 50. This seems quite wrong to me. The notion that any branch should "defer" to the others when such claims are made is a dangerous assault on our traditions of separated powers, of ambition countering ambition, and of continuous constitutional struggle. With differing constituencies, political accountabilities, and decisionmaking procedures, each branch has something unique to offer to constitutional development, as do state and local government. Moreover, a pattern of deference to congressional revisions of constitutional law would not likely remain limited to statutory expansions of rights. When the contractions come, as they inevitably will, the resolve in the judicial branch to fight for its view of the Constitution may prove essential to the preservation of liberty.

[FN317] This subject has been a matter of important recent dispute in law and commentary. In addition to the opinions in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo.Wash.L.Rev. 68 (1991); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum.L.Rev. 723 (1988); James C. Rehnquist, Note, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L.Rev. 345 (1986).

[FN318] That legislators may so behave has long been recognized. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan.L.Rev. 585 (1975). For contrasting views on the institutional capacity of Congress and its members to do so, compare Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L.Rev. 587 (1983) (arguing that Congress lacks the capacity to resolve hard constitutional questions) with Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L.Rev. 707 (1985) (taking issue with Judge Mikva on the question of institutional capacity). Similar debates have long been raging over the President's power and duty to formulate an independent view of the Constitution. See, e.g., the collection of contemporary essays and historical materials in *Who Speaks for the Constitution?: The Debate Over Interpretive Authority* (The Federalist Society, Occasional Paper No. 3, 1992).

[FN319] The Court denied a petition for rehearing in the litigation itself. 496 U.S. 913

(1990). Professor Carter's view of congressional power to enforce the Fourteenth Amendment fits this perspective. See Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U.Ch.L.Rev. 819 (1986).

[FN320] 381 U.S. 479 (1965).

[FN321] See Bruce A. Ackerman, *Transformative Appointments*, 101 Harv.L.Rev. 1164, 1179 n. 20 (1988) (noting that the defeat of the Bork nomination to the Supreme Court "signifies the President's failure to carry the People with him in his critique of the Warren and Burger Courts," but does not necessarily mean "that a mobilized majority of Americans affirmatively endorse all the constitutional principles Bork criticized").

[FN322] Bruce A. Ackerman, *We the People* (1991).

[FN323] *Id.* at 6-7.

[FN324] *Id.* at 40-50.

[FN325] For discussion and critique of Professor Ackerman's theory of constitutional moments, see Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv.L.Rev. 918 (1992) (book review); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan.L.Rev. 759 (1992) (book review).

[FN326] For another argument supporting the view that the People can change the Constitution outside both the formal amendment process and the formal legislative process, see Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U.Ch.L.Rev. 1043 (1988).

*84 LEGISLATIVE APPENDIX THE FREEDOM OF CHOICE ACT IN THE SENATE OF THE UNITED STATES--102d Cong., 2d Sess.

S.25

A BILL

To protect the reproductive rights of women, and for other purposes.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Freedom of Choice Act of 1992."

SEC. 2. CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE.

(a) FINDINGS.--Congress finds the following:

(1) The 1973 Supreme Court decision in *Roe v. Wade* established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy. Under the strict scrutiny standard enunciated in *Roe v. Wade*, States were required to demonstrate that laws restricting the right of a woman to choose to terminate

a pregnancy were the least restrictive means available to achieve a compelling State interest. Since 1989, the Supreme Court has no longer applied the strict scrutiny standard in reviewing challenges to the constitutionality of State laws restricting such rights.

(2) As a result of the Supreme Court's recent modification of the strict scrutiny standard enunciated in *Roe v. Wade*, certain States have restricted the right of women to choose to terminate a pregnancy or to utilize some forms of contraception, and these restrictions operate cumulatively to--

(A)(i) increase the number of illegal or medically less safe abortions, often resulting in physical impairment, loss of reproductive capacity or death to the women involved;

(ii) burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other States or foreign nations;

(iii) interfere with freedom of travel between and among the various States;

*85 (iv) burden the medical and economic resources of States that continue to provide women with access to safe and legal abortion; and

(v) interfere with the ability of medical professionals to provide health services;

(B) obstruct access to and use of contraceptive and other medical techniques that are part of interstate and international commerce;

(C) discriminate between women who are able to afford interstate and international travel and women who are not, a disproportionate number of whom belong to racial or ethnic minorities; and

(D) infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional.

(3) Although Congress may not by legislation create constitutional rights, it may, where authorized by its enumerated powers and not prohibited by a constitutional provision, enact legislation to create and secure statutory rights in areas of legitimate national concern.

(4) Congress has the affirmative power both under section 8 of Article I of the Constitution of the United States and under section 5 of the Fourteenth Amendment of the Constitution to enact legislation to prohibit State interference with interstate commerce, liberty or equal protection of the laws.

(b) PURPOSE.--It is the purpose of this Act to establish, as a statutory matter, limitations upon the power of States to restrict the freedom of a woman to terminate a pregnancy in order to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in *Roe v. Wade* and applied in subsequent cases from 1973 to 1988.

SEC. 3. FREEDOM TO CHOOSE.

(a) IN GENERAL.--A State--

(1) may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability;

(2) may restrict the freedom of a woman to choose whether or not to terminate a pregnancy after fetal viability unless such a termination is necessary to preserve the life or health of the woman; and

*86 (3) may impose requirements on the performance of abortion procedures if such requirements are medically necessary to protect the health of women undergoing such procedures.

(b) RULES OF CONSTRUCTION.--Nothing in this Act shall be construed to--

(1) prevent a State from protecting unwilling individuals from having to participate in the performance of abortions to which they are conscientiously opposed;

(2) prevent a State from declining to pay for the performance of abortions; or

(3) prevent a State from requiring a minor to involve a parent, guardian, or other

responsible adult before terminating a pregnancy.

SEC. 4. DEFINITION OF STATE.

As used in this Act, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each other territory or possession of the United States.

*87 THE RELIGIOUS FREEDOM RESTORATION ACT IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES--102d Cong., 1st Sess.

H.R. 2797

A BILL

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1991."

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.--The Congress finds--

(1) the framers of the American Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in *Employment Division of Oregon v. Smith* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) PURPOSES.--The purposes of this Act--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

*88 SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.--Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.--Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is essential to further a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.--Section 722 of the Revised Statutes of the United States (42 U.S.C.1988) is amended by inserting "the Religious Freedom Restoration Act of 1991," before "or title VI of the Civil Rights Act of 1964."

(b) ADMINISTRATIVEPROCEEDINGS.--Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking "and" at the end of clause (ii);
(2) by striking the semicolon at the end of clause (iii) and inserting "; and"; and
(3) by inserting "(iv) the Religious Freedom Restoration Act of 1991" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

*89 (2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States; and

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

SEC. 6. APPLICABILITY

(a) IN GENER

CONGRESS HAS THE CONSTITUTIONAL POWER TO ENACT
PUNITIVE DAMAGE REFORM LEGISLATION; THE TENTH AMENDMENT DOES NOT LIMIT THIS POWER

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INTRODUCTION

This paper will very briefly set forth the need for congressional action on punitive damage reform, why the Commerce Clause of the United States Constitution gives Congress the Power to enact such reform, why the Fourteenth Amendment of the United States Constitution allows Congress to enforce due process rights to protect parties against Constitutionally excessive punitive damage awards, and, finally, why the Tenth Amendment to the United States Constitution does not limit Congress's power to enact such legislation.

I. THERE IS A NEED FOR CONGRESSIONAL ACTION ON
PUNITIVE DAMAGE REFORM

* United States Supreme Court justices have expressed concern that punitive damages in this country are "skyrocketing" (*Browning - Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part), and have "run wild." (*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

* "It is the duty of Congress to respond to the [United States Supreme] Court's concern about punitive damages that are 'run wild' by enacting meaningful reforms that will safe-guard constitutionally protected due process rights and remove substantial barriers to interstate commerce." (S. NO. 105-32, at 44-45 (1997) (Senate Committee on Commerce, Science, and Transportation, report on Product Liability Reform Act of 1997)).

* Federal punitive damages reform is necessary to assure that lower courts will adhere more closely to the letter and spirit of the United States Supreme Court's punitive damages decisions. Without such legislation, some lower courts will continue to ignore the United States Supreme Court constitutional substantive and procedural due process mandates on the topic. (See Editorial, *Punitive Schmunitive*, WALL ST. J., Sept. 10, 2003, at A24).

* Both state and federal judges have indicated that action by Congress is needed to prevent defendants from being punished multiple times for the same act or course of conduct. (See cases cited on p. 9, Testimony of V. Schwartz before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. H. REP., Regarding Potential Congressional Responses to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 108th Cong. (2003)).

II. THE COMMERCE CLAUSE GIVES CONGRESS THE POWER
TO ENACT PUNITIVE DAMAGE LEGISLATION

* The Commerce Clause of the United States Constitution gives Congress the power to regulate interstate commerce. (U.S. CONST. art. I, § 8).

* Traditionally, the United States Supreme Court has defined Congress's interstate commerce power broadly. For example, in a case included in most law school Constitutional Law textbooks, *Wickard v. Filburn*, (317 U.S. 111, 125 (1942)), the Supreme Court held that Congress can regulate even totally local activity through the Commerce Power and that Congress can legislate concerning any activity that directly or indirectly "exerts a substantial economic effect on interstate commerce." The Supreme Court has upheld as valid Congress's use of its Commerce Power to regulate gambling, crop control, employee wages and hours, professional football, deceptive practices in the sale of products, fraudulent security transactions, and the misbranding of drugs, among other interstate activities. (*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)).

* Legislation imposing controls on punitive damages is solidly within Congress's Commerce Power because punitive damage awards are inseparable from a defendant's interstate commercial activity. As the United States Supreme Court recognized in *State Farm Mut. Auto. Ins. Co. v. Campbell*, (123 S. Ct. 1513 (2003)), in assessing punitive damages, juries consider a defendant's net wealth gained from commercial enterprise and they also

have the potential to lash out against out-of-state commercial businesses, "us[ing] their verdicts to express biases against big businesses, particularly those without strong local presences" (123 S.Ct. 1513, 1520).

* Legislation imposing controls on punitive damages is also within Congress's Commerce Power because such damages directly affect interstate commerce. Costs of punitive damage awards are spread throughout the country and adversely affect national productivity. If they are not kept under legitimate control, they also deter innovation and can cause useful and safe products to be withdrawn from the marketplace. Multi-million and multi-billion dollar awards have the potential to bankrupt companies, causing further disruptions to interstate commerce.

* Arguments of the Association of Trial Lawyers of America do not stand up under scrutiny:

* For example, distinguished counsel Bob Peck suggested in his September 23, 2003 testimony before the Subcommittee on the Constitution of the Judiciary Committee that the conduct that engenders punitive damages cannot be regarded as economic activity since there is no commercial market for willful, fraudulent or malicious acts that merit a community's moral condemnation. In *Heart of Atlanta Motel, Inc. v. United States*, (379 U.S. 241 (1964)), the United States Supreme Court disposed of his argument. In that case, opponents of legislation prohibiting discrimination by private hotel owners argued that such legislation was not in the Commerce Power because it prohibited conduct that was only a moral and social wrong with no impact on interstate commerce. The Court upheld the legislation and undercut this argument, holding that "Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." (Id. at 257-58).

* Mr. Peck argued that the United States Supreme Court's decision *United States v. Lopez*, (514 U.S. 549 (1994)), undermines Congress's authority under the Commerce Clause to regulate punitive damages. But, *Lopez* is simply an example of United States Supreme Court striking down legislation that addressed a topic that had no relationship with interstate commerce, a statute standing in stark contrast to punitive damage legislation, which would directly stem from and impact a defendant's interstate commercial activity.

* The *Lopez* Court determined that Congress acted outside of its Commerce Clause power when it enacted a criminal statute prohibiting gun possession in school zones because the law had "nothing to do with commerce or any sort of economic enterprise, however broadly one might interpret those terms." (514 U.S. at 561-567).

* The United States Supreme Court's determination in *Lopez* was understandable because there was no showing of a direct, or even an unattenuated indirect, connection between a criminal statute that affected purely a local activity (e.g., carrying a gun in a school zone) and interstate commerce. Making that connection in *Lopez*, as the Court pointed out, would require a number of steps that would "pile inference upon inference," including the inferences that "(1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce." Unlike the attenuated, indirect link between the *Lopez* statute and interstate commerce, huge punitive damage awards directly impact the economic well being of companies, resulting in disruption to interstate commerce. Under the Court's reasoning in *Lopez*, the Court would find punitive damage legislation to be within Congress's Commerce Clause power because there is a direct link between punitive damages and interstate commerce. (514 U.S. at 565-67).

* Mr. Peck also relied on the United States Supreme Court decision *U.S. v. Morrison*, (529 U.S. 598 (2000)), which struck down the Violence Against Women Act (hereinafter "V.A.W.A.") to support his contention that Congress lacks the power to enact punitive damage legislation. The United States Supreme Court struck down the V.A.W.A. (a criminal statute prohibiting rape) because, like the gun possession statute in *Lopez*, the V.A.W.A. did not substantially affect interstate commerce.

* The V.A.W.A. is quite unlike federal legislation that would set rational controls upon punitive damages. By way of contrast with such legislation, the V.A.W.A. was a criminal statute having no tie to commercial activity. Punitive damage reform legislation is aimed at the civil torts system; many punitive damages awards are intricately tied to a defendant's commercial activity. (See *Morrison*, 529 U.S. at 613).

* The United States Supreme Court suggested in *Morrison* that under the Commerce Clause power, Congress could constitutionally enact a law against gender-motivated violence if

the law affected interstate commerce, as would be the case if the law prohibited violence against "things or persons in interstate commerce." not just against women in general. The United States Supreme Court indicated that so long as Congress directed its laws toward interstate commerce, as it would do in punitive damage reform legislation, the law would be upheld. (529 U.S. at 609).

* Unlike its treatment of the V.A.W.A. in *Morrison*, in *Cleveland v. United States*, (329 U.S. 14 (1946)), the Court upheld a federal law (the Mann Act) that prohibited transporting women across state lines for prostitution purposes, finding that prostitution is a commercial enterprise. If Congress enacted punitive damages legislation, the United States Supreme Court would uphold the legislation just as it did the Mann Act, since punitive damages often are based upon the value of a defendant's commercial enterprise or significantly impact a defendant's commercial enterprise. (Id. at 19-20).

III. THE FOURTEENTH AMENDMENT ALLOWS CONGRESS TO ENFORCE DUE PROCESS RIGHTS, GIVING CONGRESS THE POWER TO ENACT PUNITIVE DAMAGE LEGISLATION

* Congress, through legislation, can enforce Fourteenth Amendment due process rights.

(U.S. CONST. amend. XIV, § 5; *Morrison*, 529 U.S. at 619).

* According to the United States Supreme Court, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." If there are improperly imposed they can affect a defendant's due process rights. (*State Farm*, 123 S. Ct. at 1520).

* United States Supreme Court cases have recognized that due process places substantive and procedural limits on punitive damages.

* In *Pacific Mutual Life Insurance Co. v. Haslip*, (499 U.S. 1 (1991)), the Court for the first time acknowledged that excessive punitive damages awards could violate the Fourteenth Amendment.

* In *TXO Production Corp., v. Alliance Resources Corp.*, (509 U.S. 443, 454 (1993)), a plurality of the United States Supreme Court indicated that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'"

* In *Honda Motor Co., Ltd., v. Oberg*, (512 U.S. 415 (1994)), the United States Supreme Court held that procedural due process required a state to provide judicial review of the amount of a punitive damages award. The Court held that states must allow for judicial review of the size of punitive damages awards.

* In *BMW of North America v. Gore*, (517 U.S. 559 (1996)), the United States Supreme Court held that punitive damages awards were "grossly excessive" and that they violated a defendant's substantive due process rights. The United States Supreme Court provided three "guideposts" for determining whether punitive damages awards are unconstitutionally excessive: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the actual damages and the punitive damages award; and (3) the comparable civil and criminal sanctions for the conduct. (Id. at 575).

* In *Cooper Industries, Inc., v. Leatherman Tool Group Inc.*, (532 U.S. 424 (2001)), the United States Supreme Court held that appellate courts must engage in a de novo review of punitive damages awards to determine if an award is unconstitutionally excessive.

Contrary to Mr. Peck's assertion that this decision was merely the United States Supreme Court exercising its supervisory role over federal courts, the United States Supreme Court made clear in *State Farm* that the *Leatherman* case was based on procedural due process and applied to both federal and state courts. (*State Farm*, 123 S.Ct. at 1519).

* Contrary to Mr. Peck's assertion that the United States Supreme Court's most recent opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell* was simply a rehash of prior decisions, the Court's set forth new and clearer substantive due process standards. In *State Farm*, the Court delineates one of these standards as a defendant's right not to have its out-of-state conduct factored into a punitive damage award in the forum state. (123 S. Ct. at 1523-1525). The Court also stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (Id.). The only exception to this rule mentioned by the Court was when compensatory awards were relatively minor and a defendant's conduct was particularly egregious. (Id. at 1524).

* Unfortunately, a number of state courts have ignored the United States Supreme Court's guidelines on punitive damages, and as such, have violated the due process rights of defendants. (See *Mertens v. Wilkinson*, 507 U.S. 969 (1993); *Bodie v. City of Huntsville*, 987 F.2d 774 (11th. Cir. 1993), vacated by 501 U.S. 801 (1993); *Cont'l Trend Res., Inc.*

v. Oxy USA, Inc., (10th Cir. 1995), vacated by 517 U.S. 1216 (1996); Johansen v. Combustion Eng'g, Inc., 834 F.Supp. 404 (S.D. Ga. 1993), vacated by 517 U.S. 1217 (1996); BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), rev'd., 517 U.S. 559 (1996); Am. Pioneer Life Ins. Co. v. Williamson, 681 So. 2d 1040 (Ala. 1995), vacated by 517 U.S. 1231; Sperau v. Ford Motor Co., 674 So. 2d 24 (Ala. 1995), vacated by 517 U.S. 1217 (1996); Union Sec. Life Ins. Co. v. Evelyn Crocker, 667 So. 2d 688 (Ala. 1995), vacated by 517 U.S. 1230 (1996); Life Ins. Co. of Ga. v. Daisey L. Johnson, 684 So. 2d 685 (Ala. 1996), vacated by 519 U.S. 923 (1996); Simon v. San Paolo U.S. Holding Co., Inc., 2001 W.L. 1380836 (Ca. Ct. App. 2001), vacated by 123 S.Ct. 1828 (2003); Textron Fin. Corp v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn., 2001 W.L. 1201631 (Cal. Ct. App. 2001), Time Warner Entm't Co., L.P. v. Six Flags Over Ga., LLC, 537 S.E.2d 397 (Ga. Ct. App. 2000), vacated by 534 U.S. 801 (2001); vacated by 534 U.S. 947 (2001); Bocce v. Key Pham., Inc., 35 P.3d 1106 (Or. Ct. App. 2001), vacated by 123 S. Ct. 1781 (2003); Apache Corp. v. Moore, 891 S.W.2d 671 (Tex. Ct. App. 1994), vacated by 517 U.S. 1217 (1996); Campbell v. State Farm Auto. Mut. Ins. Co., 65 P.3d 1134 (Utah 2001), rev'd, 123 S. Ct. 1513 (2003)).

* Through its Fourteenth Amendment enforcement power, Congress can and should codify the United States Supreme Court's holdings regarding punitive damages in order to enforce litigants' due process rights.

IV. THE TENTH AMENDMENT DOES NOT LIMIT THE CONGRESS'S POWER TO ENACT PUNITIVE DAMAGE REFORM LEGISLATION

* Although general tort law has long been the province of the states, Congress has enacted numerous federal laws when activities have affected interstate commerce. (Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEG. 274-78 (1999) (listing, e.g., the Federal Employers' Liability Act which defined rights and duties in personal injury cases brought by railroad workers against employers; the Longshore and Harbor Workers' Compensation Act which provided fixed awards to employees for deaths at sea; the General Aviation Revitalization Act which established an eighteen-year statute of repose on bringing litigation; the Small Business Job Protection Act which holds punitive damages received in personal injury suits subject to federal income tax among other things; the Federally Support Health Centers Assistance Act of 1995 which extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers; the Volunteer Protection Act of 1997 which provided limited immunity for volunteers acting on behalf of a nonprofit organization and created a national standard of punitive damage liability for volunteers; the Biomaterials Access Assurance Act of 1998 which provided suppliers of raw materials and component parts of medical devices a method for dismissing certain torts suits without excessive discovery; and the Year 2000 Information and Readiness Disclosure Act which banned the use of Y2K readiness disclosure statements by plaintiffs as evidence to prove the truth of a company's assertion about dealing with Y2K computer problems.) (See also the Strengthening and Improvement of Elementary and Secondary Schools, Preparing, Training, and Recruiting High Quality Teachers and Principals Innovation for Teacher Quality Teacher Liability Protection Act (Paul D. Coverdell Teacher Liability Protection Act of 2001), 20 U.S.C. § 6731 et seq. (2002)).

* Federal legislation can provide an effective means of addressing punitive damage problems that are rooted in interstate commerce and that are national in scope. (Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEG. 269 (1999)).

* When the United States Constitution grants power to Congress, such as through the Commerce Power or the power to enforce the Fourteenth Amendment Due Process Clause, Congress may use that power to "impose its will on the states." (Gregory v. Ashcroft, 501 U.S. 452, 460 (1990)). All other powers not delegated to the federal government are reserved to the states through the Tenth Amendment. (U.S. CONST. art. I, § 8).

* Mr. Peck's suggestion that the Tenth Amendment limits the Congress's power to set limits on punitive damages is erroneous. As the United States Supreme Court noted in Gregory v. Ashcroft, (501 U.S. 452 (1991)), concerning federal government powers to regulate versus those powers reserved to the states by the Tenth Amendment, "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas

traditionally regulated by states." (Id. at 460); See *Cleveland v. the United States*, 329 U.S. at 19 (where the Court upheld the Mann Act's regulation of marriage as a valid congressional action, even though regulation of marriage has traditionally been a state matter)).

* Mr. Peck's argument that punitive damages, because of their function of deterrence and punishment, are intimately related to the process of democratic self-governance and, as such, are protected from congressional interference by the Tenth Amendment is incorrect. The case to which he refers to support this proposition is *Gregory v. Ashcroft*, (501 U.S. 452 (1990)). where the United States Supreme Court interpreted federal age discrimination legislation narrowly so that it did not interfere with a state law requiring mandatory retirement of state judges at the age of seventy. In dicta, the United States Supreme Court indicated that a state's decision regarding which officials will exercise governmental authority through a mandatory state judge retirement law is a state decision at the heart of representative government because this determination is related to how "the State defines itself as a sovereign," similar to a state's power to regulate its own elections and to prescribe the qualifications and selection of its officers. (Id. at 461-42). These democratic state functions are clearly distinguishable from the arena of state tort law, an area where time and time again Congress has enacted legislation that has preempted state tort law.

* Further, the line of cases establishing a "political function" exemption for laws "intimately related to the process of democratic self-government" that "go to the heart of self-government" make up a limited exception to a very limited area of the law: the narrow exception to the rule that discrimination based on alienage triggers strict scrutiny in Equal Protection cases. As such, these cases are inapposite to the discussion of whether the Commerce Clause or the Fourteenth Amendment due process enforcement power give Congress the right to enact punitive damage legislation. (*Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *Gregory*, 501 U.S. at 462-63).

CONCLUSION

There is a need for congressional action on punitive damage reform. The Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution provide a Constitutional basis for punitive damage reform. The Tenth Amendment to the United States Constitution and case law and case law construing that Amendment does not create an impediment to congressional action.

MATERIAL SUBMITTED BY REPRESENTATIVE NADLER

TORT REFORM 1999: A BUILDING
WITHOUT A FOUNDATIONROBERT S. PECK*
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I. INTRODUCTION

For the better part of thirty years, corporate and other interests bent on avoiding responsibility for their misdeeds have led a battle to "reform" the civil justice system in a manner that tilts the legal playing field substantially and shamelessly in their favor. Acting under the umbrellas of various "citizens" groups, such as the American Tort Reform Association, the Civil Justice League, and Citizens Against Lawsuit Abuse, these business interests have sought to scale back the rights of American consumers by heightening negligence standards, abolishing centuries-old legal doctrines, capping damage awards, and instituting other reforms that effectively deny the American public access to the courts.

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Using their political muscle and a nonstop propaganda machine to create a false impression about "runaway juries" and to demonize lawyers who work for ordinary people, they have manufactured myths and anecdotes about supposed cases with the singular purpose of furthering their political agenda by enraging the public over a civil justice system supposedly gone awry. The tales they tell, though, have little relationship to the facts. Two scholars from the American Bar Foundation found:

Underlying this promise for legal reform are the familiar refrains of a litigation explosion, a lawsuit crisis, a liability crisis, an insurance crisis, skyrocketing jury awards, unscrupulous attorneys, and on, and on. This legal system run amok is blamed for everything from the unavailability of essential health care and medicines, the loss of business competitiveness in the world economy and the concomitant effects on economic well-being and jobs, to the closing of public parks and the demise of high school football. These costs and others are presented as a justification for immediate, fundamental reform in the civil justice system

. . . We are skeptical of the efficacy of many proposed and enacted reforms, and we are concerned about the consequences of those measures. Beyond the self-interest of those groups lobbying for reform, we can see little reason for endorsing this reform agenda. We come to this position after spending a number of years collecting and analyzing data on civil jury verdicts from different parts of the country. We—and others—do not find empirical evidence of a system run amok with skyrocketing awards, and so on. Or, we find little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system.¹

Others have expended great effort to track down the stories told by these "tort reformers" and have found the renderings to be nothing less than substantial distortions calculated to advance political goals. For example, University of Wisconsin law professor, Marc Galanter, has investigated some of the most frequently used examples of supposedly indefensible case results and found, upon review of the actual facts, the cases reached entirely logical ends.²

The distorted discourse on the civil justice system has also moved beyond such traditional fora for political rhetoric as editorials, op-eds, and sympathetic talk-show hosts. It now finds expression in what these groups routinely brandish as "scholarship." Politically motivated conservative think tanks such as the Manhattan Institute,

1. STEPHEN DANKS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 18-19 (1995).

2. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 726-31 (1998) (setting forth stories of lawsuits that were publicized in a misleading manner).

the Hudson Institute, and the Beacon Hill Institute; and polemical writers such as Peter Huber and Walter Olson publish works of dubious scholarship that are passed off as authoritative commentaries on a supposedly out-of-control civil justice system.

Unfortunately, these works are often taken at face value by uncritical members of the press, politicians and political groups looking to justify their own preconceived policy objectives, and a public that often has no means to obtain better information. In fact, much of the tort reformers' arguments have saturated the public to such an extent that many prospective jurors come to court with the mistaken belief that plaintiffs, who have suffered serious injury as a result of another's negligence, are merely out to enrich themselves at the expense of an unlucky, deep-pocketed corporation.³

Others have noted this trend as well. According to information culled from court reporters in personal injury suits, juries sided with plaintiffs 52% of the time in 1992, down from 61% in 1987.⁴ Plaintiffs' success in product liability jury trials dropped from 54% in 1987 to 43% in 1992, and in cases concerning consumer products, that success dropped from 55% to 39% in the same time period.⁵ Plaintiffs' success in medical malpractice cases has not been any better, with plaintiffs prevailing in only 25% of cases against doctors in 1992, down from 42% in 1987.⁶ The reasons for this drop are clear, according to one expert:

Jury specialists say the powerful and deep-pocketed advocates of reform have spread their message so successfully in the media that juries have changed their behavior. "The publicity of the business and insurance groups has played a major role in shifting both public and judge opinion," says Theodore Eisenberg, a professor at Cornell Law School. "Either there was a liability crisis or people got sold one, and attitudes changed in a way that led to more victories for defendants."⁷

Given the overwhelming evidence offered by independent scholars that there was no litigation explosion, it is clear that the people did, in fact, get sold one.⁸ More serious scholarship, written primarily by

3. See Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 244-45 (Mar.-Apr. 1995) (stating how skeptical jurors often "blamed the victim"); see also Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, WALL ST. J., Mar. 21, 1994, at B1; Amy Singer, *Selecting Jurors: What to Do About Bias*, TRIAL (Apr. 1995) at 29.

4. See Felsenthal, *supra* note 3, at B1.

5. See *id.*

6. See *id.*

7. *Id.*

8. A study done by a jury consulting firm found that 75% of jurors believe that awards are too large, and two-thirds say there are too many lawsuits. See *id.* Another study found that when exposed to an insurance company advertisement complaining about large jury awards, mock jurors awarded significantly less pain-and-suffering damages than

disinterested academic observers, has shown how bereft of rigor and validity the tort reformers' research truly is. Contrary to the claims that are made, the empirical evidence amply demonstrates that there is no litigation explosion,⁹ and juries do not act irrationally or prejudicially against wealthy defendants in awarding damages.¹⁰ In fact, studies demonstrate that awards, all things being equal, are no more or less consistent "if the defendant is a health care provider or the negligent driver of an automobile."¹¹ The bottom line is that the jury verdicts are not influenced by the availability of "deep pockets."

One would hope that the appearance of systematic scholarship debunking the work of pro-tort reform scholars would put an end to their specious arguments and occasional legislative successes. Unfortunately, that is not the case. Rather than focus on provable facts, the tort reform propaganda is recycled from state to state, and the troublesome reality that reputable scholars have discredited it is either ignored or rationalized.

The Florida Legislature also bought the bill of goods being sold by tort reformers and adopted the rhetoric of the majority's political patrons in attempting to justify legislation. When Governor Jeb Bush signed House Bill 775 into law on May 26, 1999,¹² the business community finally achieved its goal of securing the most far-reaching legislative restriction of citizens' and consumers' rights in more than a decade. This year's victory was the culmination of a three-year legislative battle that had raged in and out of the halls of the legislature and marked the first comprehensive tort reform legislation enacted into law since the Tort Reform and Insurance Act of 1986.¹³ The enactment was a tribute to raw power, as first the Senate, then the House of Representatives, and finally the Governor's Office changed hands and the new officeholders felt an obligation to reward the

those mock jurors who did not see the advertisement. See Elizabeth F. Loftus, *Insurance Advertising and Jury Awards*, A.B.A. J., Jan. 1979, at 69-70.

9. See DANIELS & MARTIN, *supra* note 1, at 238-43; see also Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 U. MD. L. REV. 1093, 1103 (1996) (stating that the number of civil lawsuits per capita that has been filed is lower than at previous times in the nation's history).

10. See HANS, *supra* note 3, at 248; see also DANIELS & MARTIN, *supra* note 1, at 238-43; VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY 160-63 (1986); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 193-202 (1995); MICHAEL DASTOZ, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 86 (1992) (explaining why empirical evidence does not support the theory that juries grant larger damage awards against wealthier defendants).

11. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 908 (1994) (footnote omitted).

12. Fla. HB 775 (1999) (Act effective Oct. 1, 1999), ch. 90-225, 1999 Fla. Laws 1100.

13. See Act effective July 1, 1986, ch. 86-100, 1986 Fla. Laws 096.

business community that had so assiduously supported them. The result was that a longstanding business wish list of legal changes was enacted.¹⁴

Unfortunately for the business community, there was absolutely no factual basis to claim that legal relief from liability was necessary. Florida was not experiencing an insurance crisis, a litigation explosion, or a declining economy. In fact, objective data showed just the contrary.¹⁵ Therefore, as part of their public relations plan, the business community adopted the rhetorical device of claiming that legal liability amounted to a "tort tax" that was exacted upon all Floridians. Specious research from the national tort reform movement was the only empirical evidence presented to the legislature in support of tort reform.

In Parts II through III, this Article will briefly examine House Bill 775 and its genesis, and then trace the bill through the legislative process that eventually enacted it as law. It will also look at some of the key provisions of the bill and their effects on tort litigation. Part IV of this Article will place the issue of tort reform in the context of constitutional requirements. Finally, Parts V through VIII will critically review the so-called scholarship used to justify tort reform. It will look at studies used to support the passage of Florida tort reform laws and point out their fallacies.

II. THE JOURNEY TO FLORIDA "TORT REFORM"

The efforts of the business community and the legislature that culminated in 1999 took three legislative sessions to bear fruit. In 1997, legislation was considered but not passed.¹⁶ In 1998, legislation was passed, but vetoed.¹⁷ And, in 1999, legislation was passed and signed into law.¹⁸ The provisions of these three sweeping pieces of legislation are compared in detail in the appendix to this Article.

Late in the 1997 Legislative Session, the House Committee on Financial Services took up a proposed committee bill that was entitled the "Florida Accountability and Individual Responsibility (FAIR) Liability Act."¹⁹ The bill, which included a variety of tort reforms, was taken up and passed out of committee in record time amidst an un-

14. See generally Kenneth D. Krane, *Tort Reform 1997-98: Profits v. People?*, 25 FLA. ST. U.L. REV. 161 (1998) (providing a brief overview of the history behind recent "tort reform" efforts in Florida).

15. See *id.* at 182.

16. See Fla. HB 2117 (1997) (proposed amendment to chs. 95, 768, 772 (1997)).

17. See Fla. CS for SB 871 (1998).

18. See Fla. HB 775 (1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400).

19. Fla. H.R. Comm. on Fin. Servs., PCB 97-06 (1997) (proposed Fla. HB 2117 (1997)).

usually heavy-handed display of legislative strong-arming.²⁰ Among other things, House Bill 2117 included a statute of repose for product liability cases, the elimination of the owner's vicarious liability for the use of *any* personal property by someone other than the owner, limitations on punitive damages, and a further restriction on the application of the doctrine of joint and several liability.²¹ Under the House Rules in effect at the time, House Bill 2117 was carried over and left pending for consideration during the 1998 Session.²²

In the new session, Senate President Toni Jennings created the Senate Select Committee on Litigation Reform and charged it with the following mission:

The . . . select committee will conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee will determine what civil litigation reforms would enhance the economic development climate of the state while continuing to preserve the constitutional guarantees citizens have to seek redress through the courts.²³

Both the House Judiciary Committee, previously uninvolved with the issue, and the new Senate committee conducted hearings throughout the fall and winter of 1997-98. During these hearings, Tort Reform United Effort (TRUE), a coalition of business associations and other pro-tort reform interests, unveiled with great fanfare the results of an "economic study" it had commissioned.²⁴ The study, which became known as the Fishkind Report, has been criticized by economist Frederick Raffa for making naked and unsubstantiated claims that Florida's tort liability system costs each Floridian \$655 per year,²⁵ that House Bill 2117 would reduce the volume of tort liti-

20. See Kraus, *supra* note 14, at 169 n.34 (providing a detailed description of the handling of this bill).

21. See Fla. HB 2117, §§ 2, 3, 6-8 (1997). See Appendix for a complete listing of the provisions of this bill.

22. Under Rule 96 of the 1996-98 House Rules, bills were carried over from the first session of a legislative biennium to the next. This rule is no longer in effect. See FLA. H.R. RULES 96 (1996-98).

23. Press Release from Office of the Fla. S. Pres. Toni Jennings (Aug. 14, 1997) (detailing the mission of, and reasons for creating, the Select Committee on Litigation Reform) (copy on file with authors).

24. See Fishkind & Assoc., Inc., "The Economic Impact of Tort Reform in Florida: An Analysis of HB 2117, the Florida Accountability and Individual Responsibility (FAIR) Liability Act 1997, (Oct. 22, 1997) (hereinafter Fishkind Report) (unpublished report, copy on file with authors). See also *infra* Part V (discussing the Fishkind Report in greater detail). Press release from Tort Reform United Effort, Media Advisory (Oct. 27, 1997) "TRUE Coalition Details Economic Impact of Tort Reform in Florida," (providing notice of a press conference to be held the following day) (copy on file with authors).

25. In contrast, economist Frederick Raffa found that the cost of liability insurance per capita in Florida, in 1991, was \$156 and \$203 in 1995. See Frederick A. Raffa, Ph.D., Comments on the Economic Analysis Contained in the Economic Impact Report Prepared

gation in Florida and lower litigation costs, and that House Bill 2117 could reasonably be expected to lower tort costs in Florida by \$1 billion.²⁶ TRUE immediately began trumpeting that "abusive lawsuits costs every Floridian \$655 annually,"²⁷ an outlandish exaggeration and little more than an advocate's fantasy to support a political agenda.²⁸ The report's principal author subsequently and implausibly opined that the \$1 billion savings per year "translates into an increase of over 28,000 jobs, \$470,000,000 in income and \$1,475,000,000 in total sales."²⁹ The report became the most important, if not exclusive, source of the notion that the tort reforms under consideration would have a positive impact on Florida's economy.

The 1997-1998 hearings led to several new bills being filed for the 1998 Session.³⁰ The House Civil Justice & Claims Committee divided up the various issues and addressed them in separate committee bills. The House bills included House Bill 3871, relating to products liability; House Bill 3873, relating to punitive damages; House Bill 3875, relating to premises liability; House Bill 3879, relating to comparative fault and joint and several liability; and House Bill 3881, relating to a variety of procedural reforms.³¹ Once introduced, all of the House bills went straight to the floor and were passed out of the House early in the session.

The Chairman of the Senate Select Committee on Litigation Reform, Senator John M. McKay, (Bradenton, Repub.) filed Senate Bill 874, which combined the Select Committee's recommendations into a single bill.³² Senate Bill 874 was referred directly to the Senate Rules Committee (bypassing the Senate Judiciary Committee), which

by Fishkind & Associates, Inc. for Tort Reform United Effort 3 (unpublished report, copy on file with authors).

26. Fishkind Report, *supra* note 24.

27. Press release from Tort Reform United Effort, (Oct. 28, 1997), "TRUE Business Coalition Details Economic Impact of Tort Reform in Florida" (outlining findings presented at press conference) (copy on file with authors).

28. There are numerous methodological and other problems with this "research," not the least of which is that the report's authors square tort costs with insurance premiums on a dollar-for-dollar basis and fail to consider any of the numerous benefits of the tort system and other costs that would be incurred without it. See *infra* Part V (discussing problems with this research).

29. Letter to Senator John McKay from Henry Fishkind (Dec. 10, 1997) (attachment to December 18, 1997, memorandum from Greg Krasovsky, Staff Director of the Senate Select Committee on Litigation Reform to all Select Committee members) (copy on file with authors).

30. Technically, House Bill 2117 was also still before the Legislature. See *supra* note 22 and accompanying text. However, the Legislature took no action on House Bill 2117 in 1998.

31. See Fla. HB 3871 (1998); Fla. HB 3873 (1998); Fla. HB 3875 (1998); Fla. HB 3879 (1998); Fla. HB 3881 (1998).

32. Under the Senate Rules, the Select Committee did not have the authority to file a committee bill. See Fla. S. RULE 2.39 (1996-1998).

adopted a committee substitute for the bill.³³ The full Senate passed Committee Substitute for Senate Bill 874 almost a month after the House had taken up its bills.

The subsequent Conference Committee Report on Committee Substitute for Senate Bill 874, like its predecessor, House Bill 2117, addressed joint and several liability, punitive damages, a products liability statute of repose, and vicarious liability (limited, however, to vicarious liability only with regard to the operation of motor vehicles rather than to all types of personal property).³⁴ It also included a variety of additional substantive and procedural changes to the civil justice system.³⁵

The recommendations of the conference committee were adopted by both houses; the bill passed the House by a vote of 70-46 and the Senate by a vote of 24-16. The bill was promptly vetoed by Governor Chiles, who said:

I made it clear to the 1998 Florida Legislature that I could not accept a civil reform bill that gave untoward economic windfalls to big business, that did not provide adequate compensation to innocent victims, and that failed to protect Florida consumers. I urged the Legislature to enact a balanced bill that corrected the problems in our civil justice system, while ensuring that there remain adequate remedies to victims of unlawful harm.

...

Unfortunately, a deeply divided Legislature sent me a highly controversial and extreme bill that would leave Floridians exposed to potentially harmful products and actions without adequately compensating victims for injuries those products and actions will cause. This bill would make some helpful changes to our civil justice system, but because this bill will do much more harm than good to Floridians, I am compelled to veto Committee Substitute for Senate Bill 874.

...

... This bill does not promote a strong economy, but exposes our citizens to risk and injury, and imposes upon our taxpayers unwarranted and unjustified expenses. That is not fair to Floridians. The people of Florida, and visitors to our state, deserve to be protected and compensated in the unfortunate event that they are injured or victimized. This bill would not only erode those protections significantly, but it would shift the costs of the system from wrongdoers to Florida taxpayers. As Governor, I am duty bound to

33. See Fla. CS for SB 874 (1998).

34. See Fla. CS for SB 874 (1998).

35. See Appendix for a detailed listing of all of the provisions of Committee Substitute for Senate Bill 874 (1998).

protect our citizens, and I must ensure that those who commit wrongful acts remain primarily responsible for paying for those wrongful acts. I cannot allow this bill to become the law of this state.³⁶

Following the November 1998 general elections, the business community knew it would soon be working with a Republican governor³⁷ who, during the campaign, had declared that he would have signed Committee Substitute for Senate Bill 874 had he been governor in 1998.³⁸ The newly-elected legislature moved quickly to rekindle the tort reform flames. Senate sponsors split up the tort reform issues among four bills for the 1999 Session. Senate Bill 236 (Jack Latvala, Palm Harbor, Repub.) addressed rental motor vehicle vicarious liability and the statute of repose for products liability cases, Senate Bill 374 (John F. Laurent, Bartow, Repub.) addressed procedural issues and included revisions to joint and several liability, and Senate Bill 376 (Tom Lee, Brandon, Repub.) addressed negligent hiring, premises liability, and punitive damages.³⁹ Workshops and hearings on the bills were conducted by the Senate Judiciary Committee during February and March 1999, and the bills were brought to the floor for a vote during what was only the second week of the 1999 Session.⁴⁰

The House rolled everything into one committee bill, House Bill 775, introduced by the House Judiciary Committee. House Bill 775 went to the floor and was approved in the House by a vote of 86-33 on the same day that the Senate took up its bills.⁴¹ Upon receipt of House Bill 775, the Senate substituted the language of the four Senate bills for the House language and immediately sent it back to the House on March 10, 1999. With a stalemate occurring between the two houses, each refusing to accede to the other, the compromise bill emerged from negotiations in conference committee over the next

36. Veto of Fla. CS for SB 874 (1998) (letter from Gov. Chiles to Sec'y of State Sandra Morham, May 18, 1998) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.) [hereinafter Chiles].

37. Republican Jeb Bush was elected to replace the retiring Democratic Governor, Lawton Chiles. Although the newly elected legislators take office upon election in November, the governor is not inaugurated until the following January. See FLA. CONST. art. III, § 15(d); FLA. CONST. art. IV, § 5(a).

38. See Peter Wallsten, *Lawsuit Limits a Campaign Issue*, ST. PETERS TIMES, Aug. 22, 1998, at 4B.

39. Taken together, the four bills addressed most of the provisions in Committee Substitute for Senate Bill 874; however, not all of these provisions were identical to those in the enrolled version of Committee Substitute for Senate Bill 874. The bills collectively bore more similarity to the original Committee Substitute for Senate Bill 874, as adopted by the Senate Rules Committee.

