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ON THE NECESSITY OF PRESERVING ACCESS TO STATE COURTS AND CIVIL JUSTICE: REDISCOVERING FEDERALISM & DEBUNKING "FRAUDULENT" JOINDER

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I. State Tort Law Reflects Fundamental Values and Protects Vital Interests

With nothing less than the survival of the civil justice system hanging in the balance, tort reformers and tort law defenders have been locked in a conflict that spans the last four decades.[2] Courts and legislatures at every level (federal, state, and local) are besieged by those who seek to limit or eliminate tort liability, limit or eliminate accountability for personal injury, and limit or

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[2] *See* Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445 (2016); Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543 (2014); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004); F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437 (2006); Gary R. Smith, *The Future of Tort Reform: Reforming the Remedy, Re-Balancing the Scales*, 53 EMORY L.J. 1219, 1221 (2004) (articulating the "first of several waves of federal and state tort reform efforts [in the 1960s and 1970s]" and the subsequent "waves of tort reform campaigns in the 1970's, 1980's, and 1990's, and in this first decade of the twenty-first century."); Conference, *Justice and Democracy Forum: The Law and Politics of Tort Reform*, 4 NEV. L.J. 377 (2003).

eliminate the capacity of those wronged by misconduct of every type to have access to courts, juries, and justice.[3] Defenders of the civil justice system,[4] a loosely coalesced amalgam of consumer groups, attorneys, and academics, devote themselves to protecting that same system.[5]

Those seeking the spoils of the tort reform wars (caps on punitive damages and non-economic loss, elimination of the capacity to pursue class actions at the state level, limitations on the use of evidence, elimination of strict liability, joint and several liability, and much, much more) would not only disagree with the above assessment, they would be offended.[6] Tort reformers see theirs as a mission of essential change, reform, a quest for modernization of an outdated system that misallocates resources, suppresses innovation, weakens the U.S. economy and the U.S. position in international commerce, destroys jobs, and unduly privileges a very small number of consumers and their lawyers.[7]

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[3] *See* Bernstein, *The 2x2 Matrix of Tort Reform's Distributions*, 60 DEPAUL L. REV. 273 (2011); 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 (2000) (describing the use of public relations campaigns by reformers to alter the public's perception of "what is perceived as an injury; whether and whom to blame for an injury; what to do about it; and even how to respond to what others (especially plaintiffs and their lawyers) do with regard to naming and blaming.").

[4] *See* Sandra F. Gavin, *Stealth Tort Reform*, 42 Val. U.L. Rev. 431 (2008); Ralph Nader, *Suing for Justice: Your lawsuits are good for America*, HARPER'S MAG. (April 2016), http://harpers.org/archive/2016/04/suing-for-justice/?single=1(quoting Roscoe Pound, then Dean of the Harvard Law School, remarking that "law must be stable and yet it cannot stand still").

[5] Edward J. Kionka, *Things To Do (or Not) To Address The Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469, 474 (2006) ("[T]ort reform has been on the American political agenda for decades."); *About AFJ*, ALLIANCE FOR JUSTICE, http://www.afj.org/about-afj(last visited Jan. 22, 2017); *About the Center for Justice and Democracy*, CTR. FOR JUST. & DEMOCRACY AT NEW YORK L. SCH., http://www.centerjd.org/about_us (last visited Jan. 22, 2017); *About*, CONSUMER WATCHDOG, http://www.consumerwatchdog.org/about (last visited Jan. 22, 2017); *About*, MEDIA MATTERS FOR AMERICA, http://mediamatters.org/about (last visited Jan. 22, 2017); RALPH NADER, https://nader.org/ (last visited Jan. 22, 2017); *Who We Are*, PUBLIC JUSTICE, http://www.publicjustice.net/who-we-are/(last visited Jan. 22, 2017).

[6] KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008); Mark Geistfeld, *Legal Ambiguity, Liability, Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539 (2011); Stephen D. Sugarman, *Compensation for Accidental Personal Injury: What Nations Might Learn From Each Other*, 38 PEPP. L. REV. 597 (2011); *About*, AMERICAN TORT REFORM ASSOCIATION, http://www.atra.org/about/mission/ (last visited Jan. 22, 2017) (stating that "[t]oday America's $246 billion civil justice system is the most expensive in the industrialized world," and ATRA operates "by challenging th[e] status quo and continually leading the fight for common-sense reforms in the states, the Congress, and the court of public opinion.").

[7] The Hon. Stanley Feldman, *Panel One: State Attorney General Litigation: Regulation through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 666, 670 (2001) ("I knew a lot of plaintiffs' lawyers. Many were greedy, but this is

Defenders of the civil justice system assess things quite differently. From their perspective, while the civil justice system is not perfect, it is remarkably fair, constitutionally sound, and vitally important to the dual goals of safety and efficiency for all goods and services.[8] At its best, it provides an even playing field where a person of limited or no means fairly and justly can confront interests – corporations, other entities, and individuals – of great means.[9] As such, tort law substantively and access to justice procedurally, must be guarded and supported, not attacked.[10]

America. . . . I would submit that deterrence is a public good and that the greed of plaintiffs' lawyers, in many cases, does produce something valuable for the public."); Victor E. Schwartz et. al, *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757 (2009); Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK L. REV. 1003 (1999); *About*, JUDICIAL HELLHOLES, http://www.judicialhellholes.org/about/ (last visited Jan. 22, 2017) (describing itself as "bringing greater fairness, predictability and efficiency to the civil justice system"); *see generally* James A. Comodeca et al., *Killing the Golden Goose by Evaluating Medical Care Through the Retroscope: Tort Reform from the Defense Perspective*, 31 U. DAYTON L. REV. 207, 212 (2006).

[8] *Bristol Myers Squibb Co. v. Superior Court of S.F. Cty.*, 1 Cal. 5th 783, (Cal. 2016) (finding that one court ". . . hearing the claims of hundreds of plaintiffs is a significant burden on that court. But the overall savings of time and effort . . . far outweigh the burdens placed on the individual forum court. The alternative . . . would result in the duplication of suits in in [sic] numerous state or federal jurisdictions at substantial costs to both the judicial system and to the parties. . . ."); Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475 (2002) (commenting that any advantages to a tort reform swing may include greater uniformity and predictability of application of tort law; however, come at the expense of principles of federalism); Andrew F. Popper, *A One-term Tort Reform Tale: Victimizing the Vulnerable*, 35 HARV. J. ON LEGIS.. 123, 125-28 (1998).

[9] Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 12 (1984) (promoting the idea that "[o]ur judicial federalism is, by its very nature, a flexible and dynamic accommodation of the sometimes conflicting interests of the state and federal courts"); Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 549 (2014) (considering the historic rise of tort reform as three separate epochs: the 1970s, the 1980s and the early 2000s).

[10] *See* Frank M. McClellan, The Dark Side of Tort Reform: Searching for Racial Justice, 48 RUTGERS L. REV. 761, 791 (1996) (coining the phrase "dark side of tort reform"); *See generally* Steven Cohen, *On Tort Reform, It's Time to Declare Victory and Withdraw*, http://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw/ -753fe22917dc (last visited Jan. 22, 2017) (advocating that "tort reformer's success has had one unintended consequence that hurts everyone: they have slowed down progress in patient safety initiatives").

As in any prolonged conflict, the mode of attack shifts over time.[11] Once success is achieved in one domain by one side of a conflict (e.g., in a number of states, the elimination of strict liability or limitations on punitive damages), the substantive focus moves to other aspects of the field.[12] Current targets of tort reform are the very nature of legal process including class actions,[13] and the roles of state courts[14] and federal agencies.[15] Of these three areas, the effort to minimize the essential and constitutionally driven role of state courts, a topic central to this article, surfaces in the

[11] *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 470-71 (2006) (articulating the changing dimensions of the tort reform movement, from the ad hoc calls to address liability insurance and medical malpractice liability premium "cris[es,]" of the 1970s to the long-term institutionalized reform efforts of the 1980s and 1990s); John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1029-35 (2005) (describing several waves of tort reform, each "marked by one or more private sector industries blaming common law tort liability and litigiousness for a crisis-level rise in . . . financially deleterious occurrences").

