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Democracy and Tort Law in America: The Counter-Revolution

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DEMOCRACY AND TORT LAW IN AMERICA:
THE COUNTER- REVOLUTION

*Christopher J. Roederer**

ABSTRACT

Although the seeds of democracy and democratic tort reform were sown well before America's founding, neither began to blossom until after the Second World War. Democratic progress from the 1950s to the 1970s led to, and was in part consolidated by, progressive developments in tort law during the same period. Unfortunately, the last quarter century has been a period of democratic decay in America and just as the revolution in tort law was bound up with democratic progress, the counter-revolution in tort law has tracked and reinforced the waning of American democracy since the 1980s. Although a few authors have touched on the issue, there has been no in-depth treatment of the relationship between tort reform and democratic change in the legal literature. This article takes a step to fill that gap. This article draws on recent literature in economics, political science and democratic theory to demonstrate the extreme degree of economic inequality in America and how economic inequality has led to political inequality, both in terms of having a voice and in terms of being listened to by those who govern. Gross inequality in political voice is bound up with a lack of responsiveness and accountability by the nation's leaders and this in turn leads to the erosion of government interventions to correct or counterbalance the ever widening gap between the political and economic "haves" and "have-nots" in America. Regressive tort reform is a predictable outcome of this state of American democracy. Here, the voices of the majority are not only drowned out by an economically and politically powerful minority, but they are also distorted by a campaign of disinformation driven by that minority, which further skews the political process surrounding this issue. The effects of this distorted process are illustrated by counter-democratic interventions by the Supreme Court, as well as the bulk of tort "reform" efforts since the 1980s, both of which have worked against the interests of the majority of Americans by further entrenching inequality. The article concludes by commenting on recent developments in the area of products liability that suggest that if people see clearly what is at stake in the debate over tort "reform" they may react progressively, putting torts back to work for democracy.

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

I. INTRODUCTION TO THE HISTORY OF DEMOCRACY AND TORT REFORM IN AMERICA

At the same time the U.S. has spent billions of dollars and has put the lives of its soldiers on the line for the purported purpose of spreading democracy in other countries,² Americans have allowed their own democracy to come under threat. The threat does not come from abroad but is homegrown. It is bound up in a vicious cycle of both economic and political inequality, the centrifugal forces of which have created an ever widening gap between those who have and those who do not have:

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

This gap between the “haves” and “have nots” cuts across both socio-economic aspects of life (education, jobs, income, mobility) and civil and political aspects of life (the ability to

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

² There have been over 50,000 civilian casualties since the beginning of the Iraq war and over 3,000 U.S. military casualties. *U.S. deaths in Iraq reach 3,000*, CNN, Jan. 3, 2007, <http://www.cnn.com/2007/US/01/01/iraq.deathtoll/index.html>. By the end of 2006 the U.N. High Commission for Refugees estimated that Some 3 million Iraqis had been displaced (about half within the country and half outside of the country). Patrick Cockburn, *Review of the Year: Iraq (A Nation Soaked in Blood Tears Itself Apart)*, THE INDEPENDENT, Dec., 29, 2006, http://news.independent.co.uk/world/middle_east/article2110653.ece. The economic costs are well over 300 billion for Iraq alone and over 400 billion if Afghanistan and other expenditures on the war on terror are included. AMY BELASCO, CONGRESSIONAL RESEARCH SERVICE, THE COST OF IRAQ, AFGHANISTAN AND THE OTHER GLOBAL WAR ON TERROR EXPENDITURES SINCE 9/11 4 tbl.1 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL33110.pdf>.

participate in civic and political life, through voting, volunteering, protesting, donating, etc.). This gap both skews the input into those who are elected to represent the people and the output, or the responsiveness of government to the needs and preferences of the people. Gross inequality in political voice is bound up with a lack of responsiveness and accountability and this in turn leads to the erosion of government interventions to correct or counterbalance the ever widening gap between the “haves” and “have-nots” in America. As Part IV below illustrates, interventions by the courts and legislators in the area of tort law follows this pattern. This is illustrated by counter-democratic interventions by the Supreme Court as well as the bulk of tort “reform” efforts since the 1980s.

For democracy to be meaningful people must have some degree of stake in their country’s future. Without a stake there is little reason to participate or to contribute – if one wants buy-in, there needs to be something to buy-into. If people are going to lend their voices and hands to the future of America they should have not only something to gain, but something to lose should that project fail.