40. The bills were taken up on second reading on March 9, 1999 and on third reading on March 10; each bill passed by a vote of 33-0.

41. It was taken up and amended on March 9, 1999 and passed, as amended, on March 10 (introduced and placed on calendar March 2, 1999).

three weeks. The new bill differed from both the House and Senate proposals (as well as from the prior year's Committee Substitute for Senate Bill 874) in a number of ways, but retained the major themes of the earlier proposals.⁴² On April 30, 1999, after substantial debate, the House adopted the Conference Committee Report and passed the bill, as amended, by a vote of 84-33. The Senate followed suit shortly thereafter by a vote of 25-14. Governor Bush signed the bill into law on May 26, 1999.⁴³

III. SIGNIFICANT ISSUES IN HOUSE BILL 775

The enacted law contains the following four core issues that have been key elements of the tort reform movement and are calculated to have the most substantial impact on tort practice: joint and several liability, punitive damages, products liability statute of repose, and motor vehicle vicarious liability.

A. Joint and Several Liability

Joint and several liability refers to the doctrine under which tortfeasors who are jointly at fault in causing the harm are each potentially held individually liable for total damages caused by all of the joint tortfeasors.⁴⁴ Dean John W. Wade has explained that the notion of assigning a percentage share of fault to each of several defendants but holding each 100% liable to the plaintiff was developed *for the benefit of defendants*.⁴⁵ Previously, a plaintiff could sue any tortfeasor who was the proximate cause of the plaintiff's injury and recover fully. It fell to the defendant to bring separate actions against other responsible actors for contribution. Permitting the joinder of multiple wrongdoers and assigning percentages of fault eliminated the burden on defendants of pursuing a multiplicity of actions with potentially inconsistent results. The percentage share did not represent the amount of harm defendant caused, but rather the amount he could be required by other joint tortfeasors to contribute.⁴⁶

For example, if a plaintiff visited three doctors, each of whom negligently failed to diagnose the plaintiff's cancer, each could be 100% liable to the plaintiff. To insist that each doctor caused only one-third of the plaintiff's injury, or that the same negligence caused only one-fourth of the harm when yet another doctor was responsible

42. See Appendix for a complete listing of provisions compared to the 1998 and 1997 legislation.

43. See Fla. HB 775 (1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400).

44. See BLACK'S LAW DICTIONARY 929 (7th ed. 1999).

45. See John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 194-97 (1986).

46. See *id.*

for misdiagnosis is irrational. It is even more irrational to insist that it is more equitable for the innocent plaintiff, rather than the negligent defendant, to bear the risk of nonrecovery from one or more joint tortfeasors.⁴⁷

The misconception of the doctrine of joint and several liability among legislators interfering with the centuries-old common-law concept has generally and directly been attributed by scholars to an "intensive, lavishly financed campaign"⁴⁸ for "special-interest legislation . . . primarily for the benefit of insurance companies."⁴⁹ "Reform" of joint and several liability—of the kind enacted in House Bill 775—is merely the result of "raw interest group politics" with little regard to fairness.⁵⁰

The doctrine of joint and several liability has been a part of the common law since early times and was explicitly adopted in Florida by the Florida Supreme Court in 1914.⁵¹ When the Florida Supreme Court discarded the harsh doctrine of contributory negligence in favor of comparative negligence in 1973, the court retained the doctrine of joint and several liability.⁵² Shortly thereafter, the Florida Supreme Court and the legislature, nearly simultaneously, created a right of contribution—the right of one joint tortfeasor who has paid more than his share of a judgment to seek reimbursement from the other joint tortfeasors.⁵³

The application of the doctrine of joint and several liability was substantially limited by the legislature in 1986 as part of the Tort Reform and Insurance Act of 1986.⁵⁴ The changes included: 1) abolition of joint and several liability for noneconomic damages; 2) abolition of joint and several liability for economic damages except with respect to a defendant whose fault for the injury equals or exceeds that of the plaintiff; and 3) retention of joint and several liability in cases where the total damages are \$25,000 or less, notwithstanding the foregoing. This scheme was further altered by a 1993 Florida Supreme Court decision, which decreed that juries are required to re-

47. *See id.* at 197.

48. *Id.* at 207.

49. *Id.* at 209.

50. Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1148 (1988) (arguing joint and several liability is consistent with notions of corrective justice).

51. *See Louisville & Nashville R.R. Co. v. Allen*, 65 So. 8 (Fla. 1914).

52. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

53. *See* FLA. STAT. § 768.31 (1975) (taking effect, while the Florida Supreme Court was preparing its decision in *Linsenberg v. Isen*, 318 So. 2d 886 (Fla. 1973)).

54. *See* Act effective July 1, 1986, ch. 89-100, § 60, 1986 Fla. Laws 695, 755 (codified at FLA. STAT. § 768.81(3) (1987)).

duce a defendant's liability by apportioning fault to persons who are not parties to the suit—including parties immune from suit.⁵⁵

Chapter 99-225, Florida Laws, further limits joint and several liability by imposing a series of caps on damages and fault thresholds.⁵⁶ The new law provides a scheme so Byzantine that it can only be explained as a creature of political compromise. Under the new law, application of the doctrine of joint and several liability to a particular defendant whose fault equals or exceeds that of a particular plaintiff is determined as follows:

- A defendant whose fault is 0-10% is not subject to joint and several liability; *except*, if the plaintiff is without fault, a defendant whose fault is less than 10% is not subject to joint and several liability;
- For a defendant whose fault is more than 10% but less than 25%, joint and several liability does not apply to that portion of economic damages in excess of \$200,000; *except*, if the plaintiff is without fault, then for a defendant whose fault is at least 10% but less than 25%, joint and several liability does not apply to that portion of economic damages in excess of \$500,000;
- For a defendant whose fault is at least 25% but not more than 50%, joint and several liability does not apply to that portion of economic damages in excess of \$500,000; *except*, if the plaintiff is without fault, then joint and several liability does not apply to that portion of economic damages in excess of \$1,000,000; and,
- For a defendant whose fault is greater than 50%, joint and several liability does not apply to that portion of economic damages in excess of \$1,000,000; *except*, if the plaintiff is without fault, then joint and several liability does not apply to that portion of economic damages in excess of \$2,000,000.⁵⁷

In addition, chapter 99-225, Florida Laws, also eliminates the across-the-board application of the doctrine of joint and several liability to cases where the total damages are \$25,000 or less and addresses the issue of how the alleged fault of a nonparty (per *Fabre v. Marin*)⁵⁸ is to be handled. A defendant's joint and several liability is specified as being in addition to the defendant's proportional liability for economic and noneconomic damages.

55. See *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993).

56. See Act effective Oct. 1, 1999, ch. 99-225, § 27, 1999 Fla. Laws 1400, 1419 (codified at FLA. STAT. § 768.81 (1999)).

57. See Ch. 99-225, § 27, 1999 Fla. Laws at 1419. As under current law, a defendant is liable for its proportional share of both economic and noneconomic damages and is not subject to the doctrine of joint and several liability if its percentage of fault is less than the plaintiff's. See *id.*

58. See *Fabre*, 623 So. 2d at 1185 (discussing issue of nonparty fault).

The 1999 Act further substantially limits a plaintiff's ability to recover *economic* losses such as medical expenses. This adverse impact is directly related to the seriousness of the injury, and it obviously and most harshly affects the most catastrophically injured claimants—those with large medical expenses. As was pointed out by Governor Chiles in his veto message for the predecessor bill, an injured person's necessary medical expenses rendered uncollectible from the wrongdoer by this provision will not somehow magically disappear but will instead become a burden that is shifted to the innocent—the injured victim, the health care system, and the taxpayers.⁵⁹ Moreover, what may appear to some to be generously high caps on the damages subject to joint and several liability are illusory because they are tied to high fault thresholds. The \$1,000,000 cap (\$2,000,000 if plaintiff is faultless) only applies to a defendant who is more than 50% at fault, even if the defendant's share of damages would be \$5,000,000 if they were 40% at fault.

Furthermore, there can *never* be more than one defendant in a case who will be jointly and severally liable for more than \$1,000,000 (or \$2,000,000 if plaintiff is faultless), and frequently, there will never be *any* defendant who can be held liable for that amount.

The complex formula contained in the law delivers inequitable, if not bizarre, results. For example, a 1% difference in a plaintiff's comparative fault results in a 100% difference in economic damages subject to joint and several liability (a faultless plaintiff can receive up to \$2,000,000 in damages subject to joint and several liability whereas a plaintiff who is 1% at fault is limited to a \$1,000,000 cap on damages subject to joint and several liability). And, if a plaintiff is faultless, a defendant who is 10% at fault will be subject to joint and several liability, but if the plaintiff is 1% at-fault, a defendant who is 10% at fault *will not* be subject to joint and several liability. Other aspects of the formula are mathematically imprecise and thereby leave the door open to different results from similar circumstances depending on how the calculations are performed.

B. Punitive Damages

Punitive damages are traditionally awarded in response to behavior worthy of especial condemnation. They are imposed to punish the defendant for extreme wrongdoing and to deter others from en-

59. In his letter to Secretary of State Sandra Mortham, Governor Chiles stated: "This [provision] has the potential to deny full compensation to those who need it most: those victims who suffer catastrophic injuries, some of whom may require a lifetime of medical care, or the families of victims who are killed by a wrongful act. If these costs are not borne by the wrongdoers, they inevitably will be unfairly borne by all Floridians." Chiles, *supra* note 36.

gaging in similar conduct.⁶⁰ The character of negligence necessary to sustain a recovery of punitive damages is the same as for conviction for manslaughter.⁶¹ Prior to the passage of chapter 99-225, Florida Laws, punitive damages could be awarded only if the conduct causing the injury to the claimant:

- (1) . . . was so gross and flagrant as to show a reckless disregard for human life or of the safety of persons exposed to the effects of such conduct; or
- (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or
- (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or
- (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.⁶²

Punitive damages "have long been a part of traditional state tort law."⁶³ In fact, punitive damages were well-established as a part of the common law well before the American Revolution.⁶⁴ The U.S. Supreme Court recently reiterated:

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions *for more than a century* are to be received as the best exposition of what the law is, the question will not admit of argument. . . ."

. . . .

60. See *Mercury Motors Express, Inc. v. Smith*, 363 So. 2d 545, 547 (Fla. 1981) (holding that before an employer can be held liable for punitive damages under the doctrine of respondent superior, there must be a showing of fault on the employer's part).

61. See *Curraway v. Revell*, 116 So. 2d 16, 20 (Fla. 1959).

62. FLORIDA STANDARD JURY INSTRUCTIONS, § PD 1 (1997); see also *Curraway*, 116 So. 2d at 20 n.12.

63. *Silkwood v. Kerr-McGee Corp.*, 691 U.S. 228, 255 (1984).

64. See *Willies v. Wood*, 98 Eng. Rep. 489, 498-99 (C.P., 1763) (validating exemplary damages as compensation, punishment, and deterrence). See also, 3 WILLIAM BLACKSTONE, COMMENTARIES 137-38 (reprinted 1902) (1765-1769).

"This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."⁶⁵

Florida law has been consistent with these teachings. The degree of punishment to be imposed has been a matter for the jury to decide, and punitive damages were to be held excessive only when they bore no relation to the amount a defendant was able to pay and when the tort lacked the required degree of malice or disregard for rights.⁶⁶

The 1986 Act imposed several statutory restrictions on punitive damages. It imposed on plaintiffs a prerequisite that the plaintiff first make an evidentiary showing of a reasonable basis for recovery before punitive damages could even be claimed.⁶⁷ It presumptively capped punitive damages at three times the amount of compensatory damages in any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty and involving willful, wanton, or gross misconduct; this was subject to a plaintiff being able to exceed the cap by a clear and convincing showing that the greater amount is not excessive.⁶⁸ Also, the state was given 60% of the amount of all punitive damage awards, which was amended in 1992 to 35%.⁶⁹

The 1999 legislation makes it more difficult for a plaintiff by requiring that the plaintiff prove entitlement to an award of punitive damages by clear and convincing evidence. It also limits the type of wrongful behavior for which punitive damages can be awarded. The current standard was changed to "intentional misconduct" or "gross negligence," which is defined in the bill to require "conscious disregard or indifference," in other words, essentially intentionally wrongful conduct.⁷⁰ As was the case with joint and several liability, the compromise that became the 1999 Act similarly applies a complex formula to cap punitive damages according to criteria linked with the

65. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991) (emphasis added) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)); see also *Missouri Pacific Ry. Co. v. Hooks*, 115 U.S. 512, 521 (1885) (stating that "[t]he discretion of the jury in [punitive damages] cases is not controlled by any very definite rule; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice").

66. See *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978); *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622, 626-27 (Fla. 1976).

67. See Act effective July 1, 1986, ch. 85-190, § 51, 1986 Fla. Laws 695, 718-19 (codified at Fla. STAT. § 768.72 (1987)).

68. See *id.* § 52, 1986 Fla. Laws at 749 (codified at Fla. STAT. § 768.73(1)(a), (b) (1987)).

69. See *id.* (codified at Fla. STAT. § 768.73(2)(b) (1987)). The state share was repealed by operation of a sunset provision. See Act effective July 1, 1995, ch. 92-85, § 3, 1992 Fla. Laws 821, 822 (repealing Fla. STAT. § 768.73(2)).

70. Act effective Oct. 1, 1999, ch. 99-225, § 22, 1999 Fla. Laws 1300, 1116 (amending Fla. STAT. § 768.72 (1990)).

nature of the wrongful conduct. Generally, punitive damages are limited to the greater of \$500,000 or three times compensatory damages. If the defendant's wrongful conduct was motivated solely by "unreasonable financial gain" and the defendant had actual knowledge of the dangerous nature of the conduct, then punitive damages are limited to the greater of \$2,000,000 or four times compensatory damages. Where at the time of *injury*, however, the defendant had *specific intent* to harm *the claimant*, there is no limit on punitive damages.

The 1999 Act goes on to limit multiple awards of punitive damages against an entity. The Act provides that there can be no punitive-damage award based on the same act or single course of conduct for which punitive damages have already been imposed by any court—a Florida court, any other state's court, or any federal court—unless the court determines by clear and convincing evidence that the total of any and all prior awards was insufficient to punish the defendant.⁷¹ In such cases, then, the court may allow the jury to award punitive damages.⁷² The court is allowed to "consider" whether or not the defendant has ceased the egregious conduct. If a jury verdict is allowed, the court is required to reduce it by an amount equal to the total amount of all earlier punitive damage awards made against the defendant for that act or course of conduct; however, the jury is not to be informed that this reduction will be made.⁷³

The law also immunizes employers from liability for punitive damages based on an employee's actions unless the employer actively participated in or approved the conduct, or engaged in grossly negligent conduct that contributed to the loss.⁷⁴ The 1999 Act provides an exception to the new caps and pleading requirements for cases involving child abuse, abuse of the elderly or developmentally disadvantaged, cases arising under chapter 400 (relating to nursing homes, ACLJ's, etc.), and cases where the defendant was intoxicated.⁷⁵

The 1999 Act arguably drives punitive damages to the brink of extinction in Florida. The new law effectively outlaws punitive damages for anything but consciously intentional misconduct and only if that misconduct has not been previously punished and cannot be pawned off as the *ultra vires* act of an employee.⁷⁶ For the resolute plaintiff who manages to surmount all these hurdles, the 1999 Act

71. See *id.* § 23, 1999 Fla. Laws at 1416-17 (amending Fla. STAT. § 768.73 (1999)).

72. See *id.*

73. See *id.*

74. See *id.* § 22, 1999 Fla. Laws at 1416 (amending Fla. STAT. § 768.72 (1999)).

75. See *id.* §§ 24, 25, 1999 Fla. Laws at 1418-19 (codified respectively at Fla. STAT. §§ 768.735-736 (1999)).

76. See *id.* §§ 22, 23 1999 Fla. Laws at 1416-17 (amending Fla. STAT. §§ 768.72-73 (1999)).

provides deceptively generous limits. Although these caps may look generous at first blush, careful reading of the standards for both the second and the third tier reveal that, in practice, these levels may well turn out to be virtually unattainable because of the near impossibility of proving the requisite actual knowledge and intent to cause harm.⁷⁷ Punitive damages are even capped for "intentional misconduct" as defined in the statute!⁷⁸ Under the 1999 Act, there is, however, one theoretical level of wrongful conduct with regard to which no cap applies—it must involve a specific intent to harm *the claimant at the time of injury*.⁷⁹ The problem is that the conduct must be even worse than intentional misconduct and the burden of proof is more onerous.⁸⁰ It follows that, since the requisite intent to harm the claimant must coexist in time with the claimant's injury, it would seem that there can never be a non-capped punitive damages award when the manifestation of the injury occurs at some time after the wrongful act—as is the situation in every products liability case where the wrongful act takes place at manufacture.

C. Vicarious Liability of Motor Vehicle Owners

Vicarious liability refers to the doctrine whereby liability or responsibility for one person's acts is imputed to another person, such as the employer of the person engaged in the wrongful act.⁸¹ Traditionally, vicarious liability has applied in the area of inherently dangerous devices. Florida courts have used this doctrine to hold the owner of a motor vehicle vicariously liable for injury caused by the negligence of another person whom the owner allows to use the vehicle.⁸² The rule applies equally to rental cars.⁸³ However, vicarious liability does not apply when the vehicle has been stolen or when the operator of the vehicle secures the vehicle by fraud and keeps the vehicle without authorization⁸⁴ or to the situation where injuries are caused by an employee of a repair facility with whom the car was left.⁸⁵

77. Consider that to reach the second tier, for example, the plaintiff must prove that "unreasonable financial gain" (whatever that means) was a defendant's *sole motivation*. Even if that is possible, it passes only the first prong of the test in proving actual knowledge of the dangerous nature of the conduct. See *id.* § 23, 1999 Fla. Laws at 1117 (codified as FLA. STAT. § 768.73(1)(b)).

78. See *id.*

79. See *id.*

80. See *id.*

81. See BLACK'S LAW DICTIONARY 927 (7th ed. 1969).

82. See *Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 631 (Fla. 1920).

83. See *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832, 836-37 (Fla. 1959).

84. See *Hertz Corp. v. Jackson*, 617 So. 2d 1951, 1953-54 (Fla. 1993) ("conversion" or "theft exception").

85. See *Castillo v. Beckley*, 363 So. 2d 792, 793 (Fla. 1978) ("shop exception").

The 1999 Act amends section 324.021, *Florida Statutes*, to cap the vicarious liability of motor vehicle owners.⁸⁶ The owner's liability is limited to \$100,000 per person/\$300,000 per incident, plus \$500,000 additional for economic damages if the vehicle lessee or operator has combined insurance coverage of less than \$500,000.⁸⁷ These caps apply to rental vehicles and to all privately owned vehicles operated by another with the owner's permission.⁸⁸ The bill contains an exception, however, that allows the assertion of liability for certain vehicles used in the owner's commercial activities, such as a fleet of delivery trucks, and for certain commercial vehicles used to carry hazardous products under certain conditions.⁸⁹ The 1999 Act provides a set-off against the owner's liability for all other available insurance or self-insurance covering the lessee or operator so that the owner's liability is directly reduced by the amount of such available insurance. Once again, the 1999 Act provides businesses with a windfall at the expense of the injured.

D. Product Liability Statute of Repose

A statute of repose creates a period of time within which an action must be commenced. In the products liability context where an action is based on manufacturing or design defect, a statute of repose cuts off a manufacturer's liability for injuries caused by a defective product when that product reaches an age equivalent to the repose period. If a person is injured by a defective product after its repose period has run, that person has no recourse against the manufacturer of the defective product.

At one time Florida had a twelve-year statute of repose for product liability actions.⁹⁰ Enacted in 1974, that law was declared unconstitutional, because, as applied, it violated the right of access to courts under Article I, Section 21 of the Florida Constitution.⁹¹ The Florida Supreme Court later receded from this decision,⁹² but the legislature shortly thereafter amended the law,⁹³ leaving no statute of repose in its place for products liability actions.

86. See Act effective Oct. 1, 1999, ch. 59-225, § 28, 1999 Fla. Laws 1400, 1421 (amending FLA. STAT. §324.021(9) (1999)).

87. See *id.*

88. See *id.* at 1421-22.

89. See *id.* at 1422.

90. See FLA. STAT. § 95.031 (1971).

91. See *Battila v. Allis Chalmers Mfg. Co.*, 302 So. 2d 874 (Fla. 1980), *overruled by* *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659-60 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

92. See *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659-60 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

93. See Act effective July 1, 1986, ch. 86-272, § 2, 1986 Fla. Laws 2019-20 (amending FLA. STAT. § 95.031(2) (1985)).

There is, however, an eighteen-year federal statute of repose for certain general aviation aircraft.⁹⁴ The federal statute only applies to aircraft with a maximum seating capacity of twenty individuals. It does not apply to any aircraft used in scheduled commercial service, regardless of the aircraft's size.

The 1999 Act creates a twelve-year repose period but permits extension for defective products if the manufacturer has represented that the product has an expected useful life of longer than ten years, in which case the repose period runs to the end of the expected useful life or twelve years, whichever is greater.⁹⁵ This looks good on paper, but one must wonder how many manufacturers will actually subject themselves to this voluntary exception. With respect to commercial aircraft, the law contains two conflicting provisions. In one place, the 1999 Act clearly states that there is no repose period for such aircraft; but, in another place, it indicates—albeit in a somewhat oblique fashion—that there is a twenty-year repose period (unless the manufacturer warrants a longer expected useful life) on such aircraft.⁹⁶ The Act also contains exceptions for escalators, elevators, improvements to real property, and a twenty-year repose period for vessels.⁹⁷

The 1999 Act also provides a short-sighted exception for latent disease-causing products by waiving the repose period if the injury does not manifest itself within twelve years.⁹⁸ Still, it only applies if exposure to the product occurs within twelve years of sale.⁹⁹ This proviso effectively provides substantial immunity to manufacturers of products like asbestos or DES and leaves their victims to suffer without recourse.

The new law purports to provide for tolling of the repose period during the concealment of defects by a manufacturer.¹⁰⁰ This tolling provision, however, only applies if the injured person is able to prove that the officers, directors, or managing agents of the manufacturer had *actual knowledge* of the defect and took *affirmative steps* to conceal the defect.¹⁰¹ As with so many of the Act's provisions, what at first looks like a refuge for the victim is rendered illusory in actual practice by an impossible burden for a plaintiff to overcome. Unlike

94. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.

95. See Act effective Oct. 1, 1999, ch. 99-225, § 11, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. §§ 95.031(2)(b), 3 (1999)).

96. See *id.*

97. See *id.* Improvements to real property are already subject to a fifteen-year statute of repose pursuant to section 95.11(3)(c), *Florida Statutes*. See FLA. STAT. § 95.11(3)(c) (1997).

98. See Ch. 99-225, § 11, 1999 Fla. Laws at 1411 (amending FLA. STAT. §§ 95.031(2)(b), 3).

99. See *id.*

100. See *id.*

101. See *id.*

most of the Act, the new statute of repose takes effect July 1, 1999 (as opposed to October 1), and it applies retroactively to products already on the market.¹⁰² However, any action that would otherwise be barred by the new changes and that arose before the effective date can be brought before July 1, 2003.¹⁰³ Once again, the legislature has granted to businesses a financial windfall at the expense of Florida consumers.

IV. CONSTITUTIONAL RIGHTS AT STAKE

While there are considerable economic and conceptual flaws that plague the 1999 Act, it is also critical to understand that the right of the people to seek redress for their injuries in court is a constitutional right of the first order. As was declared by the U.S. Supreme Court in the most seminal decision in all of constitutional law: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."¹⁰⁴ This essential duty was made explicit in the constitutions of the vast majority of states.¹⁰⁵ Other states have interpreted their constitutions to embrace such a right.¹⁰⁶ Florida's constitution similarly and explicitly guarantees courts available "to every person for redress of any injury, and justice . . . administered without sale, denial or delay."¹⁰⁷

As such, meaningful access to the courts is a fundamental right—a right that the U.S. Supreme Court has also recognized.¹⁰⁸ The importance of this right cannot be overemphasized. No law can pass constitutional muster if it bars the people "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped."¹⁰⁹ The vindication of rights that courts comprehend within this constitutional protection includes full and fair compensation for the full range of civil wrongs. In 1992, for example, the Supreme Court acknowledged that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff fairly for injuries caused by the

102. *See id.* § 12, 1999 Fla. Laws at 1411.

103. *See id.*

104. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

105. "Thirty-eight states have constitutional provisions that guarantee a right to a 'certain remedy.'" JENNIFER TREBEN, *STATE CONSTITUTIONAL LAW* § 6-2(a), at 347 n.11 (1999).

106. *See, e.g., Richardson v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153, 1161 (N.M. 1988) (recognizing that a limit on liability violates an implicit guarantee to the fundamental right of access to the courts that is derived from the right of redress for grievances and the right to due process).

107. FLA. CONST. art. I, § 21.

108. *See United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971).

109. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964).

violation of his legal rights."¹¹⁰ These injuries may well include emotional distress and pain and suffering.¹¹¹

The guarantee of access to the courts would be hollow indeed if it was capable of being eroded by the kinds of indirect restraints contained in the 1999 Act. Traditionally, however, the due process clauses of the nation's state constitutions stand as a bulwark against such erosion by guaranteeing, at the most primary of levels, an opportunity to be heard "at a meaningful time and in a meaningful manner."¹¹² As the Florida Supreme Court has recognized, legislation affecting the judicial process must assure "a fair trial in a fair tribunal."¹¹³ The court went on to note that "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'"¹¹⁴ So-called "reforms" that effectively tilt the civil justice playing field in a manner that encumbers the quest for fairness violate these fundamental constitutional tenets.

These rights cannot easily be swept away by countervailing governmental interests, especially ones as flimsy as those asserted by tort-reform advocates. The U.S. Supreme Court has recognized that even a legitimate concern that the enacted reforms are designed to address—"the dangers of baseless litigation"—are insufficient to justify legislative remedies that would seriously cripple the vindication of rights through the judicial process.¹¹⁵ The Florida Supreme Court has adopted a similarly strong stance against legislative interference with access to the courts. In *Kluger v. White*,¹¹⁶ the court held that the legislature was without power to abolish a common-law cause of action unless it provided an adequate alternative or was able to assert both overwhelming public necessity and a lack of alternatives.

In determining whether the legislature has met its burden, the court has conceded that deference should be given to legislative findings.¹¹⁷ In this instance, there are no legislative findings to consider. At the eleventh hour of this lengthy legislative process, there was a curious attempt to interject legislative findings into the final product to explain why the legislature was taking away the rights of

110. *United States v. Burke*, 504 U.S. 229, 235 (1992) (quoting *Carey v. Piphus*, 435 U.S. 247, 257 (1978)).

111. *See id.*

112. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 515, 552 (1965)).

113. *Kochler v. Florida Real Estate Comm'n*, 390 So. 2d 711, 712 (1980) (quoting *In re Murchison*, 349 U.S. 133, 136 (1965) (finding that such fairness was "a basic requirement of due process")).

114. *Id.* (quoting *Murchison*, 349 U.S. at 136).

115. *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) (citations omitted).

116. 281 So. 2d 1, 4 (Fla. 1973).

117. *See, e.g., University of Miami v. Behar*, 618 So. 2d 189, 196 (Fla. 1993).

its citizenry. Near the end of the Conference Committee process, at a March 28 meeting of the Senate conferees, Senator Latvala, Chair of the Senate conferees, presented the members with the latest Senate proposal for their consideration. Among the other provisions in Senator Latvala's proposal, and one that appeared here for the first time during the three years of deliberation on the tort reform bills, was a collection of legislative findings that were obviously calculated to shore up the legislation against growing concerns over its unconstitutionality.¹¹⁸

As Senator Latvala, a nonlawyer, had served neither on the 1999 Senate Judiciary Committee nor on the 1998 Senate Select Committee on Litigation Reform, one must wonder at his remarkable ability to distill so concisely two years worth of largely technical legal testimony, which he was not present to hear. Senator John A. Grant (Tampa, Repub.), a member of the Conference Committee and Chair of the Senate Judiciary Committee, immediately challenged the inclusion of these findings pointing out that, based on what went on during committee deliberations, there was no factual basis for those

118. Section 1 of Draft Senate Amendment No. 0000.1a provided:

Section 1. Legislative findings.—The Legislature finds that the provisions of this Act serve overpowering public necessities, including:

- (1) Enhancing the predictability and uniformity of the civil justice system so that citizens and businesses can conform their conduct to avoid liability;
- (2) Preserving societal cohesion by encouraging citizens to resolve their disputes amicably, rather than by filing civil actions or engaging in litigious behavior;
- (3) Stimulating economic development and productivity by limiting economic waste and reducing the cost of obtaining liability insurance;
- (4) Strengthening the state's competitive posture;
- (5) Enhancing the state's ability to attract manufacturing businesses which provide stable and high-paying jobs, which in turn will help to create a tax base sufficient to fund the vital responsibilities of state government;
- (6) Aiding consumers by encouraging innovation and the development of new products and by reducing the cost of products currently on the market;
- (7) Protecting citizens and businesses from the threat of frivolous and protracted litigation which consumes resources, costs jobs and coerces undesired settlements; and
- (8) Encouraging personal responsibility by moving away from a social-welfare model of allocating damages and toward a model which equates liability with fault;
- (9) In accordance with the Florida Supreme Court pronouncement in *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973), the Legislature finds that "in the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault"; and
- (10) In accordance with the Florida Supreme Court pronouncement in *Pabre v. Marin*, 623 So.2d 1182, 1187 (Fla. 1993), the Legislature finds that "there is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss."

Section 1 of Draft Senate Amendment No. 0000.1a, dated 1:50 PM Apr. 28, 1999.

findings. Although no vote was taken on Senator Grant's point, the "findings" disappeared from subsequent drafts, never to return.¹¹⁹

The next day, when Representative Johnnie B. Byrd, Jr. (Plant City, Repub.) Chair of the House Judiciary Committee, presented the Conference Committee Report on the House floor, his remarks included his view on the bill's legislative intent. The script was essentially the same as the one Senator Latvala used, and the remarks made it clear that the major justification for passing the legislation was to promote economic development:

Finally members, I would say that the legislative intent of the conference report and the bill would be to enhance the predictability and uniformity of the civil justice system. The conference report would enhance substantial fairness in our system. Today people have to pay even when they are innocent of wrongdoing. The conference report would encourage an amicable resolution of disputes through alternate dispute resolution such as mediation and arbitration. *The conference report would help stimulate economic development and productivity. . . . It will encourage innovation in new products and it will enhance the ability to attract a better manufacturing base.* It will discourage frivolous litigation, and finally, encourage personal responsibility by moving away from social engineering and welfare in the tort system by equating liability with fault. That is an explanation. Mr. Speaker, of the conference report.¹²⁰

As icing on the legislative intent cake, Chairman Byrd's statements as to the "goals that the legislation was necessary to accomplish" were reiterated in a somewhat more straightforward form in the final House Judiciary Committee staff analysis of House Bill 775.¹²¹ These justifications track the language of the Latvala proposal challenged the prior day even more closely. Moreover, the staff analysis goes on to point out that "the conclusions stated by Chairman Byrd in 1999 were informed by his membership on the [House Civil Justice and Claims Committee during the hearings of 1997-98]."¹²² Thus, it seems that, by the admission of its own chair, nothing presented to the House Judiciary Committee during its 1999 deliberations furthered the stated legislative goals of the 1999 Act.

119. Fla. S. Conf. Comm. on HB 775, tape recording of proceedings (Apr. 28, 1999) (on file with Secretary) (discussion between Sen. Latvala and Sen. Grant regarding legislative findings).

120. Fla. H.R., transcript of House floor debate on Conference Committee Report on HB 775 at 4 (Apr. 30, 1999) (on file with authors) (statement of Representative Byrd) (emphasis added).

121. Fla. H.R. Comm. on Judiciary Analysis, HB 775 (1999) Staff Analysis 21 (final May 15, 1999) (copy on file with authors).

122. *Id.*

It is difficult to comprehend how Representative Byrd could claim to speak for the collective intent of the legislature regarding the final product when no legislative findings of fact were ever actually approved by a vote of *any* legislative body at any time during the period from 1997 to 1999. Further, Representative Byrd was the only member of the House of Representatives who served on the House Civil Justice & Claims Committee and the Conference Committee on Committee Substitute for Senate Bill 874 in 1998, as well as the House Judiciary Committee and the Conference Committee on House Bill 775 in 1999.¹²³ Representative Byrd, by his own admission, indicated that the facts on which he based his conclusions were not even considered by the same legislature that enacted House Bill 775 into law.¹²⁴

V. THE "TORT TAX"

Although legislative findings were stripped from the 1999 Act before passage, the attempt to justify tort reform as a necessary spur to economic well-being became the mantra uttered as though it abrogated constitutional obligations. For this purpose, tort reform proponents relied heavily, if not exclusively, on a paper that has become known as the "Fishkind Report."¹²⁵ The report, prepared as an advocacy piece for tort reform proponents acting under the umbrella of Tort Reform United Effort,¹²⁶ makes no effort to appear as a disinterested scholar's report. Instead of examining the whole of the literature, it is a poorly informed survey of reforms enacted in other states and what other pro-tort reform groups have claimed about the benefits of tort reform.

The overall weakness of the report is demonstrated by, among other things, the fact that fewer than three pages—largely consisting of pie charts that reveal the subjective judgments of small business representatives about how much they like being sued—out of a total of twenty-five pages are devoted to Florida-specific data.¹²⁷ Even so, the Fishkind Report concedes that to quantify the impact of the tort system on Florida "accurately" would amount to or present "a difficult, expensive, and time-consuming task."¹²⁸ It is a task that the author does not attempt. Instead, because of "limitations of time and money," he relies entirely on what he characterizes as "secondary

123. Coincidentally, there was similarly only one member of the Senate, Senator Furl, who participated on all of the committees and conference committees.

124. The 1997-1998 hearings during which Rep. Byrd formed his conclusions were conducted by the Legislature whose biennium ended in November 1998.

125. See Fishkind Report, *supra* note 21; see also *supra* text accompanying notes 25-29.

126. Fishkind Report, *supra* note 24 at cover page.

127. See *id.* at 23-25.

128. *Id.* at 21.

data."¹²⁹ Such secondary data almost exclusively consists of studies done by other tort-reform advocacy groups in other states, notably the Beacon Hill Institute, concerning Massachusetts. The only Florida-specific information was gleaned from the National Federation of Independent Business survey of Florida's small businesses, a poll that came to the unremarkable conclusion that most respondents fear lawsuits.¹³⁰ This conclusion, however, miserably fails to justify overriding constitutional rights. Notably, the survey did not find that most respondents had been sued or subjected to untoward liability.

Fundamental to the Fishkind Report's analysis is the adoption of the idea that "most [economic] studies treat tort costs as a tax."¹³¹ because businesses "either insure themselves against a loss, or . . . 'self insure' by raising their prices."¹³² Why the decision to insure oneself constitutes a tax is never explained and is inconsistent with the definition of a tax. A tax is defined as "a pecuniary burden laid upon individuals or property for the purpose of supporting the government"; a tax is distinguishable from a penalty, which is "in the nature of a punishment and is collectible usually by fine or by suit."¹³³ Instead, it is obvious that tort reformers have latched onto the "tax" terminology because of its value in the public opinion war, regardless of its inaccuracy. Criticizing the civil justice system as exacting a "tort tax" was a tactic widely adopted and employed by tort reform advocates in Florida during the debate over the 1999 Act.

The misguided idea that every American pays a "tort tax" to fund a lawsuit industry that is economically counterproductive first gained prominence in polemicist Peter Huber's book, *Liability: The Legal Revolution and Its Consequences*.¹³⁴ The "scholarship" Huber posited has been thoroughly discredited by reputable scholars, who have derided it as misleading, shaky, and riddled with errors.¹³⁵ Despite these criticisms, Huber's much-repeated assertion that the liability system costs the economy \$80 billion directly and \$300 billion indirectly¹³⁶ has had considerable staying power even though the figures are built on artifice. After Vice President Dan Quayle repeated the numbers, Professor Galanter detailed their specious origins:

Those who beat the antilawyer drum tell us, to take a statement made by the vice-president to a group of business leaders last Oc-

129. *Id.*

130. *See id.* at 23-25.

131. *Id.* at 21.

132. *Id.* at 22.

133. *Liberis v. Nee*, 10 F. Supp. 336, 337 (N.D. Fla. 1935).

134. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4 (1988).

135. *See, e.g.*, Kenneth J. Chesebrough, *Galileo's Betart: Peter Huber's Junk Scholarship*, 42 AM. L. REV. 1637, 1655-58 (1993) (recounting some of the many critiques).

136. *See HUBER, supra* note 134, at 4.

toler, that "the legal system . . . now costs Americans an estimated \$300 billion a year." Three hundred billion? Where does that come from? The vice-president has it from the Council on Competitiveness (which he chairs), whose "Agenda for Civil Justice Reform," released August 13, 1991, borrows it from an article in *Forbes*, which in turn took it from liability guru Peter Huber, who, it is fair to say, made it up.

From a single sentence spoken by corporate executive Robert Malott in a 1986 roundtable discussion of product liability, Huber, in his 1988 book *Liability: The Legal Revolution and its Consequences*, adopted an unsubstantiated estimate that the direct costs of the U.S. tort system are at least \$80 billion a year—a number far higher than the estimates in careful and systematic studies of these costs. Huber then multiplied Malott's surmise by 3.5 and rounded it up to \$300 billion—and called that the indirect cost of the tort system. The 3.5 multiplier came from a reference in a medical journal editorial concerning the effects on doctors' practices of increases in their malpractice premiums. Huber's book contained no discussion of the applicability of this multiplier. It would appear that Huber, who has recently taken to lecturing on the dangers of "junk science," certainly knows whereof he speaks.¹³⁷

The \$300 billion figure, the first and most repeated figure when claims are made that tort liability constitutes a form of tax, has also been ridiculed by scores of scholars and other prominent legal thinkers. Judge Roger Miner of the U.S. Court of Appeals for the Second Circuit, a conservative Reagan appointee, said that the "\$300 billion figure has been 'demonstrated to be a product of casual speculation and not derived in any sense from investigative or statistical analysis.'"¹³⁸ Similarly, *The Economist* has scored the figure as having "no discernible connection to reality"¹³⁹ and for being "impossible to justify."¹⁴⁰ Economist Peter L. Kahn said Huber's numbers are "totally misleading" and "immensely overstate the cost of the tort system to society."¹⁴¹ A law professor who examined the underlying sources for Huber's claims found that they amount to a "huge exaggeration" and

137. Marc Calanter, *Pick a Number, Any Number*, AM. LAW., Apr. 1992, at 81.

138. Henry J. Reske, *In Defense of Lawyers: Conservative Judge Challenges Chayle Statistics*, A.B.A. J., Jan. 1993, at 33 (quoting Judge Roger J. Miner).

139. *Order in the Tort*, ECONOMIST, July 18, 1992, at 8, 13.

140. *Not Guilty*, ECONOMIST, Feb. 13, 1993, at 63 (explaining that increased tort litigation is not the cause of rising legal costs in the U.S.).

141. Peter L. Kahn, *Pricing the U.S. Legal System*, CHRISTIAN SCI. MONITOR, Sept. 11, 1992, at 19 (addressing the inaccuracy of statistics that are often quoted by tort reform advocates).

are "so misleading that they amount to little more than scare tactics."¹⁴²

At the most elemental level, it is improper to view the costs associated with securing all Americans access to the courts as a tax. One leading scholar, now a federal appellate judge, has written that it is nonsensical to consider anything other than losses in evaluating the economic impact of accidents.¹⁴³

Others agree. Professor Richard Abel has written that "successful tort claims do not *create* liability costs, they merely *shift* [the costs] from victims to tortfeasors [wrongdoers]. It is the *tortfeasors* who create liability costs by injuring victims. . . . If liability costs are high, it is because injuries are frequent and serious."¹⁴⁴ Professor Mark Rahdert echoes this point, warning against shifting liability, and its associated costs, away from those who cause injuries:

Shifting liability away from the manufacturer inevitably shifts it toward the victim. It makes the victim (and his or her cost-spreading pool) the bearer of the risk and, to the extent of that risk, the indirect insurer of the marketing initiative. Given that some victims are likely to be uninsured and others underinsured, what we have to ask is whether the social benefits of the marketing initiative in question justify imposing on a select group of victims the social and personal costs of uncompensated injury. In a society where the value of compensation for injury is esteemed, that is a choice we should never make lightly.¹⁴⁵

Professor Rahdert further asserts:

It is probably not particularly helpful to describe tort law as though it were tax law. There is a distinct rhetorical flavor to all arguments about the tort system that use the language of taxation

Perhaps the best way to get rid of the rhetoric is to eliminate the tax metaphor and to view the issue, less metaphorically, in insurance terms instead.¹⁴⁶

In fact, if one views the costs of liability not as a tax, but as an insurance cost, the justification for tort reform falls flat on its face.

Despite the ridicule heaped on it by scholars, the idea of the "tort tax" has remained a powerful rhetorical tool in the arsenal of the tort

142. Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 22 STAN. L. REV. 539, 547, 579 (1990) (pointing out fallacies in figures used as support for tort reform efforts).

143. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* *passim* (1970).

144. Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 446 (1987).

145. MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM* 161 (1995).

146. *Id.* at 157-58.

reformers. Instead of relying on Huber's discredited, and even outdated, \$300 billion figure, tort reformers now trot out studies like the Fishkind Report as though they are authoritative. Yet these studies also suffer from poor methodology, exaggerated addition, a studied indifference to the system's benefits, and most important, a fundamental misunderstanding of what constitutes tort costs—namely, that all manner of insurance costs can be attributed to the tort system. By adopting the "tort tax" theory of other studies, the Fishkind Report compounded the flaws and errors that such studies contain.

A. Beacon Hill Institute Study

One of the "tort tax" "studies" most heavily relied upon by the Fishkind Report was produced by the Beacon Hill Institute.¹⁴⁷ Beacon Hill applied the national tort-cost figures to Massachusetts and concluded that the "tort system imposes an implicit tax—a 'tort tax'—that penalizes business for creating jobs and capital, with predictable, negative effects on the economy." Based upon this conclusion, Beacon Hill urged support of a civil justice reform measure that would "place new limits on the rights of tort plaintiffs under Massachusetts law."¹⁴⁸

The Beacon Hill study starts with a figure of \$161 billion nationally.¹⁴⁹ Using inaccurate and flawed methodology, Beacon Hill adds

147. See BEACON HILL INSTITUTE, *ECONOMICS OF CIVIL JUSTICE REFORM IN MASSACHUSETTS* (1998).

148. *Id.* at v.