[12] *See* Nockleby & Curreri, *supra* note 10, at 1023-25 (addressing the different substantive focuses of tort reform and situating the movement within a broader political context to trace the reasoning behind each focus); Michael Zang, *Current Trends in Tort Reform and Pharmaceuticals Manufacturers' Liability: Michigan's Combination Product Exception*, THE COLUM. SCI. & TECHN. L. REV. (last visited Jan. 9, 2017) (identifying limitations on pharmaceutical liability as a substantive focus of the tort reform movement during the early-mid-2000s).

[13] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y.TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 ("Some state judges have called the class-action bans a 'get out of jail free' card, because it is nearly impossible for one individual to take on a corporation with vast resources.…By banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination, court records show.").

[14] THE FRAUDULENT JOINDER PREVENTION ACT OF 2016, H.R. REP. NO. 114-422 (2016).

[15] *See* Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law-Defamation, Preemption, and Punitive Damages,* 74 U. CIN. L. REV. 1189, 1210, 1256 (2006) (acknowledging the Supreme Court's role in tort reform and arguing that constitutional hurdles imposed by its decisions "constitute a significant intrusion on a state's ability to define, articulate, and apply its own tort law"); Nockleby & Curreri, *supra* note 11, at 1021 (arguing that "the self-styled tort 'reform' movement . . . [aims to] transfor[m] the cultural understanding of civil litigation . . . by attacking the system itself"); Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA,* 41 LOY. L.A. L. REV. 965, 968-69 (2008) (asserting that because state court judges and juries "tend to be more plaintiff friendly[,]" tort reformers target efforts at keeping certain class action suits out of state courts); *see generally* Josh Siegel, *Conservatives' New Strategy to Curb the Executive Branch, Administrative Power*, THE DAILY SIGNAL, (Mar. 16, 2016), http://dailysignal.com/2016/03/28/conservatives-new-strategy-to-curb-the-executive-branch-administrative-power/ (quoting Alan Morrison, a George Washington University law professor, on the dangers of allowing courts to "pla[y] too heavy-handed of a role in the lawmaking process" because of the difficulties in holding judges accountable for their decisions).

Fraudulent Joinder Prevention Act of 2016.[16] The House report on this bill makes clear the purpose of the drafters – and also reveals a troubling and false characterization of attorneys in this field: "The current law . . . allows trial lawyers to keep their cases in state court [and defeat a motion to remove to federal court] . . .so as long as they also sue a local [in-state] defendant . . . . [T]his body of law has been abused by trial lawyers who fraudulently [join] local defendants, even though . . . those defendants have little or no support in fact or law. . . ."[17] Insulting, prejudicial legislative pronouncements of this nature add nothing to the debate and demonstrate the determination of tort reformers to force litigation into federal court thus limiting or eliminating the critical role of state courts, local judges, and local juries.

Rather than invite a discourse that might actually illuminate the issues in the field, those supporting tort reform rely on inflammatory verbiage characterizing defendants sued as innocent "hostages" or victims rather than acknowledging that those parties may, in fact, be responsible for the harm the plaintiff sustained.[18] While this is speculation, it is just a matter of time before this one-sided legislative proposal is referred to as the "Innocent Victims Act" or words to that effect.[19]

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[16] THE FRAUDULENT JOINDER PREVENTION ACT OF 2016, *supra* note 13.

[17] THE FRAUDULENT JOINDER PREVENTION ACT OF 2016, *supra* note 13.at pt. 2.

[18] The discourse on this topic becomes remarkably counterproductive when named defendants are depicted as innocent "hostages" held against their will by allegedly unscrupulous plaintiffs. Kelly Klass, *Small Business Cheers Bill to Prevent Court Shopping*, NFIB (Feb. 25, 2016), http://www.nfib.com/content/press-release/legal/small-business-cheers-bill-to-prevent-court-shopping-73107/; Michael K. Brown, *The Rule of Fraudulent Joinder – A Weapon in the Fight for Federal Court Jurisdiction*, REED SMITH (Dec. 2001), https://www.reedsmith.com/The-Rule-of-Fraudulent-Joinder--A-Weapon-in-the-Fight-for-Federal-Court-Jurisdiction-12-01-2001/.

[19] As this paper was going forward with editing, a modified Fraudulent Joinder bill was introduced by Congressman Buck as a proposed amendment to Title 28. The Innocent Party Protection Act, H.R. 725, 115th Cong., (1st Sess., 2017).

While the tort reform dispute has transformed,[20] the core goals have not: this fight is now and always has been about access to justice, accountability, and the potential to deter future misconduct.[21] Victims of negligence and other forms of misconduct – the plaintiff community – see tort reform initiatives as unfair and ill-advised substantive limits on damages, unfair and dangerous changes in legal process, unwise limits on who can bear liability, and ill-advised constraints on the rules of evidence and procedure. In short, tort reform has come to mean the broad-based imposition of a growing number of pernicious, powerful, and comprehensive obstacles to civil justice.

Those pursuing tort reform – entities from manufacturing, retailing, healthcare (pharmaceuticals, medical providers, hospitals, health insurance), those providing professional services (legal, architectural, medical, engineering, and more), and even members of the media seeking to be relieved of the reach of defamation law – seek gross limits on liability, changes in legal process, and certainty in terms of liability exposure. They share the hope that they can know in

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[20] *See* Steven M. Sellers, *Trump on Tort Reform? Where Business, Populist Interests Clash*, BLOOMBERG BNA (Nov. 10, 2016), https://www.bna.com/trump-tort-reform-n57982082664/ (discussing the potential trajectories of tort reform under President-elect Donald Trump); Casey C. Sullivan, *What Could Tort Reform Mean for You?*, FINDLAW: STRATEGIST, FINDLAW (Dec. 1, 2016), http://blogs.findlaw.com/strategist/2016/12/what-could-tort-reform-mean-for-you.html (believing that Trump's victory creates "one of [the] most favorable political climates" that tort reform advocates have seen in some time).

[21] F. Patrick Hubbard, *The Nature and Impact of the Tort Reform Movement*, 35 HOFSTRA L. REV. 437, 475-76 (2006) ("Given the deterrent goal of tort law, the tort system is inherently a scheme designed to regulate by deterring wrongful conduct. . . stopping regulation through litigation would be a revolutionary abandonment of the basic deterrent goal of torts."); *Spotlight: How Does Tort Reform Violate Conservative Principles?*, CTR. FOR JUST.& DEMOCRACY AT NEW YORK L. SCH. (Sep. 16, 2015), https://centerjd.org/content/spotlight-how-does-tort-reform-violate-conservative-principles ("'Tort reform' interferes with the right to a civil jury trial . . . [i]t relieves wrongdoers of personal responsibility to pay for injuries they cause, shifting costs onto taxpayers . . . [a]nd it regulates a free-market approach for holding negligent companies and other wrongdoers accountable for the deaths and injuries they cause."); *See also Squibb Co.*, 1 Cal. 5th at 812 (arguing that allowing plaintiffs to coordinate their cases in instances of mass tort injuries is essential because of the "special problems for the proper functioning of the courts and the fair, efficient, and speedy administration of justice" that such claims pose).

advance their potential liability so that they can pass along those costs to consumers, breeding into the price of the products they sell and services they provide the full expanse of tort liability.