No one expects American democracy to be primarily direct, either in the sense of the people directly making decisions about how the U.S. is governed, or in the sense of getting direct results from one’s input. It is an accepted fact that most contributions are contributions to a process that must be mediated by institutions that one hopes are democratically representative and accountable. Further, the vote is but one mechanism for ensuring that officials represent the people. For democracy to operate between elections the people not only need a voice, they need to reach the ears of those who govern.

The account of how American democracy has been run off its tracks presented in this article is not based on an elaborate or idealistic view of democracy. It is not based on shattering

the illusion of direct democratic participation, or on the dream of a truly deliberative democracy,³ or even a republican democracy.⁴ The standard that is being proposed to measure or evaluate the health of American democracy is not the equal provision of conditions for human development and self actualization,⁵ nor even the ideal of equal concern and respect, although the U.S. is faltering on all these accounts.⁶ The critique that follows is based on the failure of even achieving the modest ambitions of representative democracy. The standard is based on the basic notions propounded by one of America's greatest presidents and one of America's foremost democratic theorists, namely, that democracy consists of "government of the people, by the people, for the people"⁷ and that a "key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals."⁸ Democracy requires accountability and respect for the rule of law and this entails equality before the law. It also requires transparency and access to accurate information, for

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

⁴ JÜRGEN HABERMAS, *Three Normative Models of Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 21 (Seyla Benhabib ed., 1996) (comparing liberal, republican and deliberative forms of democracy).

⁵ McPherson identifies the underlying moral value of democracy as "provid[ing] the conditions for the free development of human capacities, and to do this equally for all members of society." C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 58 (1966).

⁶ Ronald Dworkin's view of our Constitution is "that it aims to create . . . a "partnership" rather than a majoritarian form of democracy by insisting that all citizens are entitled to an equal role and voice in their self-government, that government at all levels must treat citizens with equal concern, and that government must leave individual citizens free to make the personal decisions for themselves that they cannot yield to others without compromising their self-respect." Ronald Dworkin, *Judge Roberts on Trial*, 52 *NEW YORK REVIEW OF BOOKS* 16 (2005) <http://www.nybooks.com/articles/18330#fnr6> (referring to his elaboration of this ideal in RONALD DWORKIN, *FREEDOM'S LAW* (1996) and RONALD DWORKIN, *SOVEREIGN VIRTUE* (2000)).

⁷ Abraham Lincoln, 16th President of the United States of America (1861-65), *The Gettysburg Address* (Nov. 19, 1863). The U.S. State Department begins its discussion of the definition of "What is Democracy" with Lincoln's definition. U.S. DEPARTMENT OF STATE, *WHAT IS DEMOCRACY?* (1998), <http://usinfo.state.gov/products/pubs/whatsdem/whatdm2.htm>.

⁸ ROBERT DAHL, *POLIARCHY: PARTICIPATION AND OPPOSITION* 1 (1971). Although the view of Democracy expounded by Dahl is not as rich or substantive as the requirements for political justice put forward by John Rawls, it is consistent with them. In fact, although it is not a sufficient condition for political justice, it is probably a necessary condition. See the discussion of Rawls' principles of justice at infra notes 48-54 and accompanying text. On Rawls' account and the account detailed below, economic inequality becomes problematic from the standpoint of capitalist democracy when it undermines political equality and fair equality of opportunity. See *id.*

without it, “the people” have no chance of authentic participation, or of holding representatives accountable. As will be detailed below, American democracy is failing, because its government is not, of, or for the people; those who govern are not responsive to the people. This is both true in general and in the specific case of tort reform.

Although it is not uncommon to hear of references to the founding as a democratic founding,⁹ this is not an accurate depiction of American history. It took the United States nearly 200 years to achieve a level of political participation which would justify the claim that it was a democracy. As C.B. MacPherson pointed out long ago,

In our Western societies the democratic franchise was not installed until after the liberal society and the liberal state were firmly established. Democracy came as a top dressing. It had to accommodate itself to the soil that had already been prepared by the operation of the competitive, individualist, market society, and by the operation of the liberal state, which served that society through a system of competing though not democratic political parties. It was the liberal state that was democratized, and in the process, democracy was liberalized.¹⁰

Democracy did not begin to take root in America until well into the 20th Century and it took till the 1960s for it to really begin to blossom. It is difficult to speak at all about American

⁹ See, e.g. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835); Lance Banning, *Preface* to *LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE* xiii, xiii (Lance Banning ed., 2004) (describing our revolution as the first democratic revolution). Even Jay Feinman refers to the United States at its founding as “the newly democratic” America. JAY M. FEINMAN, *UNMAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* 56 (2004).