149. See *id.* at 1 (citing TILLYNGHAST-TOWERS PERRIN, *TORT COSTS TRENDS: AN INTERNATIONAL PERSPECTIVE* (1995)) [hereinafter *TTP REPORT*]. The authors of the Tillyngast-Towers Perrin report, an insurance industry consulting firm, arrived at the figure by adding insurance benefits paid for injuries or damages caused by insureds, their costs for handling insurance claims or providing legal representation to insureds, and insurance company overhead. See *id.* at 5. TTP admits that much of the figure is derived from mere guesswork because there are no reliable figures for much of its calculation. See *id.* at 6. The \$161 billion figure is further inflated because it charges costs and expenses of the insurance industry to the tort system without accounting for the profits that insurance companies make off the premiums or the dividends paid to mutual policyholders (which, under the Byzantine accounting methods used by the insurance industry are counted as "losses" rather than profit). Further, the wealth insurance companies generate by investing liability premiums—the bulk of the insurance industry's profits—is also not subtracted from the supposed societal costs. See generally ANDREW TORIAS, *THE INVISIBLE BANKERS* (1982). Indeed, if one makes the claim that liability premiums are a cost to society, then it naturally follows that the investment return on those premiums must be considered a benefit somehow. Insurance companies are certainly not reluctant to disclose their losses, especially if it advances the tort reform cause, but these losses do not mean the insurance companies are not profitable.

This omission is readily acknowledged by TTP in its study:

The tort system also provides indirect benefits that are not measured in this study. Such benefits include a systematic resolution of disputes, thereby reducing conflict, possibly including violence. In this sense, compensation for pain and suffering is seen as not only fair, but beneficial to society as a whole. An-

an unarticulated and unknown percentage of other forms of insurance, including homeowners, farm owners, multi-peril, and product liability insurance (the last of which they incredibly and impossibly claim costs \$652 billion in Massachusetts—most likely a typographical error) to create their “tort tax.” Yet, the costs the Institute totals are not those of the tort system, but that of the insurance industry as a whole. Still, Beacon Hill claims its estimate is a conservative one because it does not calculate court costs, litigation costs, unnecessary medical procedures, or the disappearance of products or whole industries.¹⁵⁰

The Beacon Hill Report is the source for the Fiskind Report’s figure of a Florida tort tax of \$655 per person. Dr. Frederick Raffa of the University of Central Florida recalculated the Beacon Hill data, deleting the costs of multi-peril insurance that is unrelated to the tort system and arriving at net costs based on a comparison of per capita insurance premiums with per capita claims/benefits. He and arrived at a much lower per capita net insurance cost of \$156.37 in 1991 and \$203.25 in 1995.¹⁵¹ This analysis demonstrates that the claimed tort tax was strategically inflated to serve a political purpose.

Still, Beacon Hill’s reliance—and by extension, the Fiskind Report’s reliance—on insurance costs as a means of estimating the costs of the tort system is wholly inappropriate. Insurance, of course, is the means by which society spreads risks. Individuals purchase insurance on the chance that they may suffer a loss in the future, paying only a fraction of that potential loss. Most of us will not recoup those premiums paid, but some will suffer extraordinary losses that the money put into the insurance pool will cover. In many instances, neither insurance nor insurance payouts will have anything to do with the tort system. To achieve a sufficiently shocking figure about the cost of the system, the Beacon Hill “tort tax” loters throw in everything, including the kitchen sink. All paid insurance premiums are tallied in the analysis, including homeowners, crop and farm insurance, and other multi-perils. As a result, Beacon Hill charges the tort

other indirect benefit is that the tort system may act as a deterrent to unsafe practices and products.

TTP REPORT, *supra* at 9.

Robert Sturgis, the lead author of the TTP report, has been quoted in reference to an earlier report as saying, “we have settled upon a definition of gross cost without regard for the social and economic benefits that may be derived from the system.” Calanter, *supra* note 9, at 1142 n.193 (quoting Robert W. Sturgis, Address to the American Insurance Association (Nov. 14, 1985), *cited in* NATIONAL UNDERWRITER, Nov. 11, 1985). The result is a wildly inflated figure for tort costs.

150. See BEACON HILL INSTITUTE *supra* note 147, at 54.

151. See Frederick A. Raffa, Comments on the Economic Analysis, in Fiskind & Assoc., Economic Impact Report 3 (1998) (unpublished report prepared for Tort Reform United Effort 3 (unpublished report, copy on file with authors)).

system with responsibility for hurricane, fire, flood and other damages that are often regarded as acts of God and unlikely to be the objects of tort liability.¹⁵²

As Floridians know even better than most, the damage incurred during natural disasters such as hurricanes, floods and tornadoes can be devastating and may amount to billions of dollars. Proponents of the "tort tax" notion, however, fail to explain why these costs should be attributed to the legal system. The fact is, the only lawsuits likely to arise from such natural catastrophes—rare by any measure—either would be *against* an insurance company for the bad-faith denial of a claim under a person's disaster insurance policy or by an insurance company to recover for its payout against a contractor whose work was guaranteed to stand up to such catastrophes. Here, as is typically the case, the civil justice system exists to hold people and companies accountable for their clear responsibilities. Without such a system, our economy would be permeated with fraud and populated by con artists who know that they will never need to live up to their promises.

Moreover, treating liability insurance premium payments as a tort cost in other areas of recovery is a flaw of considerable dimension. Premiums finance the insurance industry, and their treatment as a tax turns that industry into little more than a parasite eating away at the economy. Yet, rather than robbing the economy of wealth, insurance premiums create significant investment profits that help pay insurance benefits, fuel other economic development, and generate real tax revenues. These profits and benefits do not materialize out of thin air, as the Beacon Hill study would have one believe, but are an offsetting economic advantage that the study fails to take into account. Nor does the study consider any benefits that might be derived from the tort system in the form of safer products, deterrence against negligent activity, or a reduction in the expenses that would otherwise have to be picked up by government and taxpayers.

Misrepresentation of the costs perhaps attributable to the tort system permeates the study. For example, Beacon Hill includes data from commercial liability,¹⁵³ which is usually a function of contract rather than tort law. Yet, the proposed reforms supposedly "tested" by the Beacon Hill study do not limit the right of businesses to sue, but only limit—by Beacon Hill's own admission—tort plaintiffs.

One point the Beacon Hill study makes repeatedly is that tort costs are synonymous with state-levied taxes. Besides being little more than self-serving rhetoric, substituting tort costs for taxes in its

152. See BEACON HILL INSTITUTE, *supra* note 147, at 60.

153. *Commercial liability* here refers to litigation between businesses. See *id.* at 80.

econometric models compounds the distorted views regarding the "likely" impact of tort reform upon such economic indicators as employment, new capital, and tax revenues. The study's authors go to great pains to show the theoretical similarities between tort costs and taxes. Rather than prove this point with either logic or empirical results, however, the authors rely on faulty assumptions and essentially view the comparison as self-evident, when it clearly is not.

For instance, in their introduction they write: "For analytical purposes, we can characterize the expansion in tort liability as a form of taxation. To be sure, it is an implicit and not an explicit form of taxation."¹⁵⁴ Later, they "identify expansive tort liability as an implicit tax not to embrace perplexing language, but because there are well-developed principles concerning the economic analysis of taxation that can be extended to the economic analysis of expansive tort liability."¹⁵⁵ In other words, the authors admit that they have to label tort costs as a tax in order for their models to work.

If one takes the position that these costs are not a tax at all, especially since they are not levied by a government entity to raise revenue, and they may not even be costs as much as transfer payments, then their econometric modeling is useless. It is a tempting and politically expedient idea for companies to equate any cost of doing business other than their internal production costs, research and development, marketing distribution, and other costs to a "tax," given the general public's disdain for taxes.

Still, these outside costs, such as insurance costs or the costs of complying with safety and other regulations, are also part of the production costs; they prevent businesses from imposing important costs on the general public. Just as society picks up the tab for cleaning up toxic waste that has been left behind by companies failing to adhere to environmental regulations, so does society ultimately pay for treatment of negligence victims whose injuries are not fully compensated by tortfeasors. Liability is part of the cost of doing business in America and in no way resembles a "tax." Professor Rahdert's point, mentioned earlier, bears repeating:

It is probably not particularly helpful to describe tort law as though it were tax law. There is a distinct rhetorical flavor to all arguments about the tort system that use the language of taxation

Perhaps the best way to get rid of the rhetoric is to eliminate the tax metaphor and to view the issues, less metaphorically, in insurance terms instead. From this perspective we have a group of indi-

¹⁵⁴ *Id.* at 2-3.

¹⁵⁵ *Id.* at 31.

viduals . . . who, by virtue of their common behavior, face a common risk of injury.¹⁵⁶

The Beacon Hill study expends significant space blaming Massachusetts' lack of competitiveness and the decline of its manufacturing sector on its tort liability system. However, the study relies on arguments about the impact of the tort system on competitiveness that have been made about the nation, not about an individual state like Massachusetts. While neutral scholars have refuted the basic premise advanced regarding the tort system's adverse impact on competitiveness, the idea that national statistics can be extrapolated to an individual state is dubious, at best, and is inconsistent with the reality of the Massachusetts economy.¹⁵⁷ Massachusetts, according to its own Department of Economic Development, has been enjoying a considerable economic rebirth. In 1998, for example, the unemployment rate was 3.3%,¹⁵⁸ duplicating a low last reached ten years earlier. As a point of comparison, the Massachusetts unemployment rate has been below the very good national rate for five straight years.¹⁵⁹

In addition, 1998 saw an increase of 61,000 jobs, setting a new state record of 3,225,900, while growth in personal income of Massachusetts residents was the second highest in the nation. Personal income per capita in Massachusetts was the third highest in the nation, 23% above the nation's average.¹⁶⁰ If, as the Beacon Hill study claims, Massachusetts were suffering a competitiveness problem, it would not have been third among states—trailing only California and Texas—in fastest-growing companies and second in fastest-growing high-tech companies.¹⁶¹ In fact, 93% of high-tech chief executive officers rated the Massachusetts business climate as "good" or "outstanding."¹⁶² Even the tort reform-oriented Associated Industries of Massachusetts gave the state a comfortably favorable business confidence rating.¹⁶³ A report card on the states, developed by the Corporation for Enterprise Development, gave Massachusetts its highest rating in "business vitality and development capacity" and placed it, along with only six other states, none of which were in the Northeast or considered a large industrial state, on its honor role.¹⁶⁴ Moreover, investors found nothing wrong with the state's competi-

156. RADEBET, *supra* note 114, at 157-58.

157. See *supra* Part V.A.

158. See Massachusetts Dep't. of Econ. Dev., *Massachusetts Economic Highlights* (visited May 19, 1999) <<http://www.state.ma.us/econ/keyindic.htm>>.

159. See *id.*

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.*

tiveness; venture capital investments in Massachusetts rose 40% from 1996 to 1997.¹⁶⁵

Ignoring these achievements, the Beacon Hill study adheres to the notion that tort costs are a "tax," which is problematic because companies tend to avoid states that have a high-tax burden because they add to the cost of doing business. The facts in Massachusetts belie the study's assumption, as do economic indicators, such as the number of business start-ups, in other states, such as California, New York, Texas, Florida and Pennsylvania, cited by the Beacon Hill study¹⁶⁶ as having the highest total tort costs. Each of these states actually have the highest number of business starts, ranking no lower than seventh among the states.¹⁶⁷ Obviously, contrary to the Beacon Hill study's assumption, the tort system the authors decry in those states has not discouraged new businesses. In fact, data suggests it may have produced the opposite result.

Another flaw in the argument posed by the Beacon Hill study is shown by the data presented regarding company relocation. They cite a survey that questioned manufacturers who opened new plants about their reasons for locating where they did. Tax considerations ranked only fifth most important among reasons for plant location in a regional search; taxes were not given much consideration in local plant searches.¹⁶⁸ But the more intriguing result of the survey it cites authoritatively is that liability or tort system concerns are never mentioned as a factor, a finding that clearly undermines any argument that the tort system is the root of all adverse business decisions. In addition, the study cites another survey that looked at areas of concern to business executives in Massachusetts. Again liability is not specifically mentioned, though the Beacon Hill study authors suggest, without foundation, that the perception among executives of hostility toward business derives in part from current tort law. They make this leap in logic on the basis of surveys of executives about liability performed by the National Federation of Independent Business and Associated Industry of Massachusetts. These surveys, not surprisingly, show the Federation's concern over liability.¹⁶⁹ The Fishkind Report cites the same national survey for its only Florida-specific data.

The Beacon Hill study's *coup de grace* is the chart showing the economic effects of tort reform using the results from the models.¹⁷⁰ It

165. See *id.*

166. See *id.* at tbl.12.

167. See U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 547 tbl.853 (1997) (citing DUN & BRADSTREET CORP., A DECADE OF BUSINESS STARTS and BUSINESS FAILURES REVEALED).

168. See BEACON HILL INSTITUTE, *supra* note 147, at 44-45.

169. See *id.* at 87-88.

170. See *id.* at vi.

posits four different tax breaks that might possibly come out of tort-reform efforts in Massachusetts, and it projects results onto various economic indicators. These predictions are aptly called "scenarios,"¹⁷¹ because they seem more rooted in fiction than in fact. Scenario I asserts that Massachusetts tort costs would fall to the national average as a result of reforms, even though the authors provide no empirical evidence to buttress this claim.¹⁷² Scenarios III and IV also suffer from a lack of empirical evidence to undergird their assumptions.¹⁷³ The authors simply make unfounded postulates about the real impact tort reform would have on cost. By using 1970 figures to arrive at their projections, they are in essence picking a year out of a hat and guessing accordingly.

The only scenario with an assumption rooted in empirical results is Scenario II, which uses the Illinois tort-reform efforts as a model.¹⁷⁴ But the empiricism used in the study is seriously flawed. According to Beacon Hill, in 1996, the year after comprehensive tort reform was passed in Illinois, a study of the Cook County tort system showed a 26.6% drop in the number of tort filings, based on a figure supplied by tort reform supporters, the Illinois Civil Justice League (ICJL). Reliance on this figure is misplaced. First, Illinois experienced a flood of tort claims, filed immediately before the law went into effect to avoid the harshness of the draconian measure.¹⁷⁵ Therefore any drop in tort filings was most likely an artificial result of claims being filed earlier than they otherwise would have been in an attempt to beat the effective date of the law. Second, and most important, the Illinois law was enjoined as unconstitutional in its Cook County implementation—in part in February 1996 and more fully in May 1996.¹⁷⁶ In December 1997, the Illinois Supreme Court invalidated the law *in toto* on constitutional grounds.¹⁷⁷ Whatever drop may or may not have occurred in Cook County tort filings cannot be said to be a function of the actual operation of the statute there—because it was not operational for most of the year. The authors of the Beacon Hill study, nonetheless, use this figure to lessen their tort cost estimate by 26.6% and use the resulting change in the "tort tax"

171. *See id.* at 81-82.

172. *See id.* at 81.

173. *See id.* at 82.

174. *See id.* at 81.

175. *See* Laura Duncan, *A Year Later, Tort Reform Is Changing the Business of Law*, CHL DAILY L. BULL., Apr. 27, 1996, at 1.

176. *See* David Bailey, *Law Capping Non-Economic Damages Ruled Unconstitutional*, CHL DAILY L. BULL., May 22, 1996, at 1; David Bailey, *Two Tort Law Changes Ruled Unconstitutional*, CHL DAILY L. BULL., Feb. 27, 1996, at 1.

177. *See* *Boat v. Taylor Mach. Works*, 689 N.E. 2d 1067 (Ill. 1997).

to arrive at their misleading and speculative impact figures presented in Table 1 of their study.¹⁷⁸

Regardless of the validity of the ICJL tort filing change figure, there is absolutely no reason to believe that a percentage drop in tort filings will lead to the *exact* same drop in tort costs. Such reasoning assumes a one-to-one relationship between filings and tort costs, which is an indefensible position to take. There are far too many other factors involved in torts and insurance premiums—award size, accident rate, and insurance profits, for example—to speculate on the relationship between filings and costs. In addition, the tort costs that would be most affected by the drop in tort filings, court and litigation costs, are not even included in the Beacon Hill study's figures.

The Beacon Hill study sells itself as a serious look at the economic impact of the tort system. It relies on sophisticated econometric models adapted from earlier studies on the effect of taxation to give the impressive veneer of rigor. Without commenting on the merits of these earlier studies, it is easy to dismiss the Beacon Hill study as worthless. The study makes the mistaken and popular analogy between insurance premiums and taxes, wildly inflates the actual costs of the tort system, and relies on assumptions that have absolutely no factual or empirical basis. The Beacon Hill study, designed to arrive at desired results regardless of the evidence it confronts, ultimately delivers answers that tort reformers want to hear.

B. National Bureau for Economic Research

Albeit on a considerably smaller scale, the Fishkind Report also attempts to duplicate the study conducted under the auspices of the National Bureau for Economic Research (NBER), which it calls a model for these kinds of studies.¹⁷⁹ The NBER purports to show that tort reforms have a positive impact on a state's economy.¹⁸⁰ Confidence in the study is misplaced. The NBER study has never appeared in a peer-reviewed journal, where it would have been subjected to a rigor that is obviously lacking in its marshaling of facts and analysis. Even so, the study's authors found that tort reform produced no increases in productivity or employment in either manufacturing or health care—the two areas that tort reformers claim are most hurt by the liability system.

In addition, the NBER researchers could not rule out other possible reasons for the increased output they claim to have found in

178. See BEACON HILL INSTITUTE, *supra* note 147, at vi.

179. See Fishkind Report, *supra* note 21, at 21.

180. See THOMAS J. CAMPBELL ET AL., THE CAUSES AND EFFECTS OF LIABILITY REFORM: SOME EMPIRICAL EVIDENCE 2 (National Bureau of Econ. Research Working Paper No. 4989, 1995) (examining the relationships between productivity and employment in industry and liability reform).

states that enacted tort reform, such as tax cuts or demographic shifts. This failure to account for significant variables that may influence productivity, employment, and growth undercuts the study's credibility and its relevance. In fact, the authors themselves recognize this flaw. In their conclusion, they write:

However, the results are also consistent with three other alternative hypotheses. First, the observed association between liability law and productivity and employment may be due to other state-level public policies that are correlated with both the instruments and the status of liability law but not captured by the fixed effects. For example, politically conservative states or states with high densities of lawyers may adopt policies other than liability reforms that increase employment or productivity.¹⁸¹

Without accounting for these other effects, the authors cannot authoritatively claim that liability reform leads to increased economic output. Indeed, one does not have to be an economist to recognize that the tax structure of a state and other efforts made to attract and keep businesses are more likely to have a large effect on productivity and employment levels.

Another limitation of the NBER study is that it treats all tort reforms as equally effective. For instance, it is impossible to tell from the study whether damage caps work better or even differently than do changes in joint and several liability. A conclusion that treats each type of tort reform the same is extremely implausible. Instead of separately examining the effects of different tort reforms, the authors combine them into a single variable.¹⁸² They simply count the number of tort reforms a state has in place and use that figure to test for effects on productivity and growth.¹⁸³ There is no indication of which reforms are effective; instead they assume that the more reforms you have, the more effect there appears to be.¹⁸⁴ The suggestion that all tort reforms are created equal and that piling them on constitutes good economic strategy is grossly at odds with other studies. For instance, in its review of the literature regarding the effectiveness of malpractice reform efforts, the United States Congress Office of Technology Assessment found that studies showed various reforms had discernibly different effects.¹⁸⁵

One of the NBER study's authors, Daniel Kessler, noted the limitation of his study in an interview with the *ABA Journal*: "This paper is *not the final word on anything*. It doesn't give us an answer, but

181. *Id.* at 28.

182. *See id.* at 11.

183. *See id.* at 18.

184. *See id.* at 19.

185. *See OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, OTA-BP-11-119 IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 73 (1993).*

the results do suggest that this is worth looking into.¹⁸⁶ The Fish-kind Report treats the study as the final word, despite Mr. Kessler's contrary declaration.

VI. THE STRENGTH OF THE FLORIDA ECONOMY

Despite the doomsday rhetoric of the tort reformers that is intended to justify the changes enacted by the new law, the Florida economy has been doing quite well, especially when compared with neighboring states. At the same time the legislature was sprinting toward tort reform, Governor Jeb Bush declared that the state was "remarkably strong. Incomes are growing, unemployment is low, and in the last two and a half years alone, over 110,000 Florida families have left the welfare rolls, a decline of over [fifty] percent!"¹⁸⁷ These declarations should not be treated as mere political puffery; Bush's claims were not a reflection on his then-incipient leadership of the state, but on his Democratic predecessor.

The empirical data bears out this pride in the state economy. Florida's gross state product (GSP) rose from \$273 billion in 1990 to \$326.1 billion in 1996 (in 1992 dollars), an increase of 19.5%.¹⁸⁸ During the same time period, while the nation was experiencing an economic boom, its gross domestic product (GDP) rose only 14.5%.¹⁸⁹

Employment trends were similarly favorable. Unemployment in Florida fell from 5.5% to 5.1% between 1995 and 1996, while the national rate fell only from 5.6% to 5.4%.¹⁹⁰ *Florida Trend* reported that in May 1996, Florida's unemployment rate fell further to 4.9%, with metropolitan areas such as Jacksonville, Orlando, Tampa-St. Petersburg, Gainesville and Tallahassee experiencing a rate below 4%.¹⁹¹

Another important economic indicator is new businesses, where Florida, with more than 13,000 new businesses begun in 1997, ranked third in the country, behind only California and New York.¹⁹²

186. Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, A.B.A. J., Jan. 1996, at 28 (emphasis added).

187. Governor John Ellis "Jeb" Bush, State of the State Address (Mar. 2, 1999), F.L.A. H.R. JOUR., 11, 11 (Reg. Sess. 1999), available at <http://www.state.fl.us/doc/speeches_remarks/3-2-99_sosaddress.htm> (visited Apr. 5, 2000).

188. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 454, tbl.719 (1998) (citing U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS (June 1998)).

189. See *id.*

190. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 397, tbl.621 (1996) (citing U.S. BUREAU OF LABOR STATISTICS, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT (1995)); U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 404 tbl.626 (1997).

191. See Tom Fullerton, *Retailing's Uncertain Outlook*, FLA. TREND, Sept. 1996, at 17.

192. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 553, tbl.878 (1998) (citing DUN & BRADSTREET CORP., A DECADE OF BUSINESS STARTS AND BUSINESS FAILURE RECORD).

Enterprise Florida, a public-private partnership organized to improve the economic quality of life in Florida, Florida has noted:

[Florida] leads the nation in the number of incorporations and was designated by *Business Facilities* magazine in its May 1997 issue to be the best place in the nation to expand a business. . . . In 1997, 20 of *Money* magazine's top 80 communities with the highest quality of life were in Florida. For these and other reasons, corporations are moving to Florida in increasing numbers to take advantage of the state's assets and resources.¹⁹³

Enterprise Florida goes on to state:

In recent years, Florida has emerged as one of the world's fastest growing markets, experiencing an explosion of international growth as a major economic hub of the Southeastern United States. With a gross state product of \$368.9 billion, if the State of Florida were a sovereign nation, it would rank as the world's 16th largest market economy and [fifth] in the Americas.¹⁹⁴

As a marketplace, Florida is also a leading state, suffering no adverse effects from the nature of its legal system. The business press has celebrated its positioning for business. *Expansion Management* indicated that "[t]he structure is in place for the state to continue its leadership in the medical devices industry, and to take off in biotechnology."¹⁹⁵ It is ranked third, behind only California and Texas, as a location for health technology businesses.¹⁹⁶ Furthermore, along with Texas, Florida also boasts one of "the most profitable banking markets anywhere."¹⁹⁷

In another area of economic evaluation, personal income, Florida continues to perform well. The Bureau of Economic and Business Research found that Florida's per capita personal income, which grew 5.1% in 1996, outpaced both the national average of 4.8% growth and the Southeast region's rate of 4.7%.¹⁹⁸

Housing starts are another key economic indicator to determine the strength of an economy. The building and purchase of homes sends positive ripples throughout the economy, as producers of raw

193. Enterprise Florida, *Doing Business in Florida (1999)* (document previously published on the World Wide Web, on file with author).
<<http://www.floridabusiness.com/advantages/climate.html>>.

194. *Id.*
<<http://www.floridabusiness.com/advantages/economy.html>>.

195. Lance Yoder, *Florida Assembles Winning Pieces in Health Technology Puzzle*, *EXPANSION MGMT.*, Mar. 1999, at 1.

196. *See id.*

197. Kyle Parks, *Finding Ways to Make Money*, *FLORIDA TREND*, Jan. 1997, at 44.

198. See Press Release from Bureau of Economic and Business Research, University of Florida, *Florida Personal Income Release* (June 23, 1999) (citing U.S. Bureau of Economic Analysis), available at <<http://www.BEIR.ufl.edu/PressRelease/fpi.htm>> (visited Apr. 5, 2000).

materials, builders, contractors, and the makers of products used to fill the home with furniture and appliances all see an increase in business. Florida's housing market has been booming.¹⁹⁹ Florida was first in the nation in housing starts in 1996, with the starts spread well between large metropolitan areas and smaller cities and towns.²⁰⁰

One economic observer concluded:

The sun still shines a little brighter on Florida's economic landscape than elsewhere. The slowdown in the national economy barely cast a shadow through much of Florida, which saw gross state product (GSP) expand at a robust 5% pace during 1995. Employment and income continued to rise and commercial vacancy rates dropped to their lowest levels in nearly a decade. Job seekers and retirees continued to flock to the State, pushing Florida's population to more than 14 million.

...

Florida's economic outlook remains one of the brightest in the nation and should remain so through the rest of the decade.²⁰¹

John M. Godfrey, an adjunct professor of economics and finance at Jacksonville University, opines that Florida's performance in all the key economic drivers will keep the economy healthy in the foreseeable future. "Without exception, all [pollled economists] believed that Florida will again outperform the nation by a significant margin in the coming year." He writes, "Florida's business can take some comfort, as well as pride, in knowing that its market will experience some of the nation's best economic conditions in 1996 and beyond."²⁰²

While the Fishkind Report and tort reformers in general ignored the robust Florida economy, they did place all their marbles on insurance costs. Here, too, there is no support for their dire descriptions of the state of the Florida insurance industry. Florida's overall insurance profitability has remained steady, with an average return on net worth of 11% from 1988-1997.²⁰³ During the last five years of that period, which saw losses drop and profits rise further, Florida outperformed Alabama, Georgia, and South Carolina.²⁰⁴ Similar re-

199. See John M. Dunn, *Construction: More Work, Less Profit*, FLA. TUDEN, Jan. 1997, at 52.

200. See *id.*

201. Mark P. Vitner, *Florida Continues to Shine*, FLA. TUDEN, May 1996, at 6, 8. Mark Vitner is vice president and an economist at First Union Capital Markets Group in Charlotte, NC.

202. John M. Godfrey, *Pretty Picture*, FLA. TUDEN, Aug. 1996, at 16.

203. See NATIONAL ASS'N OF INS. COMMERS. PROFITABILITY BY LINE BY STATE IN 1997 (1998) (excluding figures from 1992 in which catastrophic losses were suffered due to Hurricane Andrew).

204. See *id.*

sults were obtained with respect to private-passenger liability coverage, with Florida's return on net worth averaging 9.9% from 1988-1997 and experiencing even greater profits from 1993-1997, again outperforming the states listed previously.²⁰⁵ For commercial automobile liability, Florida posted an average return on net worth of 9.03% from 1988-1997 and again outperformed Alabama and Georgia.²⁰⁶

These figures have made the Florida insurance market one of the most profitable in the country. Before the Florida Senate Committee on Banking and Finance, at the same time the legislature was rushing to enact tort reform, Insurance Commissioner Bill Nelson testified:

Despite its hurricane risk, the Conning [& Company] study [of the property and casualty market in all fifty states] ranks Florida's insurance market number one in the country in desirability as a place to [sic] business in commercial lines and number three in personal lines. And no other big state was even in the top ten.²⁰⁷

In fact, profitability was so high that Nelson ordered a June 1998 reduction in rates from four major insurers because of success in fighting insurance fraud and crackdowns on drunk drivers.²⁰⁸ Insurers and regulators agreed that "overall claims are on the decline in frequency and severity."²⁰⁹

The vice president of the Florida Insurance Council, the industry's lobbying arm, forecast a record year in 1997 and saw a robust and profitable market down the road.²¹⁰ It is clear that no insurance crisis engulfed the state.

VII. THE DETERRENT EFFECT

One of the many failures of the tort-reform reports that pass as studies, especially those that make the "tort tax" claim, is their failure to ascribe any benefits to the tort system. Primary among these benefits is the deterrent effect that it has on negligent behavior and unsafe products. Conservative law-and-economics scholar and federal appellate judge, Richard Posner, has noted that "although there has

205. *See id.*

206. *See id.*

207. Bill Nelson, Florida Treasurer and Insurance Commissioner, Remarks Before the Florida Senate Committee on Banking and Finance (Mar. 3, 1999), *available at* <<http://www.doi.state.fl.us/Consumers/Alerts/remarks.html>> (visited Apr. 5, 2000).

208. See Press Release from Fla. Dep't of Ins., Insurance Rates to Fall Again for Many Drivers (Jun. 12, 1998), *available at* <<http://www.doi.state.fl.us/Consumers/Alerts/Press/1998/jc061298.html>> (visited Oct. 5, 1999).

209. *Id.*

210. See David Villano, *Reversal of Fortune*, FLA. TRENDS, Jan. 1997, at 42.

been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters."²¹¹

One industry in which consumers have clearly seen safety benefits derived from the tort system is the automobile industry. The tort system, coupled with consumer safety efforts and increased regulation, has led to the withdrawal of unsafe cars, such as the Corvair, and the development and subsequent improvement of new safety devices. In an analysis of the impact of product liability on automobile safety, John D. Graham found that while liability may not be the sole factor in leading to safety improvements in cars, it may act as a catalyst and quicken the process through which safety features are developed and implemented.²¹² Graham notes, for instance, that "the installation of rear-seat shoulder belts and the phaseout of belt tension relievers may have been hastened by liability considerations."²¹³ At times, Graham continues, liability risk may have been enough to spark safety improvements even when other factors, such as regulation and professional responsibility, were not present.²¹⁴

Another interesting finding by Graham, especially in light of tort reformers' claims that liability concerns impose an undue financial burden on manufacturers, is that the cost of liability is not all that important to industry: "The direct financial costs of liability are usually a relatively minor factor, at least from the perspective of large manufacturers."²¹⁵ What is more injurious to manufacturers is the adverse publicity that accompanies product liability suits, which may lessen consumer demand for unsafe products²¹⁶ and provide tort law with a considerable amount of its deterrent power.

When Ford Motor Company introduced the Pinto in the early 1970s, it situated the gas tank in such a way that the car was in severe danger of explosion in rear-end collisions.²¹⁷ People were killed

211. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 19 (1987).

212. See John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120, 180 (Peter W. Huber & Robert E. Lean eds., 1991). Professor Gary Schwartz agrees with this idea of interaction:

An added observation is that insofar as there are various safety incentives that might serve as alternatives to tort, tort law has the capacity to *interact* with those other incentives in a beneficial way. For example, a party's basic sense of morality can be reinforced by the prospect of liability. A product designer might say that "this is the right thing to do; besides, it will reduce the risk of my company's liability."

Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 384-85 (1994) (citation omitted).

213. Graham, *supra* note 211, at 181.

214. See *id.*

215. *Id.* at 182.

216. See *id.* at 181, 182.

217. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360 (Cal. Ct. App. 1981).

as a result of this design defect.²¹⁸ Ford knew there was a problem with the location of the gas tank and that it could be easily remedied.²¹⁹ In every crash test of at least twenty-five miles per hour, the fuel tank ruptured, causing leakage that violated federal regulations.²²⁰ Yet, in order to save money, they deferred the safety improvement, a fuel bladder, for two years.²²¹ In upholding a punitive award of \$3.25 million, which had been reduced from \$125 million, the appellate court said:

Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.²²²

Ford compounded this indifference by petitioning the National Highway Transportation Safety Administration (NHTSA) to abandon or postpone fuel tank regulations, arguing that the standard would force American manufacturers to spend \$137.5 million to prevent an estimated 360 deaths and injuries from occurring, which Ford calculated to be worth only \$49.5 million.²²³ In other words, Ford engaged in a cost-benefit analysis accepting that it might ultimately be held liable for \$49.5 million in damages, resulting in a savings to the corporation of \$88 million, by not correcting the fuel tank problem. The tort system, with its threat of punitive damages, is designed to prevent corporations from making such callous calculations about the value of human lives.

Here, the liability judgment forced Ford to make important institutional changes to improve product safety. Still, other companies that have exhibited a callous disregard for consumer safety have been hauled into court.²²⁴ Chrysler, for example, chose not to make

218. *See id.* at 359.

219. *See id.* at 361.

220. *See* Carl E. Bogus, *War on the Common Law: The Struggle at the Center of Product Liability*, 90 MICH. L. REV. 1, 78 (1982) (explaining the facts that were disclosed prior to a ruling against Ford Motor Co. in a product liability suit).

221. *See* Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 825 (1997) (arguing that punitive damages effectively encourage product manufacturers to consider the public health impacts of their decisions).

222. *Grimshaw*, 174 Cal. Rptr. at 381.

223. *See* Bogus, *supra* note 219, at 78-79.

224. Ford was not the only automaker that cut corners on fuel-tank safety. GM produced millions of pick-up trucks with dangerous side-saddle gas tanks from 1973 to 1987.

an inexpensive adjustment to a minivan doorlatch, which resulted in the death of a ten-year-old boy.²²⁵ From 1984 to 1995, at least thirty-seven passengers were ejected and killed from Chrysler minivans whose rear lift gates had opened, according to the NHTSA.²²⁶ Evidence at the wrongful-death trial of the little boy showed that Chrysler knew the rear gate latch was defective, that the latch design had not been used in any automobile in twenty years, and that it had destroyed documents and crash-test results related to the latch.²²⁷ Though Chrysler knew that the latch could be strengthened for as little as twenty-five cents per van in 1990, it did not do so "because the move would have undercut Chrysler's position with safety regulators that there was no problem with the latches."²²⁸

In a striking similarity to the Ford Pinto case, an internal memorandum, which revealed the company's disregard for consumer safety, became a smoking gun. The memorandum disclosed Chrysler's attempt to use political muscle in Congress to prevent a federal recall. The December 9, 1994, memo from a top company official to Chrysler chairman, Robert Eaton, and president Robert Lutz stated that officials from the NHTSA "told the auto maker that the latch problem 'is a safety defect that involves children.'"²²⁹

The memo noted that . . . Chrysler's vice president for Washington affairs[] suggested that [Chrysler] mount an aggressive effort in Washington to prevent the adverse use of bureaucratic power within NHTSA, specifically their funding from Congress, the process which allows NHTSA to design tests for the public record that play to the media and trial lawyers before ruling on a defect . . .

The memo concluded: "If we want to use political pressure to try to squash a recall letter [from the NHTSA], we need to go now."²³⁰

These two examples are part of a legion of instances where lawsuits have forced the adoption of important safety features. There are, of course, many more. Without the threat of meaningful tort actions, irresponsible companies have little financial incentive to make needed safety modifications.

The trucks were vulnerable to catastrophic explosions during side-impact collisions. *See id.* at 81. This design defect has been alleged to have resulted in the death of more than 300 people, but GM settled these cases rather than institute an expensive recall of the vehicles. *See id.* At one trial, former GM engineers testified that GM knew as early as 1980 from its own crash tests that the fuel tank design was indefensible, and that GM lawyers had collected and shredded damning documents. *See id.*

225. See Milo Glyelin, *Costly Verdict: Why One Jury Dealt a Big Blow to Chrysler in Minivan-Latch Case*, WALL ST. J., Nov. 19, 1997, at A1.

226. *See id.*

227. *See id.*

228. *Id.*

229. Nichole M. Christian et al., *Chrysler Is Told to Pay \$262.5 Million by Jurors in Minivan-Accident Trial*, WALL ST. J., Oct. 9, 1997, at A6.

230. *Id.*

Other industries, such as the chemical industry, have made significant safety improvements as a result of liability exposure.²³¹ Massachusetts Institute of Technology (MIT) professors Ashford and Stone found that the tort system has not only stimulated the development of safer products and processes, but it also has spurred significant technological innovations that have resulted in chemical hazard reduction.²³² As a result of the Bhopal disaster, in which thousands were killed when a Union Carbide plant emitted deadly methyl isocyanate gas into the surrounding area, many chemical firms reduced the amount of dangerous chemicals stored near population centers. Major chemical manufacturers such as Dow Chemical, Hoffman-LaRoche, Monsanto, and Dupont have all used less deadly chemicals in their processing or have improved their chemical containment practices.²³³ Another commentator details some of the industry-wide changes made, in part because of toxic tort liability worries:

In the aftermath of Bhopal, many American companies reevaluated their operating risks. Companies worked to reduce their on-site stockpiles of hazardous chemicals and to better monitor the remaining stocks. . . . Many companies more closely scrutinized the transport of chemicals to and from their plants. Shipments are now more often routed through less-populous areas. To further reduce transport hazards, some companies have created on-site facilities for producing materials they formerly shipped in. Others participate more in community-education programs about the products being made, and many have developed or revised detailed community notification and evacuation plans in the event of a major emergency. Finally, more firms have engaged consultants to study the reduction of risk in the handling of hazardous substances.²³⁴

After extensively studying the effect of the tort system on chemical liability and innovation, Ashford and Stone came to the conclusion that the reforms suggested by traditional tort reformers are seriously misplaced:

These observations and conclusions indicate that the recent demands for widespread tort reform, while directing attention to dissatisfaction with the tort system, tend to miss their mark, since significant underdeterrence already exists. Thus proposals that

231. See Nicholas A. Ashford & Robert F. Stone, *Liability, Innovation, and Safety in the Chemical Industry*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 367 (Peter W. Huber & Robert E. Litan eds., 1991).

232. See *id.* at 368.

233. See *id.* at 100.

234. Hollis B. Johnson, *The Impact of Liability on Innovation in the Chemical Industry*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 128, 149 (Peter W. Huber & Robert E. Litan eds., 1991).

damage awards be capped, that limitations be placed on pain and suffering and punitive damages, and that stricter evidence be required for recovery should be rejected. On the contrary, the revisions of the tort system should include relaxing the evidentiary requirements for recovery, shifting the basis of recovery to subclinical effects of chemicals, and establishing clear causes of action where evidence of exposure exists in the absence of manifest disease.²³⁵

While other commentators, especially Peter W. Huber, have suggested that liability discourages innovation, a common refrain of the tort reform movement, others recognize that tort liability does have safety incentive effects.²³⁶ Another scholar, Rollin B. Johnson of Harvard University, argues that the current liability system may provide incentives for safety and innovation. Johnson further argues that attempts to change the system may do more harm than good:

It would be difficult to argue that the uncertainty and unpredictability of the tort system does not affect business planning to some degree. And some risk-averse companies may decide to abandon certain lines of research and development because of concern over liability, leaving those areas open to foreign competitors. But such actions arguably increase the average safety of products, while preserving opportunities for American competitors willing to assume the risk and creating incentives for producers to innovate to make alternative and even safer products.

On the whole, it is difficult to evaluate the magnitude of the disadvantages of the present system and even more difficult to weigh them against the advantages of the deterrence they provide against the introduction of truly hazardous products. Furthermore, the possibility of an occasional "excessive" award may provide greater deterrent value at lower net cost to society than universally applicable regulations do. . . . The liability system might benefit from some fine-tuning to make the system more responsive, less expensive, and more equitable. But such attempts may actually make it less effective.²³⁷

Indeed, the common claim that the tort system inhibits the development of new products, and thus leads to economic stagnation or reduced competitiveness, seems misguided. As Rahdert points out, "[t]he rapid proliferation of new products and services in our econ-

235. Ashford & Stone, *supra* note 230, at 419.

236. See generally W. Rip Viscusi & Michael J. Moore, *An Industrial Profile of the Links Between Product Liability and Innovation*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 81 (Peter W. Huber & Robert E. Litan eds., 1991).

237. Johnson, *supra* note 234, at 450.

omy is ample evidence that stagnation due to tort liability is the exception, not the rule."²³⁸

Experience in the pharmaceutical industry is consistent with these conclusions.²³⁹ In her study of prescription drug safety, Judith Swazey interviewed pharmaceutical company attorneys, who credited the product-liability system with providing a deterrent which has, in turn, led to safety improvements. One attorney she interviewed remarked,

For certain classes of drugs, liability concerns have probably led to safer products, in conjunction with FDA requirements. . . . I personally don't think that the litigation threat is that serious. . . . I believe—though it's heretical—that the liability crisis is largely a myth when one looks at available information such as the actual number of cases. . . . Tort law is a law of what ought to be—compensation for injury and, when warranted, punishment.²⁴⁰

Another product liability attorney working for a pharmaceutical company agreed: "Overall, I think liability has had a deterrent effect for industry with respect to drug safety; safety has been improved as a result of causes of action under negligence."²⁴¹

Risk managers, those responsible for reducing liability exposure for companies, associations, governmental units, and other organizations, may have a valid perspective on whether tort law actually deters risk. Professor Gary Schwartz interviewed risk managers for several public agencies in California, including city managers, state motor vehicle department managers, and managers from the UCLA Medical Center. He asked them about the impact of liability on their safety efforts, or whether the impetus to improve safety was simply a desire to do the right thing. He found:

All of them emphasized that their efforts were due to the combination of both. A risk manager starts with the idea that accident avoidance is good for its own sake. But the prospect of tort liability provides an important reinforcement as well as an essential way to sell the risk manager's proposals to others in the organization.²⁴²

In fact, this need to sell to others in an organization can itself be a function of the search for cost savings. As one Los Angeles city manager explained to Schwartz, officials "are not much affected by abstract appeals to safety. Indeed, funding will generally be denied

238. RABURNT, *supra* note 144, at 161.

239. See generally Judith P. Swazey, *Prescription Drug Safety and Product Liability*, in THE LIABILITY MUSE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 291 (Peter W. Huber & Robert F. Litan eds., 1991).

240. *Id.* at 297.

241. *Id.*

242. Schwartz, *supra* note 211, at 415-16.

'unless we can tie it to cost savings for the City.'²⁴³ Schwartz found one risk manager, the director of Non-Profit Risk Management, started his job with considerable skepticism over whether the tort system effectively deterred, but his job experiences led him to believe that 'tort liability exerts a significant influence.'²⁴⁴

Similar results were obtained in a survey of risk managers for major corporations by the business-oriented Conference Board, which 'found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial.'²⁴⁵ The survey noted that, of 232 major corporations, concerns about products liability encouraged approximately 22% to improve manufacturing procedures, 32% to improve product safety design, and 37% to improve labeling.²⁴⁶ The appearance of the first survey, which countered tort reformers' arguments that the liability system was ruining American businesses, prompted a second survey of 2,000 corporate CIO's, a third of whom, despite a self-interest in tort reform, admitted that they had improved the safety of products and nearly one-half of whom improved their product warnings.²⁴⁷

Schwartz himself attempted a cost-benefit analysis of tort liability, focusing on the medical malpractice system, though in a self-admittedly conservative fashion. By comparing the cost of medical malpractice insurance and the estimated cost of practice changes due to liability, with the Harvard medical malpractice study estimate that medical injuries had been reduced by 11% and the number of medically negligent injuries by 23%, Schwartz concluded:

Given the \$130 billion total for actual medical injuries in 1984, the malpractice system can be understood as having reduced the cost of injuries by \$19.5 billion. Since this estimated safety benefit is considerably higher than the \$15 billion estimated cost of the medical malpractice regime, that regime seems to have been cost-justified.²⁴⁸

VIII. CONCLUSION

Tort reform is an idea that has been so fervently adopted by the business community that it has lost all basis in reality. 'Reforms' are desired more as a trophy on a mantelpiece²⁴⁹ than in furtherance of

243. *Id.* at 416 n.196 (citation omitted).