Those fighting tort reform understand the hazard of providing the precise means to determine liability exposure in advance; to do so would eliminate, in large part, one critical force driving the tort system – deterrence of misconduct.

The fight for a vibrant and potent tort system has rumbled along for decades. It is a struggle for the survival of a grand and historic system of civil justice. This is a fight worth fighting.

II. The U.S. System of Civil Justice Should Be Celebrated, Not Vilified

The last four decades have witnessed an ever-changing and nearly continuous challenge to the most accessible of legal fora, the state courts. One is hard-pressed to see how these attacks on the civil justice system even vaguely constitute reform. For those injured by a defective product or misconduct that gives rise to an actionable state tort claim, one would think "reform" would include facilitating, not limiting or barring claims,[22] access to state courts where in-state judges[23] can oversee a fair and impartial process and where one has a right to be judged by a jury of their peers.

This is about the system of civil justice, with origins in the most fundamental of rights—the right to be free from violence, torment and torture, to possess and hold personal and real property, the right not to be confined without basis, the right to be free from the damaging, dangerous

[22] McClellan, *supra* note 9 and accompanying text.

[23] The critical role of state tort law was recently reaffirmed by the California Supreme Court: "California has a strong interest in protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." *Squibb Co.*, 1 Cal. 5th at 810 (citing *Asahi Metal Industry Co., Ltd. v. Superior Court*, 702 P.2d 543, 553 (1985)).

irresponsible acts of others.[24] If that list is familiar, it is because those are the five ancient trespassory torts as well as trespass on the case or negligence—and the roots go back, and back, and back. They are the bedrock of tort law.[25]

Left to others are the deeper reasons why we have spent 40 years fighting to maintain the system that preserves these rights. Likewise left to others is an attempt to explain just why attacks on this most fundamental aspect of civil justice are an important plank in political platforms for the last six presidential races.[26] Instead, the premise for this work is more straightforward: Tort law generates far-reaching and positive market effects beyond victim compensation and recovery.

III. Deterrence Matters

Civil judgments, settlements, the potential for litigation—the tort system itself—has a beneficial effect on the behavior of those who are the subject of legal action as well as others in the same or similar lines of commerce. In short, the system of tort law is an engine of deterrence. The actual or potential imposition of civil tort liability changes the behavior of others.[27]

This is not a fanciful field dealing with esoteric interests. Tort law involves the hard business of loss, of life and death, fairness, justice, economic common sense and economic survival, competition in increasingly globalized markets, and accountability—no small task.[28] This system is

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[24] Jonathan Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 560-61 (2005) (exploring the historic origins and constitutional foundations of a right to a redress of wrongs through the tort system).

[25] Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1568 (2009) (noting the "important role tort law continues to play in providing private rights for the redress of private wrongs. . . .").

[26] Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 439 (2015) (tort reform emerges as a central theme in the republican party platform starting in the 1990s); Gary R. Smith, *The Future of Tort Reform: Reforming the Remedy, Re-Balancing the Scales*, 53 EMORY L. J. 1219, 1221 (2004) (describing the ebb and flow of tort reform initiatives over the decades).

[27] Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183, 186-87 (2012).

[28] Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019 (2001); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

about the promise of justice—and for victims, the potent and oft expressed hope that the tort system will be the vehicle that prevents repetition of their tragedy.[29] Families and victims do not want their tragedy to be a loss in vain.[30] Tort law is their hope. Individuals and entities brought to justice establish models for future actions producing positive incentives that lessen the probability that others will suffer the same harm they experienced. That is the reality of deterrence.[31]

To deny this effect is to deny the collective reality of the human experience.[32] Frankly, it is hard to conceive of a healthy economic model where rational actors ignore clear warning signs and thus render themselves vulnerable to sanctions or punishment.

To argue that the prospect of civil liability has little or no effect on future behavior collides with a common understanding of how we react to the potential of punishment.[33] The presumptive operating assumption of courts is not just that they will be there to provide a neutral accounting-like function to compensate an injured party, but that they will be sending a message heard clearly by those engaged in similar market practices. To think otherwise is to undervalue the obvious and deny the common human experience.[34]

Although the goal of "making a plaintiff whole" is essential and laudable, the simple fact is that money is not the only goal. Money approximates loss and covers expenses; money alters financial possibilities and provides remedial potential—but justice requires more: the avoidance of

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[29] Michael C. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433 (2011).
[30] John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010).
[31] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 10 (1987) (tort cases deter misconduct even in the presence of liability insurance),.
[32] Popper, *supra* note 26.
[33] John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U.L. REV. 43, 44-48 (2011).
[34] C.B. FERSTER & B.F. SKINNER, SCHEDULES OF REINFORCEMENT 7-11 (Julie S. Vargas ed., 1957).

similar harms, or deterrence—the best side of our collective sense of justice and fairness will be preserved.[35] That is the tort system.

Tort law—civil justice—walks with us.[36] Tort law follows our families, sits quietly in the school dining room, and hovers over the workplace. Tort law joins you as you click on your seatbelt in your car or apply the brakes. Tort law is the unmasked presence in the operating room and pharmacy. Tort law is among the authors of increasingly thorough informed consent statements that provides an understanding of treatment to be administered and options to treatment. Tort law lives in appliances and bicycles, hand tools and the endless variations of machinery that shape our lives. Tort law presses toward truth—and tolerates errors and certain mistruths, facilitating free speech. Tort law warns and sanctions those who would steal ideas and innovation or otherwise corrupt the marketplace. Tort law fights the battle for clean air and water and safe food. Tort law urges competency in medicine and an array of learned professions. To insult this field, to pretend it is about greedy lawyers and clients who set out to extract undeserved riches, is outrageous.[37] This is a field of consequence. It is played out in the state courts—and that is where it belongs.

Limiting tort liability will not improve justice and will dilute or destroy critical forces that push the providers of all goods and services to find safer, more efficient, and more competitive products and processes. In fact, it will do the opposite.

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[35] Gardner, *supra* note 32 at 62.

[36] John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 437 (2016) ("It is not surprising that the Supreme Court has found its way back into tort law. Tort law is not simply a local, small-stakes dispute resolution system for injured plaintiffs. Like criminal law and constitutional law, tort law is central in the operation of our legal system.").

[37] Feldman, *supra* note 6 and accompanying text.

In those areas where so-called tort reforms have been implemented, they have stripped deserving persons of their right to justice and remedy and also "had [many] unintended consequence[s]."[38] Tort reform, and especially caps on damages, has reduced "the ability of the most severely injured claimants to get representation. [T]hese provisions inhibit the ideals of access to justice and equality before the law that are fundamental principles of justice."[39]

IV. State Courts Are the Proper Venue for Tort Cases

Federalism, the allocation of power that makes Congress responsible for those functions enumerated in the Constitution and those activities in interstate commerce but leaves the matter of the police powers (the health, safety, and welfare of citizens) to the states, is under attack. History and precedent affirm the virtue of state courts to protect citizens, evolve new standards, and achieve just and fair resolution of claims.[40] This is by design, predicated on a fundamental belief that advocacy for individual rights properly belongs in state court. This concept predates the founding of the republic. "Colonial leaders took up arms in 1776 not simply because they found Parliament's actual policies during the 1760's and 1770's intolerable in fact, but also because—as a matter of principle—they could not accept the British idea that Parliament had legitimate authority to do anything it wanted to the colonies. . .[41]

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[38] Steven Cohen, *On Tort Reform, It's Time to Declare Victory and Withdraw*, FORBES (Mar. 12, 2015, 9:59 AM), http://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw/#753fe22917dc; DeVito & Jurs, *supra* note 1 at 590 ("Whether examining the effects of tort reform on the legal system or on the larger world, the empirical evidence supporting tort reforms seems mixed at best, which leads to the conclusion that the benefits of tort reform have been significantly oversold.").