¹⁰ MACPHERSON, *supra* note 5, at 5.

democracy prior to 1920 when women finally won the right to vote,¹¹ and as Alexander Keyssar notes, despite the much earlier formal emancipation of African Americans, until the 1960s most African Americans could not vote in the South.¹² “As late as 1950s, basic political rights were denied [not only to those blacks in the South but] . . . to significant pockets of voters elsewhere, including the illiterate in New York, Native Americans in Utah, many Hispanics in Texas and California, and the recently mobile everywhere.”¹³

Tort reform since the 1980’s has largely consisted of tort retrenchment to the 1950’s and before. The notion that the current wave of retrenchment is compatible with democracy may be based, in part, on the misconception that the founding was democratic,¹⁴ and that the U.S. has been a democratic republic ever since. However, the classical liberal state was not democratic at its inception and thus it should not be surprising that the common law and tort law as they existed at the time of the founding were similarly not supportive of democracy.¹⁵ The common law system largely presumed equality and freedom while exploiting the lack thereof, for example, by limiting access to courts for the poor, allowing those with superior bargaining power

¹¹ U.S. CONST. amend XIX. Note that 12 of the western territories along with New York extended the franchise to women before the Amendment. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 211-218 app. at 390 (2001) (Table A.20 States and Territories Fully Enfranchising Women Prior to the Nineteenth Amendment).

¹² KEYSSAR, *supra* note 11, at xvi.

¹³ *Id.* at 316. Universal suffrage is not a right enshrined in our Constitution.

¹⁴ As David C. Williams notes, the American Revolution was a conservative revolution; the revolutionaries claimed that they were defending the British Constitution from the British Crown and Parliament. David C. Williams, *The Constitutional Right to “Conservative” Revolution*, 32 HARV. C.R.-C.L. L. REV 413, 414, 430-31 (1997). Although the U.S. eventually went somewhat further in creating republican legislatures and in protecting natural rights, rather than merely the customary rights of Englishmen, the bulk of U.S. constitutional structures and rights derived directly from British structures and rights. *Id.* 431. See also JOHN REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF AMERICAN LIBERTY* (2005) (arguing that justifications for the American revolution were grounded in claims that Britain was violating the “Ancient Constitution” otherwise known as “the common law tradition,” and that revolutionary calls were actually justified as restorative rather than revolutionary).

¹⁵ The lawyers who were largely responsible for articulating, developing and defending the English common law which the U.S. inherited (Coke, Seldon and Hale) were apposed to the absolutist theories of monarchical power as advocated by the Stuart Kings, but they also “accepted as natural monarchical government, a very limited franchise, and a patriarchal and profoundly inegalitarian social order that doled out privileges on the basis of status and sanctioned various forms of servitude.” John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 532 (2005).

to bind and keep the gains of unequal power through contract and tort law and by providing remedies that replicated status quo inequalities. It was not until the early 1900s that tort law started its modern trend towards the expansion of liability, a movement that really did not take off until the 1960s.¹⁶

The 1960s and 1970s were decades of considerable progress in civil and political rights as well as in socio-economic rights.¹⁷ These advances came from increased political participation,¹⁸ and from executive,¹⁹ legislative²⁰ and judicial developments.²¹ These were also the years in which American democracy was further consolidated through progressive reform of the common law in general and torts in particular.²² It was not mere coincidence that progressive

¹⁶ FEINMAN, *supra* note 9, at 53.

¹⁷ President Carter even signed the International Covenant on Economic, Social and Cultural Rights in 1977, although it was never ratified by Congress. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), available at <http://www.unhcr.ch/pdf/report.pdf>.

¹⁸ Paul Allen Beck & M. Kent Jennings, *Political Periods and Political Participation*, 73 THE AM. POL. SCI. REV. 737 (1979); Thomas E. Cavanagh, *Changes in American Voter Turnout, 1964-1976*, 96 POL. SCI. Q. 53 (1981); Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899 (2005).