244. *Id.* at 416.

245. *Id.* at 409.

246. *See id.* at 108-09.

247. *See id.* at 109.

248. *Id.* at 440.

249. In the aftermath of the passage of House Bill 775, one industry lobbyist declared, 'I don't know what the poor people got, but the rich people are happy, and I'm ready to go

any demonstrated need. Legislation such as House Bill 755 is constructed in an air of supposition and lack of understanding. Two scholars recently and correctly observed that:

Current tort reform is a blunderbuss. Based on anecdote and designed to favor defendants, reform measures fail to address the tort system as it stands. . . . Rather than heed those [unsubstantiated and demonstrably false] fictions, legislators and voters should turn their attention to our growing knowledge of how the tort system truly operates.²⁵⁰

The empirical evidence demonstrates that the tort system's substantial benefits outweigh the relatively small costs that may legitimately be charged to it. Instead, the data demonstrates that the civil justice system still provides the best opportunity for an average person to achieve redress of injuries against wrongdoers, regardless of wealth or rank. As *The Economist* has reported:

So much fury is levelled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly.²⁵¹

home." Lucy Morgan, *Fall Flurry Gives Bush Happiness and Worry*, ST. PETERSBURG TIMES, May 1, 1999, at 7B (quote of lobbyist J.M. "Mac" Stipanovich commenting on the measures passed by the Florida Legislature during the 1999 session).

250. Deborah Jones Merritt & Kathryn Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 313, 338 (1999).

251. *The Way Those Crazy Americans Do It*, ECONOMIST, Jan. 14, 1996, at 29 (British ed.).

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TORT REFORM'S THREAT TO AN INDEPENDENT JUDICIARY

Robert S. Peck*

I. INTRODUCTION

For nearly three decades, a well-oiled public relations machine has attacked the American civil justice system with unrelenting regularity and zeal.¹ Adopting the repetitive tactics previously employed by conservative politicians to make "welfare queens"² part of the popular lexicon and an instrument of public policy change, these campaigners have permeated the public conscientiousness with distorted versions of the cases that they claim exemplify a lawsuit-crazed society,³ with false claims of skyrocketing jury

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1. See generally STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995) (describing the political muscle and propaganda used to create a false impression about runaway juries and a system gone awry).

2. These politicians spoke frequently of women on the dole who would drive Cadillacs to the welfare office to pick up their assistance checks and who otherwise were living a life of luxury that was beyond the reach of working Americans. The critics also claimed that these high-living idlers conceived babies indiscriminately in order to increase the size of their weekly welfare allowances. The imagery was effective in developing popular resentment, even though it was utterly untethered to reality. See generally DAVID ZUCCHINO, *MYTH OF THE WELFARE QUEEN: A PULITZER PRIZE-WINNING JOURNALIST'S PORTRAIT OF WOMEN ON THE LINE* (1997); Tonya L. Brihi, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 *VILL. L. REV.* 415 (1999).

3. For example, enormous publicity was given to the revisionist version of the "McDonald's Hot Coffee Case." See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994). The case involved a scalding cup of coffee, too hot to be consumed, that caused third-degree burns sufficient to require an eight-day hospitalization, skin grafts and debridement treatments when it spilled on an elderly woman. See Ass'n of Trial Lawyers of Am., *McDonald's Scalding Coffee Case*, Civil Justice Facts, The Other Side of the Story, at <http://www.atla.org/CJFacts/other/mcdonald.htm> (last visited Oct. 10, 2002). The woman merely sought payment of her medical bills and not the "jackpot" that she was subsequently accused of seeking. See *id.* During discovery, the plaintiff learned that there had been more than 700 claims for burns caused by McDonald's coffee, most of which were settled. See *id.* Nonetheless, McDonald's maintained its coffee at 180 to 190 degrees—some 40 to 65 degrees hotter than other similar restaurants—because its

awards,⁴ and with a host of other societal ills that they blame on a supposed litigation explosion in order to win broad support for their various prescriptions to "fix" a justice system they claim has run amok.⁵

The available empirical evidence contradicts their claims. Writing in 1992, in an exhaustive and detailed review of the available data, Professor Michael Saks bluntly concluded that the negative characterization of juries and the civil justice system asserted by the tort "reformers" and used to support their proposals is "built of little more than imagination."⁶ A decade

marketing surveys indicated that most people purchased the coffee at the store to drink elsewhere, by which time it would have cooled to an appropriate temperature. *See id.* After reducing the award by twenty percent to take into account the jury's assessment of comparative fault on the plaintiff's part, a verdict was rendered that gave the plaintiff \$160,000 in compensatory damages and \$2.7 million in punitive damages, the equivalent of two days of McDonald's coffee sales. *See id.* The trial judge then further reduced the punitive award to \$480,000, three times the compensatory award, while also declaring McDonald's behavior "reckless, callous and willful." *Id.* The parties later settled for an undisclosed, presumably lesser amount. *See id.* The case was used as a poster child for tort reform by providing a skewed and cartoonish version of the facts that portrayed the case as involving a scheming woman who hit the jackpot by carelessly spilling coffee on herself. *See* William Glaberson, *The \$2.9 Million Cup of Coffee: When the Verdict Is Just a Fantasy*, N.Y. TIMES, June 6, 1999, §4, at 1; Sandra Torrey, *Tort and Retort: The Battle over Reform Heats Up*, WASH. POST, Mar. 6, 1995, at F7 (noting "[t]ort reformers have gleefully seized on the case as the epitome of frivolity"). More neutral renditions of the facts suggested that the case was sensibly treated by the system. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Sentiment*, 44 UCLA L. REV. 1, 5 (1996) (indicating that once the facts were known, it was a tale of justice done); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1348-50 (2002); Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 266 (1998).

4. For a description of the campaign against juries and its lack of an empirical basis, see generally Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (Autumn 1989).

5. The use of the litigation explosion claim has resulted in widespread acceptance of it as if true. A 1986 Roper survey indicated that sixty-six percent of respondents believed the number of personal injury lawsuits is too high. Stephen Daniels & Joanne Martin, "The Impact That It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers," 50 DEPAUL L. REV. 453, 463 n.37 (2000) (citing Public Opinion Online, accession number 0151727). A Harris poll the same year found fifty-nine percent agreed that personal injury lawsuits are increasing faster than the population. *Id.* (citing Public Opinion Online, accession number 0072650).

6. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1155-56 (1992).

of further research continues to support that conclusion.⁷ It is clear that the so-called reformers seek to slay dragons that do not exist.

Even so, their publicity campaign has had a discernible impact on politicians who have treated liability restrictions as a high priority,⁸ on judges who have bought into the PR campaigns and altered legal doctrine to fit those views,⁹ and on juries who have reacted to the tales of wealth-redistributing juries by putting the brakes on verdicts and damage awards.¹⁰

7. See, e.g., Thomas A. Eaton et al., *Another Brick in the Wall: an Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049 (2000) [hereinafter Eaton, *Another Brick in the Wall*]; Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999).

8. See, e.g., Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995) (describing the use of civil liability reform as a centerpiece of the Republican 1994 electoral strategy).

9. Punitive damages are a prime example of this phenomenon. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting), Justice O'Connor noted that "the frequency and size of [punitive damage] awards have been skyrocketing" and called for greater judicial scrutiny of such awards as a matter of due process. Then, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996), the Court, with Justice O'Connor in the majority, adopted the position that grossly excessive punitive damage awards violate a defendant's due process rights. Finally, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court, once again with Justice O'Connor in the majority, took away the jury's prerogative to determine punitive damages by claiming that punitive damages had "evolved," *id.* at 437 n.11, abandoned traditional Seventh Amendment analysis that had preserved, *id.* at 438, as a constitutional matter, the jury's authority over punitive damages, and subjected federal trial judges' decisions on issues of excessiveness to *de novo* rather than abuse of discretion appellate review, *id.* at 443. Clearly, the public relations campaign on punitive damages had convinced members of the Court that it was a problem crying out for their attention.

The empirical evidence, however, indicates that no problem exists and that juries are not awarding punitive damages in outlandish fashion. Instead, punitive damages remain rare and relatively small. A study conducted by the U.S. Department of Justice, using 1996 statistics culled from the seventy-five largest counties in the nation, which is the latest available data, found that only three percent of plaintiffs who won their cases received punitive damage verdicts and that the median award was only \$38,000. MARIKA F.X. LITRAS ET AL., U.S. DEPT. OF JUSTICE, *Tort Trials and Verdicts in Large Counties, 1996*, in BUREAU OF JUST. STAT. BULL. 1 (Aug. 2000), available at <http://www.ojp.usdoj.gov/nij/pubs/pdf/tvtc96.pdf>; see also Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (detailing the results of the same study).

For an analysis of how the rhetoric has affected trial judge behavior in a manner that favors product liability defendants, see Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) and James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

10. See, e.g., Eugene Pavalon, *The Insurance Industry: Do Its Ads Undermine Jury*

All the sound and fury contributing to that realignment obscures a larger truth: the American civil justice system remains a remarkable achievement. There, an injured individual, neither wealthy nor well-connected, can hale a huge multinational conglomerate into court to hold it accountable for its wrongful and harmful actions. Only in an American courtroom, and not in legislative chambers or executive offices, can an individual seek full redress, standing at the bar on an equal basis with a powerful and influential adversary. That opponent's money, clout, powerful allies, and legions of lobbyists, all of which provide an insurmountable advantage in the political arena, count for naught in this legal one.

Political and economic advantages that unfairly tilt the political playing field in favor of powerful economic interests and industries dissolve in a courtroom. Unlike other venues, no prize awaits those especially skilled in the art of horse-trading, in holding out the lure of future lucre, or in traveling in influential circles. Instead, in an American courtroom, decisions are made according to the rule of law. No person—or entity—is above its reach.¹¹ As a matter of business calculus, a corporation may make a purely economic decision about the acceptable level of risk of injury in its products based on an econometric model that focuses on optimized profits. It may, for example, decide that twenty severe injuries per 100,000 units sold will maximize the return on its investment, even if compensatory damages are paid to those injured who are likely to make claims. The economic imperative behind the profit motive may trump the small sums that might otherwise be expended to make further safety modifications.

Only because of the existence of the civil justice system—and, in some instances, its ability to assess punitive damages—can that number crunching prove insufficient.¹² In that system, the person harmed as a result of such

Impartiality?, A.B.A. J., Nov. 1989, at 46; David A. Wenner & Gregory S. Cusimano, *Combating Juror Bias*, TRIAL, June 2000, at 30. See generally VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (2000).

11. The classic formulation of this fundamental precept is that this is "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The concept, originating with Aristotle as an "empire" of laws, was famously quoted by seventeenth-century writer James Harrington. See Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 4 (1986) (quoting James Harrington, *The Commonwealth of Oceana*, in *THE POLITICAL WORKS OF JAMES HARRINGTON* 170 (John G.A. Pocock ed., 1977)). It is widely considered descriptive of our legal system and may have obtained its modern formulation as a "government of laws" from John Adams in 1774 or 1775. See John Adams, *Novanglus Letters*, in 2 PAPERS OF JOHN ADAMS 216, 314 (Robert J. Taylor et al. eds., 1977). He later incorporated it into the Massachusetts Constitution in 1780. See MASS. CONST. pt. 1, art. XXX.

12. See generally Michael L. Rustad, *How the Common Good Is Served by the Remedy*

crass calculations can seek compensation for that injury in a court of law and deny projected profitability to the manufacturer,¹³ despite the considerable resources and skillful legal maneuvering the defendant may bring to bear against the lawsuit.

The preservation of the courtroom, as a place where individuals can seek redress for civil wrongs against those who occupy society's elite stations, is precisely what our constitutional framers anticipated as the proper purpose of the civil justice system, harking back to their understanding of Magna Carta's promise of access to justice.¹⁴ The Supreme Court has long

of Punitive Damages, 64 TENN. L. REV. 793 (1997).

13. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

14. This concept finds expression in provisions variously denominated as Open Courts, Right to Remedy or Access to Courts, found in the constitutions of thirty-seven states. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* 347 n.11 (3d ed. 1996), and found implicit in an additional state's constitution, *Richardson v. Carnegie Library Rest., Inc.*, 763 P.2d 1153, 1161 (N.M. 1988), *overruled in part on other grounds by* *Trujillo v. City of Albuquerque*, 965 P.2d 305 (N.M. 1998). The clauses boast a venerable lineage that can be traced back to Chapter 40 of Magna Carta in 1215. WILLIAM S. McKECHNIE, *MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2d ed. 1914). Chapter 40 declared: "To no one Will we sell, to none will we deny or delay, right or justice." *MAGNA CARTA* ch. 40 (1215). That declaration was not the articulation of new rights so much as the embodiment of fundamental rights, previously existent in the common law and the ancient customs of the realm. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 349 (1997) (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* *127-28; Edward Coke, *A Preamble to the Second Part of the Institutes*, in *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 1 (London, E. & R. Brooke 1797)).

Upon its reissue in 1225, Chapter 40 was combined with Chapter 39, the antecedent of the due process/law of the land guarantees, to form a new Chapter 29, a provision that indisputably had the most significant impact on later American constitutional thinking. McKECHNIE, *supra*, at 350-57. Four centuries after its reissue, Magna Carta's guarantee against sale, denial or delay of justice, was transformed by the great jurist, Sir Edward Coke, "into a promise of full and equal justice for all." David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 39 (1986); see also Edward Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 393 (1929) (describing Coke's position that common-law procedure operates as a permanent restraint on power). Coke's influential study of Magna Carta concluded that Chapter 29 embraced "the entire body of the common law of the seventeenth century." McKECHNIE, *supra*, at 178.

The seeds Coke planted in his writings found fertile soil in the American colonies. See A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE* 119-25 (1968). Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 (1980). His gloss on Magna Carta "was widely accepted and imported by early American colonists who incorporated it into state

recognized the nexus between Magna Carta's principles and individualized justice:

As to the words from Magna Charta, . . . after volumes spoken and written with a view to their exposition, the good sens [sic] of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.¹⁵

Though speaking of the exercise of federal jurisdiction over states, the Court also, early on, correctly captured the civil justice system's high calling:

[I]t leaves not even the most obscure and friendless citizen without means of obtaining justice [I]t recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne by the weight and number of their opponents ¹⁶

This is not an idea that necessarily sits well with those who are used to getting their own way. Mustering a natural and age-old antipathy for lawyers,¹⁷ showering their political patrons not just with money but with

constitutions." *FREEMAN, supra*, at 349 n.16. When America's constitution-writers read Chapter 29 and adopted it in their state constitutions, "they almost certainly understood it as Coke did." *Pac. Mut.*, 499 U.S. at 29 (1991) (Scalia, J., concurring). The application of that reading of Coke is apparent in the instructive recent decision of the Oregon Supreme Court. *See Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001).

Although the clauses have no federal analogue, the access-to-courts guarantee has long been considered to be a part of federal constitutional law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). It received recent reaffirmation from the United States Supreme Court. *See Christopher v. Harbury*, 122 S. Ct. 2179 (2002) (reaffirming the federal constitutional basis of access to courts claims).

15. *Bank of Columbia v. Okely*, 17 (4 Wheat.) U.S. 235, 244 (1819).

16. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793).

17. One rhetorician at the tort-reform-supporting Manhattan Institute tapped into that reservoir of lawyer hostility by establishing a website, www.overlawyered.com, that seeks to feed that predisposition with tales of unscrupulous lawyers and frivolous lawsuits. The

unrepresentative sound bites and newspaper headlines,¹⁸ creating a rumor mill of wacky lawsuits that supposedly transformed barely injured people into millionaires¹⁹ while denying any responsibility for various types of injuries inflicted upon consumers, business interests have put "tort reform" high on the public policy agenda.²⁰

The tort reform—or, more accurately and descriptively, tort restrictionism—corporate powerhouses support is nothing less than the use of their outsized political clout to skew the legal system in their favor. The advantages that obtain for business in the political system are enlisted to acquire similar advantages in the legal system. The very idea that legislation could be used to rig the legal system in favor of politically powerful players should be appalling to all who value the rule of law. Such a development would consign the courts to a status akin to the spoils of political warfare,

popular value of attacking lawyers is further evidenced by Republican pollster Frank Luntz's advice to political candidates: "[I]t's almost impossible to go too far in demonizing lawyers." Joan Claybrook, *Corporate Accountability: The Power of Citizen Access to the Courts*, 21 PUB. CITIZEN 20, 21 (2001), available at <http://www.citizen.org/documents/pnews30ann.pdf>.

18. RAND Institute for Civil Justice economist Steven Garber found that "high-visibility liability episodes such as unusually large awards, punitive damages, and liability when injury causation is disputed by respected authorities" cause business managers to overestimate the risks of liability because widely reported cases tend to be unique and give a skewed picture of litigation. Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250.

19. Professor Marc Galanter examined a variety of cases publicized by supporters of restrictive tort laws to support their claim that "people are suing each other indiscriminately about the most frivolous matters, and juries are capriciously awarding immense sums to undeserving claimants." Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998) [hereinafter Galanter, *Oil Strike*]. He found that the claims made about the cases do not match the facts; instead, some creative fictional writing was employed to create these tall tales, in order to engender support for the tort reformers' public policy goals. *Id.* at 726-40. Even when confronted with the facts, supporters of these laws continue to spin out these stories presumably because they are too good for propagandists to abandon. *Id.*

20. See, e.g., Press Release, The United States Chamber, U.S. Chamber Recognizes Pro-Business Lawmakers; Senators, Representatives Receive Annual Award (March 20, 2002), available at <http://www.uschamber.com/Press+Room/2002+Releases/March+2002/02-45.htm> ("The U.S. Chamber will fight hard in every legislative session to make sure that the business community is heard," said [Thomas J.] Donohue [, president and CEO of the U.S. Chamber of Commerce]. "We will fight for open markets overseas, for more reasoned regulations, for tax relief and for tort reform. . . ." (emphasis added)). Mike Allen, *Republicans Planning for Full Control of Congress: Accelerated Tax Cuts, Tort Reform on the Agenda*, WASH. POST, Oct. 20, 2002, at A1 ("Business lobbyists said their wish lists include substantial nationwide limits on the amount of damages that can be awarded in medical malpractice cases . . .").

rather than a branch of government equal in stature to the legislative and executive branches.²¹

This article primarily examines this legislative aggrandizement of judicial authority from a separation of powers perspective. Separation of powers, of course, is not the only limitation on legislative authority to restrict personal injury lawsuits. Tort restrictionist laws have run afoul of many other state constitutional provisions, including the right to trial by jury,²² due process,²³ equal protection,²⁴ access to courts,²⁵ the takings clause,²⁶ the special legislation prohibition,²⁷ and single-subject rule.²⁸ Part

21. See, e.g., *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 197 (Pa. 1971) (declaring that the "co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof."); cf. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268 (Fla. 1991) ("[J]udiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power." (citation omitted)).

22. See, e.g., *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 468-70 (Or. 1999) (holding that \$500,000 cap on noneconomic damages in personal injury and wrongful death actions violated jury trial right); *opinion clarified by* 987 P.2d 476 (Or. 1999); *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 365-66 (Utah 1989) (holding that a statute limiting medical malpractice liability of state hospital to \$100,000 violated jury trial right).

23. See, e.g., *Galayda v. Lake Hosp. Sys., Inc.*, 644 N.E.2d 298, 301-02 (Ohio 1994) (determining that law requiring future damages in medical malpractice cases be paid periodically rather than as a lump sum violates right to trial by jury and due process), *cert. denied sub nom. Damian v. Galayda*, 516 U.S. 810 (1995); *Ameson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (holding that statute imposing \$300,000 limit on damages recoverable in medical malpractice actions and abrogating collateral source rule violated state and federal equal protection and due process guarantees).

24. See, e.g., *Brannigan v. Usitalo*, 587 A.2d 1232, 1237 (N.H. 1991) (holding that \$875,000 limitation on noneconomic damages recoverable in actions for personal injury violates equal protection); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 743 (Ill. 1976) (holding \$500,000 cap as an unconstitutional as denial of equal protection).

25. See, e.g., *Lucas v. United States*, 757 S.W.2d 687, 690-92 (Tex. 1988) (holding that a statute limiting liability to \$500,000 for damages in medical malpractice actions violated open courts guarantee); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089-90 (Fla. 1987) (*per curiam*) (determining that a \$450,000 cap on noneconomic damages recoverable in actions for personal injury violates access to courts and jury trial provisions).

26. See, e.g., *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 270 (Colo. 1991) (holding that statute designating one-third of punitive damage award to the state general fund violated takings clauses of state and federal constitutions).

27. See, e.g., *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1080-81 (Ill. 1997) (holding that a \$500,000 cap on noneconomic damages was a legislative reinitiation, in violation of the separation of powers doctrine, and constituted impermissible special legislation); *Reynolds v. Porter*, 760 P.2d 816, 823-24 (Okla. 1988) (holding invalid as special litigation cap based on claim being more than three years old).

II of this article briefly surveys the overall weakness of the case for tort restrictionism, with specific examples from the law passed and then invalidated in Ohio, which was the subject of a constitutional challenge brought by this writer.²⁹ Part III explores the theory and jurisprudence of the separation of powers constitutional landscape against which such challenges are brought. Part IV applies those lessons to a variety of tort restrictionist measures, primarily focusing on the Ohio statute. Part V responds to specific criticisms that have been made of the Ohio Supreme Court for using its authority to strike down the omnibus tort restrictionist law. Part VI concludes that tort restrictionist laws are properly the subject of constitutional scrutiny in the courts in order to preserve the fundamental concepts of justice and independent courts.

II. THE PRODUCT OF IMAGINATION

What is most remarkable about the political traction and staying power that the tort restrictionism issue seems to have achieved is that there is no provable need for tort reform. Rather, there is only a fervent and uncritical desire coupled with the political muscle to make it happen from time to time. Professor Saks has noted that the

lack of evidence, which might seem like an insuperable barrier, has barely slowed the many policy-makers, scholars, and other commentators. Their discussions about the behavior of the tort liability system often have proceeded without even assembling the fragments that do exist, much less pausing to figure out how they fit together.³⁰

The campaign for tort restrictionist laws is dressed up in the rhetoric of nonexistent litigation explosions,³¹ insurance crises,³² horrifying economic

28. See, e.g., *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1067 (Ohio 1999) (holding unconstitutional as a violation of separation of powers and single-subject rule an omnibus tort reform statute that included caps on noneconomic damages and punitive damages and abrogation of the collateral source rule).

29. *Id.*

30. Saks, *supra* note 6, at 1155-56.

31. See John Lande, *Falling Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 51 (1998) (finding that business executives were "virtually unanimous that there has been a litigation explosion, and the vast majority believed that most suits by individuals against businesses are frivolous"). See generally PATRICK M. GARRY, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* (1997) (asserting that lawsuits have become a way of life for

consequences,³³ unconscionable jury awards,³⁴ and frivolous lawsuits.³⁵ None of the justifications withstand scrutiny, even at the most minimal level of constitutional analysis.

Often, these laws implicate fundamental rights³⁶ and therefore require analysis on a strict scrutiny basis.³⁷ Still, the laws usually fail to meet the much lower scrutiny required by the rational-basis test.³⁸

Courts often examine the underlying basis of a law challenged on constitutional grounds, particularly when the rational-basis test applies.

Americans); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (claiming that out of control lawsuits permeate the legal system and exact a high social cost).

32. See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4, 138-42 (1988) (discussing the liability insurance crisis of 1970s and 1980s); UNITED STATES 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).

33. See, e.g., HUBER, *supra* note 32, at 4 (asserting that modern tort liability doctrines impose a "tort tax" that saps American economic strength); COUNCIL OF ECONOMIC ADVISERS, *WHO PAYS FOR TORT LIABILITY CLAIMS: AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM* (Apr. 2002), available at http://www.whitehouse.gov/ce/tortliabilitysystem_apr02.pdf (adopting Huber's description of a debilitating "tort tax" exacted on the American public).

34. See, e.g., PUBLIC POLICY INSTITUTE, 'AN ACCIDENT AND A DREAM': HOW THE LAWSUIT LOTTERY IS DISTORTING JUSTICE, AND COSTING NEW YORKERS BILLIONS OF DOLLARS EVERY YEAR 2-4 (1998), described in Daniel J. Capra, 'An Accident And a Dream: Problems with the Latest Attack on the Civil Justice System', 20 *Pace L. Rev.* 339, 340 (2000).

35. See, e.g., Kirk W. Dillard, *Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation*, 27 *LOY. U. CH. L.J.* 805, 806 (1996).

36. See *supra* notes 22-28 and accompanying text.

37. Laws that implicate fundamental rights or suspect classes require strict scrutiny from the courts. See, e.g., *Sorrell v. Thevenir*, 633 N.E.2d 504, 511 (Ohio 1994). Strict scrutiny is such an imposing obstacle to unconstitutional acts that it has been famously characterized as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972). But see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). A law analyzed under strict scrutiny must promote a compelling governmental interest and be implemented by the least restrictive means. See, e.g., *Northampton County Drainage Dist. No. One v. Bailey*, 392 S.E.2d 352, 355 (N.C. 1990).

38. *Northampton County Drainage*, 392 S.E.2d at 355 (describing rational-basis analysis as requiring only that the legislation bear "some rational relationship to a conceivable legitimate interest of government."). But see *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (Court indicated that it has never abided by a "no set of circumstances" standard suggested by the conceivable legitimate interest approach and that such a high standard "would serve no functional purpose").

When courts have deferred to legislatures, it is because there is some significant need that the statutory enactment attempts to address in an effective manner. It is black-letter law in most states, however, that legislative purposes and findings are not beyond judicial examination. Legislative findings "are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry."³⁹ And it is reversible error to exclude evidence attacking the validity of the legislature's findings.⁴⁰

Following this prescription, the Utah Supreme Court has noted the

constitutionality of the [tort-restrictionist] legislation was at first sustained by courts on the un rebuttable presumption that a factual basis existed for the proposition that the [medical] malpractice crisis was caused by a large increase in the number of malpractice lawsuits filed and in the size of judgments against physicians and hospitals.⁴¹

Before long, the legislative assumptions about the causes of the "malpractice crisis" were challenged, as was the efficacy of the legislative responses.⁴² Reviewing that landscape, the Utah Supreme Court found that:

After assessing the factual basis for the so-called malpractice crisis and the legislative findings supporting tort reform legislation, a number of courts held that the crisis did not warrant restricting the rights of individuals injured by malpractice. In some cases, entire malpractice acts were held unconstitutional. In addition, as Justice Durham stated in her opinion in [*Condemarin v. University Hospital*]⁴³, "[A] substantial majority of courts addressing damages limits in medical malpractice statutes have invalidated

39. *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235, 236 (Fla. 1951) (recognizing that plaintiffs are free to disprove the legislature's factual assumptions); see also *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977) (declaring that legislation carries a rebuttable presumption of constitutionality); *Nohr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971) (declaring that a party can challenge a legislative determination and show that it "was so clearly wrong as to be beyond the power of the Legislature"); *Moore v. Thompson*, 126 So. 2d 543, 549 (Fla. 1960); *Goldstein v. Maloney*, 57 So. 342, 344 (Fla. 1911).

40. See *Cox v. Fla. Dep't of Health & Rehabilitative Servs.*, 656 So. 2d 902, 903 (Fla. 1995).

41. *Lee v. Gaufin*, 867 P.2d 572, 584 (Utah 1993).

42. See, e.g., *Moninee v. Scherbarth*, 503 N.E.2d 717, 724-26 (Ohio 1986) (Celebrezze, C.J., concurring); Robert B. McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 VILL. L. REV. 1219, 1220 (1987).

43. 775 P.2d 348, 361-62 (Utah 1989).

those limits, usually on equal protection grounds, but also occasionally under a due process rubric."⁴⁴

The Utah Supreme Court further required that, in order to be constitutional, such laws needed to be reasonable; have more than a speculative tendency to further the legislative objective; actually and substantially further that valid legislative purpose; and, finally, be reasonably necessary to further that goal.⁴⁵

The Utah Supreme Court's approach to scrutinizing the supportive evidence is standard operating procedure, not just in state court, but in federal court, as well.⁴⁶ In *Planned Parenthood v. Casey*,⁴⁷ the U.S. Supreme Court sustained a facial challenge on due process grounds to each of the provisions of a statute that regulated access to abortion services. In striking down the law, the Court relied upon "testimony of numerous expert witnesses" that formed the basis of "detailed findings of fact regarding the effect of this statute."⁴⁸ The Court then concluded that the statute was unconstitutional because in "a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."⁴⁹ In the far less controversial arena of access to the courts, evidence of the irrationality of the justification and approach, as well as the impact, is highly material.

A. No Litigation Explosion

Contrary to frequently proffered legislative justifications, tort litigation is not on the rise. A study conducted by the National Center for State Courts, using data from twenty-seven states in the period from 1991 to 1993, found a six percent *decrease* in tort filings.⁵⁰ A more recent National Center study

44. *Lee*, 867 P.2d at 584 (internal citations omitted).

45. *Id.* at 583.

46. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational.")

47. 505 U.S. 833 (1992).

48. *Id.* at 888.

49. *Id.* at 895.

50. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS 22 (Brian J. Ostrom & Neal B. Kauder eds., 1995).

found the decrease continued, with a ten percent decline in tort filings from 1991 to 2000.⁵¹

State-specific studies reach the same conclusion: there is no litigation explosion. In Georgia, for example, a 1996 study involving more than 2,100 tort cases filed in four counties between 1990 and 1993, as well as tort cases disposed of in another county in 1992, found that tort claims represented a small percentage of total civil filings, with simple automobile collision cases comprising the large majority of all tort cases filed.⁵² Within that small universe of tort cases, the vast majority of those filed were settled and less than seven percent went to trial.⁵³ Rather than clog the courts interminably, the average case ended within two years of filing.⁵⁴ And contradicting the doom and gloom claimed by the tort restrictionists, damage awards remained modest.⁵⁵ When the thirst for tort restrictionism failed to be quenched, the study's authors updated their work in 2000. The results they found remained "largely consistent" with their previous study.⁵⁶ Specifically, they concluded:

Tort claims remain a relatively small percentage of total civil filings. There have not been any large increases in the number of tort filings between 1994 and 1997. When adjusted for population changes, the rate of tort filings actually declined slightly. Suits arising from automobile accidents still account for more than sixty percent of all claims filed. More than fifty percent of all tort cases are disposed within one year of filing and almost eighty percent are disposed within two years. Most cases are settled and fewer than five percent go to trial. Plaintiffs prevail in slightly more than half the jury trials (although this varies by location and type of claim) and enjoy an even higher win rate in bench trials. When the plaintiff does prevail,

51. NAT'L CTR. FOR STATE COURTS, *Tort and Contract Caseloads in the State Trial Courts*, in EXAMINING THE WORK OF THE STATE COURTS, 1999-2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (Brian Ostrom et al. eds., 2001), available at http://www.ncsconline.org/D_Research/csp/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf.

52. Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 669 (1996).

53. *Id.*

54. *Id.*

55. *Id.*

56. Eaton, *Another Brick in the Wall*, *supra* note 7, at 1057.

compensatory damages tend to be modest, and punitive damage awards are exceedingly rare.⁵⁷

After examining the filings in detail, the authors concluded that "there is no evidence that there was or is an explosion in the number of tort claims filed in Georgia courts."⁵⁸ They added:

The combination of data pertaining to plaintiffs' success rates, median compensatory damage awards, and frequency and size of punitive damage awards belie the popular image of a system beset with runaway juries. On the contrary, outcome and damage data indicate that the civil jury in personal injury trials frequently rules for defendants, awards modest compensation to those plaintiffs who do prevail, and rarely punishes defendants.⁵⁹

Similar results were found in Texas, where claims of a litigation crisis fueled tort restrictionist efforts in the 1980s. Examining the available empirical evidence, two law professors found there was no support for the justifying claims made about the frequency of lawsuits filed, trials held, or outlandish jury verdicts.⁶⁰

Contrary to the image painted by tort restrictionists, people do not sue at the drop of a hat. Instead, reputable studies have established that there is significant underclaiming by victims of torts and substantial deficits in compensation to those with large, legitimate claims.⁶¹ Professor Richard Abel, after surveying the empirical literature on claims filed by those injured in tort, concluded:

Vast numbers of accident victims fail to seek and thus to recover any compensation whatever. The most significant reform of the tort system—far more consequential than any incremental change in substantive or procedural law—would be to make it begin to fulfill its promises by responding to a higher proportion of victims. This would strengthen the norm against dangerous behavior, relieve the anger of victims, ameliorate the financial

57. *Id.* at 1058.

58. *Id.* at 1094-95. They also found, contrary to the tort restrictionists' claims, "there does not appear to be any systematic bias in favor of plaintiffs in the civil trial itself." *Id.* at 1095.

59. *Id.* at 1095.

60. Joseph Sanders & Craig Joyce, *Off to the Races: The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 234-55 (1990).

61. See, e.g., DEBORAH HENSLEY ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 131, 174 (RAND Inst. for Civil Justice, Doc. No. 3999-HHS/ICJ, 1991).

plight of victims, and encourage safety. Collective solicitation of the injured would be an important step in this direction.⁶²

The literature in the medical malpractice field demonstrates that the underclaiming Professor Abel described is the norm. Patricia Danzon studied the issue and found, using data from a California Medical Association/California Hospital Association study of 20,864 inpatient charts from twenty-three California hospitals done in the 1970s, on average that one in twenty hospital patients incurs an injury as a result of a medical error.⁶³ Harvard University conducted a celebrated study of medical malpractice in New York covering the late 1980s and came to similar conclusions.⁶⁴ It found that one injury occurred for every twenty-seven hospitalizations.⁶⁵ The researchers extrapolated the "New York population estimates to the nation as a whole [and concluded] that every year there are more than 150,000 fatalities and 30,000 serious disabilities precipitated by medical treatment in this country."⁶⁶ According to the American Hospital Association, there were 35,644,440 hospital admissions in the United States in 2001.⁶⁷ Using these figures, the one-in-twenty estimate from Danzon would translate to a total of 1,782,222 patient injuries nationwide, and the one-in-twenty-seven estimate from the New York data would convert to 1,320,164 injuries nationwide. A November 1999 report of the Institute of Medicine found that at least 44,000 and as many as 98,000 Americans die each year as a result of medical errors.⁶⁸ Even if one relied solely on the lower figure, medical errors were responsible for more fatalities than automobile accidents, and medical errors ranked eighth on the list of leading causes of disease.⁶⁹ The nation's bill for such avoidable medical errors was

62. Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 467 (1987).

63. PATRICIA DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 20 (1985).

64. PAUL WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION* (1993).

65. *Id.* at 43.

66. PAUL WEILER, *MEDICAL MALPRACTICE ON TRIAL* 12 (1991).

67. AMERICAN HOSPITAL ASS'N, *FAST FACTS ON U.S. HOSPITALS FROM HOSPITAL STATISTICS* (2003), available at http://www.hospitalconnect.com/vha/resource_center/fastfacts/fastfacts_US_hospitals.html.

68. INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 1 (2000).

69. *Id.*

estimated to run between \$17 and \$29 billion.⁷⁰ Moreover, the study warned that these figures represented only a "very modest estimate of the magnitude of the problem since hospital patients represent only a small proportion of the total population at risk" from medical errors.⁷¹ Interestingly, a survey of doctors conducted by the Harvard School of Public Health and the Henry J. Kaiser Family Foundation found that more than one-third of U.S. doctors say that they or their family suffered medical errors in the course of receiving medical care and that a significant number of those errors resulted in serious consequences.⁷² Considering this evidence, even among such knowledgeable consumers of health care, there is a clear crisis in the amount of negligent medical care in the United States.

Even so, both the California and New York/Harvard studies found that most of these hospital-related injuries did *not* lead to a malpractice claim. The California hospital study showed that only ten percent of the patients suffering an injury actually filed a claim,⁷³ while the Harvard study estimated that only one in eight (or 12.5 percent) of the injured patients filed a claim *and* only one in sixteen claims made resulted in a damage award.⁷⁴ The studies' ineluctable results conclusively establish that few claims are brought, fewer still go to trial, and the vast majority of claims are closed without a payment to the patient,⁷⁵ hardly an indication of a crisis in medical malpractice claiming.

The RAND Institute for Civil Justice found the same statistics when studying civil claims more generally: one in six American households experiences some economic loss as a result of an accidental injury⁷⁶ and only one in ten turned to the liability system for compensation.⁷⁷ Clearly, there is no litigation explosion.

70. *Id.* at 2.

71. *Id.*

72. Robert J. Blendon, et al., *Views of Practicing Physicians and the Public on Medical Errors*, 347 N.E.J. OF MED. 1933, 1934 (2002) (reporting that 35 percent of physicians and 42 percent of the public reported errors in their own or a family member's care, with 18 and 24 percent, respectively, identifying the consequences as serious.) *Id.* at 1935 (Table 1).

73. DANDON, *supra* note 63, at 41.

74. WEILER, *MEASURE OF MALPRACTICE*, *supra* note 64, at 69-75.

75. See DANIELS & MARTIN, *supra* note 1, at 117-23.

76. HENSLEY, *supra* note 61, at 173.

77. *Id.* at 110.

B. No Insurance Crisis

Tort restrictionists often attempt to justify their proposed limitations on plaintiffs' rights by claiming a need based on a supposed insurance availability and affordability crisis.⁷⁸ When consumer group Citizens for Corporate Accountability & Individual Rights issued a study concluding that tort restrictionist laws had no impact on insurance premium rates, the principal national lobbyist for such laws told *Business Insurance* that many of his allies do not suggest that restricting litigation will lower insurance rates, and "I've never said that in 30 years."⁷⁹ The president of the American Tort Reform Association also reacted to the study by declaring, "[W]e wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates."⁸⁰ Experience shows that tort restrictionist laws are no panacea for whatever happens to the insurance industry. Experience also shows that other causes are at work to explain the periodic insurance crises that occur. There is more than sufficient reason to reject any linkage between the tort system and insurance premium rates.

Still, when liability insurance premiums shot up in the 1980s, tort restrictionism became the presumed solution, and many states duly enacted such laws.⁸¹ The effort was further fueled by a 1986 report commissioned by the U.S. Attorney General that asserted that there was a "rapidly expanding crisis in liability insurance availability and affordability" that claimed to be a result of expanding tort liability.⁸² In response, many state legislatures passed comprehensive tort reform legislation in the latter half of the 1980s.⁸³

78. See, e.g., *Smith v. Dep't of Ins.*, 507 So. 2d at 1080, 1095 (Fla. 1987) (finding the bulk of an omnibus tort restrictionist law to be a rational response to an insurance availability and affordability crisis that had been examined in "detailed legislative findings").

79. Michael Prince, *Tort Reforms Don't Cut Liability Rates, Study Says*, *BUS. INS.*, July 19, 1999, at 73 (quoting Victor Schwartz, general counsel for the American Tort Reform Association).

80. *Study Finds No Link Between Tort Reforms and Insurance Rates*, *LIABILITY WK.*, July 19, 1999, available at 1999 WL 13960550 (quoting Sherman Joyce, president of the American Tort Reform Association).

81. See Howard A. Leamer, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 *HARV. J. ON LEGIS.* 143, 148 (1981).

82. *Petreira v. Rediger*, 778 A.2d 429, 434 (N.J. 2001) (citing REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY I (Feb. 1986)).

83. *Id.*

When the mad rush brought on by an apparent crisis subsided, eight attorneys general, under the auspices of the National Association of Attorneys General, studied the question of whether litigation was a cause of that crisis.⁸⁴ Their report found that the "present 'crisis' of unavailability and unaffordability is not caused by the civil justice system but by the unrestrained price cutting recently undertaken by the industry when it attempted to obtain as much new business as possible to invest the premiums received at the then-high interest rates."⁸⁵ It further concluded that "[t]here is little evidence that making the changes in the tort system proposed by the federal government and the insurance industry will prevent a similar 'crisis' in the future given the cyclical nature of the insurance industry."⁸⁶ The report went on to find that, despite the dire cries heard about the state of the industry, insurance, "by virtually any of the standard measures of profitability," was enjoying a significant net gain on the order of \$5 billion, at the same time it was claiming that it needed protection from rampant lawsuits.⁸⁷

The NAAG report inspired attorneys general of nineteen states to bring suit against a number of insurance companies, a national insurance association, and foreign reinsurers alleging a conspiracy to increase insurance premiums.⁸⁸ The attorneys general charged that the insurance industry had engaged in a global conspiracy in violation of the Sherman Antitrust Act.⁸⁹

After a torturous trip to the U.S. Supreme Court, the case was settled in 1994 with an agreement to restructure the industry association and to establish a database and "Public Entity Risk Institute" at a cost to the industry of more than \$36 million.⁹⁰ The crisis turned out to be self-

84. NAT'L ASS'N OF ATTORNEYS GEN., AN ANALYSIS OF THE CAUSE OF THE CURRENT CRISIS OF UNAVAILABILITY AND AFFORDABILITY OF LIABILITY INSURANCE (May 1986) (prepared by the attorneys general from California, Massachusetts, North Carolina, Texas, West Virginia, and Wisconsin) [hereinafter NAAG Report].

85. *Id.* at 2.

86. *Id.*

87. *Id.* at 16, 18.

88. *In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 468 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part and rev'd in part sub nom.* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

89. 15 U.S.C. §§ 1-7 (1994).

90. See Judy Greenwald, *Antitrust Settlement to Alter ISO, Industry*, BUS. INS., Oct. 10, 1994, at 1.

imposed—the NAAG charged that it was the result of mismanagement—⁹¹ and irrelevant to the tort restrictions the industry supported.

Lower courts then reached similar conclusions. One justice of the Utah Supreme Court was blunt in his assessment: “In truth and fact, the assertion of an insurance crisis in Utah was a pure sham.”⁹² Other states found the crisis nonexistent.⁹³ For example, the Wyoming Supreme Court acknowledged:

[T]he absence in the record of any evidence demonstrating the existence of such a[n] insurance crisis in Wyoming or elsewhere. More importantly, we note the absence in the record of any evidence that the “crisis,” if in fact it exists, is in any way connected with medical malpractice claims. The statement of purpose contained in the act offers no explanation as to why the legislature’s sole response to the insurance “crisis” was to attempt to change commonly recognized procedures and principles related to causes of action in tort. The act is silent as to other conceivable causes of the “crisis” such as poor management, bad underwriting, and bad investments by the insurance industry. Likewise, the act is silent as to other conceivable approaches to solving the alleged crisis such as regulation of the insurance industry. Apparently, tort reform was the only avenue explored by the legislature in its efforts to solve the “crisis.”⁹⁴

The Wyoming Supreme Court anticipated a criticism that it was second-guessing the legislature:

While it is true that “[t]he social wisdom of the legislature’s policy choices is, of course, irrelevant to the question of constitutionality of the Act,” it also is true that “[c]omplete disregard for other potential policy options is, however,

91. NAAG Report, *supra* note 84, at 39 (quoting Glaberson & Farrell, *Commentary*, Bus. Wk., April 21, 1986, at 24).

92. *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1217 (Utah 1999) (Stewart, J., concurring).