[39] DeVito & Jurs, *supra* note 1 at 596.

[40] JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA, (2012) ("Margaret Marshall, the recently retired chief justice of the Massachusetts Supreme Judicial Court, said "From the people's point of view, justice in America is delivered first and foremost through the state courts[.]").

[41] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426, 1430 (1987) ("[T]he Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights.").

Recognition of the importance of federalism and, concomitantly, the importance of state courts, is evident in the *Federalist Papers*. "Federalism's first achievement was to enable the American people to secure the benefits of national union without imperiling their republican institutions."[42] Rather than fear of the power of state courts to impose accountability, the power of state courts to protect the citizens of a state can be seen as, "a celebration of local autonomy [and] in a way a celebration, and a protection, of individual liberty."[43] When the power of state courts is diluted and federal "controls" are imposed, "[t]he result is a constitutional arrangement that diminishes liberty [and leaves] much of the original Constitution in disarray."[44]

From the founding of the Republic, the expectation has been that the states would be the primary forum for the protection of rights and interests of citizens and that the power of the federal courts and the Congress itself would be carefully confined or limited. Like the Class Action Fairness Act,[45] the legislative initiatives discussed below (the Fraudulent Joinder Act[46] and the Separation of Powers Restoration Act[47]) abandon that most vital premise.[48]

The Supreme Court has long recognized the hazard of undue assertion of federal power. "[T]he scope of [federal] power must be considered in the light of our dual system of government, and may not be extended so as … effectually obliterate the distinction between what is national and

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[42] Edward S. Corwin, *The Passing of Dual Federalism*, 36 VIRGINIA L. REV. 1, 22 (1950) (quoting The Federalist, No. 9 at 48 (Lodge ed. 1888)).
[43] Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 2 (1982).
[44] Richard A. Epstein & Mario Loyola, *Saving Federalism*, NATIONAL AFFAIRS (2014), http://www.nationalaffairs.com/publications/detail/saving-federalism.
[45] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C.§§1332(d), 1453, 1711-15).
[46] Fraudulent Joinder Act, H.R. REP. NO. 114-422 (2016).
[47] Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016).
[48] *See* Epstein & Loyola, *supra* note 43 ("Under the supremacy clause, the national government could trump the states, but to keep that from turning into a tyranny of the national majority, federal supremacy was carefully confined to the limited powers enumerated in Article I.").

what is local and create a completely centralized government."[49] From 1789 forward, the 10th Amendment in the Bill of Rights made explicit that the states were to play a vital role in protecting the interests of citizens. "[The] Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized."[50] Maintaining the proper balance between the state and federal courts is not a particularly simple task[51] —but it is an essential endeavor.

V. State Courts, Essential Experimentation, and Federalism

Beyond constitutional structure and the responsibility of state courts to protect the citizens of that state, there are both the benefits and hazards of localism. The downside, of course, is that out-of-state defendants may perceive the system as weighted against them—in which case, if they are genuinely out-of-state, they may seek to remove a case to federal court. Distilled to its most base level, after removal, plaintiffs prevail less frequently in federal court than in state court. "Removal of civil cases from state to federal court results in a precipitous drop in the plaintiffs' win rate. As we have previously reported, the overall win rate in federal civil cases is 57.97%, but in the subset of those cases that have been removed the win rate is only 36.77%."[52]

The benefits are equally clear and of great consequence. State courts have an opportunity to implement a broad range of options to achieve a prompt and fair resolution of civil disputes. The notion that the states are laboratories designed to improve the civil justice system has been

[49] *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 37 (1937).
[50] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 -72 (1985) (Powell, J., dissenting).
[51] *See* Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 95 (2014).
[52] Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998).

fundamental to our jurisprudence for generations. As the Supreme Court noted in 1937, it is one of the "happy incidents" of our legal system.[53] Beyond that most significant benefit, there is the matter of simple federalism and access to justice: in-state plaintiffs have every right to pursue justice in their home forum for the resolution of a claim sounding in tort.[54] That state courts have an interest in providing a forum for the citizens of their state does not suggest a bias or a lack of fairness, the implicit assumptions in the tort reform argument.[55] Instead, it suggests the proper role of state courts and the importance of viewing the states as independent judicial systems that have the potential to explore differing doctrines, theories, and strategic approaches to address injury. State courts acting to address novel theories or cases of first impression become non-binding exemplars from which all other states as well as federal courts can assess the efficacy or proprietary of different remedial theories.

Charles Fried noted that, "by disaggregating governmental power, there may be an impetus toward innovation, toward experimentation."[56] To limit state courts by relentlessly pushing personal injury controversies either into arbitration[57] or federal forma[58] runs afoul of one of the most

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[53] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

[54] *See Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238 (1984) (discussing the importance of maintaining state tort remedies even in the presence of a field—nuclear power—regulated comprehensively by the federal government).

[55] *See* Galligan, Jr., *supra* note 14 at 1199 ("Finally, courts deciding tort cases frequently rely upon and respect the jury as the common sense voice of the community on questions of fact and certain critical normative issues.").

[56] Fried, *supra* note 42.

[57] *See* Federal Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-16); Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses after Concepcion and Amex*, 67 VAND. L. REV. 955, 961 (2014); Silver-Greenberg & Gebeloff, *supra* note 12 ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices."); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y.TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html ("The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court.").

fundamental virtues of federalism. There is no better expression of this virtue than the Court's decision in *New State Ice Co. v. Liebmann*: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. *It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country*."[59]

Beyond the loss of state courts as laboratories, the current push to federal courts, away from state courts,[60] compromises essential parts of governmental balance.[61] Federalism, in its many and varied forms, is a central republican construct, and vibrant state tort law is one component parts of that system. "Court[s] must . . . preserve meaningful state sovereignty over some part of the purely internal commerce of the states; and to ensure the separation of state and federal government operations. Without judicial protection for the checks and balances at the heart of our Constitution, those checks and balances will continue to dissolve."[62]

The arguments for strong and independent state tort law are fully compatible with the notion of maintaining, where appropriate, aggressive regulatory structures. In numerous fields, e.g., health care, environmental law, transportation law, securities law, and telecommunications, it is vitally important that federal agencies are able to accomplish their delegated tasks. Curiously, even

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[58] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C.§§1332(d), 1453, 1711-15); Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1417 (2006).

[59] *New State Ice Co.*, 285 U.S. at 311 (emphasis added).

[60] *See* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554-55 (2008) ("When the Republican President George W. Bush signed it into law, he declared that it 'marks a critical step toward ending the lawsuit culture in our country.' The statute's method was to funnel more class actions away from the state courts and into the federal courts, and perhaps thereby to discourage class actions.").

[61] This interest recently was expressed as an admonition by the California Supreme Court: "We do not want to discourage states from taking an interest in protecting its citizens from harm." *Bristol Myers Squibb Co.*, 1 Cal. 5th at 810 (citing Bus. & Prof. Code, §§ 4070-4078).

[62] Epstein & Loyola, *supra* note 43.

in that regard, those seeking tort reform have, almost inexplicably, sought to undermine those federal agencies that can protect consumer interests.