¹⁹ For instance, The War on Poverty introduced by Lyndon B. Johnson during his State of the Union address (Jan. 8, 1964), as well as proposed legislation that culminated in the Economic Opportunity Act and the Establishment of the Office of Economic Opportunity.

²⁰ See, e.g., The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 1, 78 Stat. 508 (1964); Civil Rights Act of 1964, Pub. L. No. 88-352, Title II, § 201, 78 Stat. 243 (1964); Social Security Act of 1965, Pub. L. No. 86-778, Title VII, § 701(a)-(e), 74 Stat. 992, 993 (1965); and The Age Discrimination Act of 1967 (ADEA), Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967). Title VII of the Civil Rights Act of 1964 also created the Equal Employment Opportunity Commission (EEOC), Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253. The EEOC obtained enforcement authority under the Equal Opportunity Act of 1972; Pub. L. No. 92-318, Title IX, 86 Stat. 235 (1972) (Education Amendments prohibit sex discrimination in all aspects of education programs that receive federal money); The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978).

²¹ For a list of landmark cases, see, e.g., Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 app. 1 (2002).

²² See *infra* Part IV. B. Although torts still reflected social inequalities, the reforms during the 60s provided easier access to courts and better protection for consumers. As George Priest notes, "since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system." George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). Constitutional torts also emerged during this period, with *Monroe v. Pape*, 365 U.S. 167 (1961) and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

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

Since the 1980s those democratic gains have been eroding. As Keyssar states, “Although the formal right to vote is now nearly universal, few observers would characterize the United States as a vibrant democracy.”²³ In 2004 the American Political Science Association came out with its warning that American democracy was in peril. They did so with the press release quoted at the beginning of this article,²⁴ and through a set of reports commissioned by the Association.²⁵ Those reports located the cause of this demise in the widening gap between rich and poor. As its authors state, “progress toward realizing the American ideals of democracy may have stalled, and in some arenas reversed” due to the broadening gap in income and wealth in America.²⁶

Arguably, the U.S. has had a number of constitutional revolutions since its founding.²⁷ Few, if any, would argue that these revolutions, past or present, have been as fundamental as the many democratic revolutions that took place around the world in the late 1980s and early

²³ KEYSSAR, *supra* note 11, at 4, 322. For the view that our democracy is crumbling based on current obstacles to voting see SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006).

²⁴ Press Release, *supra* note 1.

²⁵ The task force compiled a series of reports in 2004: *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY; THREE CRITICAL ANALYSES ON ECONOMIC, GENDER, RACIAL, AND ETHNIC INEQUALITIES IN AMERICAN POLITICS*; and a set of teaching materials. Apsanet.org, Task Force on Inequality and American Democracy, http://www.apsanet.org/section_256.cfm (last visited Jan. 23, 2007). These materials were edited into a book. *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* (Lawrence Jacobs & Theda Skocpol eds., 2005).

²⁶ TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POL. SCI. ASS'N, *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 1* (2004), <http://www.apsanet.org/imgtest/taskforcereport.pdf>. This is not to say that healthy levels of economic inequality are antithetical to democracy. As is argued below in section II however, certain levels and certain forms of economic inequality become problematic from the standpoint of democracy when they either undermine fair equality of opportunity or our civil and political liberties.

²⁷ According to Ackerman, the US has gone through three historical ruptures or transitions brought about by heightened democratic participation resulting in “higher law making”: the extra legal Founding which did not follow the procedures set out in the articles of Confederation, the 13th and 14th Reconstruction amendments which bypassed the proper Article V procedures and the New Deal amendments which took place largely through the pressure brought to bear on the courts to switch in time in order to save the nine Supreme Court justices from having to share the bench with a few more judges. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42-44 (1991). Unlike these constitutional moments the current revolution is not a democratic moment of higher law making.

1990s.²⁸ Even fewer would consider the U.S. to be in the throes of a revolution, or in the recent aftermath of such a revolution.²⁹ Yet, a number of commentators have characterized the culmination of changes brought about by the Rehnquist Court over the last two decades in these very terms.³⁰ Andrew Siegel recently noted that those commentating on the history of the Rehnquist Court are nearly uniform in their view that “Chief Justice Rehnquist and his allies on the Court instigated a judicial "revolution" that has fundamentally altered both the substance of American law and the institutional arrangements through which we develop and enforce legal norms.”³¹

Properly speaking, these changes have been reactionary or counter-revolutionary and are routinely described in undemocratic terms. For instance, Jack Balkin and Sanford Levinson place the Court's contraction of congressional power at the core of this "constitutional revolution.”³² Or, as Larry Kramer puts it:

²⁸ See RUTI G. TEITEL, TRANSITIONAL JUSTICE 206-209 (2002) (arguing that our founding revolution was conservative compared to many of the legal transitions that took place around the world in the 90s).