93. *See, e.g., Crowe v. Wigglesworth*, 623 F. Supp. 699, 706 (D. Kan. 1985); *Kenyon v. Hammer*, 688 P.2d 961, 975-76 (Ariz. 1984); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978); *Sorrell v. Thevenir*, 633 N.E.2d 504, 509-11 (Ohio 1994); *Boucher v. Sayend*, 459 A.2d 87, 92-93 (R.I. 1983); *In re Certification of Questions of Law from U.S. Ct. of App. for Eighth Cir., Pursuant to Provisions of SDCL 15-24A-1*, 544 N.W.2d 183, 190 (S.D. 1996).

94. *Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988).

of at least tangential relevance when considering whether a legislative . . . goal is a legitimate one."⁹⁵

The Court then assumed, for purposes of its application of the state constitution, that an insurance crisis existed in Wyoming and that there was some nexus with medical malpractice litigation.⁹⁶ While agreeing that "the legislature has a legitimate interest in protecting the health of the citizens of Wyoming as well as the economic and social stability of the state,"⁹⁷ it then held that the tort-restrictionist legislation at issue⁹⁸ did not constitute "a reasonable and effective means of doing so" because "[i]t cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health."⁹⁹

In another instance, the Utah Health Care Malpractice Act was passed with a legislative finding in support of the bill that stated "the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years [and because] of these increases the insurance industry has substantially increased the cost of medical malpractice insurance."¹⁰⁰ Yet, the only statistical report before the legislature demonstrated the opposite—there was a dearth of malpractice lawsuits in the two and one-half year period before enactment of the statute and that "malpractice claims against the three largest medical malpractice insurance liability carriers in Utah had actually decreased."¹⁰¹ After reviewing other studies that supported these results, the Utah Supreme Court concluded:

95. *Id.* (quoting *Waggoner v. Gibson*, 647 F. Supp. 1102, 1104 n.3 (N.D. Tex. 1986)).

96. *Id.*

97. *Id.*

98. The Wyoming Medical Review Panel Act, Wyoming Statute section 9-2-1501 et seq., was the subject of this challenge. *Id.* at 780. The act was passed in 1986 for the purpose of preventing medical malpractice filings "where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are, or reasonably may be, well founded." *Id.* (quoting WYO. STAT. ANN. §9-2-1052 (Michie 1977)). The Wyoming Supreme Court found that the statute violated the state equal protection clause. *Id.*

99. *Id.*

100. *Lee v. Gaufin*, 867 P.2d 572, 585 n.17 (Utah 1993) (quoting UTAH CODE ANN. §78-14-2 (1976)).

101. *Id.* (citation omitted) (emphasis in original).

In sum, the dramatic increases in medical malpractice insurance premiums and the increased costs of health care were not caused by significant increases in malpractice lawsuits or claims in Utah, by either adults or minors, or by significant increases in the size of jury verdicts. The legislative means for solving the insurance problem by cutting off the malpractice claims of minors simply does not further the legislative objective.¹⁰²

The court further looked at the actual causes of the liability insurance crisis. Though the court noted that this finding was "not critical" to its holding, it recognized that:

[T]here is respected authority for the proposition that a significant cause of dramatically increased malpractice insurance premiums was the cyclical pricing and investment practices of insurance companies. During certain periods, insurance companies set premiums at unrealistically low rates for the purpose of acquiring new business and increasing their revenues so that additional funds could be invested. Later, to offset the unrealistically low rates, higher rates were charged. Such cyclical pricing, which has little to do with malpractice claims and lawsuits, has been an important factor in the malpractice insurance premium crisis.¹⁰³

In arriving at that analysis, the court relied heavily on an American Bar Association study chaired by Professor Robert B. McKay.¹⁰⁴ The McKay Report indicated that the "violent cyclical swings of boom and bust, profitability and loss" were occasioned by economic downturns and low interest rates that forced insurance companies that had previously set premium rates "unrealistically low because of the hugely favorable investment climate" to "raise[] their rates dramatically, prompting started protests from the health care services, particularly medical doctors," resulting in the adoption of "ill-conceived" legislation "designed to reduce the recoveries."¹⁰⁵

The cyclical nature of these "crises" and their coincidence to the business cycle is a well-known phenomenon. As Professor Mark Rahdert has observed:

102. *Id.* at 588.

103. *Id.*

104. *Id.* at 588-89.

105. *Id.* (quoting Robert B. McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 VILL. L. REV. 1219, 1219-21, 1221 (1987)).

[B]ecause certain monopolistic pricing practices are legally permitted in the insurance industry, it responds to changes in the business cycle in a unique fashion. When times are good, insurers compete intensely with one another for market share, attempting to attract the maximum number of premium dollars to invest for those high returns. This competition drives premium prices down, sometimes to artificially low levels, which insurers rationalize with the prospect of handsome offsetting investment returns. When, however, the economy turns sour and return on investment plummets, insurers that may have deliberately underpriced their product during boom times fall back on their ability to engage in legalized price collusion, raise insurance premium rates sharply, and thus attempt to restore profitability. During these bad times the insurers always find it convenient to blame, not their own previous investments or marketing strategy, but the courts and tort doctrine, for the need to raise premiums.¹⁰⁶

Insurance company executives also recognize that these business practices cause the periodic insurance crises. Donald J. Zuk, chief executive of Scpie Holdings, Inc., a major California medical malpractice insurer told the *Wall Street Journal*, "I don't like to hear insurance-company executives say it's the tort [injury-law] system—it's self-inflicted."¹⁰⁷ Medical associations, even as they continue to push for liability protection, have also begun to recognize that the insurers themselves are part of the problem.¹⁰⁸

The assertion of a tort-induced insurance crisis proves as untenable as the claims of a litigation explosion.

C. No Economic Implosion

Tort restrictionists often assert that the civil liability system hurts a state's economy,¹⁰⁹ exacts an unwarranted tax on citizens,¹¹⁰ or otherwise

106. MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM* 114 (1995).

107. Rachel Zimmerman & Christopher Oster, *Assigning Liability: Insurers' Missteps Helped Provoke Malpractice 'Crisis'*, *WALL ST. J.*, June 24, 2002, at A1.

108. See *id.* (quoting Alice Kirkman, a spokeswoman for the American College of Obstetricians and Gynecologists).

109. See, e.g., Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 420 (2000) (citing what was termed the "Fishkind Report" that served as the basis for Florida's 1999 tort reform statute).

110. *Id.* at 421, 424-31 (citing HUBER, *supra* note 32, at 4; BEACON HILL INSTITUTE, *ECONOMICS OF CIVIL JUSTICE REFORM IN MASSACHUSETTS* (1998)).

harms business.¹¹¹ These assertions have been thoroughly reviewed and discredited by many, including this writer in an earlier work.¹¹² Without fully rehearsing that analysis again, it is sufficient to note that the "economics" asserted is often based on wildly speculative figures,¹¹³ irrationally ascribes costs to the tort system without logical basis,¹¹⁴ and ignores the benefits, including the deterrent effect, of the tort system.¹¹⁵ That last demonstrable favorable effect yields measurable economic benefits.¹¹⁶

Studies have revealed that liability concerns have prompted manufacturers to improve product safety, even while liability, contrary to the claims of tort restrictionists, accounts for little to no additional cost in the overall price of a product.¹¹⁷ Even where other safety incentives exist, Professor Gary Schwartz found that potential tort liability acts as a helpful reinforcement to a manufacturer's basic sense of morality.¹¹⁸ In studying the impact of the tort system on the chemical industry, Massachusetts Institute of Technology professors Nicholas A. Ashford and Robert F. Stone concluded that the tort system encourages safer products and processes,

111. See Capra, *supra* note 34, at 343-48 (critiquing PUBLIC POLICY INSTITUTE, "AN ACCIDENT AND A DREAM": HOW THE LAWSUIT LOTTERY IS DISTORTING JUSTICE, AND COSTING NEW YORKERS BILLIONS OF DOLLARS EVERY YEAR (1998)).

112. See Peck, *supra* note 109.

113. *Id.* at 420-33 (detailing the origins of the speculative and inflated numbers alleged to be of the costs of the tort system and the provably false accusations that Americans end up paying a "tort tax" for tolerating our current litigation system).

114. *Id.* at 422-27 (detailing how insurance company salaries, bonuses and administrative expenses, as well as losses due to natural disasters that entail no litigation, are part of the calculation used by tort restrictionists to inflate the cost of the tort system).

115. *Id.* at 436-43; see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987) ("[A]lthough there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters . . .").

116. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* 185 (1994); Steven Croley & Jon Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 51 (1991).

117. See, e.g., John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120, 180 (Peter W. Huber & Robert E. Litan eds., 1991) [hereinafter *THE LIABILITY MAZE*]. See generally Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1 (1995).

118. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 382-85 (1994).

enhances innovation and causes a greater focus on adverse consequences.¹¹⁹ Even so, they found significant under-deterrence continues to exist and suggested, rather than tort restrictionism, enhancing existing causes of action to include liability even where exposure does not result in manifest disease.¹²⁰ Similar conclusions were drawn in a study of the pharmaceutical industry.¹²¹

In fact, a survey of corporate risk managers conducted for the Conference Board¹²² "found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial."¹²³

The claims that the tort system hurts the economy have proven unfounded. In scrutinizing the report of a New York business group advocating tort restrictions, Professor Daniel Capra stated:

[The Public Policy Institute's case] for tort reform is not based on fact. It is simply another part of the onslaught on public opinion, generated by tort reformers, to create a mindset that the tort system is out of control. The attack looks at the costs of the tort system, but not its benefits. It is a carefully crafted attack, ostensibly looking at what is good for society, but on close analysis focusing only on corporate financial benefits to business. The attack of tort reformers favors cost savings over quality and emphasizes the corporate bottom line over safety.

Any arguable savings to business caused by the tort reforms proposed by PPI will not benefit society in the long run. Such changes would simply shift the cost of the current system to other places, such as a system of social insurance, without giving nearly the same benefits to victims that the current system provides. Moreover, a fair analysis of all of the evidence indicates

119. Nicholas A. Ashford & Robert F. Stone, *Liability, Innovation, and Safety in the Chemical Industry*, in THE LIABILITY MAZE, *supra* note 117, at 367-68.

120. *Id.* at 419.

121. See Judith P. Swazey, *Prescription Drug Safety and Product Liability*, in THE LIABILITY MAZE, *supra* note 117, at 291.

122. The Conference Board is an influential international business group whose members include such large American corporations as AT&T, Boeing, DuPont, Exxon Corporation, Ford, General Electric, General Motors, IBM and Microsoft. For more information about The Conference Board, see <http://www.conference-board.org/index.cfm> (last visited Oct. 29, 2002).

123. Schwartz, *supra* note 118, at 409.

that any perceived benefits to business from its tort reform initiatives will be largely, if not totally, illusory.¹²⁴

The cost-shift phenomenon that Professor Capra describes is well documented.¹²⁵ If compensation is not available from the tortfeasor, then either the victim (or victim's insurance) must bear the cost, or, when the victim cannot afford to do so, is uninsured, or is underinsured, society itself must frequently pick up the tab through some form of social insurance. For example, often the state will make Medicaid payments in connection with injuries received in tort. Federal and state law mandate the recovery of those payments from liable third parties.¹²⁶ In a significant number of instances, state law requires that Medicaid "be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid."¹²⁷ For budgetary reasons, such recovery is extremely important to the states. Medicaid spending ranks only second to education in state budgets and grew at an alarming 13.2 percent rate in fiscal 2002.¹²⁸

With these additional pressures, it is clear that the tort system should not be revamped to lessen the ability of injured parties to receive compensation from tortfeasors. A recent large-scale empirical study on consumer bankruptcy concluded that when neither liability compensation nor taxpayer-funded substitutes are forthcoming as a stand-in for insurance, the

124. Capra, *supra* note 34, at 408.

125. See, e.g., RAHDERT, *supra* note 106, at 161.

126. The Federal Medicaid Act requires state and local Medicaid agencies to "take all reasonable measures to ascertain the legal liabilities of third parties to pay for care and services arising out of injury, disease, or disability" and to "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. §1396a(a)(25)(A), (B). The requirement was added to the Act to "make certain that the State and the Federal Governments will receive proper reimbursement for medical assistance paid to an eligible person when such third-party liability exists." S. REP. NO. 90-744, *reprinted in* 1967 U.S.C.C.A.N. 2834, 3022. In enacting the provision, Congress found that "many people need medical care because of an accident or illness for which someone else has fiscal responsibility, for example, . . . a party who is determined by a court to have legal liability." *Id.* Typical of the states, Florida's Medicaid Third-Party Liability Act states that "the public treasury should not bear the burden of medical assistance to the extent of [available and liable third-party] resources." FLA. STAT. ANN. §409.910(1) (West 2002). In support of that mandate, the state is required to seek reimbursement from liable third parties. *Id.* at §409.910(4).

127. *Id.* at §409.910(1).

128. NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 1, 4 (Nov. 2002).

result is often personal bankruptcy.¹²⁹ The study found one out of four debtors in 1999 identified illness or injury as a reason for filing for bankruptcy, and a significant number of these debtors identified tort injuries as the basis for their incapacity.¹³⁰ As other research indicates that women receive a significantly larger proportion of their compensatory damages as noneconomic,¹³¹ it is notable that the consumer bankruptcy study found that households headed by women, and single women, were nearly twice as likely to file for bankruptcy for medical reasons as households with a male present.¹³² For other especially affected categories, debtors over sixty-five years of age, 47.6% listed medical costs as a reason for filing, compared to 7.5% of debtors under twenty-five.¹³³ Each of these categories is likely to depend on public assistance as well.

Rather than hurt the economy, it is clear that the tort system contributes to product safety and innovation, making American products highly desirable. Equally important, limitations on the system will bring about economic dislocation for injured persons that have adverse consequences throughout the economy.

D. No Robin Hood Juries

Tort restrictionists also claim that juries award irrational and outlandish damages and are influenced by the deep pockets of business defendants.¹³⁴ The empirical evidence again indicates otherwise. Juries are not just competent decision-makers;¹³⁵ their awards are consistent with awards made by jurists.¹³⁶ The data suggests that because jury verdicts "result from the combined judgments of six or twelve persons, juries likely yield more consistent awards than would be obtained from judges or individual

129. M. Jacoby et al., *Medical Problems and Bankruptcy Filings*, NORTON BANKR. L. ADVISOR (May 2000), reprinted in WEST'S BANKRUPTCY NEWSLETTER (May 31, 2000).

130. *Id.*

131. See generally Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Kennedy*, 73 CALIF. L. REV. 772, 799 (1985); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

132. Jacoby, *supra* note 129.

133. *Id.*

134. NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 175 (1995).

135. See generally VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

136. See, e.g., VIDMAR, *MEDICAL MALPRACTICE*, *supra* note 134, at 221-35.

arbitrators."¹³⁷ Such a finding is consistent with studies that find federal judges favor plaintiffs with greater frequency than juries.¹³⁸

In fact, the scholarly opinion consistently holds that juries do as well as judges in the role of decision-maker.¹³⁹ Moreover, contrary to the assertion that juries are prejudiced in favor of certain kinds of litigants or make incredible decisions, "the evidence indicates that juries can reach rationally defensible verdicts in complex cases, that we cannot assume that judges in complex cases will perform better than juries, and that there are changes that can be made to enhance jury performance."¹⁴⁰

There is also significant evidence that the campaign of the tort restrictionists has prejudiced juries against plaintiffs. Two Cornell law professors have suggested that the:

combination of dramatic increases in insurance rates [in the 1980s], widespread reporting of the insurance crisis, a multimillion dollar publicity campaign to link the insurance crisis to products liability rules, and such rules' effects on daily life, may have created the kind of massive, widespread shift in attitude needed to produce the observed pro-defendant trend.¹⁴¹

They further suggest that the use of mass media in this fashion also influenced judges to adopt pro-restrictionist views.¹⁴²

Even where jurors find liability to exist, there is no evidentiary support for the claim that juries are indiscriminate in their awards. The leading researcher on the "deep-pockets" theory of jury behavior, psychology professor Valerie Hans, has categorically rejected the claim that juries discriminate against wealthy defendants in favor of those in unfortunate

137. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 908 (1994). The data also finds that awards are no different "if the defendant is a health care provider or the negligent driver of an automobile" and thus not influenced by the availability of "deep pockets." *Id.*

138. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1125, 1134 (1992).

139. See REID HASTIE ET AL., *INSIDE THE JURY* 250 (1983); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 207-16 (1988); HANS & VIDMAR, *supra* note 135, at 116.

140. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 181, 235 (Robert E. Litan ed., 1993) (emphasis in original).

141. Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 791-92 (1992).

142. *Id.* at 793.

circumstances. She found that jurors tend to be "suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards."¹⁴³ After reviewing the empirical literature and conducting social experiments and juror interviews, Hans concluded that the "Robin Hood jury appears to be nearly as mythical as the character on which it is based."¹⁴⁴

E. No Frivolous Lawsuits

Claims of outrageous lawsuits receive substantial attention in the media, making it a favorite tactic of tort restrictionists. Like the "McDonald's Hot Coffee Case,"¹⁴⁵ distorted descriptions of actual lawsuits make popular fodder for the idea of a liability system that is more like a lottery than an ordered approach to assessing responsibility. These propagandists depend on the verity in an observation attributed to Mark Twain that "a lie can travel halfway around the world while the truth is putting on its shoes."¹⁴⁶ Anecdotal evidence of the sort they advance, even when true to the facts, can still be misleading because it highlights anomalies that do not give a fair picture of the system. Such an approach to lawmaking has been derided as wrongheaded by leading empiricists of decidedly different stripes.¹⁴⁷

Still, truth is often a stranger to these tales of frivolous lawsuits. For example, in support of tort restrictionism, the President's Council on Competitiveness asserted that on the basis of "expert" testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her \$1 million.¹⁴⁸ The truth was that a woman who worked as a

143. Valerie Hans & William Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 93 (1992).

144. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 212 (2000).

145. *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994); see *supra* note 3 and accompanying text.

146. See <http://www.twainquotes.com/lies.html> (last visited Oct. 29, 2002).

147. See Richard A. Posner, *The Uncertain Future of Legal Education*, Speech to the Annual Meeting of the Association of American Law Schools (Jan. 15, 1991), discussed in Ken Myers, *At Conference, Posner Lambasts Academics for Weak Scholarship*, NAT'L L.J., Jan. 21, 1991, at 4; Marc Galanter, *News from Nowhere: The Debated Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 90-95, 99-103 (1993).

148. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 5 (Aug. 1991), quoted in Galanter, *Oil Strike*, *supra* note 19, at 728.

psychic did bring a medical malpractice action over an allergic reaction she experienced due to a dye used to conduct the CAT scan.¹⁴⁹ Police officers did testify that she had helped the department solve crimes using her psychic powers.¹⁵⁰ Nonetheless, the jury was told to "consider only the damages related to the immediate allergic reaction, which included nausea, welts and hives."¹⁵¹ The jury awarded \$600,000 plus \$388,000 in prejudgment interest, but the judge later set the award aside as excessive and ordered a new trial.¹⁵² When the plaintiff's expert was disqualified, the new case was dismissed.¹⁵³ Even though the plaintiff did not recover a dime, the media hype portrayed this case as an example of jackpot justice.¹⁵⁴

There are good reasons why a personal injury lawyer would be loath to bring a frivolous lawsuit—the availability of substantial sanctions and the loss of a fee. Nearly every state has adopted the equivalent of Rule 11 of the Federal Rules of Civil Procedure,¹⁵⁵ which authorizes sanctions levied directly against the attorney for frivolous claims, defenses, or other legal contention.¹⁵⁶ Beyond that, courts have inherent power to impose expenses, including attorney's fees, on the lawyer who files frivolous litigation.¹⁵⁷

149. Galanter, *Oil Strike*, *supra* note 19, at 726-27.

150. *Id.*

151. *Id.* at 726-27 (citation omitted).

152. *Id.* at 727.

153. *Id.*

154. Professor Galanter thoroughly debunked the allegations promoted by the American Tort Reform Association (ATRA) on its website as "Horror Stories: Stories that Show a Legal System that's Out of Control." *Id.* at 729. ATRA has renamed this feature to "Looney Lawsuits." See <http://atra.org/display/13> (last visited June 20, 2002).

155. FED. R. CIV. P. 11. Rule 11 provides that the signer of a pleading or other filing must certify to the court that: "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) [the pleading or written filing] it is not being presented [or maintained] for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;" (2) "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;" (3) the signer represents that "the allegations and factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;" and (4) "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." FED. R. CIV. P. 11(b)(1)-(4).

156. As one scholar has noted, "[w]ithout exception, the trial courts in each federal and state jurisdiction currently possess at least one available sanctions provision that they can enforce against persons who file or sponsor 'frivolous' litigation." Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and*

Equally important, tort lawyers representing plaintiffs have an additional economic incentive to screen out frivolous litigation. These lawyers usually charge on a contingent fee basis because their clients are ordinarily unable to advance the substantial costs of litigation.¹⁵⁸ The contingent fee system discourages frivolous litigation because a lawyer paid on this basis cannot bear the costs of bringing a lawsuit that has no chance of succeeding. One prominent trial lawyer has noted that contingent-fee lawyers are "the members of the profession whose practice is *least* protected from the forces of the marketplace and who therefore cannot afford to spend great amounts of time on cases which hold out no honest promise of success."¹⁵⁹ Courts have found that rationale persuasive.¹⁶⁰

Although frivolous lawsuits do not plague the system as the tort restrictionists would have one believe, it is still insufficient reason to limit access to the courts. A greater principle, recognized by both the U.S. Supreme Court and state courts, is at stake. The U.S. Supreme Court has said that no law can pass constitutional muster if it bars the people "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped."¹⁶¹ In fact, laws restricting access need a stronger justification than that "they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even [when] . . . the laws do in fact provide a helpful means of dealing with such an evil."¹⁶² Thus, even "the dangers of baseless litigation" are insufficient to justify remedies so broad that they "seriously cripple[]" the vindication of rights through the judicial process.¹⁶³

State Sanctions Provisions, 21 *PEPP. L. REV.* 1067, 1072-73 (1994). Keeling notes a number of provisions for sanctions are based, at least in large part, upon the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 1073. For a listing of the sanction provisions cited, see *id.* at 1073 n.25.

157. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48 (1991) (citing the Advisory Committee's Notes on the 1983 Amendment to Rule 11).

158. Tort restrictionist laws frequently add additional costs to bringing such lawsuits, making a higher percentage of them economically prohibitive.

159. Philip Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 *LITIG.* 27, 32 (1976) (emphasis in original).

160. See, e.g., *Balts v. Balts*, 142 N.W.2d 66, 73 (Minn. 1966) (noting that lawyers do not encourage meritless litigation, "particularly where the customary fee arrangement is a contingent one").

161. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964).

162. *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (citations omitted).

163. *Id.* at 223.

The recognition of such plaintiffs' rights is even more palpable where a state constitution guarantees access to the courts,¹⁶⁴ which one prominent jurist has called

a plaintiffs' clause, addressed to securing the right to set the machinery of the law in motion to recover for harm already done to one of the stated kinds of interest [person, property, or reputation], a guarantee that dates back by way of the original state constitutions of 1776 back to King John's promise in Magna Charta chapter 40 ¹⁶⁵

Thus, the reasoning of the North Carolina Court of Appeals, issued in the context of a medical malpractice case, is instructive:

While doctors may have a legitimate interest in reducing the number of frivolous malpractice actions filed against them, their interest does not outweigh the State's interest in having these disputes resolved in a court of law. The means by which this resolution is accomplished is by lawsuits [If those lawsuits are deterred, the end result would be the limitation of free access to the courts.¹⁶⁶

Anticipating the concern that such a blanket rejection of restrictions might give aid and comfort to frivolous claims, the court added:

Ready remedies for the institution of frivolous lawsuits are presently available. While it is true that an attorney has a duty to refrain from instituting frivolous or malicious lawsuits at the behest of his clients, ample means exist to provide appropriate relief for violation of this duty, i.e., institution of disciplinary proceedings and malicious prosecution actions.¹⁶⁷

The idea that a lawsuit is unsuccessful does not mean that the case was frivolous,¹⁶⁸ any more than a successful one means that the defense was

164. See *supra* note 14.

165. Davidson v. Rogers, 574 P.2d 624, 625 (Or. 1978) (Linde, J., concurring).

166. Petrou v. Hale, 260 S.E.2d 130, 135 (N.C. Ct. App. 1979) (citations omitted).

167. *Id.* at 135 (citations omitted).

168. FRCP 11 permits federal courts to sanction frivolous filings, but is not intended to chill novel legal theories, attorney creativity, or the pursuit of cases where the evidence is weak. See, e.g., Teamsters Local Union No. 430 v. Cement Express, Inc., 430 F.2d 66, 69 (3d Cir. 1968). For that reason, "[f]ailure on the merits is not synonymous with frivolousness." D'Aquino v. Citicorp/Diner's Club, Inc., 139 F.R.D. 357, 360 (N.D. Ill. 1991). See also

frivolous. Where a case is filed in good faith after due investigation, that lawsuit belongs in the system. After all, the "right to sue and defend in the courts is the alternative of force. In an organized society it is the Right conservative of all other rights, and lies at the foundation of orderly government."¹⁶⁹

While tort restrictionists may view lawsuits with a jaundiced eye, those who understand our organic charters see no "cause for consternation" in citizens looking to the courts for redress; instead citizens' "access to their civil courts . . . is an attribute of our system of justice in which we ought to take pride."¹⁷⁰

F. The State-Specific Data Also Negates the Tort Restrictionists' Claims

From this wealth of data, it is clear that business has worked itself into an unjustifiable frenzy about the civil justice system. Instead, as one commentator in the *Harvard Law Review* remarked, "Recent federal and state tort reform resembles a political juggernaut crushing virtually all obstacles in its path."¹⁷¹ The data ought to give substantial pause. Two researchers at the American Bar Foundation, who examined the arguments and data empirically, soberly declared:

We are skeptical of the efficacy of many proposed and enacted reforms and we are concerned about the consequences of those measures. Beyond the self-interest of those groups lobbying for reform, we can see little reason for endorsing this reform agenda. We come to this position after spending a number of years collecting and analyzing data on civil jury verdicts from different parts of the country. We—and others—do not find empirical evidence of a system run amok with skyrocketing awards, and so on. Or, we find little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system.¹⁷²

Moreno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990), cert. denied, 498 U.S. 1028 (1991). Similar rules exist in the states. See *supra* notes 154-56 and accompanying text.

169. Chambers v. Baltimore & O.R. Co., 207 U.S. 142, 148 (1907).

170. Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 643 (1985).

171. Note, "Common Sense" Legislation: The Birth of Neoclassical Tort Reform, 109 HARV. L. REV. 1765, 1765 (1996).

172. STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM ix-x (1995).

Legislatures have not acted so prudently. Often, tort restrictionist supporters advance specific legislative proposals without mustering reliable data. When a court considers the constitutionality of such legislation, the lack of evidence to support need or purported findings can be fatal.¹⁷³

When the Illinois legislature considered its omnibus act in 1995, it did so literally by stealth of night. The bill was delivered full-blown at 11:40 p.m. the night before an 8:00 a.m. hearing.¹⁷⁴ The sixty-seven-page bill then won a floor vote in the house the next day, with the senate following suit within two weeks.¹⁷⁵ Obviously, there was no time for deliberation or reflective consideration—or the review of supposed evidentiary support for the alleged failings of the tort system. Even so, defenders of the law, in an *amicus* brief filed with the Illinois Supreme Court that was also published as a law review article, were so bold as to urge the court to defer to the public policy choices of the general assembly because of its “superior” ability to investigate a problem, gather facts, and deliberate about solutions.¹⁷⁶ The court specifically addressed that argument, finding that it “assumes too much [because] the legislature is not free to enact changes to the common law which are not rationally related to a legitimate government interest.”¹⁷⁷ Even the Defense Research Institute, a civil defense lawyer bar association that favors tort restrictionist laws,¹⁷⁸ could not stomach this political power play, acknowledging that the statute went “too far” in giving business a

173. See *supra* notes 39-49 and accompanying text.

174. See Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672, 674 (2001).

175. See *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057, 1065 (Ill. 1997) (describing the legislative history of the Public Act 89-7, which, *inter alia*, limited compensatory damages for noneconomic injuries to \$500,000). The law also established a mandatory consent requirement “by which every patient who files a personal injury lawsuit is deemed to agree to the unlimited disclosure of his or her medical history, records, and other medical information to any party who has appeared in the action and who requests such information.” *Id.* at 1089. If the plaintiff failed to comply, his or her case would be involuntarily dismissed. *Id.* In addition, the law partially abolished joint and several liability and made major changes to products liability law. *Id.* at 1059. Public Act 89-7, including these core provisions, was declared unconstitutional by the Illinois Supreme Court on the basis of separation of powers, the prohibition against special legislation, and the right to privacy. *Id.* at 1104.

176. See Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 751 (1997).

177. *Best*, 689 N.E.2d at 1077.

178. See generally <http://www.dri.org> (last visited May 16, 2001).

litigation advantage and undermined "one of the pillars of the jury system."¹⁷⁹

Ohio's massive tort restrictionist effort was the product of eighteen months of consideration, but still relied heavily on tall tales and data that was never forthcoming. For example, one subcommittee of the House Select Committee on Tort Reform reported, "On a number of issues, proponents did not provide a compelling rationale to link a proposed change in H.B. 350 [Ohio House Bill 350]¹⁸⁰ with a specific problem in existing law. On some troubling proposals, the Subcommittee specifically asked for such a rationale to be provided, without any response from proponents."¹⁸¹ Consistent with how enactment of the statute was a matter of political muscle and not need, the subcommittee nonetheless approved the proposals.¹⁸²

On the rare occasions when supportive justifications were offered, they were often anecdotes that had no connection with Ohio. For example, two H.B. 350 proponents¹⁸³ testified in favor of passage on the basis of inaccurate versions of the "McDonald's Hot Coffee" case, which took place in New Mexico.¹⁸⁴ The representative of the National Federation of

179. Darryl Van Duch, *Illinois Tort Reform: A Cautionary Tale*, NAT'L L.J., Dec. 9, 1996, at A1 (internal quotations omitted).

180. Ohio House Bill 350 [H.B. 350], the tort-restrictionist law under consideration by the Ohio general assembly, was described by the state supreme court as "the latest effort at civil justice reform, and . . . the most comprehensive and multifarious legislative measure thus far." *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1073 (Ohio 1999). H.B. 350 amended, enacted, or repealed "over one hundred sections of the Ohio Revised Code 'relative to changes in the laws pertaining to tort and other civil actions.'" *Id.* at 1073 n.6. Among its provisions, it capped noneconomic and punitive damages, established new rules of procedure and evidence, abrogated the collateral source rule, changed apportionment of damages, limited jurisdiction, created new statutes of limitation and repose, imposed new legal presumptions, and rewrote the law of medical malpractice and products liability. *Id.* at 1090-95.

181. OHIO H. SELECT COMM., REPORT ON TORT REFORM, H.B. 350, at 1 (Oct. 5, 1995) (copy on file with author).

182. *Id.*

183. *Civil Justice Reform: Hearings on Am. Sub. H.B. 350 Before the Senate Select Comm. on Tort Reform*, 121st Gen. Assem. 2 (Ohio 1996) (statement of Ralph B. Hoffman, Professional Engineer, Hoffman Engineering Co.); *Civil Justice Reform: Hearings on Am. Sub. 350 Before the Subcomm. on Limitation of Damages of the House Select Comm. on Civil Justice Reform*, 121st Gen. Assem. 4 (Ohio 1995) (statement of Roger B. Geiger, Director, Ohio Chapter of The National Federation of Independent Business (NFIB/Ohio) and President, Ohio Alliance for Civil Justice (the business coalition that pushed through H.B. to passage) [hereinafter Geiger Statement]).

184. For a description of the misuse of this case, see *supra* note 3 and accompanying text.

Independent Businesses¹⁸⁵ curiously went on to urge civil justice reform on the basis of the alleged size of the Illinois Girl Scout Council's liability premiums and a supposed outrageous verdict won in Texas.¹⁸⁶ Certainly, the Ohio general assembly's actions could never affect those examples, even if accurate, which were internal to New Mexico, Illinois, or Texas.

The only Ohio anecdotes offered by this witness were unidentifiable or involved non-tort cases. He claimed, without more, to have "examples of costly verdicts that range from an inebriated college student who falls from a second floor window to an Akron woman who sues because her adult toy does not function right."¹⁸⁷

Other witnesses offered hypothetical horrors or speculated about the liability records of others.¹⁸⁸ Proponents also often contradicted each other. Two proponents trotted out the old chestnut that a "tort tax"¹⁸⁹ adds to the cost of a "typical \$30 ladder in your neighborhood hardware store," but differed as to whether that "tax" was \$20 or \$2.70.¹⁹⁰ Similarly, the general assembly received testimony from the Ohio Farm Bureau that obstetricians had become scarce in thirty-six rural Ohio counties. The Farm Bureau's assertion was then contradicted by the Ohio Medical Association, which said there was no problem in Ohio, but pointed to one in Missouri.¹⁹¹

The proponents' showcased "evidence," along with H.B. 350's citation of a study by the non-existent "United States Accounting Office," upon which the general assembly professed to rely,¹⁹² indicated the lack of care employed by the legislature in gathering the evidence the Ohio Supreme

185. For information about the Federation, see <http://www.nfib.com> (last visited Mar. 16, 2001).

186. Geiger Statement, *supra* note 183, at 4-5.

187. *Id.* at 4. The latter example sounded in contract, rather than tort, which was supposedly the object of this "tort reform" bill.

188. See, e.g., *Civil Justice Reform: Hearings on Am. Sub. H.B. 350 Before the Senate Select Committee on Tort Reform*, 121st Ohio Gen. Assem. 4-7 (Ohio 1996) (statement of Donald L. Mader, Executive Director, Ohio Association of Consulting Engineers (OACE)).

189. For a discussion of the invalidity of the "tort tax" argument, see Peck, *supra* note 109.

190. Compare Geiger Statement, *supra* note 183, at 5 (estimating the "tort tax" at twenty dollars), with *Senate Tort Reform Hearing*, 121st Gen. Assem. 2 (Ohio 1996) (statement of John Hatfield, President, Archbold Ladder Co. (estimating the "tort tax" at \$2.70)).

191. Compare *House Select Comm. on Civil Justice Reform Hearings*, 121st Gen. Assem. 4 (Ohio 1995) (statement of Larry R. Gearhardt, Ohio Farm Bureau), with *Civil Justice Reform: Hearings on H.B. 350 Before the House Select Comm. on Civil Justice Reform*, 121st Gen. Assem. 2 (Ohio 1995) (statement of Claire V. Wolfe, M.D., Immediate Past President, Ohio State Medical Association).

192. See H.B. 350 §5(P)(7), 121st Gen. Assem., Reg. Sess. (Ohio 1996).

Court previously said was needed to satisfy the minimal requirements of due process.¹⁹³

The bill's statement of legislative intent propounded that punitive damage awards have been excessive and irrational,¹⁹⁴ that the justice system had become dysfunctional,¹⁹⁵ and that there have been too many "insupportable, frivolous" medical malpractice lawsuits.¹⁹⁶ The principal panacea for this parade of horrors, the legislation asserted, was noneconomic damage caps, which it surmised would effectively "reduce loss payments, liability insurance premiums, and defensive medicine costs"¹⁹⁷ For all its plausibility, the legislature might as well have asserted that the caps would also constitute a cure for cancer.

The resulting law was challenged in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.¹⁹⁸ The *Sheward* challengers put forth credible Ohio-specific evidence contradicting the legislative assumptions. The Ohio Supreme Court had previously put the general assembly on notice that such evidence was a necessary part of the legislative record in order to overcome constitutional concerns.¹⁹⁹

For example, the challengers utilized a study by two American Bar Foundation researchers who analyzed data on more than 20,000 state trial court civil jury verdicts from eighty-two sites covering more than 100 counties in sixteen states for the period 1988-90.²⁰⁰ Among the sites were nine Ohio counties, involving 910 verdicts. For all types of jury verdicts, just over one-half of the eighty-two sites studied (45 of 82 or 54.9 percent) had median jury awards of \$50,000 or less in 1990 dollars, while seventeen had median awards of \$100,000 or more. Most of those seventeen sites were in California (four) or New York (ten). Twenty-four of the eighty-two sites (29.3 percent) had median awards for all types of jury verdicts of \$30,000 or less, and five of the nine Ohio counties fell into this group. The other Ohio counties were Cuyahoga (\$34,650), Hamilton (\$33,825), Lorain (\$49,989), and Summit (\$31,500).²⁰¹ Clearly, no skyrocketing jury verdicts plagued Ohio.

193. See *Morris v. Savoy*, 576 N.E.2d 765, 770-71 (Ohio 1991).

194. Ohio H.B. 350 §5(B)(1)(b).

195. *Id.*, at §5(G).

196. *Id.* at §5(H)(4).

197. *Id.* at §5(P)(7).

198. 715 N.E.2d 1062 (Ohio 1999).

199. See, e.g., *Sorrell v. Thevenin*, 633 N.E.2d 504, 511 (Ohio 1994).

200. DANIELS & MARTY, *supra* note 1, at 60-243.

201. *Id.* at 71 (Table 3.1).

The Ohio statute also attempted to cap punitive damage awards out of a concern that such awards were routinely excessive. The ABF study found that juries awarded punitive damages in only 8.3 percent of all plaintiff verdicts,²⁰² consistent with an earlier study that pegged that percentage at 8.8 percent.²⁰³ The nine Ohio counties in the study were among the bottom half of punitive damage awards in the 1988-90 data. There were 14 punitive damage awards in Cuyahoga County, or 6.6 percent of all plaintiff verdicts. There was a combined total of 14 punitive damage awards in the other eight counties, with three (Lorain, Montgomery and Portage) having none. Compared to other urban jurisdictions, Cuyahoga County's 6.6 percent was in the middle to low category of frequent punitive awards.²⁰⁴

Among the 22 sites with ten or more punitive verdicts, Cuyahoga County had the second lowest median punitive damage award—\$15,000—among urban jurisdictions in the study (St. Louis County at \$10,125 was the lowest).²⁰⁵

For the constitutional challenge to the Ohio law, the same researchers, as affiants, examined the comprehensive jury verdict data collected by the Columbus Bar Association for Franklin County²⁰⁶ and found nothing in that more recent data or any other studies to suggest that different conclusions were warranted.²⁰⁷ Franklin County includes the state capital of Columbus and is widely regarded as a demographic microcosm for the state and the nation.²⁰⁸

202. *Id.* at 214.

203. Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 32 (Table II) (1990).

204. DANIELS & MARTIN, *supra* note 1, at 215-16 (Table 6.1).

205. *Id.*

206. STEPHEN E. CHAPPELEAR, SO WHAT'S YOUR CASE REALLY WORTH?: A DECADE OF JURY TRIAL VERDICTS (1995); STEPHEN E. CHAPPELEAR, SO WHAT'S YOUR CASE REALLY WORTH? A DECADE OF JURY TRIAL VERDICTS, 1995-1996 SUPPLEMENT (1997). Chappellear, a Columbus, Ohio lawyer who had practiced on both the defense and plaintiff sides of the aisle and who was a recent president of the Columbus Bar Association, had personally undertaken as a *pro bono* project from 1985 to 1998 the collection of information about every jury verdict (more than 1,000) rendered in Franklin County. Affidavit of Stephen E. Chappellear, Relators' Joint Presentation of Evidence, State of Ohio *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, at 2-4, 6-7 (May 17, 1998) (on file with author). The information collected included the type of case, date of verdict, amount of total award, and amounts (if any) of any separately itemized damages. *Id.* at 7.

207. Aff. of Stephen Daniels and Joanne Martin, Relators' Joint Presentation of Evidence, State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) (May 17, 1998) (on file with author).

208. See Merritt & Barry, *supra* note 7, at 319-22.

The Franklin County data also served as the basis for an independent study of the Ohio civil justice system prior to enactment of the tort restrictionist statute. Using data meticulously collected from the twelve-year period prior to enactment of the omnibus tort reform statute,²⁰⁹ thereby giving a very real picture of the tort system that was the object of legislative disenchantment, two Ohio State law school researchers concluded:

[C]omprehensive analysis of medical malpractice and product liability verdicts reveals a system of few trials, low win rates, declining verdicts, and rare punitive awards. Our research includes all verdicts from a representative urban county over a full twelve years, thus avoiding the biases of more selective databases or restricted time periods. Our multivariate analyses, moreover, dramatically illustrate pro-defendant trends by controlling for other relevant variables. In the face of this evidence, exaggerated anecdotes and wild stories no longer have a place in responsible review of the tort process. Rather than heed those fictions, legislators and voters should turn their attention to our growing knowledge of how the tort system truly operates.²¹⁰

The legislature's conclusions were also at odds with the most credible information available about liability insurance in Ohio. St. Paul Fire and Marine Insurance Company, the nation's largest medical malpractice carrier, reported that the annual premiums for Ohio's physicians and surgeons dropped by forty percent between 1987 and 1993, indicating that there was no medical malpractice crisis of any kind.²¹¹ Similarly, State Farm Insurance Company, Ohio's largest automobile liability insurer, reported that in 1996, it came away from Ohio with a staggering twenty-eight percent profit *after accounting for losses and expenses*.²¹²

The Ohio Supreme Court was already familiar with the cyclical nature of insurance premium increases. In an earlier case, the court found confirmation in "the public remarks of an official of the largest hospital insurer in Ohio" to the effect that "the general assembly may not be able to prevent 'periodic crises' in the affordability or availability of liability

209. *Id.* at 323-24.

210. *Id.* at 398.

211. *Aff. of Tim Ryles, Exhibit B, Relators' Joint Presentation of Evidence, State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (May 17, 1998) (on file with author) [hereinafter *Aff. of Tim Ryles*].

212. *A.M. Best State/Line Report-Ohio*, at 1 (1996).

insurance," indicating that it would happen every ten years.²¹³ In another case, the court cited "a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, [which] found that the savings from various tort reforms, including a \$250,000 cap on noneconomic damages, were 'marginal to nonexistent.'"²¹⁴

The Ohio-specific evidence demonstrated there was no logical, empirical or other foundation that might provide a rational justification, let alone a compelling interest. For those reasons alone, the statute patently violated the constitutional guarantees of due process and equal protection.

III. THE ATTACK ON AN INDEPENDENT JUDICIARY

It is clear that tort restrictionism of this kind cannot stand up to even the most deferential scrutiny a constitution permits. But tort restrictionism is more than an abridgement of due process and equal protection. The ultimate agenda of these so-called "reforms" becomes exposed when one considers the substance of what it seeks to accomplish. Rather than seek any appropriate improvement of the system, tort restrictionism seeks to impose caps on damage awards, place new costs and obstacles before the commencement of meritorious lawsuits, higher burdens of proofs for plaintiffs and enhanced affirmative defenses for defendants, liability limitations for joint tortfeasors, the abrogation of venerable legal doctrines, and other roadblocks to holding wrongdoers accountable.²¹⁵ In short, the "reforms" are designed to make lawsuits more costly and, at the same time, less likely to result in full compensation. If enacted and upheld, they would render most lawsuits uneconomic to pursue.