This aspect of the attack on consumerism (another way to describe tort reform) comes in the form of the preposterous Separation of Powers Restoration Act,[63] a bill that would neuter federal agencies and give federal judges power beyond anything even remotely required by the Supreme Court[64] or envisioned in the constitution.[65] This legislation reflects tort reform overreaching at a level that defies description. Presumably, because federal agencies just might provide a forum that mandates accountability for those who have sold or manufactured defective products, legislation was proposed to neutralize those agencies by making any significant decisions those agencies render subject to *de novo* review in federal court. This proposal would be laughable where it not for the fact that it appears to be taken seriously in certain influential quarters.[66]

If there is anything remotely defensible about the aforementioned legislation, it might be that it acknowledges the difficulty of sorting out those injuries that are most properly addressed through a federal regulatory structure and those that are most properly addressed in a state tort action. This difficulty was recognized by the Supreme Court more than half a century ago: "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the

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[63] Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016).
[64] *See* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).
[65] *See* S. 2724 (amending the Administrative Procedure Act, giving *de novo* review power to unelected federal court judges, undoing the vitally important *Chevron* doctrine, with the following proposed change: "Section 706 of title 5, United States Code, is amended, in the matter preceding paragraph (1), by striking "all relevant questions of law, interpret constitutional and statutory provisions' and inserting "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules'.").
[66] U.S. CHAMBER OF COMMERCE, HILL LETTER TO CONGRESS SUPPORTING H.R. 4768 AND S. 2724, THE SEPARATION OF POWERS RESTORATION ACT (Mar. 18, 2016).

unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."[67] That difficulty, however, is hardly the basis for one of the most hypocritical legislative initiatives of the last hundred years.

Just how giving the judiciary unprecedented power over federal agencies restores separation of powers is anybody's guess.[68] On its face, the bill does the opposite – turning on its head the most fundamental notions of checks and balances. One wonders: is all this necessary to protect companies and individuals who have injured consumers?

Unless there has been a sea change and suddenly, judicial activism is a virtue and unelected judges have mystically been granted enhanced constitutional authority, the bill is nothing more than a transparent attack on legal mechanisms set up to insure accountability. If there is anything to consistency, this bill should be seen as an endorsement of judicial activism, the bane of those supporting tort reform for decades. More than a century ago, Professor James Thayer laid down the gauntlet, attacking judicial activism as inconsistent with any coherent construction of constitutional law, a quest that has been central to the conservative agenda – until now.[69] Judicial activism had been declared evil: "[J]udicial activism, the results-oriented approach to judging . . . is simply inconsistent with representative self-government and the rule of law. It is similar to, and even more

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[67] *Polish Nat'l All. v. NLRB*, 322 U.S. 643, 650 (1944) (internal quotation marks omitted).
[68] *See* Eric Wolf, *Flint Hearing Gets Testy*, POLITICO (Mar. 18, 2016, 10:00 AM), http://www.politico.com/tipsheets/morning-energy/2016/03/pro-morning-energy-wolff-213296#ixzz43Hhwf3dM ("The Separation of Powers Restoration Act would require judges to consider all cases before them on a "de novo" basis — that is, no longer giving deference to an agency's decisions, only weight").
[69] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893).

dangerous than, the decline of constitutionalism among lawmakers. . . ."[70] Now, presumably, it has been . . . tort reformed?[71]

In the event that there is any question about the tort reform goal of limiting or eliminating state courts as a primary forum for the resolution of civil tort claims or the desire to avoid accountability derived through agency action, one need do no more than peruse the recent legislative track record of those supporting tort reform. As mentioned, the Class Action Fairness Act[72] has the purpose and effect of forcing litigants into federal court or simply making it impossible for injured persons to join forces in that efficient litigation model, the class action, and succeed.[73] Similarly, as noted, the Separation of Powers Restoration Act,[74] if passed, would gravely limit the ability of federal agencies to protect consumer interests and leave to judges (who may well lack substantive or technical expertise in the field regulated) the impossible task of assessing the propriety and efficacy of regulatory actions.[75] Add to this the resurgence of interest in direct congressional review of agency action or bills designed to inhibit or freeze regulatory action and the goal of limiting or eliminating liability in state court or at the agency level becomes transparent.

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[70] Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1753 (2007) (finding activism the antithesis of judicial restraint); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 179 (1987) (arguing "judicial activism" is the absence of essential "judicial self-restraint").

[71] *See* Siegel, *supra* note 14 ("*Chevron* [*Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837(1984)] has enjoyed bipartisan support in the past from those who believe that it limits the power of activist judges and gives more authority to experts in their fields working for administrative agencies. But law experts say the doctrine has become a political tool used by both parties to further their agendas.").

[72] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C.§§ 1332(d), 1453, 1711-15).

[73] *See Christine* P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 804-05 (2015) (characterizing industry complaints regarding class actions as "false-cries" and calling for reform that actually helps consumers as opposed to making it more difficult for consumers to pursue legitimate complaints).

[74] Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016).

[75] Most recently, the Separation of Powers Restoration Act has been subsumed into a broader legislative proposal, Regulatory Accountability Act of 2017, H.R. 5, 115th Cong., (2017) (which passed the House on January 11, 2017).

Consider the renewed interest in the heretofore rarely used Congressional Review Act ("CRA").[76] If brought to the fore on a regular basis, the CRA would wreak havoc with the convention of separation of powers by placing recently enacted and future major regulatory actions[77] before Congress for an up-or-down vote.[78]

Next is the REINS Act, a bill that would freeze regulatory actions and require, prior to implementation, an affirmative vote by both the House and the Senate. This would apply to "major rules," turning agency rulemaking into a legislative and political side-show event where consumer interests are likely to be lost in the shuffle.[79] Among other things, the REINS Act requires a vote in a 70-day timeframe with no amendments possible rendering effective regulation nearly impossible.[80]

Two final bills round off the anti-accountability agenda. The ironically named Regulatory Accountability Act[81] would impose complex cost-based rules on regulation, including health and safety rules, where such analysis is literally impossible.[82] Lastly, the SEC Regulatory Accountability

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[76] Congressional Review Act, Pub. L. 114-38 (1996) (codified at 5 U.S.C. §§ 801-808). The only well-documented example of congressional override of agency action involves a rule pertaining to ergonomics. *See* Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1075 (1999).

[77] *See* Memorandum from the Congressional Research Service, "Major" Obama Administration Rules Potentially Eligible to be Overturned under the Congressional Review Act in the 115th Congress, (Nov. 17, 2016) (on file with author).

[78] Congressional Review Act, Pub. L. 114-38, (1996) (codified at 5 U.S.C. §§ 801-808).

[79] *See* Regulations from the Executive In Need of Scrutiny Act of 2017, H.R. 26, 115th Cong., 1st Session (2015) (a completely transparent law designed to do nothing but undo regulatory and presidential action); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131 (2013).

[80] *Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on* Courts, Commercial, & Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 5 (2011) (statement of Chairman Lamar Smith) ("The REINS Act threatens to make it harder for . . . beneficial regulations to be implemented.").

[81] Regulatory Accountability Act of 2017, H.R. 5, 115th Cong., (2017)

[82] *See* Lydia Wheeler, *Regulatory Accountability Act reintroduced in House,* THE HILL (Jan. 7, 2015, 3:55 PM), http://thehill.com/regulation/228809-regulatory-accountability-act-reintroduced-in-house ("'This bill rigs the regulatory process against new public safeguards and provides industry special interests a blueprint for killing new health and safety standards in court,' said Amit Narang, regulatory policy advocate for Public Citizen.")

Act[83] would impose on the Securities Exchange Commission the obligation to study *all* alternative means to achieve a regulatory goal prior to the adoption of a rule, a requirement that does not exist at any other agency. In fact, it is axiomatic in administrative law that while fair and rational decision-making compels agencies to consider reasonable alternatives, that does not and cannot mean any and every alternative.[84] Given the creativity of those opposing regulation, it is fair to say that there could be endless alternatives one could dream up to bring to a halt agency action. Thus, a regulatory obligation of that nature would make it impossible for an agency to do much of anything – which, presumably, is the goal of the sponsors.

The statues and bills just discussed vary, one to the next, but their import does not. None of them are designed to support the constitutionally mandated design of federalism. None of them support state courts and none even remotely respect the Founders imperative that in this republic, the states bear primary responsibility for the health, safety, and welfare of the people. None of them deal meaningfully with interstate commerce or areas where there is a strong federal interest in an area (e.g., nuclear power or commercial aviation). None of them advance the interests of injured consumers. None of them facilitate or improve access to justice.