²⁹ Perhaps the U.S. is now in a phase of consolidation. As Andrew Siegel puts it, “In rough cut, one might suggest that the years prior to 1994 represent rehearsal and experimentation with the agenda for the Rehnquist Revolution, the period from 1994 until 2002 or 2003, the years of the Revolution, and the years since then a period of consolidation or retrenchment.” Andrew Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1112 (2006).

³⁰ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). See also CHARLES J. OGLETREE, JR., THE REHNQUIST REVOLUTION IN CRIMINAL PROCEDURE, IN THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 55 (2002); Larry D. Kramer, *The Supreme Court, 2000 Term--Foreword: We The Court*, 115 HARV. L. REV. 4, 130 (2001); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 370 (2002) (critiquing the "federalism revolution"); cf. Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L. J. 47, 49-52 (2003) (taking a "modest" view of the Court's rulings); Dawn Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L. J. 363, 364 (2003) (remaining agnostic about the “revolution”).

³¹ Siegel, *supra* note 29, at 1100.

³² Balkin & Levinson, *supra* note 30, at 1045 (noting the revolution and criticizing the bare majority of the Court which has systematically reappraised the doctrines of federalism, racial equality, and civil rights, and who also gave the presidency to George W. Bush).

The defining characteristic of [the Rehnquist Court] is the Justices' conviction that they and they alone are responsible for the Constitution [A]ny notion that what the Constitution does or permits might best be left for the people to resolve using the ordinary devices available to express their will seems beyond the Rehnquist Court's compass.³³

The counter-revolution is undemocratic, both because of the usurpation of the power of Congress and of the people and because of the erosion of mechanisms developed over time to hold government accountable and to keep democracy on track. According to Sylvia Law, the Supreme Court has limited the ability of Congress to address national problems to a degree only matched by the Lochner Court's interference with attempts by Congress and the president to respond to the Great Depression.³⁴ This includes: restricting the constitutional power of Congress to regulate interstate commerce, and to enforce the guarantees of the Fourteenth Amendment; expanding state immunity from federally defined claims of unfair labor practices and discrimination; and "rejecting settled interpretations of federal civil rights laws to limit the protection that Congress has sought to give to the civil and economic rights of many vulnerable people, including older people, people with disabilities, women, and working people."³⁵

It may come as little surprise that this counter-revolution tracks the decline in American Democracy. It may come as more of a surprise that both of these changes track the onslaught of regressive tort reform in the U.S.³⁶ Part IV below, addresses the supporting role the Supreme Court has played in the regressive tort reform movement. This is not to say that the Supreme

³³ Kramer, *supra* note 30, at 158.

³⁴ Law, *supra* note 30, at 371.

³⁵ *Id.* at 371-72.

³⁶ As Goldberg points out, arguing that that private law is integrally connected to public law runs against the grain of academic wisdom. Goldberg, *supra* note 15, at 530.

Court has played a leading role in this movement, but the mere fact that the Supreme Court is involved at all is notable. It is testament to the fact that the present counter-democratic changes that are taking place are not merely economic or political, or limited to broad public law areas like federalism. Rather, these changes are pervasive, cutting across the public and private law domains.

There is very little written in the legal literature connecting tort reform to constitutional change,³⁷ much less democratic change,³⁸ although some have been arguing for years that tort law reflects and further entrenches the inequalities that exist in the U.S.,³⁹ and numerous writers have noted that the recent wave of tort “reform” has been a product of powerful corporate interest groups and a campaign of disinformation.⁴⁰

³⁷ *But see* Jo Ellen Lind, “Procedural Swift”: Complex Litigation Reform, State Tort Law, and Democratic Values, 37 AKRON L. REV. 717, 719 (2004) (arguing that federal legislation moving class actions into federal courts poses risks to the role of states in promoting the democratic values of political participation, transparency, and accountability); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 556 (1999) (arguing that in the arena of tort reform “that courts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions”); Goldberg, *supra* note 15 (arguing for a Constitutional Right to an adequate legal scheme for the redress of wrongs); George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 SETON HALL L. REV. 683, 683 (2001). There are many articles written on the subject of constitutional torts, see, e.g., Thomas A. Eaton, *Symposium: Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts*, 35 GA. L. REV. 837 (2001); and for the relationship between state constitutions and tort law, see John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159 (2005).