At its most basic and essential level, the tort restrictionist agenda represents dissatisfaction with the legal system, most particularly dissatisfaction with judges and juries, on the part of those who are frequent defendants in personal injury cases. Under the restrictionists' theory, juries are biased against defendants, and the judges are complicit by failing to

213. *Mominee v. Scherbarth*, 503 N.E.2d 717, 725-26 (Ohio 1986) (citation omitted).

214. *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991).

215. See, e.g., H.B. 350, 121st Gen. Assem., Reg. Sess. (Ohio 1996) (massive tort reform legislation that sought to accomplish all those goals and amended, enacted, or repealed more than 100 sections of the Ohio Revised Code) declared unconstitutional *in toto* by State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1075 (Ohio 1999).

restrain them and permitting tort doctrine to expand potential liability.²¹⁶ In essence, they seek legislative oversight of the system.²¹⁷

When legislatures uncritically accept these complaints and enact tort restrictions, they proceed without caution or good and sufficient reason in what amounts to a transparent and bold assault on the authority, responsibilities, and prerogatives of the judiciary, and the judiciary's partner—the jury—in the exercise of judicial power, while also substantially interfering with the rights of injured people seeking redress from the courts. As such they assume a constitutionally illicit supervisory authority over the courts.²¹⁸

Tort restrictionists' rejoinder is that the courts owe great deference to the public policy choices of the legislature,²¹⁹ as though the restriction of constitutional rights, the obliteration of the jury system, the destruction of fairness in the civil justice system, and the illicit arrogation of judicial power by the legislature is a mere public policy choice that the legislature somehow has the right to make.

In so arguing, tort restrictionists have turned separation of powers on its head by asserting that the courts owe an unexamined and one-way deference to any and all legislative actions, and they have labeled this attitude "cooperation."²²⁰ Such a blanket-deference makes no sense when a legislature roams beyond its constitutional authority.²²¹ It makes even less sense when the legislature has intruded into a constitutional realm reserved to the judiciary and has embarked on an uneducated journey to control the

216. Victor E. Schwartz and Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907, 907, 911-13 (2001).

217. Of course, in a government that distributes governmental authority among three co-equal branches, there is no place for legislative oversight of the judiciary. See, e.g., *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268-69 (Fla. 1991) (rejecting an oversight role over the judicial branch by another branch of government).

218. See *id.*

219. See generally Victor E. Schwartz, et al., *Fostering Mutual Respect and Cooperation Between State Courts and Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1 (2000).

220. *Id.*

221. See, e.g., *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 333 (Pa. 1986) ("We may not abdicate this responsibility [of judicial review] under the guise of our deference to a co-equal branch of government. While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation.")

conduct of judicial proceedings, something the courts have recognized best belongs in the hands of trial judges.²²²

In the development of American constitutional law, both state and federal, no principle was considered or has proven more important to the protection of liberty and justice than the diffusion of power through the separation of government authority into distinct branches of government.²²³ The Father of the U.S. Constitution, James Madison, wrote of separation of powers that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."²²⁴ Thomas Jefferson declared it "the first principle of government."²²⁵ And the U.S. Supreme Court has recognized the "central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."²²⁶

For state constitutions, separation of powers may be an even more important concept. Despite the centrality of the concept to the Framers and the U.S. Supreme Court, the words "separation of powers" appears nowhere

222. See, e.g., *Hahn v. State*, 58 So. 2d 188, 191 (Fla. 1952) (indicating that it was "always recognized" that judges are in the best position to understand the circumstances of a particular case and "regulate the conduct of trials in order that the administration of justice be speedily and fairly achieved in an orderly manner and befitting the gravity of the business at hand"); *Worthington v. Bynum*, 290 S.E.2d 599, 606 (1982) (recognizing that trial judges have "a unique opportunity to consider evidence in the courtroom context" that enables him or her to evaluate the proceedings and the validity of the jury's fact-finding).

223. Its importance has been clear throughout American history. For example, President William Howard Taft vetoed the resolution admitting New Mexico and Arizona as states because Arizona's proposed constitution permitted judges to be recalled by the electorate, subjecting "the rights of the individual to the possible tyranny of a popular majority, and therefore, . . . to be so injurious to the cause of free government." 47 CONG. REC. 3864 (Aug. 11, 1911) (veto message of Pres. Taft), reprinted in ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 100, 101 (1999). Recently, as a condition for United States' support for the establishment of a Palestinian state, President George W. Bush called for a new Palestinian "constitution which separates the powers of government" and has "a truly independent judiciary." President George W. Bush, President Bush Calls for New Palestinian Leadership, Speech at the White House Rose Garden (June 24, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/06/20020624-3.html>).

224. THE FEDERALIST NO. 47, at 301 (Clinton Kossiter ed., 1961) (James Madison) [hereinafter THE FEDERALIST NO. 47].

225. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 604 (1969).

226. *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

in the Federal Constitution.²²⁷ On the other hand, state constitutions have contained an explicit separation guarantee from the very beginning.²²⁸ In fact, from the time of the American Revolution, "[t]he separation of governmental powers along functional lines has been a core concept of American constitutionalism."²²⁹ It is of some moment that the states chose to articulate the doctrine in their text for "at stake was how the new state governments would be structured and which groups in society would have the dominant policy-making role under the new governments."²³⁰

It is also significant that states like Maryland, Massachusetts, New Hampshire, North Carolina and Virginia put their separation of powers guarantees into their declarations of rights, thereby establishing a link between aspirations and guarantees of liberty and a system of separated powers.²³¹ The decision was not merely a reflection of theory among elites, but was part of the American conception of what the revolution was about. For example, the 1778 draft of the Massachusetts Constitution was rejected, in part, because it failed to make the executive, legislative and judicial powers sufficiently separate and distinct.²³² Thus, "it was the State constitutions that first institutionalized the principle that government can be limited by the separation and independence of departments."²³³

These constitutions were the product of colonial animosity to centralized rule married to the self-interest of the legislators who drafted them. As a result, the lip service given in text to the separation concept was "widely dishonored in other provisions of the constitutions themselves and, even more, in the practices of powerful state legislatures."²³⁴ Each of the early

227. Both Madison and Roger Sherman offered constitutional amendments in the First Congress that would have given separated powers a textual basis. See GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 18-19* (1997). The House adopted Madison's proposal, but the Senate did not. *Id.* at 19.

228. See, e.g., VA. CONST. of 1776, art. I, § 5 ("That the legislative and executive powers of the State should be separate and distinct from the judiciary.").

229. CASPER, *supra* note 227, at 1.

230. Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 544 (1989) [hereinafter Williams, *State Constitutions of the Founding Decade*].

231. CASPER, *supra* note 227, at 8; cf. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.").

232. CASPER, *supra* note 227, at 14.

233. HENRY STEELE COMMAGER, *THE EMPIRE OF REASON* 213 (1977).

234. *Id.* at 214.

state constitutions, according to historian Forrest McDonald, "provided for legislative supremacy quite as complete as that of Parliament."²³⁵ It is fair then to describe these constitutions as containing "an exceedingly weak version of separation of powers."²³⁶

Those weaknesses were not lost on the framers of the Federal Constitution.²³⁷ Madison, for example, specifically criticized the constitutions of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia for surrendering too much authority to the legislative branch, despite explicit state constitutional guarantees to the contrary.²³⁸ He warned that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."²³⁹ The Madisonian argument for a truer separation of powers was part of a "continuous process of learning, communication, and adjustment . . . [that] led from Virginia's revolutionary convention codifying a set of fundamental rights in June 1776 to federal protection of such rights in 1791."²⁴⁰ As the federal constitutional drafting process got underway, James Wilson stated that the "same train of ideas which belonged to the relation of the Citizens to their State Govts. were applicable to their relations to the Genl. Govt. and in forming the latter, we ought to proceed, by abstracting as much as possible from the idea of State Govts."²⁴¹

There was good reason that the states traveled down the road of legislative omnipotency, only to correct that error later. Their colonial experience had imbued within them a deep-seated hostility to executive power.²⁴² Under the reign of colonial governors, whose powers exceeded the English king of that time, legislation was subject to veto, legislatures

235. FORREST McDONALD & ELLEN SHAPIRO McDONALD, *REQUIEM: VARIATIONS ON EIGHTEENTH-CENTURY THEMES* 150 (1988).

236. CASPER, *supra* note 227, at 12.

237. See also Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269, 270 (1989) (stating that even judicial views on separation of powers "were reactions to circumstances that arose during the early years of the nation's existence").

238. THE FEDERALIST NO. 47, *supra* note 224, at 306-07 (James Madison).

239. The Federalist No. 48, at 309 (Clinton Rossiter ed., 1961) (James Madison) [hereinafter THE FEDERALIST NO. 48].

240. Willi Paul Adams, *The State Constitutions as Analogy and Precedent: The American Experience with Constitutional Power Before 1787*, in THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS AND RESPONSIBILITIES 3, 4 (A.E. Dick Howard ed., 1992).

241. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 405-06 (Max Farrand ed., 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

242. COMMAGER, *supra* note 233, at 214.

subject to dissolution, and judges subject to dismissal.²⁴³ This is not to deny that colonial legislatures were avaricious for power. At every opportunity, they assumed authority, extending it in some ways beyond what Parliament itself had achieved.²⁴⁴

Placing a greater trust in a plurality of hands, the first state constitutions denied significant powers to the governor, rendering them inordinately weak offices.²⁴⁵ Commonly, despite explicit provisions for separated powers, they "tended to exalt legislative power at the expense of the executive and the judiciary."²⁴⁶ For example, the Virginia Constitution of 1776 sharply limited executive power and, to make a clean break from colonial experience, explicitly mandated that the governor "shall not, under any pretence, exercise any power of prerogative by virtue of any law, statute, or custom, of England."²⁴⁷ As governor, Thomas Jefferson complained bitterly about the easy habit that the legislature had acquired in directing the work of the executive branch, while assuring that all governmental powers "result[ed] to the legislative body."²⁴⁸ He warned that the arrogation of power to a single branch, the legislature, "is precisely the definition of despotic government."²⁴⁹ Responding to the widespread belief that a democratically elected legislature without a single leader was not likely to develop into a tyrant, Jefferson declared, "173 despots would surely be as oppressive as one."²⁵⁰ He closed his plea for structural change with an attempt to recapture the revolutionary high ground: "An elective despotism was not the government we fought for."²⁵¹

243. BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 69 (1970). Resistance to executive authority was equally apparent in the Articles of Confederation. See Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1417 (1998).

244. See WOOD, *supra* note 225, at 154.

245. See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* (Rita Kimber & Robert Kimber trans., The Univ. of N.C. Press 1980) (1973).

246. WILLIAM M. WIECK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 21 (Milton R. Konvitz ed., 1972).

247. VA. CONST. of 1776, ch. II, art. IX. Other original state constitutions were equally slanted toward legislative power at the expense of the executive branch. See, e.g., PA. CONST. of 1776, ch. II, §§1-3; see also Williams, *State Constitutions of the Founding Decade*, *supra* note 230, at 571.

248. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 120 (William Harwood Peden ed., Univ. of N.C. Press 1955) (1787).

249. *Id.*

250. *Id.*

251. *Id.*

Others with executive posts echoed Jefferson's thoughts. Pennsylvania's executive council complained to the legislature that "one of the greatest objections made to . . . [Pennsylvania's] Constitution" was

"that it has left too little power in the executive branch; and yet we see daily attempts to make that little less. We cannot suppose that it is intended practically to show the people what mischief and abuse a single legislature may do, and yet we are at a loss otherwise to account for those proceedings which are particularly the objects of this message."²⁵²

The situation was succinctly described by James Wilson as one where the executive and judicial branches were treated as stepchildren and "excessive partiality" was shown to the legislative branch, "into whose lap, every good and precious gift was profusely thrown."²⁵³

The federal Constitutional Convention was well aware that trust could not be reposed in an all-powerful legislature. Edmund Randolph, for example, urged delegates not to make the same error of state constitutions that lacked "sufficient checks" against the democratic branch of government, namely the legislature.²⁵⁴ Gouverneur Morris advised that the power to counter the types of excesses seen in the state legislatures must be placed in a coequal branch if "personal liberty private property & personal safety" were to be maintained.²⁵⁵ And James Madison worried aloud about how legislative authority over the courts and judicial salaries would tempt judges "to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor as well as the maker of the laws."²⁵⁶

Justice Antonin Scalia, writing about that period for the Supreme Court, noted that:

This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution . . . [who]

252. Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAAMI L. REV. 165, 169 (1988) (internal citation omitted).

253. 1 THE WORKS OF JAMES WILSON 357 (Robert McCloskey ed., 1967), quoted in Williams, *State Constitutions of the Founding Decade*, supra note 230, at 571.

254. RECORDS OF THE FEDERAL CONVENTION, supra note 241, at 26-27.

255. James Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 233 (Ohio Univ. Press 1984 reprint; 1840).

256. *Id.* at 311.

made the critical decision to establish a judicial department independent of the Legislative Branch....²⁵⁷

In *The Federalist*, both Madison and Hamilton played up this theme. In writing their own charters, Madison said that the states "seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."²⁵⁸ The legislature's extensive powers, he warned, "can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."²⁵⁹

When separation of powers is not realized, judicial independence is among the first and foremost victims. Strangely, judicial independence should not have been such an easy casualty of early state government. American experience under British rule had re-enforced the importance of independent courts.²⁶⁰ Still, colonial experience had inured Americans to legislatures capable of adjudicating legal disputes.²⁶¹

The early state legislatures were not at all shy about interfering with the courts. As historian Henry Steele Commager describes, legislatures "played fast and loose with the very structure of the judiciary; meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity."²⁶² Most states permitted legislative appointment of judges.²⁶³ In

257. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 221 (1995).

258. *THE FEDERALIST* No. 48, *supra* note 239, at 309 (James Madison).

259. *Id.* at 310.

260. CASPER, *supra* note 227, at 135-36. For example, when a British legislator and publisher printed a scathing attack on the government, he was arrested and jailed; upon his release he sued the under-secretary of state for damages and won. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). The *Wilkes* case has been used variously to symbolize a free press, freedom from unreasonable search and seizure, and the right to trial by jury. For that reason, the case, and by extension the role of independent courts, was imprinted upon American minds during the founding era. *City of W. Covina v. Perkins*, 325 U.S. 234, 247 (1999).

261. For a description of that experience, see Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998); Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW & HIST. REV. 257 (1998).

262. COMMAGER, *supra* note 233, at 214.

263. See Rogan Kersh et al., "More of a Distinctions of Words than Things": The Evolution of Separated Powers in the American States, 4 ROGER WILLIAMS U. L. REV. 5, 17

many states, judges who reached disagreeable decisions were removed from office by the legislature, virtually at will.²⁶⁴ In urging ratification of the Federal Constitution, Madison drew contrast with the undesirable tendency prevalent in the states whereby "cases belonging to the judiciary department frequently [were] drawn within legislative cognizance and determination."²⁶⁵

Clearly, a tradition of judicial independence, though acknowledged intellectually as necessary, had not yet taken root in the states. One could use the states of that time as a dartboard and blindly throw a dart at it to find proof of this historical fact. For example, North Carolina endured these same experiences and then adopted dual constitutional provisions to separate judicial power from legislative power. Originally, the North Carolina Constitution centralized power in the general assembly, authorizing it to choose all judicial officers.²⁶⁶ a provision that Madison criticized in *The Federalist*.²⁶⁷ In 1835, constitutional amendments were added to restrain the assembly from engaging in a variety of acts that would be recognized today as indisputably judicial.²⁶⁸ The other provisions still extant in today's North Carolina Constitution further confirm the unconstitutionality of legislative action that is judicial in nature.²⁶⁹

In nearly every state, bitter experience taught the wisdom of limiting legislative power and enhancing judicial independence. As the U.S. Supreme Court has recognized, the common "system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the

(1998). Virginia and South Carolina still permit legislative appointment of judges. See S.C. CONST. art. VI, §3; VA. CONST. art. VI, §7.

264. Kersh, *supra* note 263, at 5 (discussing a 1786 incident involving the Rhode Island Supreme Court); see also Williams, *State Constitutions of the Founding Decade*, *supra* note 230, at 556 (referring to the Pennsylvania legislature's authority over justices of the Pennsylvania Supreme Court under the Commonwealth's 1776 Constitution).

265. THE FEDERALIST NO. 48, *supra* note 239, at 312 (James Madison). Madison also approvingly quoted Montesquieu, whom he dubbed the "oracle who is always consulted and cited on this subject," "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." THE FEDERALIST NO. 47, *supra* note 224, at 301, 302 (James Madison).

266. N.C. CONST. of 1776, art. XIII, §13 (1835).

267. See THE FEDERALIST NO. 47, *supra* note 224, at 307 (James Madison).

268. See, e.g., Amendments to the North Carolina Constitution of 1776, N.C. CONST. art. I, §§4(3), (4), reprinted in 7 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 409 (William F. Swindler ed., 1978) (forbidding legislative divorces, name changes, and legitimating of persons).

269. See N.C. CONST. art. I, §6 (Separation of Powers); & N.C. CONST. art. IV, §1 (Judicial Power).

Revolution, and which after the Revolution had produced factional strife and partisan oppression" contravened American ideals about individualized justice because "legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments."²⁷⁰ Soon, however, the value of an independent judiciary as a counterweight to legislative aggrandizement was realized through a more robust version of separated powers.²⁷¹

As separation of powers became a more meaningful concept, an independent judiciary became the primary beneficiary.²⁷² The growing popular sentiment was rather than meddle in private affairs, through which opposing parties sought advantage in the legislature, "the assembly ought not to interfere by any exertion of legislative power, but leave the contending parties to apply to the proper tribunals to settle their differences."²⁷³

This burgeoning awareness that danger lurked in the authority that seemed to be drawn almost magnetically to legislatures has made the restraint of legislative power a singular and constant theme in state constitutional history. After their disastrous experiments with legislative supremacy, states embarked on significant constitutional changes that were a direct product of Jacksonian democracy. Misgivings about legislative power and the influence that the powerful interests had over it became so widespread that one observer at the close of the nineteenth century recognized that "[o]ne of the most marked features of all recent State constitutions is the distrust shown of the Legislature."²⁷⁴ The approved changes sought to end the special access to authority, wealth, and clout enjoyed by moneyed interests. High among these priorities were mechanisms that were designed to end the ability of powerful interests to turn the law into economic advantage or to enjoy "legal privileges that [they] could turn to [their] own account in an otherwise competitive economy."²⁷⁵

To accomplish these ends, states promulgated more detailed constitutions, prohibitions on special legislation, procedural hurdles that legislation had to meet, and enhanced separation of powers that emphasized increased judicial independence. One of the primary reasons for these

270. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

271. Wood, *supra* note 225, at 452.

272. *Id.* at 454.

273. *Id.*

274. Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 109 (1892) [hereinafter Eaton, *Recent States Constitutions*].

275. RUSH WELTER, *THE MIND OF AMERICA: 1820-1860*, at 78 (1975).

constitutional developments was utter dissatisfaction with "state legislative forays into economic boosterism and favoritism."²⁷⁶ Many of those constitutional revisions were also a "response to the rise of large corporations and their economic and political power."²⁷⁷ These provisions often regulated corporate conduct and contained new protections for consumers and labor.²⁷⁸ For example, Wyoming's Constitution prohibited contractual arrangements that immunized employers from liability to their employees.²⁷⁹ Other state constitutions prohibited the legislative enactment of statutes that advantaged corporations.²⁸⁰ Some constitutions recognized the corruptibility of legislative authority by limiting gifts and other benefits that might entice favorable treatment of corporate interests.²⁸¹

State constitutions also attempted to lay out "a few simple, well-established uncontroverted principles, lest in moments of passion or inadvertence, or under the temporary pressure of special interests, these should be disregarded."²⁸² Many of these were added solely to prevent the wealthy and influential from bending the legislature to their will. Because state courts uniformly construe their constitutions to reflect the intent of those who drafted and ratified them,²⁸³ the motivating concerns about legislative control over the judicial process are of abiding relevance to today's debates on tort restrictionism.

In such a system of separated powers, the judicial role is critically important, resistant of the political fads and expedencies that can buffet and engulf the other two branches. When acting in that fashion the courts realize their role as Hamilton's "intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."²⁸⁴ Tort restrictionist laws, particularly the omnibus variety, present a threat to that system, which in turn requires the judiciary to intermediate once again, against the legislature's arrogation of

276. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 113 (1998).

277. *Id.* at 115.

278. *Id.*

279. *Id.* at 115-16.

280. *Id.* at 116.

281. *Id.*

282. EASON, *Recent State Constitutions*, *supra* note 282, at 121 (quoting James Thayer, CAMBRIDGE TRIBUNE, March 9, 1889).

283. *See, e.g., Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 110 (N.C. 1980).

284. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST NO. 78].

powers that the people have assigned to the courts through their constitutions.

A look at judicial decisions after the states' disastrous experiments with legislative supremacy indicates that the changed constitutions yielded a stricter adherence to separation of powers and recognition of how important it is for courts to resist legislative meddling in judicial affairs. For example, the Florida Supreme Court, early on, recognized the essential nature of the separation principle, when it declared unconstitutional, as an exercise of judicial power by a legislative body, an act that granted a divorce to a couple.²⁸⁵ That court eloquently described the importance of separation of powers in words that are important to the current controversies over tort restrictionist laws:

If the constitution of a State has any vitality at all, its provisions, separating the several departments of government, do necessarily, as they were designed, restrict this prior usage within constitutional bounds, and prevent a blending together of those powers, which the wisest and best of men have considered the only safe guarantee to public liberty and private rights

The fundamental principle of every free and good government, is that these several co-ordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, and too sacred to be tampered with. Every other political principle is subordinate to it—for it is this which gives to our system energy, vitality and stability. Montesquieu says there can be no liberty, where the judicial are not separated from the legislative powers. Mr. Madison says these departments should remain forever separate and distinct, and that there is no political truth of greater intrinsic value, and which is stamped with the authority of more enlightened patrons of liberty. . . .

It is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved—blend them, and constitutional law no longer exists. The purity of our government, and a wise administration of its laws, depend upon a rigid adherence to this principle. It is one of fearful import, and a relaxation is but another step to its abandonment—for what authority can check the innovation, when the barriers so clearly defined by every constitutional writer, are once thrown down. Each department is a blank in government without the aid and cooperation of the others; and when one is encroached upon, its powers, to that extent, become paralyzed, and the

285. *Ponder v. Graham*, 4 Fla. 23 (1851).

whole system fails to carry out those high purposes for which it was designed. Under all circumstances, it is the imperative duty of the courts to stand by the constitution.²⁸⁶

A similar sentiment, in decidedly more florid language, was later expressed by Chief Justice Edwin M. Randall under Florida's 1868 Constitution:

If [the Legislature could appropriate to itself judicial authority], the modern theories of government and the forms of civil governments framed in the later periods, are but solemn complicated frauds, machines for the amusement and the impoverishment of the people. If all political and judicial supervisory power is lodged in one body of men, notwithstanding the establishments which all peoples have so reverently organized under written Constitutions, which in terms divide the powers of government into several departments of magistracy, supposed to be created to perform the offices of adjustments and balances, then are such several departments mere cheats and shams, baubles and play-things invented to delude and ensnare.²⁸⁷

More modern Florida decisions reach a similar conclusion: "'Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.'"²⁸⁸ Other states' courts agree.²⁸⁹

B. The Development of Separation of Powers and Judicial Independence in Ohio

Ohio had a similar constitutional experience to that of its sister states: reaction to executive autocracy by enshrining legislative supremacy, followed by a constitutional cabinining of the authority of both the legislature and special interests while, at the same time, promoting enhanced judicial independence. And, as with its sister states, that history has constitutional significance. The Ohio Supreme Court has long held that the intentions of the Ohio Constitution's drafters are the most significant indicia for the

²⁸⁶ *Id.* at 42-43 (internal citations omitted).

²⁸⁷ *In re Executive Communication* filed the 17th day of April, A.D. 1872, 14 Fla. 289, 310-11 (1872) (Randall, C.J., dissenting).

²⁸⁸ *Simmons v. State*, 36 So. 2d 207, 208 (Fla. 1948) (citation omitted).

²⁸⁹ *See, e.g., Luebbers v. Money Store, Inc.*, 40 S.W.3d 745, 749 (Ark. 2001) ("An act of the general assembly violates the separation-of-powers doctrine when it deprives the courts of the power to decide a judicial question."); *Holmberg v. Holmberg*, 588 N.W.2d 720, 725-26 (Minn. 1999) (holding that the legislature may not interfere with a court's inherent equitable power).

proper construction of its provisions.²⁹⁰ In determining that original intent, one begins by looking at the actual words used, then at the meaning of the words, if different, at the time of adoption, and finally at the history surrounding adoption, if available.²⁹¹ Any and all of these techniques, when employed to elucidate the meaning of the Ohio Constitution—the words themselves, their plain meaning, and the historical context that called them into existence—reveal that the framers had a deep-seated concern about restraining the exercise of legislative power at the expense of individual rights and a complementary apprehension about the influence of business interests over the exercise of legislative power. Thus, the Ohio Constitution was specifically designed to prevent the general assembly from exercising arbitrary power at the behest of special interests, especially when that exercise undermines the fair administration of justice.

Ohio's first constitution, adopted by a constitutional convention on November 29, 1802, was written to avoid experiences suffered under its dictatorial territorial governor, Arthur St. Clair.²⁹² It created a government by and of the legislature. The general assembly had virtually unchecked legislative authority, as well as the power of appointment for state and county judges and for all executive officers other than the governor.²⁹³ In the assembly's eyes, the judiciary was "a subordinate governmental department."²⁹⁴ The governor this constitution envisioned was essentially powerless and did not have a veto over general assembly-passed legislation.²⁹⁵

The judiciary's weakness became apparent when the Ohio Supreme Court had the temerity in 1807 to declare unconstitutional a legislative act that gave justices of the peace jurisdiction over cases involving damages up to \$50, but no power to empanel a jury.²⁹⁶ The court held the act violated the jury trial right found in Article VIII, Section 8 of the Ohio Constitution of 1802.²⁹⁷ Chief Justice Samuel Huntington and Judge George Tod wrote

290. *Castleberry v. Evatt*, 67 N.E.2d 861, 862-63 (Ohio 1946).

291. *State ex rel. Swetland v. Kinney*, 433 N.E.2d 217, 220 (Ohio 1982).

292. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1076 (Ohio 1999).

293. *Id.*; see also OHIO CONST. of 1802, art. II, §16 (1802); OHIO CONST. of 1802, art. III, §8.

294. *Sheward*, 715 N.E.2d at 1076.

295. GEORGE W. KNEPPER, OHIO AND ITS PEOPLE 96 (1989).

296. OHIO CONSTITUTION HANDBOOK xviii (Thomas R. Swisher ed., 1990).

297. *Sheward*, 715 N.E.2d at 1076 (citing *Rutherford v. M'Faddon* (Ohio 1807), reprinted in ERVIN H. POLLACK, OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823, at 71 (1952)).

separately. The chief justice attempted to lay out principles of judicial independence in terms that would be familiar today:

"[T]he judiciary [is] a co-ordinate branch of the government deriving its authority from the constitution The people can never be secure under any form of government, where there is no check among the several departments [I]f the legislature can pass unconstitutional acts—that they are the sole judges of their constitutionality—and if unconstitutional, that there is no remedy; then indeed is our constitution a blank paper: there is no guarantee for a single right to citizens; . . . but slavery may be introduced; a religious test may be established; the press may be fettered or restrained; the trial by jury may be abolished; *ex post facto* laws may be made; standing armies may be raised, and the whole train of evils against which our constitution meant to provide, may be gradually let in upon us."²⁹⁸

Judge Tod similarly wrote:

"[I]f legislative acts are to all intents obligatory on the court—the constitution is a subordinate instrument—liable to be annulled, altered and amended by legislative supremacy. Their acts would not only be equal, but superior to that charter, which has the sanction of "We the people do ordain and establish."²⁹⁹

For this boldness, Tod faced an impeachment trial in the senate, where he was charged with using "his judicial capacity" to declare the

act of the general assembly . . . unconstitutional, null and void, . . . to the evil example of all good citizens of the State of Ohio . . . [which is] contrary to its constitution and laws, disgraceful to his own character as a judge, and degrading to the honor and dignity of the State of Ohio.³⁰⁰

Tod was acquitted by a single vote, but still lost his office with his other colleagues as the assembly declared all offices vacant, replaced the judges with more compliant fellows, and reenacted in stronger form the law previously declared unconstitutional.³⁰¹

298. *Id.* at 1076-77 (internal citations omitted).

299. *Id.* at 1077 (internal citations omitted).

300. *Id.* (citation omitted).

301. *Id.*

That experience, as well as others, quickly showed the fallacy of investing all governmental authority entirely in a supreme legislature. One prominent delegate at the 1850-51 Ohio Constitutional Convention summed up the experience this way: "Under the old Constitution, the legislature swallowed up all the rest of the government."³⁰² Another delegate suggested that, unless new principles restraining the general assembly were adopted, Ohio would experience the "subversion of all our freedom, for our general assembly might barter away one right and another, till every vestige of freedom, and all proper powers of our Government, might be lost by an imprudent assumption of power."³⁰³

Much of the animus against the general assembly was the result of its collaboration during the previous half-century with rapacious businessmen who saw the Ohio Constitution's concentration of political power and control over the public treasury in a single body as an invitation to plunder and win advantages ensconced in law. As R.P. Ranney, later a justice of the supreme court, complained at the constitutional convention, even doctors and taverns were incorporated to take advantage of the general assembly's largess for their needs.³⁰⁴ He added, "corporate power and the money power had joined hands."³⁰⁵ There was good reason to protest. The general assembly's members had embarked on a program "to haggle, dicker, and bargain to secure individual and special advantages and privileges for those who had sent them."³⁰⁶ Almost immediately, the most powerful businessmen divided the state into areas of influence and had the legislature bless these divisions by formalizing the monopolies.³⁰⁷ Not satisfied with captive markets based on legislatively conferred monopolies, the companies made frequent and devastating raids on the state treasury, masking the use of taxpayer funds for corporate purposes in the sheep's clothing of promised public benefits.³⁰⁸

302. *Id.* at 1078 (quoting 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, at 174-75 (1933 reprint) (1851) (remarks of Charles Reemelin) [hereinafter DEBATES], available at <http://www.hti.umich.edu/cgi/t/text/text-dix?c=moa&idno=AEY0639-0001.001>.

303. 2 DEBATES, *supra* note 302, at 87 (remarks of Benjamin Stanton). For further remarks at the convention on this order, see *Sheward*, 651 N.E.2d at 1078.

304. 1 DEBATES, *supra* note 302, at 370 (remarks of R.P. Ranney).

305. *Id.* at 371.

306. ISAAC PATTERSON, THE CONSTITUTIONS OF OHIO 16-17 (1912).

307. See generally ROBERT E. CHADDOCK, OHIO BEFORE 1850 (1908).

308. See generally *id.* Similar claims of public benefits are advanced by tort restrictionists in favor of the laws they propose. There, too, the benefits are illusory.

For example, corporate interests took full advantage of the public's need for more modern roads, harbors, canals, bridges and other internal improvements.³⁰⁹ They secured passage of the Ohio Loan Law of 1837 (also known more descriptively as the "Plunder Law"),³¹⁰ which "required the state to give financial aid to private canal, turnpike, and railroad companies," while those same private enterprises retained the right to charge tolls and other fees to the very people—the taxpayers—who had financed these public conveyances.³¹¹ Within three years, by virtue of this law, the state's debt ballooned to \$12 million.³¹² The Plunder Law proved a "costly and unwise act" that "did little to improve" the transportation system.³¹³ Even though it was repealed in 1842, corporate avarice at the public trough continued to grow, as the state sold public lands to corporate interests "at a fraction of the real cost."³¹⁴

Pressure continued to build to call a constitutional convention to right these wrongs. On February 16, 1850, the Cleveland *Plain Dealer* recommended that the upcoming convention be populated with delegates devoted to curbing corporate power.³¹⁵ Only a "new Constitution" could combat the "evils in legislation" that are perpetrated on behalf of the "Bank, Corporation, and the whole monopoly system," it editorialized.³¹⁶ The power of the legislature to act at the behest of the corporations "must not be left to corrupt cupidity or caprice," or the corporations would win "such tyrannical and exclusive privileges as shall make them masters, we their slaves," the *Plain Dealer* continued.³¹⁷ The editorial identified corporate avarice effectuated through the general assembly as "the root of all political sin."³¹⁸ It went on to state that "[a]ssociated wealth with the strong bonds of interest, is generally powerful and oppressive enough in its exactions upon

309. KNEPPER, *supra* note 295, at 144.

310. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1077 (Ohio 1999).

311. David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6 and 13 of Article VIII in Historical Perspective*, 16 U. Tol. L. Rev. 405, 408-09 (1985).

312. *Id.* at 409. Reviewing this history, the Ohio Supreme Court stated, "Between 1825 and 1830, the total state debt increased nearly elevenfold and more than doubled again by 1840." *Sheward*, 715 N.E.2d at 1077.

313. KNEPPER, *supra* note 295, at 156.

314. *Id.* at 160.

315. Reprinted in PATTERSON, *supra* note 306, at 337.

316. *Id.*

317. *Id.*

318. *Id.*

the poor and the weak, but when in addition to this it obtains the sanction of authority of law, blended with privileges denied to the people at large, it becomes insolent and intolerable."³¹⁹ While the reformers' major concern was the monopolistic grants of privilege, they were quick to note legislative complicity in the "*more palpably unjust process of exonerating the chartered few from liabilities to which the rest of the community are subject*."³²⁰ It urged the convention to champion the cause of the "laboring classes in Ohio" at the expense of corporations.³²¹

Thus, the constitutional convention was convened to design a constitution that would contain corporate avarice and legislative complicity. One commentator has written that "the major motivating force [for the constitutional convention] was anti-corporation sentiment."³²² Disenchantment over the state's close relationship with business was "wide and deep."³²³ People "were angered by the tax burdens imposed on citizens for the benefit of private companies and by the public losses incurred when subsidized corporations failed."³²⁴ The constitutional convention also witnessed extensive discussions of corporate liability and individual responsibility. For example, in successfully opposing the Trumbull Amendment, which would have released stockholders from corporate liability, Delegate Samuel Quigley explained that "the reason that we recognize personal liability to the fullest extent in our dealings with each other" was because the idea "is founded on the great, broad and eternal principles of truth, justice and right. And it is absolutely necessary that, in all the business transactions of men, each should be individually and fully responsible for all his acts."³²⁵ Instead of adopting the Trumbull Amendment, the convention adopted a provision that imposed double liability on stockholders of banking corporations.³²⁶

Delegate H.D. Clark reiterated these points by declaring his lack of confidence in proper corporate conduct:

319. *Id.* at 337-38.

320. *Id.* at 338 (emphasis added).

321. *Id.*

322. Gold, *supra* note 311, at 411.

323. *Id.* at 413.

324. *Id.* at 411.

325. I DEBATES, *supra* note 302, at 410.

326. OHIO CONST. of 1851, art. XIII, §3 (1936) (amended in 1936 to comply with the federal deposit insurance act to limit stockholders liability to the value of their stock not fully paid for).

The experiment has been tried in that body . . . and almost every effort to engraft private responsibility on corporations has failed. The State is now strewn with the rotten, putrid carcasses of defunct corporations, and the affluvia is a stench in the nostrils of an outraged, swindled, community. The people of the county I represent have been scourged too much by corporations, to be willing to trust the Legislature.³²⁷

Outrage filled the convention. "The people had been handed over to [the corporations'] tender mercies," said Ranney, who added, "One of the most crying evils connected with corporate privileges, was . . . [e]xemption from individual liability for the payment of their debts."³²⁸ One commentator has noted that the convention represented a triumph for those favoring individual responsibility over those favoring a direct government role in private economic development.³²⁹

Business interests were so dominant at the time that "any man, who could think of a scheme by which to forcibly take tribute from his fellow citizens, could secure the legal right to do so by applying to the legislature."³³⁰ The constitutional convention sought to stop "the wild debauch of the treasury, and [tie] the hands of the agents of the privileged interests," namely the legislature.³³¹

The Ohio debates were representative of feelings throughout the country during the latter part of the nineteenth-century. For example, U.S. Supreme

327. 1 DEBATES, *supra* note 302, at 411. Clark went on to give several examples of legislative-corporate collusion at the public's expense. He noted that the general assembly had chartered the C.C. & Cincinnati Railroad Company in 1836 and required notice and appointment of three appraisers whenever the railroad sought to condemn and take property. *Id.* In 1848, the railroad succeeded in getting the legislature to allow a judge to appoint the appraisers without notice to the landowners, so that the railroad ended up acquiring property at a "mere nominal price." *Id.* at 411-12. Clark fumed, "I consider it land stealing—nothing else." *Id.* at 412.

328. *Id.* at 371.

329. Gold, *supra* note 311, at 423.

330. PATTERSON, *supra* note 306, at 21.

331. *Id.* at 19. Evidence that the legislature was in the thralls of the business community is demonstrated by the number of special pieces of legislation passed. In 1833, while only thirty pieces of general legislation were passed, the legislature enacted 250 pieces of special legislation. *Id.* In 1849, the legislative record included seventy-five plank road, sixty-seven railroad, and seventy-eight turnpike bills enacted. *Id.* In 1851, as the constitutional convention finished its work, 817 pieces of special legislation were enacted, including forty to benefit insurance companies, sixty-six on plank roads, seventy-four on turnpikes, and eighty-nine on railroads. *Id.* The Ohio Constitution of 1851 had an obvious impact; in the next year, only twenty-four pieces of special legislation were passed. *Id.* at 20.

Court Justice John A. Campbell, in the course of a contemporaneous dissent noted that corporations are unusual creatures that combine "faculties for good . . . [with] durable dispositions for evil. They display a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom."³³²

That attitude helped shape the Ohio Constitution of 1851, which remains its constitution today. In fact, article XIII is devoted to corporations and: (1) prohibits special acts conferring corporate powers;³³³ (2) removed any reliance by corporations that the laws governing their behavior would remain unchanged;³³⁴ (3) established full stockholder liability for corporate debts and liability until superceded by federal law a half century later;³³⁵ (4) made corporate property taxable on the same basis as individual's property;³³⁶ (5) guaranteed full and secured prepaid compensation for any right of way appropriated for corporate use, regardless of any benefit derived from the improvement with the amount of compensation committed to a jury's determination;³³⁷ and (6) gave the people a veto by referendum on laws that authorized associations to assume banking powers.³³⁸

Not only were laws and actions benefiting corporate actors put under tighter rein, but so was the authority of the Ohio Legislature. It was the common wisdom that "the legislature could not always be trusted, so an effort was made to take away its powers and have a self-acting Constitution take its place so far as possible."³³⁹ In fact, "fear of the abuse of power by the legislature permeated all discussions."³⁴⁰ For example, Jacob Perkins spoke on the convention floor about the need to confine the general assembly to "the exact scope of its duties, so as to prevent it from consuming powers it has no business to assume, and interfering with rights it has no business to interfere with . . ."³⁴¹

The Ohio Supreme Court reported, in further debate on this point, that one convention delegate warned:

332. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 375 (1856) (Campbell, J., dissenting).

333. OHIO CONST. art. XIII, §1.

334. *Id.* at §2.

335. *Id.* at §3.

336. *Id.* at §4.

337. *Id.* at §5.

338. *Id.* at §7.

339. PATTERSON, *supra* note 306, at 23.

340. *Id.* at 34.

341. 1 DEBATES, *supra* note 302, at 123; *See also id.* at 278 (remarks of R.P. Ranney); *cf.* *Hale v. State*, 45 N.E. 199, 200 (Ohio 1896) ("[T]he people, possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments.").

"It is, then, in the Legislative department of the Government that the rights of the people will be usurped and sacrificed, in my opinion, if at all. And it is this body, possessing by far the most vast and dangerous discretion of any body under the constitution, that we should especially watch and restrain."³⁴²

The changes effected in the authority and power of the legislature were, according to one scholar, "the most far-reaching" outcome of the convention.³⁴³ Under the new constitution, general laws had to have statewide uniformity, could contain but one subject, could not be retroactive, and specifically and independently from its explicit separation of powers, guarantee were restricted from invading the province of the judiciary, among other requirements.³⁴⁴ Other provisions allowed the people by referendum to review any law passed by the legislature.³⁴⁵ In essence, "[u]nder the second constitution the power of the legislature was drastically curbed."³⁴⁶

As a direct consequence of the cabining of legislative power, the authority of the judiciary was enhanced. This was an expected result. Convention delegates accused the legislature of usurping judicial authority and believed that a "just equilibrium in the government" would result in "a more active Judiciary, thus restoring the harmony that has been so long disturbed under the old Constitution"³⁴⁷ Concern about assuring a properly functioning judiciary was considered an important motivation for the constitutional convention.³⁴⁸ In fact, there was great awareness about how in the past the legislature had threatened judicial independence and could do so in the future.³⁴⁹ In light of the legislature's treatment of Chief Justice Huntington and Justice Tod for declaring a statute unconstitutional in 1807,³⁵⁰ it is significant that one year after the new constitution took effect the Ohio Supreme Court reaffirmed the power of judicial review, declaring

342. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1078 (Ohio 1999) (quoting 1 DEBATES, *supra* note 302, at 123).

343. Frederick Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. OF CIN. L. REV. 191, 220 (1939).

344. OHIO CONST. art. II, §§ 26, 15(D); 28; and 32.

345. *Id.* at § 1.

346. Woodbridge, *supra* note 343, at 231.

347. *Sheward*, 715 N.E.2d at 1078 (quoting 1 DEBATES, *supra* note 302, at 174-75).

348. OHIO CONSTITUTION HANDBOOK, *supra* note 296, at xxii.

349. *Id.* at 314.

350. See *supra* notes 296-301 and accompanying text.

that "laws of this character involve a gross abuse of right."³⁵¹ In the course of its opinion, the court observed,

How any doubt could ever have been entertained upon this subject [the right and duty of courts to nullify laws violative of the constitution], is matter of no little astonishment; and yet the history of our own State shows, that the power was, at one time, not only doubted, but positively denied; and judges, for a fearless discharge of this duty, were subjected to impeachment by the house of representatives.³⁵²

Subsequent amendments to the Ohio Constitution have strengthened the judicial role. It is little wonder that the Ohio Supreme Court has stated that "a major part of our history involves a continuing effort to establish and secure this power as intrinsic to the judiciary and, indeed, to establish the judiciary as a viable and coequal branch of our government."³⁵³

Today, Article IV, Section 1 of the Ohio Constitution vests the judicial power of Ohio exclusively in the supreme and other courts. The constitution goes on to provide that the supreme court shall have sole responsibility for the "general superintendence over all courts."³⁵⁴ The constitution also specifically and unambiguously states that the "supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right" and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."³⁵⁵ These provisions are further reinforced by Article II, Section 32, which explicitly prohibits the general assembly from exercising judicial power.