These initiatives represent an attempt to use the power of Congress to deny the states their right to serve the best interests of their residents and to serve the vital role as laboratories of justice. Each initiative, in its own way, does the opposite – each limits, restricts, or obscures access to justice.

VI. Debunking Fraudulent Joinder

[83] SEC Regulatory Accountability Act, H.R. 78, 115th Cong. (2017).
[84] *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978); *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Perhaps nothing reflects more the troubling perspective of the current tort reform struggle than the Fraudulent Joinder Prevention Act ("FJPA").[85] If the goal of tort reform is to make it difficult or impossible for injured parties to have access to justice, to a state court, a jury, and a fair hearing in an impartial forum, the FJPA would achieve that pernicious objective. "[I]t is clear from the bill's radical changes to longstanding jurisdictional practice that the true purpose of this measure is simply to stifle the ability of plaintiffs to have their choice of forum, and possibly even their day in court."[86]

For decades, the Federal Rules of Civil Procedure[87] ("FRCP"), the carefully crafted body of rules that govern process in Article III courts, established the structure and procedure governing the litigation process. While there is always room for change,[88] the FRCP reflect the work of the Judicial Conference of the United States, congressional committees, the advisory committees, diverse groups that, almost by definition, are impartial.

Among many other aspects of legal process, the FRCP govern removal from state court to federal court when, *inter alia*, a case is initiated by an in-state plaintiff against an out-of-state defendant.[89] Removal will fail if another defendant is joined who is in-state, thus defeating diversity.[90] To avoid having a case heard in state court, those supporting tort reform crafted the FJPA, a bill

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[85] H.R. 3624, 114th Cong. (2016).
[86] *Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on* the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 8-9 (2015) (statement of Rep. John Conyers Jr.).
[87] Fed. R. Civ. P. (as amended December 1, 2016).
[88] *See* Luke Meier, *Probability, Confidence, and Twombly's Plausibility Standard*, 68 SMU L. REV. 331 (2015); John Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010).
[89] Fed. R. Civ. P. 81(c). Federal statutory law is also instructive. *See* 28 U.S.C. § 1332 (2012) (asserting that district courts have original jurisdiction over civil actions between citizens of different states); *see also* 28 U.S.C. § 1441(a) (providing that actions filed in state court can be removed to federal court whenever federal court has original jurisdiction).
[90] 28 U.S.C. § 1441(b) ("A civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

designed to address fraudulent joinder, facilitating removal from state court to federal court, addressing the possibility that the plaintiff will somehow, "fraudulently" shift defendants, adding an in-state defendant to defeat diversity.[91] In fact, wrongful fraudulent joinder is covered thoroughly and effectively under the FRCP.[92] The need for this "fix" is not just suspect, it is nonexistent. Federal Rule 17(a) requires that lawsuits proceed with the "real party in interest" and addresses joinder and party substitution explicitly.[93] Federal Rule 21 deals specifically with misjoinder or fraudulent joinder.[94]

Despite the process and remedies in the FRCP, supporters of the FJPA contend that even more protection is needed to guard against the possibility of losing a quest for removal thus requiring a defendant to stand trial in state court.[95] The FJPA could be read as a check against any possible shift in party status that would prevent defendants from removing a case from state court to federal court. This raises an obvious question: why are defendants so intent on having cases heard in federal court?

The purpose of this article is not to parse the specifics of the FRCP but rather to comment on the importance of federalism, in this instance referring to the importance of providing in-state plaintiffs access to justice in state courts before a state court judge and the jury of their peers.

The FJPA is not supported by any credible empirical evidence, reflects a patent bias against federalism, is antithetical to fundamental notions of the rights of states to govern their citizens, and

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[91] H.R. 3624, 114th Cong. (2016).
[92] Fed. R. Civ. P. 21; Fed. R. Civ. P. 17(a).
[93] Fed. R. Civ. P. 17(a).
[94] Fed. R. Civ. P. 21.
[95] 162 CONG. REC. H907 (daily ed. Feb. 25, 2016) (statement of Rep. Goodlatte) (affirming the FJPA's ability to "reduce litigation abuse and forum shopping"); Fraudulent Joinder Act, H.R. REP. NO. 114-422 at 5 (2016) ("H.R. 3624 addresses the problem by codifying a somewhat more robust version of the fraudulent joinder doctrine").

presupposes both bad faith and the inability of state and federal court judges to apply the current FRCP regarding *in personam* jurisdiction and removal. Motives underlying the FJPA are not subtle – the goal is to push cases to federal court where the chance the defendant will prevail is greater.[96] Thus, for producers of defective goods or providers of services who fail to exercise due care, it only makes sense to seek the forum least friendly to plaintiffs.

On its face, the FJPA has no purpose other than to reduce access to justice in state court. While there are anecdotes about defendants who claim to have been "victimized" by having to endure state court justice,[97] they are insufficient to require a change in the FRCP – particularly when the bill is designed to correct a problem that does not exist.

Imagine a plaintiff suffering from a personal injury residing in any small town anywhere in the United States. Imagine that plaintiff retaining local counsel and being advised that a suit can be filed in the local courts to pursue their claim. Now, once the litigation process has started, imagine that plaintiff learning that the case has been stripped from their local courthouse and move to a federal court, often hours away, to be tried before judges not necessarily from that state – and then being advised that the probability of prevailing is simply less.[98] That is not the plight of a few "national defendants" who are suddenly forced into state court. That is the plight of plaintiffs from many, many communities throughout the country.

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[96] *See* Clermont & Eisenberg, *supra*, note 51 at 593.

[97] *The Fraudulent Joinder Prevention Act of 2015 – What is it and Why it Matters*, TEXANS FOR LAWSUIT REFORM (Feb. 3, 2016), https://www.tortreform.com/news/ilr-fraudulent-joinder-prevention-act-2015-what-it-and-why-it-matters (posturing hypotheticals regarding fraudulent joinder).

[98] *See* Clermont & Eisenberg, *supra* note 51 at 593.

The FJPA is tort reform at its worst. If successful, it's hard to see how the FJPA would achieve anything beyond making it difficult to hold certain defendants accountable in state court.[99] It was characterized by Congressman John Conyers as a "bill [that] attempts to solve a non-existent problem . . . [raising] fundamental federalism concerns. . . . [and denying] state courts the ability to decide and ultimately to shape state law."[100]

One of the arguments supporting FJPA and other aspects of the tort reform over the years focuses on efficiency,[101] i.e., removal to a federal court offers the hope of more uniform process in a more neutral environment. First, there really is nothing to support the argument in terms of empirical evidence. Second, tort reform advocates have not beat a consistent path to efficient outcomes. For example, when a California resident plaintiff sued Bristol Myers Squibb for harms related to the use of Plavix, plaintiffs from 34 states with similar complaints sought to participate in the suit, creating the potential for a highly efficient consolidated process in which the defendant would need to defend itself just once instead of doing so in 34 different states.

Rather than take advantage of the efficiency, the defendant (along with a host of other groups supporting tort reformers) fought the consolidation, taking the matter to the California Supreme Court – and lost. The Court addressed the matter thusly: "To be sure, a single court hearing the claims of hundreds of plaintiffs is a significant burden on [a] court. But the overall

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[99] *See* H.R. REP. NO. 114-22. Aa 19 (2016) ("Current law already establishes a standard for courts to determine when a party has been improperly joined, a standard that has been in place for a century. Tellingly, the Supreme Court has not seen fit to change this standard . . . .")