³⁸ Michael L. Rustad and Thomas H. Koenig come very close to linking democracy and tort reform when they label the period from 1945 to 1980 “the Democratic Expansionary Era.” Rustad & Koenig, *supra* note 21, at 4. Although the facts perhaps speak for themselves, Rustad and Koenig do not explain why the period from 1945 to 1980 is an era of democratic expansion and they do not argue that the current era is a period of democratic contraction. Nockleby & Curreri note that the first wave of tort neo-liberal tort reform began in the 1970s. Nockleby & Curreri, *supra* note 1, at 1030-31. Jay Feinman also comes close to connecting the “un-making” of the common law to democratic decay. FEINMAN, *supra* note 9. While Feinman places the blame on “radical conservatives,” “the right” and/or “Republicans,” the problem of unresponsiveness cuts across party lines. For examples of regressive legislation (including tort reform) and policies during the Clinton presidency see *infra* notes 67, 77, and 216.

³⁹ The most prominent example is Richard Abel. See, e.g., Richard Abel, *The Real Tort Crisis--Too Few Claims*, 48 OHIO ST. L. J. 443 (1987); Richard Abel, *A Critique of American Tort Law*, 8 BRITISH J. L. & SOC’Y 199-231 (1981) (Reprinted in CRITICAL LEGAL STUDIES (Allan Hutchinson ed., Rowman & Littlefield, 1989)); Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006). See also Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (arguing that deep biases in tort law result in higher damage awards for white men than for women and minorities).

⁴⁰ See, e.g., Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1300 (2005) (“The story of the punitive damages recoil is a familiar one about special legislation to help corporate

If these commentators are correct, that the success of the regressive tort reform movement can be credited to political influence, power lobbying and “a campaign of misinformation [that] convinces people that reducing their rights is actually in their own interest,”⁴¹ then there is little room for question that the process behind this wave of tort reform is undemocratic. As the argument in Parts II-III shows, regressive tort reform is a predictable outcome of the state of American democracy even without the “campaign of misinformation.” Nonetheless, this campaign of misinformation further erodes the democratic values of transparency and accountability, making it harder for truly democratic reforms to gain traction. It further distorts the already muted voices of the majority of Americans on this issue.

To argue that the democratic gains of the 60s and 70s have come undone may sound slightly radical.⁴² It may not jibe with the average law review reader’s view of reality. The idea that the United States is the “the model” of democracy for the world is well entrenched in the American psyche. The fact that the U.S. has the longest standing written Constitution is often wrongly equated with the idea that the U.S. is one of, if not the, longest established democracies.⁴³ However, American democracy is very young and even if the average law

America.”). Rustad also points to Jerry J. Phillips, *Comments on the Report of the Governor's Commission on Tort and Liability Insurance Reform*, 53 TENN. L. REV. 679, 680 (1986) (punitive damages reform is about special legislation for corporate America) and John W. Wade, *Strict Products Liability: A Look at its Evolution*, THE BRIEF, 1989, at 8, 56 (tort reform should be unconstitutional because it is special interest legislation). See also Siegel, *supra* note 29, at 1147 (noting the substantial energies and resources spent by American businesses in their fight for constitutional protection against punitive damages); See also Abel, *supra* note 37; and FEINMAN, *supra* note 9. For the view that the tort reform campaign is based on misinformation, see Abel, *supra* note 37; FEINMAN, *supra* note 9, at 48, 190-192; and Rustad & Koenig, *supra* note 21. See also WILLIAM HALTOM & MICHAEL MCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS (2004); See also THOMAS BAKER, THE MEDICAL MALPRACTICE MYTH (2005) (deconstructing the myths surrounding the calls for medical malpractice reform). For misinformation concerning punitive damages, see Eisenberg, *infra* note 268. See also *infra* section IV.

⁴¹ *Id.* at 19. See also Lind, *supra* note 37, at 719; Abel, *supra* note 37, at 556; Goldberg, *supra* note 15; Priest, *supra* note 37, at 683; Eaton, *supra* note 37; Witt, *supra* note 37. See also *infra* notes 171-179 and accompanying text for further discussion of this phenomenon.