IV. TORT RESTRICTIONISM AS A USURPATION OF JUDICIAL AUTHORITY

A. *A War Over Results*

Tort restrictionism is about the results in litigation. Wealthy interests with experience as disappointed defendants given to habitual negligence or intentional recklessness, use their raw political power to take their

351. *Cincinnati, Wilmington & Zanesville R.R. Co. v. Clinton Comm'rs of Clinton County*, 1 Ohio St. 77, 105 (1852).

352. *Id.* at 81.

353. *Sheward*, 715 N.E.2d at 1076.

354. Ohio Const. art. IV, §5(A)(1).

355. *Id.* at §5(B).

complaints to the legislature in order to rig the legal system in their favor by acquiring various legal immunities and establishing limits on damages, as well as impose other obstacles and burdens that render the prospect of filing a lawsuit economically problematic. In other words, the tort restrictionists seek to hijack the civil justice system so that it does not serve the objective of redressing grievances but instead minimizes liability for wrongdoing. They justify their agenda by asserting that business and the economy need such relief from liability.

Typically, when a legislature is amenable to such entreaties from the tort restrictionists, the legal system is transformed into a fire sale. Lobbyists for every industry realize their jobs depend on securing a niche for their clients' favorite legal protection, and the legislature improperly takes on the role of super-judiciary, promulgating rules of practice, procedure and evidence, overruling constitutional cases and established doctrine, and rewriting common-law principles that were incorporated into modern-day constitutional rights. Fortunately, the very state constitutions that create these state legislatures stand as bulwarks against such an arrogation of power. Whereas legislative decisions are made on the basis of who has political clout, in an American court, decisions are made according to the rule of law.

Ohio's experience is telling. Amended Substitute House Bill 350 was the product of an alignment of the stars. Control of the general assembly and executive branch was in the hands of politicians friendly to the concerns of the business interests clamoring for tort restrictionism. Despite an empirically provable lack of need,³⁵⁶ the gargantuan legislation, weighing in at 246-pages, made it through a legislature that knew the bill was constitutionally problematic. The general assembly's own Legislative Service Commission found at least thirteen different constitutional infirmities that supporters of the act chose to ignore.³⁵⁷ One commentator, Professor Stephen Werber, who was sympathetic to some of the provisions in the legislation and consults for defense counsel, noted that in a number of areas, "most notably statutes of repose and limitations on damages, the

356. See *supra* notes 180-214 and accompany text. See generally Merritt & Barry, *supra* note 7 (detailing lack of empirical support for tort restrictionists' claims in Ohio).

357. Memorandum from the Legislative Service Commission, Potential Constitutional Infirmities in H.B. 350 of the 121st General Assembly, No. R-121-1458 (Sept. 18, 1995), cited in *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1073 n.7 (Ohio 1999).

government need is weak, the effect drastic, and the likelihood of defending against constitutional attack is minimal."³⁵⁸

The legislature knew that many parts of the bill had been invalidated by the Ohio Supreme Court before, but maintained a right to reenact them. In doing so, the legislature attempted to arrogate to itself an unheard-of power of cancellation over the supreme court by overruling constitutional decisions, by overriding rules of procedure and evidence, and by interfering with access to the courts and the fair administration of justice. The intent section of the legislation³⁵⁹ declares its reliance on a series of overruled and reversed holdings of the Ohio courts, as well as some dissenting opinions, while "respectfully disagree[ing]" with controlling precedent.³⁶⁰ For example, with respect to the legislation's fifteen-year statute of repose for improvements to real property, the general assembly asserted its reliance on three cases that were no longer good law³⁶¹ and on a dissent,³⁶² while expressing disapproval for three recent decisions that clearly and unmistakably indicated that the new enactment was unconstitutional.³⁶³ Similar treatment was accorded the section of the bill establishing a new medical statute of repose.³⁶⁴

In fact, the legislature's declaration of its legislative intent generally read more like a legal brief than an intent section, as it undertook a selective and disapproving review of the Ohio Supreme Court's precedents. Still, even its laundry list of precedents in conflict with the statute was modest compared to the number of decisions it attempted to overturn. Some of those decisions³⁶⁵ were constitutional rulings that cannot be overruled by mere

358. Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155, 1199-200 (1996).

359. H.B. 350 §5, 121st Gen. Assem., Reg. Sess. (Ohio 1996).

360. *Id.* at §5(E)(2).

361. *Id.* at §5(E)(1) (indicating reliance on *Sedar v. Knowlton Constr. Co.*, 551 N.E.2d 938 (Ohio 1990), overruled by *Brennan v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); *Ross v. Sam W. Emerson Co.*, 551 N.E.2d 950 (Ohio 1990), overruled by *Brennan v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); *Cyrus v. Henes*, 623 N.E.2d 1256 (Ohio Ct. App. 1993), *rev'd*, 640 N.E.2d 810 (Ohio 1994)).

362. *Id.* at §5(E)(1) (indicating reliance on *Brennan v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994) (Moyer, C.J., concurring in part and dissenting in part)).

363. *Id.* at §5(E)(2) (disagreeing with *Ross v. Tom Reith, Inc.*, 645 N.E.2d 729 (Ohio 1995); *Brennan v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); *Cyrus v. Henes*, 640 N.E.2d 810 (Ohio Ct. App. 1994)).

364. *Id.* at §5(G).

365. See, e.g., *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994) (invalidating statute requiring trial court to deduct from total jury award plaintiff's collateral benefits on grounds of jury trial right, due process, equal protection, and right to remedy); *Brennan v. R.M.I.*

legislation.³⁶⁶ The *Sheward* court properly took umbrage at the legislature's attempt to ignore the court's authority to say what the constitution means and to render acts inconsistent with constitutional authority null and void.³⁶⁷ Even without more, the massive scale of the assembly's attempt to roll back the court's constitutional decisions was a significant challenge to the court's authority and to judicial independence. A decision based on this violation alone would have been sufficient to invalidate H.B. 350.

Still, other decisions overruled by the legislation were declarations of the common law that have a constitutional dimension.³⁶⁸ Generally, the legislature may change the common law by statute, however, that power is

639 N.E.2d 425 (Ohio 1994) (invalidating ten-year statute of repose for real property improvements on right to remedy grounds).

366. See *DeRolph v. Ohio*, 677 N.E.2d 733, 737 (Ohio 1997) (holding that it is the court's duty to review the constitutionality of legislation as part of the system of checks and balances); *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton County*, 1 Ohio St. 77, 81-82 (1852) (same).

367. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1073 (Ohio 1999).

368. See, e.g., *McFarland v. Bruno Machine Co.*, 626 N.E.2d 659 (Ohio 1994) (permitting certain evidence of subsequent remedial measures in products liability cases); *Leichtamer v. AMC*, 424 N.E.2d 568 (Ohio 1981) (adopting the consumer expectation test in products liability actions); *Horton v. Harwick Chemical Corp.*, 653 N.E.2d 1196 (Ohio 1995) (permitting lawsuits against certain defendants in hazardous and toxic substances cases); *Browning v. Burt*, 613 N.E.2d 993 (Ohio 1993) (defining medical claim); *Bowling v. Heil*, 511 N.E.2d 373 (Ohio 1987) (eliminating comparative negligence as a defense in strict products liability); *Eberly v. A-P Controls, Inc.*, 572 N.E.2d 633 (Ohio 1991) (prohibiting the jury from considering the fault of non-parties); *Pryor v. Webber*, 263 N.E.2d 235 (Ohio 1970) (adopting common law collateral source rule); *Ede v. Atrium S. OB-GYN, Inc.*, 642 N.E.2d 365 (Ohio 1994) (permitting evidence of common insurance or other financial bias on part of expert witness); *Thompson v. Wing*, 637 N.E.2d 917 (Ohio 1994) (permitting wrongful death actions where personal injury judgment or settlement was previously rendered); *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994) (establishing hospital's liability under agency doctrine for negligence of practitioners not on staff but holding privileges).

not without limits.³⁶⁹ H.B. 350 substantially overstepped those limits and encroached upon the judicial power.³⁷⁰

Consider, for example, the holding in *Bowling v. Heit*,³⁷¹ where the court held that there is no persuasive rationale that can be mustered to support the idea that "comparative negligence or comparative fault principles should be applied to products liability actions."³⁷² The court found the comparative doctrine "fundamentally inapplicable" since strict products liability actions focus on product safety rather than a user's conduct.³⁷³ Yet, H.B. 350³⁷⁴ attempted to accomplish what the Court already deemed irrational; it made comparative negligence a defense in strict products liability without providing any *quid pro quo* to the plaintiff. Surely, this is one of those instances recognized by Lord Coke where "common right and reason," as enunciated through the common law, were a sufficient basis upon which to strike down an act of the legislature.³⁷⁵ That same rationality standard used by Coke is now a standard feature of our constitutional due process and equal protection jurisprudence,³⁷⁶ and mirrors the responsibility courts once undertook to prevent the legislature from making undue encroachments on the common law.³⁷⁷

369. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("[T]here are limits on governmental authority to abolish 'core' common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy"); see also *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917) (same); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (drawing distinction between congressional authority over statutory causes of action and common-law causes); cf. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985).

370. See *Hardy v. VerMeulen*, 512 N.E.2d 626, 631 (Ohio 1987) (Douglas, J., concurring) (explaining that the gist of a right to remedy violation is the absence of a reasonable alternative remedy); accord *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987) (holding that a damage cap violated the constitutional guarantee of access to the courts because it provided no alternative remedy or commensurate benefit to the plaintiff).

371. 511 N.E.2d 373 (Ohio 1987).

372. *Id.* at 380.

373. *Id.*

374. H.B. 350 §1, 121st Gen. Assem., Reg. Sess. (Ohio 1996) (amending Ohio Rev. CODE ANN. §2315.19 (West 1996)).

375. *Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610).

376. *Adkins v. McFaul*, 667 N.E.2d 1171, 1173 (Ohio 1996). See also *Willis v. Mullett*, 561 S.E.2d 705, 709 (Va., 2002); *Thorp v. Town of Lebanon*, 612 N.W.2d 59, 76 (Wis. 2000).

377. See, e.g., *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) ("[A]ll laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law. . . . These maxims are dictated by public policy, have their foundation in universal law

Because the Ohio tort restrictionist effort's illicit arrogation of power tilted the playing field of litigation favorably for wrongdoers, it resulted in a denial and delay of justice for those injured, and it operated to deter the people of Ohio from filing meritorious actions. The restrictionists' vision of a legal system was one that featured more expensive justice with arbitrary limits on the jury's verdicts and formidable disincentives to vindicating plaintiffs' rights in court. In such circumstances the courts have a constitutional responsibility to intercede and declare the statute unconstitutional.

By asserting plenary authority to reformulate the administration of justice contrary to the proper determinations of the courts, the legislature clearly overreached its authority. A legislative assembly may hold considerable political clout and great authority to set public policy, but it must do so in accordance with constitutional restraints.³⁷⁸

Ohio's constitution emphatically assigns the primary role in superintending the administration of justice to the judiciary.³⁷⁹ The state's "constitutional convention was determined upon a simplification and shortening of judicial procedure, to the end that substantial justice should be administered without denial or delay."³⁸⁰ The processes available to achieve justice are indisputably dependent upon and defined by the exercise of judicial power; the authority to do so has long "inhered in the courts of [Ohio] which are rightfully regarded by the people as the ultimate repositories of justice."³⁸¹ Even determining "[w]hether or not justice is administered without 'denial or delay' is a matter for which the judges are answerable to the people, and not to the general assembly of Ohio."³⁸² Precedent establishes the judiciary's discharge of this duty "cannot be

administered in all civilized countries, and have nowhere been superseded by statutes." See generally, PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* (1997).

378. See *In re Hawke*, 140 N.E.2d 583, 583 (syllabus) (Ohio 1923) ("State constitutions are primarily *limitations* upon political power, and secondarily *delegations* of political power." (emphasis added)). Under Ohio law, the Ohio Supreme Court-produced syllabus is the official holding of the Court. See Ohio Sup. Ct. R. Rep. Op. 1(B). When appropriate, citations to Ohio cases will be to the syllabus.

379. OHIO CONST. art. IV, §5(A)(1) ("In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state.").

380. *Hawke*, 140 N.E.2d at 585.

381. *State ex rel. Portage County Welfare Dep't v. Summers*, 311 N.E.2d 6, 11 (Ohio 1974) (citation omitted).

382. *Schario v. State*, 138 N.E. 63, 64 (Ohio 1922).

impeded by the other branches of the government in the exercise of their respective powers" and must remain "free and untrammelled [in the] exercise of their judicial functions"³⁸³

Although the superintending authority of the supreme court is explicitly set out in the constitutional text, no constitutional blessing was needed to assure that the judiciary had all the power and responsibility necessary to assure that justice is achieved. For more than a century, the Ohio courts have recognized it as an inherent power:

When constitutional governments were established upon this continent there was general familiarity with the course of judicial proceedings in the administration of the common law. This power had long been exercised by courts as inherent. It was within every conception of a judicial court.³⁸⁴

It is little wonder then that the Ohio Supreme Court, in the opening heading of *Sheward*, characterized the tort restrictionist law at issue as a device that "Converts the Drive for Civil Justice Reform into an Attack on the Judiciary as a Coordinate Branch of Government."³⁸⁵ Because H.B. 350 was a product of a political power play, it could accurately be characterized as a hostile takeover of the civil justice system to the complete and one-sided benefit of tortfeasors over injured persons. Ohio law, however, held that such an "arbitrary imposition of disabilities . . . is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."³⁸⁶ This idea, of course, was a much-discussed notion at the constitutional convention.³⁸⁷

At the time the Ohio case challenging H.B. 350 was heard, the Illinois Supreme Court had just found that such a law flies in the face of the constitutional separation of powers.³⁸⁸ The decision is instructive because of the acknowledged influence the Illinois Constitution had on the framing of the Ohio Constitution.³⁸⁹ The Illinois Constitution of 1848 was available for study by the framers of Ohio's Constitution and addressed many similar issues. Like Ohio's, it renounced a system of legislative supremacy,

383. *State ex rel. Johnston v. Taulbee*, 423 N.E.2d 80, 80-81 (syllabus) (Ohio 1981).

384. *Hale v. State*, 45 N.E.2d 199, 200 (Ohio 1896).

385. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1072 (Ohio 1999).

386. *Primes v. Tyler*, 331 N.E.2d 723, 726 (Ohio 1975) (citation omitted).

387. See *supra* notes 324-29 and accompanying text.

388. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997) (holding an omnibus tort reform bill unconstitutional).

389. See *Bates v. People's Savings & Loan Ass'n*, 42 Ohio St. 655, 669 (Ohio 1885).

strengthened the judiciary, and continued an earlier guarantee of "a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain right and justice freely, and without delay, conformably to the laws."³⁹⁰ Those features have not substantially changed in the current Illinois Constitution.

It is black-letter law in Illinois that those powers that are judicial in nature cannot be exercised by the legislature.³⁹¹ It is within the sole competence of the judiciary to determine when such an arrogation of judicial power has taken place.³⁹² Where the legislature violates the constitution, the courts have an absolute obligation to strike down the offending law, regardless of its social desirability.³⁹³ In fact, studies establish that state courts have most frequently used judicial review to stave off encroachments from legislative or gubernatorial authorities.³⁹⁴

Similarly, the Ohio Constitution's right to remedy guarantee³⁹⁵ imposes an affirmative obligation on the judiciary. As the Ohio Supreme Court has noted, "It is the primary duty of courts to sustain [the Ohio Constitution's] declaration of right and remedy, wherever the same has been wrongfully invaded."³⁹⁶ Even changes to the presumptions and burdens of proof violate the right to a remedy³⁹⁷ and, concomitantly, the constitutional separation of powers. In this respect, Ohio law operates on a principle recognized by the Supreme Court in articulating a vital distinction between common-law causes of action and rights actionable as a matter of legislative grace:

when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies . . . Such provisions do, in a sense, affect the exercise of

390. ILL. CONST. of 1848, art. XIII, §12.

391. *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952).

392. *Murnigh v. Gainer*, 685 N.E.2d 1357, 1365 (Ill. 1997).

393. *Wilson v. Dep't of Revenue*, 662 N.E.2d 415, 417 (Ill. 1996); see also *Grasse v. Dealer's Transp. Co.*, 106 N.E.2d 124, 130 (Ill. 1952).

394. See, e.g., CHARLES H. SHELTON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 71 (1997).

395. OHIO CONST. art. I, §16.

396. *Kintz v. Harriger*, 124 N.E.2d 168, 168 (syllabus) (Ohio 1919); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.")

397. *Byers v. Meridian Printing Co.*, 95 N.E. 917, 917 (syllabus) (Ohio 1911).

judicial power, but they are also incidental to Congress's power to define the right that it has created.³⁹⁸

Where the right does not devolve from statutory authority, legislative tinkering with presumptions, burdens and remedies, exercise constitutionally unauthorized judicial power.

B. Invasion of the Ohio Supreme Court's Authority to Set Trial Rules

H.B. 350 was a separation of powers violation on a massive scale. Beyond its attempt to overrule constitutional decisions of the Ohio Supreme Court by statute,³⁹⁹ perhaps the most easily recognizable violation of separation of powers in H.B. 350 was the legislature's attempt to change Ohio's rules of procedure and evidence. However small a constitutional violation this may appear at first blush, it goes to the heart of the court's authority over its own domain. Madison taught that any accession to the assumption of another branch's authority is "the very definition of tyranny."⁴⁰⁰ Hence, Madison warned against "a gradual concentration of the several powers in the same department" and advocated the need to give "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."⁴⁰¹

The Ohio Constitution follows the Madisonian formulation and, like constitutions of many states,⁴⁰² places the responsibility for promulgating courtroom rules exclusively in the supreme court.⁴⁰³ The Ohio Constitution

398. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982).

399. See *supra* notes 363-72 and accompanying text; *infra* notes 396-406 and accompanying text.

400. THE FEDERALIST No. 47, *supra* note 224, at 301 (James Madison).

401. THE FEDERALIST No. 51, at 321-22 (James Madison) [hereinafter THE FEDERALIST No. 51].

402. See, e.g., ARIZ. CONST. art. VI, §5, cl. 5; COLO. CONST. art. IV, §21; MO. CONST. art. V, §5; N.J. CONST. art. XI, §§IV, V; N.D. CONST. art. VI, §3; UTAH CONST. art. VIII, §4. In some states, the legislature is granted the authority to veto court-promulgated rules by supermajority vote. See, e.g., FLA. CONST. art. V, §2(a). Still others divide the authority between their supreme court and the legislature according to the level of the court. See, e.g., N.C. CONST. art. IV, §13, cl. 2. In yet other states, no constitutional text assigns the courts the authority over rules of practice, yet the courts have held that it is a matter of inherent judicial authority. See *State v. Clemente*, 353 A.2d 723, 726-27 (Conn. 1974); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1092 (Ill. 1997); *Ammerman v. Hubbard Broad., Inc.*, 551 P.2d 1354, 1358-59 (N.M. 1976).

403. OHIO CONST. art. IV, §5(B).

brooks no role for the legislature.⁴⁰⁴ This allocation of authority furthers the goal of restraining legislative overreaching into the judiciary's province and means, under Ohio precedent, that the rules of civil procedure promulgated by the court "control over subsequently enacted inconsistent statutes purporting to govern procedural matters."⁴⁰⁵ The Ohio Supreme Court has similarly declared that a statute is unconstitutional when it attempts to "change (enlarge) the Evidence Rules as promulgated by this court."⁴⁰⁶

Still, as part of its campaign to reconfigure the civil justice system for the benefit of its political patrons, the general assembly embarked upon an extensive revision of the rules, including reenactment of one provision that the court had previously voided as a violation of the constitution. This provision required prior to trial the filing of a certificate of merit in which a "reviewing individual" willing to testify in court verifies that there is a reasonable basis for any medical, dental, optometric, chiropractic or malpractice claim.⁴⁰⁷ The new provision was indistinguishable from an earlier certificate of merit law that the court found in conflict with Ohio Rule of Civil Procedure 11,⁴⁰⁸ reasoning that the certificate requirement abridged the rule's declaration that verified complaints or accompanying affidavits are not required except where the rules indicate otherwise.⁴⁰⁹

The legislature attempted to evade that constitutional decision by asserting that it was "clarifying the jurisdictional nature" of the requirement and making it a feature of substantive, rather than procedural law.⁴¹⁰ The assertion was appropriately rejected as pretextual.⁴¹¹ The new requirement established neither an element for a medical malpractice action nor a type of proof that distinguishes one form of malpractice from another. It merely required an expert's assurances that the underlying case was meritorious.⁴¹² It could not be regarded as jurisdictional.

404. *Id.*

405. *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789, 792 (Ohio 1993) (citation omitted).

406. *In re Coy*, 616 N.E.2d 1105, 1108 (Ohio 1993).

407. H.B. 350 §1, 121st Gen. Assem., Reg. Sess. (Ohio 1996) (amending Ohio Rev. CODE ANN. §2305.011 (West 1996)).

408. Ohio Rule of Civil Procedure 11 provides in pertinent part that "[e]xcept when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit." Ohio R. Civ. P. 11.

409. *Hiatt v. Southern Health Facilities, Inc.*, 626 N.E.2d 71, 72 (Ohio 1994).

410. Ohio H.B. 350 §5(H)(1).

411. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1087-88 (Ohio 1999).

412. Such requirements have also been invalidated on right to remedy grounds. See *State ex rel. Cardinal Glennon Mem. Hosp. For Children v. Gaertner*, 583 S.W.2d 107, 110

The only difference between the certificate H.B. 350 required and the one invalidated in *Hiatt* was that the newer requirement delayed the time for compliance. Rather than mandate that it be filed with the complaint, as in the earlier version, the newer iteration required the affirmation ninety days after either a responsive pleading or a defendant's compliance with medical record discovery.⁴¹³ Changing the timing, however, did not change the substance of the requirement: it sought verification of the meritorious nature of allegations made in the complaint.⁴¹⁴ It was an adjunct to the pleadings and thus clearly ran counter to Rule 11's plain statement that "pleadings need not be verified or accompanied by affidavit."⁴¹⁵ Contrary to the general assembly's assumption, Rule 11's applicability does not end ninety days after a responsive pleading or the completion of discovery.

The legislature asserted, even though the record did not support the contention, that it was "unequivocally demonstrated in the hearings" that merit certificates would have the "salutary effect" of "reducing insupportable, frivolous claims."⁴¹⁶ Even so, there was no indication that Ohio's Rule 11, which mirrors the federal rule, was inadequate in its requirement that an attorney's signature on the pleading is a certification "that to the best of his knowledge, information, and belief there is good ground to support it" with the prospect that the attorney could be sanctioned for bringing a frivolous claim.⁴¹⁷ Moreover, an exhaustive review of the hearing record did not turn up any testimony indicating that frivolous medical malpractice cases were a problem in Ohio or that requiring merit certificates would reduce such claims. On the contrary, the best indicia that medical malpractice cases, frivolous or otherwise, were not a problem in Ohio was the manner in which medical malpractice insurance premium rates fell during the relevant period. St. Paul Fire & Marine Insurance Company, then the nation's largest medical malpractice carrier, reported that the average annual premium for Ohio physicians and surgeons dropped steadily by forty percent during the period 1987 to 1993.⁴¹⁸ This compared favorably

(Mo. 1979); *Jiron v. Mahlab*, 659 P.2d 311 (N.M. 1983). Other pre-trial medical review requirements that are non-binding have been upheld in some states. See, e.g., *Dubin v. Wakuzawa*, 970 P.2d 496 (Hi. 1999); *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 348 (Alaska 1988).

413. Ohio H.B. §1 (amending Ohio REV. CODE ANN. §2305.011(A) (West 1996)).

414. *Id.*

415. Ohio R. Civ. P. 11.

416. Ohio H.B. 350 §5(H)(4).

417. Ohio R. Civ. P. 11. See generally *Lewis v. Celina Fin. Corp.*, 655 N.E.2d 1333 (Ohio Ct. App. 1995).

418. Aff. of Tim Ryles, *supra* note 211.

with a twenty-six percent drop during the same period nationwide.⁴¹⁹ Obviously, no medical malpractice insurance affordability crisis existed.

The certificate of merit issue is demonstrative of how Ohio's tort reform effort was a political power play expressing dissatisfaction with the courts and attempting to assume the judiciary's authority. The underlying premise of the statute was that the courts were permitting too many medical malpractice cases to proceed instead of short-circuiting them at an early stage. Because the courts were not handling the situation to the legislature's satisfaction, an opinion that was based entirely on the lobbying of the medical profession and not on any demonstrated need, the legislature attempted to reenact a measure previously declared unconstitutional as an invasion of the state supreme court's explicit constitutional authority. It passed the law again in a palpably transparent effort to fool the court into believing that its extension of the period for compliance by ninety days constituted a real difference.

Counsel attempting to reargue a settled issue on a similar basis would find sanctions in the offing. A good-faith argument could not be mustered to assert that the court's jurisprudence had changed since the earlier decision nor that the court had impaired its own precedent to support a suggestion that a different result might be obtained this time. The resulting separation of powers violation was manifold—the new certificate of merit requirement exercised an authority that the constitution assigned exclusively to the judiciary and attempted to override a constitutional decision of the supreme court by mere statute in what was a naked challenge to the court's power of judicial review.

Although the certificate of merit issue was exemplary of the legislature's attempt to override the court's authority, conflicts with the rules of civil procedure occurred elsewhere in H.B. 350, as well. For example, Ohio Civil Procedure Rule 42 gives courts discretion to determine whether a separate trial is merited on any of the claims before it.⁴²⁰ A provision of H.B. 350 took away the trial judge's discretion and strictly mandated the bifurcation of trials where punitive damages are claimed.⁴²¹

Similarly, H.B. 350 improperly attempted to override the rules of evidence promulgated by the supreme court. Ohio Evidence Rule 301, which governs the extent to which presumptions can affect the risk of non-

419. *Id.*

420. *Estate of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1131, 1334-35 (Ohio 1997).

421. H.B. 350 §1, 121st Gen. Assem., Reg. Sess. (Ohio 1996) (amending OHIO REV. CODE ANN. §2315.21(B)(1) (West 1996)).

persuasion,⁴²² was violated by provisions that established improper presumptions about alcohol and drug impairment and use of automobile restraining devices.⁴²³

Ohio Evidence Rule 403 relates to when evidence may be excluded on grounds of prejudice, confusion or waste of time.⁴²⁴ H.B. 350 attempted to override it by mandating instructions to the jury about the non-taxability of certain damage awards⁴²⁵ in an obvious effort to influence juries to award smaller verdicts. Longstanding precedent had established, however, that the only proper measure of damages is that which will make the plaintiff whole and foreclosed the use of devices that would result in a benefit or windfall for the tortfeasor.⁴²⁶ It is because of potential prejudice in the jury's consideration of damages that evidence of liability insurance, indicating that the defendant will not have to pay a judgment, is excluded at trial. The same reasoning applies to evidence of the non-taxability of a plaintiff's verdict, separate and apart from the lack of legislative authority to enact such a provision.

Similar problems existed with the tort restrictionist law's attempt to exclude all evidence of subsequent remedial efforts in products liability cases⁴²⁷ and to prohibit disclosure of commonality of insurance between defendants and their experts.⁴²⁸ The product liability issue is governed by Ohio Evidence Rule 407, which excludes such evidence to prove negligence but permits it for other purposes such as proving ownership, control, impeachment or, when controverted, the feasibility of precautionary measures.⁴²⁹ The insurance disclosure issue is governed by Ohio Evidence Rules 411 and 616.⁴³⁰

422. OHIO R. EVID. 301.

423. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2323.59 (West 1996)); see *Carson v. Metropolitan Life Ins. Co.*, 135 N.E.2d 259 (Ohio 1956); *Evans v. Nat'l Life & Accident Ins. Co.*, 488 N.E.2d 1247, 1250 (Ohio 1986).

424. OHIO R. EVID. 403.

425. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2315.01 (West 1996)).

426. See, e.g., *Pryor v. Webber*, 263 N.E.2d 235 (Ohio 1970).

427. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2744.06 (West 1996)).

428. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2317.46(C) (West 1996)).

429. OHIO R. EVID. 407; see also *McFarland v. Bruno Mach. Corp.*, 626 N.E.2d 659, 662 (Ohio 1994).

430. OHIO R. EVID. 411 (permitting proof of insurance for purposes of demonstrating bias or prejudice of a witness); OHIO R. EVID. 616 (relating to witness bias for impeachment purposes); see, e.g., *Ede v. Atrium S. OB-GYN, Inc.*, 642 N.E.2d 365, 368 (Ohio 1994).

C. Invasion of the Jury's Function as a Violation of Separation of Powers

Tort restrictionist laws like H.B. 350 typically attempt to drive a stake through the heart of the state constitutional jury trial guarantee. Most frequently, these laws do so by limiting damages that juries may award. H.B. 350 did so in three ways: (1) it generally limited noneconomic damages in tort actions to the greater of \$250,000 or three times the economic loss, to a maximum of \$500,000;⁴³¹ (2) it separately limited noneconomic damages in wrongful death;⁴³² and (3) it limited punitive damages to three times compensatory damages or \$100,000 (\$250,000 for employers with more than twenty-five employees).⁴³³ Because a jury's damage assessment is a factual determination protected against interference other than by common-law

431. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2323.54 (West 1996)).

432. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2125.01 (West 1996)). Ohio's Constitution contains an explicit prohibition against limits to damages in wrongful death. OHIO CONST. art. I, §19a. Ohio's first wrongful death statute was enacted in 1851 and contained a cap on damages. 1851 Ohio Laws 1105. The current constitutional provision, added by amendment in 1912, eliminated the authority of the legislature to cap damages. OHIO CONST. art. I, §19a. In one early instance where a court permitted an award of non-pecuniary damages in a wrongful death case prior to statutory authorization, the judge based his decision in part on the role that the jury had played in determining the damage award. *Kountz v. Toledo St. Louis & W. R.R. Co.*, 189 F. 494, 494-95 (N.D. Ohio 1908).

When the legislature endeavored to make non-pecuniary damages available in wrongful death actions in 1982, OHIO REV. CODE ANN. §2125.02-.03 (West 1982), the new statute fell within the terms of the clear prohibition of the Ohio Constitution on damage limitations and Article I, Section 5's assignment of damage determinations to the jury.

H.B. 350's wrongful death provision further violated this prohibition on damage limitations by precluding a wrongful death action if a decedent settles his or her injury claims prior to death or obtains a judgment that is satisfied during his or her lifetime. Ohio H.B. 350 §1 (amending OHIO REV. CODE ANN. §2125.01 (West 1996)). The new provision legislatively reversed the court's holding in *Thompson v. Wing*, 637 N.E.2d 917, 924 (Ohio 1994), distinguishing between factual determinations and calculations of damages in personal injury and wrongful death actions stemming from the same body of facts. In doing so, H.B. 350 effectively reduced damages available to a wrongful death claimant in violation of the constitutional prohibition. Moreover, it misconceived who the plaintiff is in a wrongful death action—a personal injury action is asserted for the benefit of the directly injured party; a wrongful death action compensates for the losses sustained by the decedent's beneficiaries, not the decedent. The practical effect is that H.B. 350 allows a decedent's personal injury action to extinguish all rights in wrongful death actions for his or her beneficiaries. Such a non-suited result would have been the most palpable legislative limit on damages that could be conceived.

433. Ohio H.B. 350 §5(B)(1). The court had previously determined that the assessment of punitive damages was in the province of the trier of fact. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994).

methods by the constitutional guarantee of the right to a jury trial,⁴³⁴ limitations on damages violate the jury guarantee. Since at least 1913, the Ohio Supreme Court has recognized that legislative fact-finding in a case, which is what a damage cap comprises, is "a sinister and indirect invasion and usurpation of the right of trial by jury . . . [and is] clearly unconstitutional."⁴³⁵ These damage caps, which are the sine qua non of tort restrictionism, may also properly be deemed a violation of separation of powers.

There are three reasons why these damage caps are a violation of separation of powers, all flowing from the jury's unquestioned authority to determine damages. Each is discussed below.

1. The Jury is Part of the Judicial Department

First, the jury is an adjunct to the judiciary, exercising authority delegated to it within the judicial structure and otherwise only exercised by a judge in the absence of a jury. As such, juries were always considered part of the judicial department.⁴³⁶ In that respect, Americans adopted the view Montesquieu articulated that judicial independence was largely achieved through the selection of jurors from among the populace, rather than through dependence upon the attitudes or longevity of judges.⁴³⁷ John Taylor of Caroline, a leading early American constitutionalist, called the jury the "lower judicial bench" in a bicameral judicial department.⁴³⁸ One aspect of

434. See *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 474 (Or. 1999) (invalidating a \$500,000 cap on noneconomic damages in personal injury and wrongful death actions on the basis of the state constitutional jury trial right); see also *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (distinguishing punitive damages, which the Court held fell outside the scope of the federal constitutional right to a jury trial, from noneconomic damages, which falls within the right).

435. *Gibbs v. Girard*, 102 N.E.2d 299, 301 (Ohio 1913).

436. See, e.g., 2 THE COMPLETE ANTI-FEDERALIST 249-50 (H.J. Storing ed., 1981) (Federal Farmer) (finding that the jury trial, especially politically considered, is by far the most important feature in the judicial department of a free country); 5 *id.* at 38 (Maryland Farmer) (calling the jury "the democratic branch of the judiciary power"); see also *infra* notes 444-45 and accompanying text.

437. DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 122 (1989).

438. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (Stark ed. 1950). See also *Muscall v. Drainage Comm'rs*, 14 N.E. 47, 49 (Ill. 1887) ("since all judicial power is invested in courts, it inevitably follows that a jury is an integral part of the court in all cases, where, at common law, there was a right of trial by jury.").

the authority lodged within the jury is the determination of damages.⁴³⁹ In Ohio, that authority is established in a trio of cases.⁴⁴⁰ Therefore, legislative interference with that authority in the form of damage limitations intrudes on the authority of the judicial department, in violation of the separation of powers guarantee.

2. The Jury Trial Right is Preserved Under Judicial Authority, As Well As Constitutional Authority

Second, the constitutionally guaranteed jury trial right is often incorporated into the civil rules, as it is in Ohio. Abridgement of the rule then invades the supreme court's exclusive rulemaking authority.⁴⁴¹ Ohio Civil Procedure Rule 38(A)⁴⁴² contains a guarantee of the right to a jury trial that is coextensive with the inviolate right guaranteed by the Ohio Constitution.⁴⁴³ The right to trial by jury in civil cases occupies a special place in the pantheon of rights enjoyed in most state constitutions. Decisions from every state mirror the idea expressed by the North Carolina Supreme Court that the jury trial right "has been regarded from the earliest times as one of the safeguards of the liberties of the people and as one of the

439. The jury's authority to award damages under the common law is beyond dispute. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *397 ("the quantum of damages sustained" must be determined by a jury); see also Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675 (1918) (asserting that the constitutional framers intended the jury's fact-finding role to include the assessment of damages, an issue that was settled at least since the time of Lord Coke). Because the constitutional right to trial by jury incorporates the full range of authority exercised by the jury under the common law, the jury's authority to set damages, subject only to reduction through remittitur, cannot be exercised by the legislature through statutory limits. For a thorough discussion of this principle, see *Lakin*, 987 F.2d at 474, which invalidated a \$500,000 cap on noneconomic damages in personal injury and wrongful death actions on the basis of the state constitutional jury trial right.

440. *Zoppo*, 644 N.E.2d at 402 (invalidating a statute that permitted the judge, rather than the jury, to determine the amount of punitive damages); *Sorrell v. Thevenit*, 633 N.E.2d 504, 511-13 (Ohio 1994) (holding that deduction of collateral benefits from jury award violates the right to trial by jury, along with due process, equal protection, and the right to a meaningful remedy); *Galayda v. Lake Hosp. Sys., Inc.*, 644 N.E.2d 298, 301-02 (Ohio 1994) (holding that a law requiring that future damages in medical malpractice cases be paid periodically rather than as a lump sum violates right to trial by jury and due process).

441. See *supra* notes 405-406 and accompanying text.

442. Ohio Civil Procedure Rule 38(A) provides in pertinent part: "The right to trial by jury shall be preserved to the parties inviolate." OHIO R. CIV. P. 38(A).

443. Ohio Constitution Article I, Section 5 provides in pertinent part: "The right to trial by jury shall be inviolate." OHIO CONST. art I, §5.

essentials to the due administration of justice."⁴⁴⁴ From the start, state constitutions declared this ancient mode of adjudication "inviolable."⁴⁴⁵

The importance of preserving jural authority was indelibly impressed on the minds of the nation's Founders because of their experience under British rule. The Declaration of Independence had charged England, among other complaints, with "depriving us in many cases, of the benefit of trial by jury."⁴⁴⁶ One notorious incident that inspired such allegiance to the jury trial right occurred when New York's colonial governor arbitrarily attempted to lessen the damages awarded by a jury, which one anti-federalist said inspired "a flame of patriotic and successful opposition, that will not be easily forgotten."⁴⁴⁷

When the Federal Constitution failed to guarantee a civil jury trial right, the anti-federalists nearly derailed its ratification. As Justice Joseph Story wrote: "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."⁴⁴⁸ The Seventh Amendment to the United States Constitution⁴⁴⁹ was added in response to assure that corrupt or politically motivated legislators did not interfere with the jury's

444. *Chesson v. Kieckhefer Container Co.*, 26 S.E.2d 904, 906 (N.C. 1943). See also, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."); *White v. White*, 196 S.W. 508, 512 (Tex. 1917) (jury trial right is "bulwark of human liberty . . . held . . . sacred . . . in English and American history").

445. Historian Leonard Levy observed that "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions . . ." LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 281 (1960), quoted in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting). Equally interesting, one of the earliest instances of judicial review in the new states occurred when the North Carolina Supreme Court invoked its state constitution's "sacred and inviolable" jury trial right to invalidate a legislative enactment that interfered with the jury's prerogatives. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787).

446. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

447. 2 *Letters of Centinel*, in *THE COMPLETE ANTI-FEDERALIST*, supra note 436, at 149; see also Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MICH. L. REV. 639, 696 n.141 (1973).

448. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

449. The Seventh Amendment to the United States Constitution provides:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

prerogatives.⁴⁵⁰ The U.S. Supreme Court has long held that the Seventh Amendment constitutionalizes the jury's common law authority.⁴⁵¹ The vast majority of states construe their jury trial right on the same basis.⁴⁵² The constitutional guarantee encompasses the "the right to have a jury determine the amount of . . . damages."⁴⁵³ Ohio construes its right similarly. In Ohio, the jury trial right dates back to the Northwest Ordinance of 1787.⁴⁵⁴ It exists today, with all the same jury prerogatives preserved, as it did at the time of the Ohio Constitution of 1802.⁴⁵⁵ It also applies with inviolate and fundamental constitutional force to the negligence actions that H.B. 350 addressed.⁴⁵⁶

Despite the inviolate nature of this right, the Ohio General Assembly has not proven to be its guardian, and the Ohio Supreme Court has been compelled to step in to protect the jury's function again and again. The legislature's disregard for the right to trial by jury, and the jury's primacy with regard to damages, dates back to 1806 when the court invalidated an act of the legislature that gave justices of the peace jurisdiction over cases involving damages up to fifty dollars, but no power to empanel a jury; the court held the act violated the jury trial right found in Article VIII, Section 8 of the Ohio Constitution of 1802.⁴⁵⁷

450. Wolfram, *supra* note 447, at 664-65.

451. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) ("Since Justice Story's day, we have understood that '[t]he right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.'" (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935))).

452. See, e.g., *Dep't of Revenue v. Printing House*, 644 So. 2d 498, 500 (Fla. 1994) (holding that the inviolate jury trial right preserved in the Florida constitution is the same as the right "enjoyed at the time this state's first constitution became effective in 1845" (quoting *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986)); *N.C. State Bar v. DuMont*, 286 S.E.2d 89, 93 (N.C. 1982) (holding that the right to trial by jury in civil cases was designed to preserve the same jury prerogatives that "exist[ed] at common law or by statute" at the time the 1868 Constitution was adopted).

453. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998); see also *id.* at 355 ("[I]f a party so demands, a jury must determine the actual amount of . . . damages . . . in order 'to preserve the substance of the common-law right of trial by jury.'" (citation omitted)); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991) ("[N]othing is better settled than that . . . [in] actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." (quoting *Barry v. Edmunds*, 116 U.S. 550, 563 (1886))).

454. NORTHWEST ORDINANCE OF 1787, §14, art. II ("The inhabitants of the said territory shall always be entitled to the benefits . . . of the trial by jury . . .").

455. *Mason v. State ex rel. McCoy*, 50 N.E. 6, 9 (Ohio 1898).

456. *Sorrell v. Thevenin*, 633 N.E.2d 504, 510 (Ohio 1994).

457. OHIO CONSTITUTION HANDBOOK, *supra* note 296, at xviii.

The Ohio Constitution of 1851 not only preserved the jury's existing authority, but actually extended that authority in the determination of damages by adding a new provision. It established that compensation for the taking of property "shall be assessed by a jury, without deduction for benefits to any property of the owner."⁴⁵⁸ The provision was adopted in response to an 1848 statute enacted at the railroads' behest, which allowed a judge to appoint land appraisers without notice to the landowners, so that the greedy railroads could acquire property at a "mere nominal price."⁴⁵⁹ This constitutional provision unambiguously recognized the role of the jury in determining damages, insulated the jury's determination from interference from the legislature, and informed the meaning of the inviolate jury trial right found in Article I, Section 5. Most importantly, it is properly read as a bar against both legislative damage caps and the deduction of collateral benefits.⁴⁶⁰

If the inviolate jury trial right means anything at all, it must mean that juries, except when infected by passion or prejudice, must be the arbiters of damages in civil cases. A legislative role in determining damages in cases entrusted to a jury is particularly inappropriate since assessment of damages depends upon "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts [which] are jury functions, not those of a judge."⁴⁶¹ The setting of an arbitrary ceiling fails to take these facts into account and destroys the American tradition of individualized justice. The Ohio Supreme Court has previously stated that legislative fact-finding in a case, which is what a damage cap comprises, is "a sinister and indirect invasion and usurpation of the right of trial by jury . . . [and is] clearly unconstitutional."⁴⁶² Upon similar reasoning, the court has struck down legislative attempts to reduce damage awards on right to jury trial grounds, as well as on due process and equal protection grounds, and the right to open courts and a meaningful remedy.⁴⁶³ The Ohio Supreme Court has also held that the right to trial by jury is violated whenever the traditional function of the jury to assess damages, including punitive damages, is impaired.⁴⁶⁴

458. OHIO CONST. of 1851, art. I, §19.

459. 1 DEBATES, *supra* note 302, at 411-12 (remarks of H.D. Clark).

460. See also *Sorrell*, 633 N.E.2d at 510 (holding that a statute permitting a court to reduce a jury verdict by the amount of collateral benefits violates the right to jury trial).

461. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

462. *Gibbs v. Vili. of Girard*, 102 N.E. 299, 301 (Ohio 1913).

463. *Sorrell*, 633 N.E.2d at 510-13.

464. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 391, 401 (Ohio 1994).

The jury is a part of the machinery at trial, preserved under the procedural rules promulgated by the Ohio Supreme Court. Legislative interference with the jury's function violates the Supreme Court's authority over rules of procedure, as well as the constitutional guarantee of a jury trial.