[100] *See* H.R. REP. NO. 114-422. at 8-9 (2016)(statement of Rep. John Conyers Jr.); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 2406 – SPORTSMEN'S HERITAGE AND RECREATIONAL ENHANCEMENT (SHARE) ACT (Feb. 24, 2016) (stating "[t]he [White House] strongly opposes H.R. 3624 because it is a solution in search of a problem and makes it more difficult for individuals to vindicate their rights in State courts.").

[101] David W. Lannetti, *Toward a Revised Definition of "Product" under the Restatement (Third) of Torts: Products Liability*, 35 TORT & INS. L.J. 845, 853 (2000).

savings of time and effort [to the parties and] to the judicial system, both in California and interstate, far outweigh the burdens placed on the individual forum court."[102]

If the goal is efficiency in litigation, something that was supposed to be a virtue of the Class Action Fairness Act,[103] is likewise a purported goal of compulsory arbitration,[104] why fight here? While this may be unduly cynical, it would appear that the fight was undertaken to increase the difficulty of the plaintiffs from outside of California who wanted to pursue their claim in the unified way. In other words, this reflects a current premise of tort reform: do what is possible to make it more difficult for injured people to get access to justice. If the hope is to avoid liability, presumably that justifies fighting at every juncture.

VII. Preemption

In one core area in this field, preemption, the Supreme Court[105] and Congress[106] have already provided a dramatic and systematic limitation on tort liability.[107] Preemption of state tort claims can be the result of express congressional action or by implication, e.g., congress has fully occupied the field, it is not possible to implement the federal regulatory scheme if state tort actions are permitted,

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[102] *Squibb Co.*, 1 Cal. 5th at 790.

[103] Class Action Fairness Act, 28 U.S.C.§§1332(d), 1453, 1711-15 (2012) (commentating on Section 4, amending 28 USC § 1332 and stressing the virtue of efficiency in the Class Action Fairness Act).

[104] Michael Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDHAO L. REV. 19, 34 (2007) (describing how arbitration present the potential for "improved efficiency" when contrasted with other decision-making models).

[105] *See* Pliva, Inc. v. Mensing, 564 U.S. 604 (2011); Wyeth v. Levine, 555 U.S. 555 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).

[106] *See* Marcia Boumi, *FDA Approval of Drugs and Devices: Preemption of State Law for "Parallel Tort Claims*, 18 J. HEALTH CARE L. & POLL'Y 1 (2015); Elizabeth J. Cabraser, *Symposium: Federal Preemption of State Tort Law: A Snapshot of the Ongoing Debate: When Worlds Collide: The Supreme Court Confronts Federal Agencies with Federalism in Wyeth v. Levine*, 84 TUL. L. REV. 1275 (2010).

[107] Goldberg & Zipursky, *supra* note 35, at 456. ("[b]y recognizing various different forms of preemption—express preemption, frustration-of-purpose preemption, impossibility preemption, and occupation-of-the-field preemption—it has given repeat-player products liability defendants vast protections from state law tort liability.").

or finding that tort actions require a result different from and inconsistent with essential component parts of a federal regulatory program.[108]

Preemption of state tort liability is an obvious goal of those who seek to limit liability making the Separation of Powers Restoration Act even more troubling, and making the motives of its backers more transparent. From the perspective of those who seek to limit or eliminate accountability, what could be better than having common law tort actions barred by preemption to make way for the implementation of a regulatory system – and then having the regulatory system neutered by giving District Court judges *de novo* review power over significant regulatory action?[109]

Looking briefly at just pharmaceuticals, the problem of preemption becomes obvious – and of constitutional moment.[110] States have the responsibility to protect health, safety, and welfare of its citizens, i.e., police powers. Preemption renders that protection outside the reach of state tort law . . . and the Separation of Powers Restoration Act could render protect of citizens through FDA regulation highly limited. In the pharmaceutical field, the broad-based elimination of the right to pursue a personal injury claim should be the exception, not the norm. As the Court noted in *Wyeth*, the operating "assumption [is] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[111] Three decades earlier, the court affirmed the importance of a "federal-state balance," cautioning that the power of states to protect their citizens should "not be disturbed unintentionally by Congress or

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[108] *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987); Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir. 2005); Goldberg & Zipursky, *supra* note 35.

[109] *See generally Chevron* 467 U.S. at 864-866 (signing into law the Separation of Powers Restoration Act would destroy the critical doctrine of deference to agency action enshrined in *Chevron*.)

[110] Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 807 (2004), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1179&context=facpub.

[111] Wyeth, 555 U.S. at 565 (2009) (internal quotation marks omitted).

unnecessarily by the courts."[112] A few years later, the Court instructed that making a preemption determination should be an exercise in ascertaining the plain and clear meaning of a statute, the "purpose of Congress," which should be the "ultimate touchstone" in determining whether a field was expressly or, by essential implicated, occupied thus preempting state tort claims.[113]

In the decade that followed, the clarity of the approach gave way to a more opportunistic and irregular methodology.[114] From that point forward, preemption, at least in the pharmaceutical field, has often, but not always, produced what devotees of tort reform seek: limited or eliminated access justice, to state courts, and to juries of one's peers.[115]

A recent analysis of this dynamic by Professors John C.P. Goldberg and Benjamin C. Zipursky finds that preemption, "has given [a range of] defendants vast protections from state law tort liability."[116] In cases involving defective products generally, "a plaintiff's rights to recover damages . . . under common law are greatly diminished from what they were in the early 1990s. . . .[T]he Supreme Court has now effectively immunized the manufacturers of generic drugs . . . from products liability claims [generally and for claims regarding] . . . medical devices that go through the

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[112] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (internal citations and quotation marks omitted).
[113] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985).
[114] Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087-88 (2000) (reviewing 20th Century preemption doctrine and caselaw); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) (linking conservative ideology with preemption of state tort law options),; Ernest A. Young, Two Cheers for Process Federalism, 46 VILL. L. REV . 1349, 1380 et. seq. (2001) (tracking the unevenness of preemption decisions).
[115] Mut. Pharm. Co., Inc. v. Bartlett, 133 S. Ct. 2466 (2013) (acknowledging the caselaw in the field is somewhat inconsistent); PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011); Wyeth, 555 U.S. 555; Mason v. SmithKline Beecham Corp., 596 F.3d 387 (7th Cir. 2010); In re Prempro Prods. Liab. Litig., 586 F.3d 547 (8th Cir. 2009); Dolin v. SmithKline Beecham Corp., No. 12 C 6403, 2016 WL 537949 (N.D. Ill. Feb. 11, 2016); Wells v. Allergan, Inc., No. Civ-12-973-C, 2013 WL 389147 (W.D. Okla. Jan. 31, 2013); Dobbs v. Wyeth Pharms., 797 F. Supp. 2d 1264 (W.D. Okla. 2011); Dorsett v. Sandoz, Inc., 699 F. Supp. 2d 1142 (C.D. Cal. 2010); Maya v. Johnson & Johnson, 97 A.3d 1203 (Pa. Super. Ct. 2014); Brockert v. Wyeth Pharms., Inc., 287 S.W.3d 760 (Tex. App. 2009); Reckis v. Johnson & Johnson, 28 N.E.3d 445 (Mass. 2015); Gurley v. Janssen Pharms., Inc., 113 A.3d 283 (Pa. Super. Ct. 2015).
[116] Goldberg & Zipursky, *supra*, n. *supra* note 35, at 45-56.