⁴² The argument that follows does not depend on any “radical” or socialist view of the state or democracy. The point is not “put down” the ailing “golden goose” out of envy because others have more, but to nurture the goose back to life by reinvigorating the principles that sustain her.

⁴³ Thirteen countries extended the franchise to women before the United States. Grolier Multimedia Encyclopedia, <http://ap.grolier.com/article?assetid=0279670-0&templatename=/article/article.html> (last visited Jan. 23, 2007).

review reader is correct to think that he or she does, or could have, not only a stake in, but a voice in, the political system,⁴⁴ this is not the case for the majority of Americans.

It is not expected that this proposition be taken on faith, and thus the remainder of this article will put forth evidence detailing how large the gap is between the ‘haves’ and the ‘have-nots’ in the U.S. political and economic system, as well as how the rising inequality gap is bound up with losses in socio-economic and political stake, political voice, and losses in political responsiveness and accountability.⁴⁵ The spiraling downward pressure of both socio-economic and political inequality has resulted in unresponsive legislation and policies, including tort reform that is contrary to the needs and interests of the majority of Americans. Unlike the tort reform that helped consolidate American democracy in the 60s and 70s, the tort reform of the last two decades has acted to further entrench and consolidate oligarchy if not plutocracy. This article will draw on contrasting trends in Europe to illustrate and support these points.

II. ECONOMIC INEQUALITY: THE EROSION OF CAPITALIST DEMOCRACY’S FOUNDATION

A. Introduction

Few, if any, in America or elsewhere are arguing for communist style economic equality.⁴⁶ There is little to no support for the view that at the end of the day, Americans should all have an equal income or equal wealth, no matter how talented, hard working or even lucky one may be.⁴⁷ Nonetheless, economic inequality becomes problematic from the standpoint of

⁴⁴ It may be particularly difficult for law professors to imagine that they have little voice in American politics (see *infra* Part III below on the impact of academics on political responsiveness).

⁴⁵ In spite of the fact that surveys are biased against those with egalitarian views, Schlozman et al.’s survey results revealed substantial pro-egalitarian sentiments. KAY L. SCHLOZMAN ET AL., TASK FORCE ON INEQUALITY & AM. DEMOCRACY, INEQUALITIES OF POLITICAL VOICE 12-13 (2004), <http://www.apsanet.org/imgtest/voicememo.pdf>. Those pro-egalitarian sentiments are much stronger when it comes to the preferences of Americans for political equality than for economic quality. *Id.* at 11, 17.

⁴⁶ Ronald Dworkin makes this point in RONALD DWORKIN, SOVEREIGN VIRTUE 2 (2000).

⁴⁷ Ronald Dworkin would subject all choice independent luck-based economic inequality to redistribution including the luck of having or not having talent. *Id.* at 90-91, 287. Dworkin sees this as following from the principle of equal

democracy both when it reaches a point where it seriously undermines political equality and when it undermines fair equality of opportunity in the market.

The principle of political equality is enshrined in John Rawls' first principle of justice which requires that "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."⁴⁸ As he states in his later work, "The fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."⁴⁹ For Rawls, equal citizenship is incompatible with allowing any trade-offs between economic inequality and one's liberties.⁵⁰ While his second principle of justice allows for economic inequality his first principle does not allow for political inequality.⁵¹ Americans tend to share this view in that they show overwhelming support for political equality,⁵² and are more comfortable with economic inequality than political inequality.⁵³

resources, which in turn follows from his principle that governments should show equal concern for the fate of each of its citizens. *Id.* at 1, 65-119. For Dworkin, equal concern is the sovereign virtue of political community. *Id.* at 1.
⁴⁸ JOHN RAWLS, A THEORY OF JUSTICE 302 (1971). The point of Rawls' theory of justice, justice as fairness, is to provide a moral and philosophical basis for democratic institutions. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 5 (2001). Rawls does believe that his two principles of justice can be realized under either a property owning democracy or a liberal socialist regime, but not under a laissez-faire capitalist regime. *Id.* at 137-38. Ronald Dworkin shares this view. Ronald Dworkin, *Liberalism*, in LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984) (arguing for a social democratic form of liberalism). For Dworkin, the demands of equality require either "redistributive capitalism or limited socialism—not in order to compromise the antagonistic ideal of efficiency and equality, but to achieve the best practical realization of the demands of equality itself." *Id.* at 69.