3. Damage Caps Amount to an Unconstitutional Legislative Remittitur

Third, the authority to revise a jury verdict that is the product of passion or prejudice resides exclusively in the judiciary. It is not a difficult proposition to understand that a law exercising a judicial power

would have been a nullity as an attempt to deprive the judiciary of a power which has belonged to it from the remotest antiquity, and which has never been denied to any other court, and which is an inherent power necessary to the very existence of any authority in the courts.⁴⁶⁵

Such precepts apply to all powers, "which are incident to the discharge by the courts of their judicial functions, are inherent in the courts, . . . [including] such power as is necessary to the exercise of the judicial department as a coordinate branch of the government."⁴⁶⁶ It should be noted that the power of the state to render judgments resides in the courts, rather than the legislature.⁴⁶⁷

Remittitur is precisely such a power that is indisputably judicial in nature. In capping various damage verdicts, the general assembly impermissibly exercised the power of remittitur. The law in Ohio, like that of every other state,⁴⁶⁸ establishes that a court may only take a verdict away from a jury where, "after construing the evidence most strongly in favor of

465. *State v. Little*, 94 S.E. 680, 681 (N.C. 1917) (citation omitted); cf. *Simmons v. State*, 136 So. 2d 207, 208 (Fla. 1948) ("Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional." (citation omitted)).

466. *In re Albemarle Mental Health Ctr.*, 256 S.E.2d 818, 821 (N.C. Ct. App. 1979) (quoting 16 C.J.S. CONSTITUTIONAL LAW §144, at 694 (1956)); cf. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1076-79 (Ohio 1999) (describing the history of the acceptance of this proposition).

467. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

468. For example, the North Carolina Supreme Court has recognized that trial judges are vested with "the inherent and traditional authority . . . to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned" *Worthington v. Bynum*, 290 S.E.2d 599, 602 (N.C. 1982). Longstanding precedent establishes that the "power of the court to set aside a verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice." *Britt v. Allen*, 231 S.E.2d 607, 611 (N.C. 1977) (quoting *Bird v. Bradburn*, 42 S.E. 936, 938 (N.C. 1902)).

the party against whom the [directed verdict] motion is directed, it finds that upon any essential issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party."⁴⁶⁹ Similarly, in considering a motion for a new trial, the trial court

must review the evidence and pass on the credibility of the witnesses; not in the substantially unlimited sense that such weight and credibility is passed on originally by the jury, but in the more restricted sense of whether it appears to the trial court that a manifest injustice has been done, and that the verdict is against the manifest weight of the evidence.⁴⁷⁰

A mere difference of opinion between judge and jury is insufficient.⁴⁷¹

Similarly, the power of remittitur may be exercised only when the verdict is the product of a jury's passion or prejudice.⁴⁷² It is the trial judge, who has heard the same evidence as the jury, who is best positioned to determine whether passion or prejudice entered the calculation.⁴⁷³ It cannot be anything but a judicial power. Obviously, with the general assembly's one-size-fits-all remittiturs, there is no consideration of evidence. Instead, the power of remittitur is being exercised by a remote legislative body in a fashion that disrespects the jury's function and disrespects the evidence adduced. There is no authority for the general assembly to direct such a reduction in damages. Instead, the damage caps exercise an authority that is judicial in nature and, even then, sharply circumscribed.

The legislature has no authority to render judgments or review the work of a jury. In doing so by reducing the jury's damage determination, the legislature violates the well-established principle that courts of general

469. *Rohde v. Farmer*, 262 N.E.2d 685, 691 (Ohio 1970).

470. *Id.* For a detailed discussion of the constitutional aspects and the common-law history of orders granting new trials, see *Smith v. Times Publishing Co.*, 36 A. 296 (Pa. 1896).

471. *Poske v. Mergl*, 157 N.E.2d 344, 347 (Ohio 1959).

472. *Villella v. Waiken Motors, Inc.*, 543 N.E.2d 464, 469 (Ohio 1989).

473. *Id.* The Florida Supreme Court has similarly ruled that

remittitur operates as a procedural device to bring the damages back within the outer bounds of law. Accordingly, the judge's use of remittitur is permissible only to the extent it accomplishes this purpose, and usurps the jury's function to the extent it accomplishes anything else. Remittitur emphatically is not a device to enforce the judge's opinion as to what damages should be.

Rowlands v. Signal Constr. Co., 549 So. 2d 1380, 1382 n.1 (Fla. 1989). Indeed, Florida permits use of remittitur "only to subtract from the total dollar amount of damages, not to apply any other form of mathematics." *Id.* at 1382.

jurisdiction "possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government."⁴⁷⁴

Such a view is not a peculiarity of Ohio law, but a mainstream perspective on constitutional law. The historical record teaches that

the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."⁴⁷⁵

Applying these principles, at least two state supreme courts have struck down damage caps that were found to constitute legislative remittiturs. The Washington Supreme Court struck down a damage cap, finding that "[a]ny legislative attempt to mandate legal conclusions would violate the separation of powers."⁴⁷⁶ Similarly, in Illinois, the supreme court struck down a cap on noneconomic damages, declaring that "[i]n furtherance of the authority of the judiciary to carry out its constitutional obligations, the legislature is prohibited from enacting laws that unduly infringe upon the inherent powers of judges."⁴⁷⁷

These conclusions are not novel. Thomas Cooley, in his 1868 influential and authoritative treatise on constitutional law, wrote:

If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry.⁴⁷⁸

474. *State ex rel. Johnston v. Taulbee*, 423 N.E.2d 80, 83 (Ohio 1981) (quoting with approval *Zangerle v. Ct. of Common Pleas of Cuyahoga County*, 46 N.E.2d 865 (syllabus) (Ohio 1943)).

475. *Plaut v. Spendthrift Farms*, 514 U.S. 211, 218 (1995) (citation omitted) (emphasis in original).

476. *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989).

477. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997).

478. *Plaut*, 514 U.S. at 244 (quoting THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 94-95 (1868)).

Taking such principles to heart, the Florida Supreme Court observed in 1940, "[s]tatutes cannot direct or control the judicial judgment of the trial or the appellate court in the exercise of the judicial power vested in the court by the constitution."⁴⁷⁹ Where remittitur is only properly exercised by a trial judge⁴⁸⁰ and constitutes the exercise of judicial power, there is no room for legislative revision of the jury's verdict.

V. CRITICISM OF THE OHIO SUPREME COURT IS MISPLACED

The decision in *Sheward* engendered considerable criticism from the community that had spent enormous sums of money to obtain H.B. 350. Much of the critique accused the majority of substituting their own policy views for that of the legislature.⁴⁸¹ As previous sections of this article have amply demonstrated, the court's substantive ruling was well-grounded in Ohio's constitutional history, the body of precedents material to the issue, and the structure and admissions of unconstitutionality found in the legislation.⁴⁸² It also marked no departure from mainstream constitutional analysis. Nonetheless, the well-heeled interests that thought it had bought the tort-restrictionist bill to end all tort-restrictionist efforts mounted a nasty, expensive and ultimately unsuccessful effort to unseat the decision's author in 2000.⁴⁸³

The other criticism maintained against the decision echoes the dissent's accusation that this was the wrong party in the wrong court.⁴⁸⁴ This

479. *In re Estate of Alkire*, 198 So. 475, 483 (Fla. 1940).

480. *See Hetzel v. Prince William County*, 523 U.S. 208 (Fla. 1998) (per curiam) (finding that an appellate court's order that a remittitur be granted violated the right to a jury trial).

481. *See, e.g.,* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 922 (2001).

482. *See supra* Parts III(B) & (C) & IV.

483. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 386 (2002); Paul D. Carrington and Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 475-76 (2002); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 870-77.

484. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1113 (Ohio 1999) (Moyer, C.J., dissenting). *See, e.g.,* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 920-23 (2001); Note, *State ex Rel. Ohio Academy of Trial Lawyers v. Sheward: The Extraordinary Application of Extraordinary Writs and Other Issues; The Case That Never*

criticism is equally misplaced. As the foregoing indicates, this was a case that directly implicated the superintending authority of the supreme court over the trial courts of the state. The general assembly had intruded grossly and substantially on the exclusive authority of the court in violation of the clear commands of the Ohio Constitution. H.B. 350 directed trial judges, the respondents in the case, to follow legal principles and procedural and evidentiary rules contrary to those properly promulgated by the court in the exercise of its exclusive constitutional authority. As a result of that unwarranted and severe violation of the constitutional separation of powers, the fair administration of justice for injured persons seeking redress through the courts was substantially impaired and the cause of constitutional government significantly damaged. As the Illinois Supreme Court noted in striking down a similar tort restrictionist measure, it was not merely good legal policy, but a "constitutional duty of this court to preserve the integrity and independence of the judiciary and to protect the judicial power from encroachment by the other branches of government."⁴⁸⁵

Because the case involved fundamental issues of legislative intrusion on judicial authority resulting from the legislature's challenge to the court's rulings and rules, the case properly invoked the court's original jurisdiction over writs of mandamus and prohibition.⁴⁸⁶ The relators alleged that the court's supervisory authority was necessary to prevent

the application of those provisions in Am. Sub. H.B. 350 that intrude on judicial power; . . . [to assure that trial judges] follow the Supreme Court's promulgated rules of civil procedure, rules of evidence, relevant constitutional decisions, and relevant common-law causes of action for which

Should Have Been, 29 CAP. U. L. REV. 433 (2001); Note, *State Tort Reform-Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, 113 HARV. L. REV. 804 (2000); Abusecette, *The Courts are Disregarding Standing and Original Jurisdiction Principles so They Can Declare Tort Reform Unconstitutional*, 84 MARQ. L. REV. 491 (2000); Note, Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward: *The End Must Justify the Means*, 27 N. KY. L. REV. 883, 884 (2000).

⁴⁸⁵ *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1091 (Ill. 1997). One supporter of such laws also accused that court of entertaining a lawsuit implicating the entire tort restrictionist statute without having plaintiffs who might properly raise all the issues contained in the law. Schwartz & Lorber, *supra* note 216, at 926-27. The criticism is uninformed. The *Best* case also encompassed the *Isbell* lawsuit, which itself was the consolidation of a number of lawsuits simultaneously seeking a declaratory judgment action and implicating all major aspects of the challenged law. *Best*, 689 N.E.2d at 1064-65 (consolidated with *Isbell v. Union Pac. R.R.*). The various plaintiffs had standing, by design, to challenge the restrictionist law's multifarious provision.

⁴⁸⁶ OHIO CONST. art IV, §2(B)(1)(b) & (2).

no reasonably just substitute exist, notwithstanding contrary provisions in Am. Sub. H.B. 350.⁴⁸⁷

Only the supreme court had the proper authority, as the respondent trial judges were within different appellate districts of the state. No other court had supervisory authority over the respondents.

Because a statute enjoys a presumption of constitutionality and trial courts will be torn between the commands of the legislature and those of the supreme court, a definitive ruling was necessary to prevent a train wreck in the state's trial courts. Extraordinary writs, such as writs of mandamus and prohibition, are available to prevent just such a "failure of justice."⁴⁸⁸ In one of its earliest examinations of the availability of these extraordinary writs, a determination that is still good law today as a matter of Ohio constitutional law, the state supreme court held that "it is necessary to recur to the common law, to learn in what cases the writ is properly applicable."⁴⁸⁹ An examination of the common law confirms its appropriateness in *Sheward*.

Mandamus has long been a form by which superior courts have exercised their superintendency of lower courts.⁴⁹⁰ Blackstone advised that mandamus is available to direct an "inferior court . . . to do some particular thing therein specified, which appertains to their office and duty, and which the [superior] court . . . has previously determined . . . to be consonant to right and justice."⁴⁹¹

In fact, the Ohio Supreme Court had previously traced the availability of this judicially devised writ back to the thirteenth century.⁴⁹² It exists pursuant to the Ohio Constitution as it existed under the common law.⁴⁹³ Under the common law, Lord Mansfield taught that mandamus lies "to prevent disorder from a failure of justice" and "ought to be used upon all occasions where the law has established no specific remedy, and where in

487. Complaint, at ¶ 28 (on file with author).

488. *In re Turner*, 5 Ohio 542, 543 (1832).

489. *Id.* at 542; cf. *Glidden Co. v. Zdanok*, 370 U.S. 530, 563 (1962) ("[O]ne touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort 'recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial system.'" (citation omitted)).

490. See, e.g., *Groenvelt v. Burwell*, 91 Eng. Rep. 134, 134 (K.B. 1700); see also 67 OHIO JUR. 3d *Mandamus* §90 (1998) ("The writ of mandamus is one of the recognized modes by which a superior court exercises a superintending control over inferior tribunals.").

491. 3 WILLIAM BLACKSTONE, COMMENTARIES *110.

492. *State ex rel. Moyer v. Baldwin*, 83 N.E. 907, 907 (Ohio 1908).

493. *Id.*

justice and good government there *ought* to be one."⁴⁹⁴ Mansfield's formulation of the writ was adopted in Ohio in 1832.⁴⁹⁵ That age-old approach to mandamus remains consistent with modern Ohio practice.⁴⁹⁶

Blackstone acknowledged that the uses of mandamus are "infinite" and "impossible to recite minutely."⁴⁹⁷ Still, he wrote, "it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed."⁴⁹⁸ He further noted that it is the "peculiar business" of a high court "to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which . . . [they have been invested]."⁴⁹⁹

By appropriately alleging that H.B. 350 transgressed the constitutional assignment of authority between the legislature and the judiciary so as to create a failure of justice for injured persons whose rights to seek redress through the courts had been impaired to such an extent that they could not bring the lawsuits at all, mandamus was properly invoked. H.B. 350's impact in deterring meritorious actions was a constitutional violation that admitted of no other adequate remedy. Mandamus properly lies to prevent inferior tribunals from employing rules of practice that are beyond their authority and jurisdiction to enforce. H.B. 350 attempted to mandate precisely such an unjust and unconstitutional practice, and the writ of mandamus sought attempted to prevent it.

Similarly, a writ of prohibition was properly sought. Prohibition seeks to prevent a tribunal from exercising or usurping jurisdiction not vested by law. Like mandamus, it too is of ancient origin, dating back to the twelfth century.⁵⁰⁰ It is a "remedy for the furtherance of justice to secure proper regulation in proceedings of a judicial character."⁵⁰¹ And it is "calculated to keep inferior tribunals from usurping power with which they have not been invested."⁵⁰²

Blackstone supportively wrote that its primary use was to address the "encroachment of jurisdiction," which included "collateral matter."⁵⁰³

494. *Rex v. Barker*, 97 Eng. Rep. 823, 824-25 (K.B. 1762) (emphasis added).

495. *In re Turner*, 5 Ohio 542, 542-43 (1832) (citing *Rex*, 97 Eng. Rep. at 824).

496. See 67 OHIO JUR. 3d *Mandamus* §3 (1998) (stating that mandamus is available to prevent a "failure of justice").

497. BLACKSTONE, *supra* note 491, at *110.

498. *Id.*

499. *Id.*

500. 63 AM. JUR. 2d *Prohibition* §1 (1997).

501. 67 OHIO JUR. 3d *Mandamus* §5 (1998).

502. *State ex rel. Powhatan Mining Co. v. Blake*, 54 N.E.2d 949, 950 (Ohio 1944).

503. BLACKSTONE, *supra* note 491, at *111-112.

Prohibition, then, was highly appropriate in this challenge, where the relators sought to enforce obedience to rules of practice promulgated by the supreme court rather than any promulgated by the overreaching of the legislature. Trial judges have no authority or discretion to do otherwise. If they were to do so, it would amount to an enlargement of jurisdiction that is without legal authority—precisely what prohibition is available to stop. Its use in *Sheward* was its traditional use: namely, to attack “unauthorized action” by a court.⁵⁰⁴

The Ohio Supreme Court has also been criticized for finding that the relators had standing. The court rejected the contention that standing existed for the two associations, the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO, on the basis of economic loss, even though such standing was well-grounded.⁵⁰⁵ The Academy demonstrated that it had lost members directly as a result of H.B. 350's impact on the legal system and that its members' clients would suffer a cognizable financial loss, if for no other reason than because of the enacted damage caps.⁵⁰⁶ Relator AFL-CIO also alleged financial injury resulting from the impact of H.B. 350 on its health and welfare benefit programs—these programs would be called upon to make up shortfalls that resulted from the unavailability of full compensation

504. See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969).

505. In Ohio, an association has standing if “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Ohio Contractors Ass'n v. Bicking*, 643 N.E.2d 1088, 1089 (Ohio 1994) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). While conceding that the uncontroverted facts supported the relators' claims of financial injury, the court was unwilling to open the doors to attorney standing because “[v]irtually every legislative action is bound to affect at least some attorneys who practice in an area of law related to the subject of the legislation.” *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1084 (Ohio 1999).

506. Undisputed affidavit evidence established these facts. See, e.g., Aff. of Richard Mason, Executive Director, Ohio Academy of Trial Lawyers, Relators' Joint Presentation of Evidence, *Sheward*, at ¶¶ 14-21 (May 17, 1998) (on file with author). In advocating its clients' interests, the Academy asserted a position akin to the one approved in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-55 (1984), which permitted a professional fundraising company to assert the rights of their clients and prospective clients in a constitutional challenge because the company “suffered both threatened and actual injury as a result of the statute.” *Cf. Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (permitting a parochial school to assert the constitutional rights of others because of an adverse financial impact).

through the tort system.⁵⁰⁷ Any small amount of loss is sufficient to supply standing. The U.S. Supreme Court adopted the principle articulated by Professor Davis that "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."⁵⁰⁸ In addition, the Court has recognized that an association has standing to challenge a regulation that expands the universe of competitors to its members and "might entail some future loss of profits."⁵⁰⁹ Ohio has adopted these federal standards.⁵¹⁰

Instead, the Ohio Supreme Court found that the citizen-standing also asserted by the parties was separate and sufficient for standing purposes.⁵¹¹ Ohio law has long held that a taxpayer generally has standing to contest the creation of an illegal public debt, which taxpayers may be compelled to pay.⁵¹² To maintain a taxpayer action, two requirements must be met. First, the funds in question must be derived from some type of taxation.⁵¹³ There can be no question that the trial courts of the state, which are expected to implement the law, are funded through tax funds. In causing some matters to

507. Aff. of William A. Burga, President, Ohio AFL-CIO, Relators' Joint Presentation of Evidence, *Sheward*, at §§7-9.

508. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973) (quoting K. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)); see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (finding standing where the injury was a \$1.50 poll tax); *McGowan v. Maryland*, 366 U.S. 420 (1961) (finding standing where the injury was a \$5.00 fine and costs).

509. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). *Camp* also adopted the "zone of interests" analysis for standing purposes. *Id.* at 153. Clearly, attorneys and their clients are within the zone of interest protected by the state constitution's right to remedy guarantee, which H.B. 350 violated in massive fashion.

510. *Bicking*, 643 N.E.2d at 1089.

511. The complaint included the heads of both relator-organizations as citizen-taxpayer complainants. Complaint, at ¶¶ 11-15 (on file with author). Many states have liberal standing requirements for citizen and taxpayer actions. See, e.g., *Chiles v. Children A, B, C, D, E and F*, 589 So. 2d 260, 263 n.5 (Fla. 1990) (citizens and taxpayers have standing "to challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury."); Tort restrictionist statutes constitute an exercise of the taxing and spending power because of the impact they have on a state's budget. See *supra* notes 125-28 and accompanying text. The rationale for allowing such standing was well-stated by the Florida Supreme Court: "It is the 'ordinary citizen' and taxpayer who is ultimately affected and who is sometimes the only champion of the people." *Department of Administration v. Horne*, 269 So. 2d 659, 663 (Fla. 1972).

512. See *Wash. County Taxpayers Ass'n v. Peppel*, 604 N.E.2d 181, 184 n.3 (Ohio Ct. App. 1992) (citing 88 OHIO JURIS. 3d 69 *Taxpayers Action* §55 (1989)).

513. *State ex rel. Masterson v. Ohio State Racing Comm'n*, 123 N.E.2d 1, 2 (Ohio 1954).

be tried under an illegal set of rules and later likely to be retried after higher court decisions invalidated those improper rules, taxpayers would be forced to fund unnecessary repeated trials of cases. It is also clear that tax dollars will be called upon to provide some of the compensation that would no longer be available through the tort system.⁵¹⁴

Second, taxpayer standing requires that those bringing the challenge must have a special interest in the matter.⁵¹⁵ Such a special interest is evidenced by a showing that the action complained of has affected the relators' pecuniary interests differently than the interests of the general taxpaying public.⁵¹⁶ Because the law had adversely affected the financial well being of both organizations and, in particular, the employee executives of the organizations as individual complainants, the taxpayer-relators had a distinct interest very different from the average taxpayer. Still, what was at stake was a public right, which is the fundamental reason that taxpayer standing exists.⁵¹⁷

The taxpayer relators in *Sheward*, the executive director of the Ohio Academy of Trial Lawyers and the president of the Ohio AFL-CIO, had precisely the kind of special interest required. Each was a real party in interest who would be directly benefited or harmed by the outcome of the case.⁵¹⁸

Even so, the court found standing on a more general basis that comports with traditional common-law principles. Much of the criticism of the court is misplaced because the critics attempt to employ federal "case or controversy"⁵¹⁹ standards in a state court. Repeated decisions of the U.S. Supreme Court acknowledge that such a requirement "has no bearing on the jurisdiction of the [state] courts."⁵²⁰ The Court has stated that state

514. State social insurance programs often must pay various health and welfare costs incurred by indigents. When the money is not forthcoming from the responsible tortfeasors, these programs are often called upon to make up the difference. See *supra* notes 125-28 and accompanying text.

515. *Masterson*, 123 N.E.2d at 4.

516. *Id.*

517. See *State ex rel. Cater v. City of N. Olmsted*, 631 N.E.2d 1048, 1052 (Ohio 1994).

518. See *State ex rel. Massie v. Bd. of Educ. of Gahanna-Jefferson Pub. Sch.*, 669 N.E.2d 839, 841 (Ohio 1996).

519. U.S. CONST. art. III, §2.

520. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 970-71 (1984) (Stevens, J., concurring); see also *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules

judiciaries have a "right" to choose "a different path" from federal standing requirements.⁵²¹ Yet, even the federal approach recognizes that a commitment to certain societally important purposes places one within the particular class protected by a constitutional provision, and that "zone of interest" analysis makes members of the class eligible to bring a case to vindicate those public interests.⁵²² Certainly, trial lawyers, as officers of the court, as persons who file cases protected under the state constitution's guarantee of open courts and remedy by due course of law,⁵²³ and as representatives of his or her clients with detailed responsibilities to that client,⁵²⁴ in the case of trial lawyers, who represent personal injury plaintiffs, the relationship to the tort system and the provisions of the challenged law are obvious and direct, especially because H.B. 350 chilled the constitutionally protected activity of filing a tort lawsuit. The U.S. Supreme Court, applying the more stringent federal standing regime, has recognized that relaxed prudential limitations on standing are appropriate where the exercise of rights are chilled.⁵²⁵ All that is necessary to support such a relaxed approach to standing is that a party is in a position "to assure that concrete adverseness which sharpens the presentation of issues upon

of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.").

⁵²¹ *Munson*, 467 U.S. at 971.

⁵²² See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

⁵²³ OHIO CONST. art. I, §16. The U.S. Supreme Court has recognized that some persons "may have a spiritual stake in [constitutional] values sufficient to give standing to raise issues." *Camp*, 397 U.S. at 154 (citation omitted). While that decision was rendered under the First Amendment, the cognizable interest that can confer standing is not limited to First Amendment interests; all that is necessary is the interest be sufficiently central to render a party "a reliable private attorney general to litigate the issues of the public interest in the present case." *Id.*

⁵²⁴ See OHIO CODE OF PROF'L RESPONSIBILITY Canon 7 (2001), available at <http://www.sconet.state.oh.us/rules/professional>.

⁵²⁵ See *Munson*, 467 U.S. at 956. While the *Munson* Court indicated that such a relaxed approach was most appropriate in the First Amendment context, *id.* at 957, there is no reason why it should be limited to those particular rights. Even so, the filing of a lawsuit is protected as a part of the First Amendment right to petition government for redress of grievances. See *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) ("[M]eaningful access to the courts is a fundamental right within the protection of the First Amendment.").

which the court so largely depends for illumination of difficult constitutional questions."⁵²⁶

Ohio's Supreme Court considers this issue through the prism of the common law.⁵²⁷ A review of the common law finds considerable authority to support the proposition that no standing requirement was interposed on those seeking to bring a public action. There are a "number of notable statements [in opinions of the King's Bench that] expressed the King's general concern for legality, and in the writ of prohibition, at least, there is overt authority for allowing anyone to initiate the proceeding."⁵²⁸

Professor Raoul Berger similarly found that "English practice . . . did not in fact demand injury to a personal interest as a prerequisite to attacks on jurisdictional excesses, and that neither separation of powers nor advisory opinion doctrines as originally envisaged require insistence on a personal stake as the basic element of standing to make such challenges."⁵²⁹ Berger extensively surveyed the courts of Westminster and found no decision requiring a personal stake where public legal obligations were sought to be enforced.⁵³⁰

Similarly, Lord Coke, who defined for Americans the fundamental English rights they sought to engraft into their constitutions,⁵³¹ found that writs of prohibition were available whenever the governing law was abridged, irrespective of the applicant's interest. When the clergy complained to the King about the ease with which writs of prohibition were granted against ecclesiastical courts, an authoritative answer was written by the judges of England in a single voice, and quoted approvingly by Coke:

Prohibitions by law are to be granted at any time to restraints a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary And the kings courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall

526. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

527. *State ex rel. Moyer v. Baldwin*, 83 N.E. 907, 907 (Ohio 1908).

528. Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961).

529. Berger, *supra* note 504, at 817-18 (citation omitted).

530. See *id.* at 819.

531. PRUISSEN, *supra* note 14, at 349 n.16; see also *Pac. Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring).

doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgement and execution, as before.⁵³²

Of particular interest in this regard is a decision of the Queen's Bench issued in the same year in which the Ohio Constitution was ratified, in which the court found "it laid down in books of the highest authority that, where the court to which prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger."⁵³³ Even today, England has no personal injury requirement to maintain an action in prohibition.⁵³⁴

This history recognizes that the vindication of public rights is a value second to none in our legal culture. When the laws governing the courts themselves are lawless, when the legislature acts in a manner that the organic law of the state adopted by constituent act of the people forbids, there must be a way to receive rapid vindication of constitutional requirements. That need is particularly acute when, as with H.B. 350, the constitutional issues may evade judicial review entirely⁵³⁵ because no careful lawyer would put his or her client's case at risk by foregoing compliance with the unconstitutional procedures promulgated by the tort restrictionist law.

The *Sheward* court properly applied these principles, which are consistent with longstanding Ohio law. The court noted that in 1878 it had struck down two statutes that attempted to reconstruct the common pleas districts of the state in a manner the court found would work "the substantial destruction of," constitute "an attempt to overthrow," and otherwise be "subversive of the judicial system established by the constitution,"⁵³⁶ findings that closely tracked the allegations made in *Sheward*. No standing

532. Berger, *supra* note 504, at 819 (emphasis and spelling in original) (quoting 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (1797) (emphasis added)). A similar practice was found in Roman law, where any citizen could "sue for a prohibitory or restitutory interdict for the protection of *res sacrae* and *res publicae*." *Id.* at 819 n.20 (quoting S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 423 (2d ed. 1968)).

533. *Wadsworth v. Queen of Spain*, 17 Q.B. 171, 214 (1851) (emphasis added), cited in Berger, *supra* note 504, at 819 n.22.

534. Berger, *supra* note 504, at 821 (citation omitted). See also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 172 (1992).

535. The possibility that the issues would otherwise evade judicial review is an independent ground for conferring standing. See *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

536. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1082 (Ohio 1999) (citing *In re Assignment of Judges to Hold Dist. Courts*, 34 Ohio St. 431, 436, 438, 439 (1878)).

requirement was interposed by the court to entertain the issues because of their high public importance, even though the issues were presented solely by amici curiae.⁵³⁷

Similar results were found in cases where a voter sought mandamus to declare a county eligible to elect a judge,⁵³⁸ a taxpayer sought mandamus to force bids for the construction of a street railway,⁵³⁹ a citizen and taxpayer sought mandamus to force the governor to fill the vacant office of lieutenant governor,⁵⁴⁰ a citizen and taxpayer sought mandamus to challenge the constitutionality of a statute in order to prevent certain candidates from being listed on the ballot,⁵⁴¹ and a taxpayer sought mandamus to enforce a city charter's removal provisions.⁵⁴² These cases, stretching from 1882 to 1994, all support the proposition that

[w]here a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been steadily adhered to by this court over the years.⁵⁴³

Applying this venerable common-law principle, the *Sheward* court appropriately concluded that "the issues sought to be litigated in this case are of such a high order of public concern as to justify allowing this action as a public action,"⁵⁴⁴ and thereby allowed the case to proceed as a citizen lawsuit. Indeed, the proper operation of the civil justice system so that complainants may seek redress for injuries is a *first duty* of the highest constitutional order.⁵⁴⁵ There was no departure from established precedent.

VI. CONCLUSION

Tort restrictionist laws, like H.B. 350, constitute a severe transgression on the constitutional separation of powers. It amounts to nothing less than an

537. *Id.*

538. *State v. Brown*, 38 Ohio St. 344, 344 (1882).

539. *State ex rel. Meyer v. Henderson*, 38 Ohio St. 644, 644-45 (1883).

540. *State ex rel. Trauger v. Nash*, 64 N.E. 558, 558 (Ohio 1902).

541. *State ex rel. Newell v. Brown*, 122 N.E.2d 105, 107-08 (Ohio 1954).

542. *State ex rel. Cater v. North Olmsted*, 631 N.E.2d 1048, 1054-55 (Ohio 1994).

543. *Brown*, 122 N.E.2d at 107.

544. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1084 (Ohio 1999).

545. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

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attempt by the legislature to place itself in the seats of the state supreme court, on the trial bench, and in the jury box simultaneously. It is a palpable exercise of judicial power that is inconsistent with the constitutional scheme that distributes government powers among three separate and distinct branches and prevents justice from becoming the spoils of a political victory in the other branches. Without doubt, tort restrictionism of the variety perpetrated by H.B. 350 and similar laws improperly invades the courts' exclusive authority, undermines their independence, and revisits the jury's verdicts without benefit of the evidence or the determinations of credibility that cause us to celebrate the jury system. They cannot stand.

September 30, 2003

The Honorable Steve Chabot
United States House of Representatives
129 Cannon House Office Building
Washington, DC 20515-3501

The Honorable Jerrold Nadler
United States House of Representatives
2334 Rayburn House Office Building
Washington, DC 20515-3208

Dear Representatives Chabot and Nadler:

To supplement my testimony at Tuesday, September 23rd's hearing on Possible Congressional Responses to *State Farm v. Campbell*, I am enclosing several items. During the hearing, questions came up about several issues that time did not fully allow an answer. I provide this material now to assist the committee and ask that it, along with this letter, be added to the record.

Chairman Chabot, for example, raised a question about Justice Ginsburg's seeming endorsement of caps in her *Campbell* dissent and why that didn't amount to support for legislation. As I responded at that time, Justice Ginsburg was speaking solely of possible state legislative authority, not federal. In that dissent, Justice Ginsburg stated that she continues to "adhere" to her previously stated view that punitive damages reside in a "'territory traditionally within the States' domain.'" 123 S.Ct. 1527 (Ginsburg, J., dissenting) (citation omitted). In suggesting that damage cap legislation may be "fitting and proper," Justice Ginsburg states that "[n]either the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers." *Id.* (emphasis added). She also endorses Justice Kennedy's observation in the *Haslip* case that "the laws of the particular State must suffice [to superintend punitive damages awards] until judges or legislators authorized to do so initiate system-wide change." *Id.* (brackets in original), quoting *Haslip*, 499 U.S., at 42, (Kennedy, J., concurring). The bottom line is that Justice Ginsburg saw no appropriate federal role in regulating punitive damages, but opined that there was a state role.

On a related issue, Representative Feeney asked why the Supreme Court could impose due-process limitations on punitive damages, but that the Congress may not. Time did not permit a full answer to this aspect of Representative Feeney's multi-part question. In *Campbell*, the Supreme Court said that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." 123 S.Ct. at 1524. That indicates that it is a judicial function to assess whether the evidence and record in an individual case supports the punitive damage award. That determination, compliance with substantive due process, cannot be prejudged and thus cannot be legislated. It is instead an inherent judicial function that is part of the fair administration of justice. It is emphatically not a legislative function, which cannot - without functioning as a superjudiciary - be discharged by a one-size-fits-all formula. Enclosed is a law review article, *Tort Reform's Threat to an Independent Judiciary*, 33 Rutgers L.J. 835 (2002), that describes the separation of powers problem that occurs when Congress or a legislature intrudes into this realm reserved to the judiciary.

In his testimony, Professor Owen endorsed having judges, rather than juries, make punitive damage assessments. Such a federal enactment would violate the same federalism principles I outlined in my testimony without producing measurably different results. The empirical research described in that testimony demonstrates that judges and juries reach the same conclusions on the amount of punitive damages to be assessed, a fact

further evidence by the Utah Supreme Court's decision in Campbell, where after undertaking a de novo review of the evidence, the Court reinstated the full \$145 million verdict, though they had the authority to reach their own conclusion on the amount. An additional flaw in his analysis is that such an enactment would also run afoul of the Seventh Amendment, which the U.S. Supreme Court stated in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 439 n.12 (2001) still preserves an inviolate role for the jury in making findings with respect to punitive damages. The role authorized for judges in cases in which a jury was demanded is a reviewing role.

Finally, Representative King raised some issues about frivolous lawsuits and unnecessary incentives for cases to be brought. My co-witness, Mr. Schwartz, indicated that he would provide the Subcommittee, for the record, information based on the Tillinghast study of the tort system. Because that study improperly attributes costs to the tort system that are part of the insurance system, such as payments for hurricane damage, bonuses and overhead for insurance companies, and the like, I enclose a law review article that analyzes the multiple flaws in the Tillinghast analysis: Tort Reform 1999: A Building Without a Foundation, 27 Fla. St. L. Rev. 397 (2000).

I appreciated the opportunity to address the Subcommittee and to provide these additional materials. I stand ready to be of further assistance, as the Subcommittee pleases.

Sincerely,

Robert S. Peck
President

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CENTER FOR CONSTITUTIONAL LITIGATION, P.C.

Tax bill wipes out officer's award in suit

By Adam Liptak
New York Times News Service

A police officer in Chicago who won a sex discrimination and harassment lawsuit against her employer may face a tax bill larger than her award.

Under federal tax laws, she is responsible for paying taxes on a \$300,000 award and almost \$1 million in lawyers' fees and costs.

"She loses every penny of the award," said her lawyer, Monica McFadden, "plus she will end up owing the Internal Revenue Service \$90,000."

The result is a consequence of amendments to the federal tax laws in 1996 that made awards for some non-physical injuries taxable. In many states, including Illinois, lawyers' fees are considered to belong to plaintiffs, so the award and the fees are taxable.

"Prior to 1996, the awards in civil rights cases were not taxable at all," said Laura Sager, a law professor at New York University, who said the plaintiff's problem was an increasingly common one. "Since then, the main category of cases that have been affected are employment discrimination cases and civil rights cases generally. It has been a disaster."

Last December, Officer Cynthia C. Spina was awarded \$3 million by a federal jury in Chicago in her lawsuit against the Forest Preserve District of Cook County, her employer. It was \$1 million more than she had requested. Spina said she had been berated, belittled and isolated because of her sex. Her colleagues and superiors, she said, put pornography in her mailbox, spread sexual rumors about her and slashed her tires. The harassment continued for eight years.

In May, Magistrate Judge Arlander Keys gave Spina a choice between a new trial and a reduced award of \$300,000, because he said the jury award was excessive. In justifying even the smaller award, Keys said the defendants' conduct was

"reprehensible" and that he did not know of another case in which a plaintiff "has endured such continuous harassment at the hands of so many different officers and superiors for such an extended period of time."

A lawyer for the defendants did not return a telephone call.

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S.L.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To exclude certain punitive damages received by
the taxpayer from gross income.

IN THE SENATE OF THE UNITED STATES—108th Cong., 1st Sess.

S. _____

A bill to provide for reconciliation pursuant to section 201
of the concurrent resolution on the budget for fiscal
year 2004.Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. HATCH

Viz:

1 At the end of subtitle C of title V, add the following:

2 SEC. ____ EXCLUSION OF CERTAIN PUNITIVE DAMAGE

3 AWARDS.

4 (a) IN GENERAL.—Section 104 (relating to com-
5 pensation for injuries or sickness) is amended by redesi-
6 nating subsection (d) as subsection (e), and by inserting
7 after subsection (c) the following new subsection:8 “(d) EXCLUSION OF PUNITIVE DAMAGES PAID TO A
9 STATE UNDER A SPLIT-AWARD STATUTE.—

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S.L.C.

2

1 “(1) IN GENERAL.—The phrase ‘(other than
2 punitive damages)’ in subsection (a) shall not apply
3 to—

4 “(A) any portion of an award of punitive
5 damages in a civil action which is paid to a
6 State under a split-award statute, or

7 “(B) any attorneys’ fees or other costs in-
8 curred by the taxpayer in connection with ob-
9 taining an award of punitive damages to which
10 subparagraph (A) is applicable.

11 “(2) SPLIT-AWARD STATUTE.—For purposes of
12 this subsection, the term ‘split-award statute’ means
13 a State law that requires a fixed portion of an award
14 of punitive damages in a civil action to be paid to
15 the State.”.

16 (b) EFFECTIVE DATE.—The amendment made by
17 this section shall apply to awards made in taxable years
18 ending after the date of the enactment of this Act.

The Salt Lake Tribune

WEDNESDAY August 13, 2003

Talk of the Morning, Victory in State Farm case could cost plaintiff dearly

By Elizabeth Neff
The Salt Lake Tribune

It's hard to believe Inez Campbell could be left owing after winning millions in a court case that exposed bad business practices at State Farm insurance.

At the end of the lawsuit she filed with her late husband, jurors awarded the Lewiston couple \$2.6 million in compensatory damages and ordered State Farm to pay \$145 million in punitive damages.

The U.S. Supreme Court has told Utah's justices to reduce the punitive amount. But no matter what number they decide on, Campbell's attorneys say, applying a little-known state law would leave her in the red.

Known nationwide for uncovering a scheme to pay policyholders less than their claims were worth, the long-running case now stands to test whether Utah can bite off chunks of punitive damage awards to fatten an increasingly slim general fund.

A law that took effect in 1989 entitles the state to half of punitive damages awards above \$20,000, minus a deduction for attorneys' fees and costs. The problem, says attorney Rich Humpherys, is that recipients are stuck paying federal and state taxes on the entire amount, including what they are awarded for attorneys' fees.

Combine that with a contingency fee of 40 percent to be split among different firms and, Humpherys says, Campbell would owe money. He has argued the state can't apply the law retroactively in the Campbell case.

"To take the money in a way that leaves the injured party worse off than when he or she began is wrong," he said.

Although the law has been on the books for well over a decade, it sat largely ignored until last year. That is when the Legislature passed an amendment to the law introduced by Sen. Lyle Hillyard, R-Logan, requiring the courts to notify the Treasurer's Office whenever punitive damages are awarded.

Since then, the Treasurer's Office has sent demand letters in 12 cases and has identified another 12 in which money is due, said Treasurer Ed Alder. Although punitive damage judgments are a rare occurrence, the cases represent hundreds of thousands of dollars the state stands to collect, Alder said.

With Humpherys fighting any collection by the state, the Campbell case is poised to test the statute. No Utah appeals court has ever considered it.

"Once we get this all worked through, then we think in the future not only the courts but the attorneys will start to understand what it is and how it works. But right now we've had to go back and send demand letters in every case," Alder said. "It's like pulling teeth."

The Attorney General's Office says it has made only one collection. That came in 2001 when a jury ordered Thiokol Corp. to pay \$5 million in punitive damages to a cattle company that accused it of poisoning its cattle and grazing lands in Box Elder County.

Attorney Greg Sanders, who represented Connor Cattle, said after the verdict that the parties entered into negotiations and the case and other similar cases were rolled into one confidential settlement that did not include punitive damages.

Rather than fight the matter in court, Sanders says, his client paid the state \$90,000. He calls the statute a "shakedown."

"You've taken the risk, invested the cost upfront, and the state does nothing but have their hat out," he said. "One of the reasons I think they took \$90,000 is that it's to their advantage to keep the law ambiguous until they get Campbell going. I think they all became interested because of the Campbell case."

Assistant Attorney General Division Chief Bill Evans says his department has not taken a final position on the Campbell case, but that the state has an interest.

"We are players now," he said. "We have a statutory interest that we have a duty to pursue."

Utah is one of nine states that take a portion of punitive damages awards in some or all cases, but one of only two that earmark the awards for a general fund rather than victims' compensation or other issue-specific funds. Of those state courts that have considered the statutes, only the Colorado Supreme Court has said they are unconstitutional as a taking of property without just compensation. In June, the Indiana Supreme Court upheld a statute that takes 75 percent of punitive damage awards to put into the state's compensation fund for victims of violent crime.

Like proponents of such laws, the justices reasoned that because the Legislature created punitive damages -- which are by nature aimed at punishing the wrongdoer and discouraging similar conduct rather than compensating the plaintiff -- the Legislature can also take them.

Humpherys argues Campbell is not subject to the law because the claim that led to the case occurred before the law took effect. But barring that, his efforts to get legislators to modify the Utah statute have failed, and efforts to change federal tax laws have not yet yielded any change.

Although Hillyard, the law's original sponsor, expresses sympathy for any unfair tax consequence, Humpherys says lawmakers have made it clear Campbell must agree to pay up before the law could be amended.

"If my clients -- who don't owe the money -- agree to pay the money, then they will amend the statutes," he said.

In a letter to Humpherys, Sen. John Valentine, R-Orem, says he was unsuccessful in trying for an amendment.

"Unfortunately, the politics made it impossible to divorce good policy choices from the specific recovery in Campbell," he wrote. "My interest is correcting an inequity that may occur if a party is taxed on 100 percent of their recovery, but only receives 50 percent of it."

Valentine was not available for comment.

Utah's Supreme Court will hear arguments in October on the final amount of punitive damages State Farm should pay. The insurer, citing guideline ratios established by the U.S. justices, says it should pay \$1 million. Attorneys for the Campbells argue the justices should instead award at least \$17.4 million.

The Campbells began their legal battle against State Farm in 1986 after the company refused

to settle a claim brought against the late Curtis Campbell over a fatal car accident. A jury found Campbell at fault in the accident, which killed 19-year-old Todd Ospital and permanently disabled Indiana motorist Robert Slusher, 26. He was ordered to pay the victims more than his policy limit.

Curtis Campbell died in 2001 at age 83.

The Campbells agreed to split their share of an award with Ospital's parents and Slusher.

Humpherys says a solution still can be found that will spare Inez Campbell from owing money in the end.

"We believe that justice will ultimately triumph," he said.

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