FDA's full preclearance procedures."[117] Goldberg and Zipursky conclude: "Preemption is now front and center in modern tort law. . . .[The Court] has gradually moved, albeit inconstantly, in a direction that is as hostile to negligence and products liability plaintiffs as it is to libel plaintiffs."[118]

Instead of accountability, "most people harmed by prescription generic drugs have lost their access to the courts [and discovered that federal courts and regulatory remedies do not] provide a complete replacement for the generally applicable state-law remedies. . . ."[119]

From a public health perspective, not only does this preclude the right to have harms redressed in a court but it also "compromise[s] incentives for monitoring consumer safety risks by negating the legal remedies of consumers who wish to bring design-defect claims after experiencing dangerous reactions to a generic drug."[120]

Rather than just provide a plaintiff damages (not that personal remedies are inconsequential), tort litigation is a powerful engine that could have played a vital role in "help[ing] to uncover and assess risks that are not apparent to the [FDA] during a drug's approval process."[121] Instead, "[preemption jurisprudence] shield[s] generic drug manufacturers from liability and generic drug users from a legal remedy. . . ."[122] Even without the horrific impact that the Separation of Powers Restoration Act would have on effective regulation, "[t]he reality is that the FDA does not have the resources to perform the Herculean task of monitoring comprehensively the performance of every

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[117] *Id.*
[118] *Id.*
[119] Brian Wolfman & Anne King, *Mutual Pharmaceutical Co. v. Bartlett and Its Implications*, 82 U.S.L.W. (BNA) 1, 6 (2013).
[120] Brittany Croom, *Buyer Beware: Mutual Pharmaceutical Co. v. Bartlett Continues to Alter the True Costs and Risks of Generic Drugs*, 15 N.C. J.L. & TECH. 1, 5 (2014) (internal citations omitted).
[121] David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims,* 96 GEO. L. J. 461, 463 (2008) (internal citations omitted).
[122] Croom, *supra* note 119, at 5.

drug on the market."[123] Despite the reasonable public expectation that FDA approved drugs are safe, "the FDA cannot safeguard our nation's drug supply on its own."[124]

VIII. Concluding Comments

The importance of providing an accessible and efficient forum to pursue personal injury claims is hardly a matter for debate.[125] Tort cases are the historic form of localized justice that establishes behavior norms (deterrence) and allows for the peaceful resolution of disputes (individualized justice). While historians may dispute the precise timing of the first tort case, civil resolution of disputes resolving personal injury claims date back thousands of years.[126] By the 13th century,[127] recorded caselaw emerges as a means of memorializing how and why a particular dispute was resolved, providing for the centuries that followed a remarkably complex and rich narrative regarding legal process, fairness, simple justice, and remedial options, the common law.[128]

From the Magna Carta[129] forward, a formula emerged: claims should be resolved locally without violence, and an organized system of writs[130] would help orchestrate those claims. Judges

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[123] Kessler & Vladeck, *supra* note 120, at 463 (internal citations omitted).
[124] *Id.* at 495.
[125] Goldberg & Zipursky, *supra* note 115 at 437 ("tort law is central in the operation of our legal system.").
[126] Thomas Kelch, *A Short History of (Mostly) Western Animal Law: Part I,* 19 ANIMAL L. 23, 42 (2012) ("the concept of economic compensation for what are effectively torts caused through the agency of animals that we saw in the Laws of Eshunna and the Code of Hammurabi"); Joshua J. Mark, *Hammurabi: Definition*, ANCIENT HISTORY ENCYCLOPEDIA (Nov. 12, 2011), http://www.ancient.eu/hammurabi/ (dating Hammurabi approximately 3800 years ago); Katherine Fischer Drew, *The Laws of the Salian Franks* 3 (1991) (detailing a system of personal and property in jury claims in the 3rd Century).
[127] W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS 617 (5th ed. 1984) (dating nuisance cases back to the 13th Century).
[128] THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 350 (5th ed. 1956); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (1820).
[129] FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 172 (2d ed. 1898) (asserting that the Magna Charta reflected current practices; "On the whole, the charter contains little that is absolutely new. It is restorative.").
[130] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 19 (1971).

would need to be objective and familiar with the community's unique characteristics or belief structure, and judgments, ultimately, would rest with both a jury of one's peers and then the court itself. From this, concepts of fairness and equity emerged as did the importance of local justice that provided neither party undue favor. In addition, concerns about the power of the sovereign in the Magna Charta[131] translate well to historic concerns about the federal government noted earlier in this paper.

The aforementioned process and values translate into 21st century civil justice with remarkable consistency. Limitations on federal power, as noted in this paper, are part of the foundational quest of the Revolution in this country.[132] The importance of state law, state courts, local juries, local judges, is enshrined constitutionally and doctrinally through federalism. The importance of individual communities participating in the process of decision-making and ultimately finding safe resolution for disputes carries over exquisitely into the present. By Supreme Court[133] pronouncement, history,[134] and unquestionable public policy,[135] state courts are and ought to be the primary forum for resolution of disputes between those who claim injury and those accused of injuring.

The tort system in the 21st-century maintains the core of the procedural mechanisms and principles that flow as immutable truth over time. This is a system to preserve, not vilify. This is a

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[131] Nathan S. Chapman & Michael W. McConnell, *Essay and Feature: Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012) (finding the "Magna Charta eliminated the King's power to deprive his subjects of rights without authorization by existing law and adjudication by a court.").
[132] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426, 1430 (1987).
[133] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).
[134] Edward S. Corwin, *The Passing of Dual Federalism*, 36 VIRGINIA L. REV. 1, 22 (1950) (quoting The Federalist, No. 9 at 48 (Lodge ed. 1888)).
[135] Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004) (arguing the importance of federalism particularly as it applies to public safety and pharmaceutical products).

system that protects all of us and allows for fair resolution of disputes. It is hardly the plaything of selfish actors.[136]

The tort system maintains the dual goals it has always possessed: individual justice or remedy and the public act of deterrence, i.e., institutionalized behavioral messaging that makes our world safer, more efficient, and forward looking. Initiatives like the *Prevention of Fraudulent Joinder Act* and the *Separation of Powers Restoration Act* are antithetical to achieving the goals of deterrence and peaceful resolution of disputes. Cramming personal injury cases into a federal court that is neither local nor familiar, when simple statistics and common sense tell us that the plaintiff is disadvantaged, hardly advances the noble goals the system can achieve.

That practical and theoretical nightmare, the *Separation of Powers Restoration Act*, would destroy the fundamental relationship between the judiciary, the executive, and the legislature. Just what that the bill would restore is hard to say. Certainly, it would restore nothing remotely resembling any extant separation of powers model.[137] Moreover, it requires one to believe that its proponents, business interests that have railed against judicial activism for generations, have decided, quite suddenly, that judicial activism is suddenly the right way to go. Beyond endorsing a model of judicial action that contravenes the most basic constitutionally prescribed structure of government, the bill would greatly diminish the juridical competence of agencies to articulate enforceable norms.

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[136] The Honorable Stanley Feldman, *Symposium: Panel Three: Does Tort Reform Threaten Judicial Independence?*, 31 SETON HALL L. REV. 666, 670 (2001) ("I knew a lot of plaintiffs' lawyers. Many were greedy, but this is America. . . . I would submit that deterrence is a public good and that the greed of plaintiffs' lawyers, in many cases, does produce something valuable for the public.").

[137] Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation,* 27 HARV. J.L. & PUB. POL'Y 569, 598-99 (2001) ("Judges, however, are trained and work in the interpretation of law -- not in the formation of public policy."); Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits,* 33 EMORY L.J. 685, 701 (1984) (describing that outside of cases where making policy is a constitutional necessity, judges overstep when they venture into a domain properly the province of the legislature).

The bill vests discretionary power with federal court judges who have no claim to expertise, no substantive background, no historical perspective on the regulatory structure, thus depriving the public of a critically important and central form of governance.

The legislative proposals summarized above, coupled with an increasingly complex and unpredictable preemption environment, present a situation that can only be referred to as a public hazard. If these bills become law, if preemption continues to stumble forward in an irrational and destructive manner, if more and more cases are pushed into federal courts, the future will be grim not only for innocent injured victims but for the very structure of governance and the legal system itself.