⁴⁹ RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 48, at 46.

⁵⁰ John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 545 (1980). As Wolff points out, the priority of liberty articulates Rawls's conviction that mutual respect of equal citizenship expresses men's recognition of one another's moral personality and that "to bargain away a portion of one's liberties for a softer life would, in Rawls's view, be to sell one's birthright as a human being for a mess of pottage." ROBERT P. WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE 88 (1977). This is one way of embodying in his theory the Kantian injunction to "treat humanity, whether in oneself or others, always as an end and never merely as a means." *Id.*

⁵¹ RAWLS, A THEORY OF JUSTICE, *supra* note 48, at 302. Rawls' second principle of justice requires that social and economic inequalities be arranged so that they are "attached to offices and positions open to all under conditions of fair equality of opportunity." *Id.* at 303.

⁵² SCHLOZMAN ET AL., *supra* note 45, at 11, 15.

⁵³ *Id.* at 11, 17.

The goal, dream or myth of equal opportunity in a “land of opportunity” where people have a fair, if not equal, chance of achieving more is a fundamental principle undergirding our capitalist system.⁵⁴ It is why movies like Rocky are so popular. People accept a certain level of economic inequality based on the idea that those with less can have more if they have talent and if they put that talent to use in the market. Income or wealth mobility based on fair equality of opportunity may even be counted as a fundamental principle of our capitalist democracy. This principle draws its appeal both from an idea of fairness or desert where one gets out of the economic system in proportion to what one puts in, as well as from an idea of efficiency, namely that there will be more for everyone. The later notion is based on the assumption that people will contribute more if their input into the system results in fair outputs from the system.

It does not follow that the market provides fair equality of opportunity. The capitalist market is not like a game of chess, an Olympic competition or even championship boxing where one wins a ribbon or a gold medal and the loser goes home to practice in the hopes of taking the ribbon, gold medal or belt the next time. Left to its own, the market does not allow for comebacks on a level playing field. It does not allow Ali, much less Rocky, to win the belt one more time, just because he has the talent and energy to do it. It does not, because the market doesn't merely dole out awards and prizes for those who win, it doles out money and other tools for winning the next round of competition. It is more akin to each round of chess or checkers, where it becomes harder and harder to win, the less pieces one has. It is like those games in which one picks up more weapons and ammunition the more points one scores, thus making it easier to score. As disheartening as it is to lose round after round to the bitter end, the game needs to end, and to entice one back to the game the playing field needs to be rebalanced. Few if anyone would be willing to start the checker game or the boxing match where he or she left off,

⁵⁴ What John Rawls call fair equality of opportunity. RAWLS, A THEORY OF JUSTICE, *supra* note 51, at 302-03.

much less where one's parents left off. People want a fair chance to win the next game. If it is desirable for people to contribute – then inequalities produced by the market should be harnessed and re-directed to make it worth participating in the market. For instance, the fact that one's parents were relative losers cannot be allowed to doom one's children to being losers and thus, certain levels of health, education and general welfare are crucial for giving the “losers” what they need to get back in the game, to give them what they need to contribute and compete once again.

The remainder of this section details the extent of economic inequality in America as compared to other economically advanced democracies in terms of income, wealth and mobility. It details both how unequal the U.S. is as a result of the market and how little the U.S. government does to rebalance the inequalities generated by the market. The impact of these economic equalities on political equality will be tracked in the Part III below.

B. *Income inequality*

For a short time, the impact of hurricane Katrina on the people of New Orleans brought American inequality into sharp relief. As one commentator wrote, “Katrina’s whirlwind has laid bare the fault lines of race and class in America. For a lightning moment, the American psyche was singed.”⁵⁵ There appeared to be some hope that “the shock and shame” of Katrina might “strip away the old evasions, hypocrisies and not-so-benign neglect” surrounding issues of inequality in America.⁵⁶ The overwhelming racial dimension to the impact of the hurricane no doubt further accentuated the contrast between the “haves” and the majority of African-

⁵⁵ Johnathan Tilove, “*Our Society is so Uneven*”: *Katrina Exposes Inequalities of Race, Wealth*, TRENTON TIMES, Sept. 4, 2005, at B1.

⁵⁶ Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42-48; Larry Bartels, *Is the Water Rising? Reflections on Inequality and American Democracy*, 39 PS: POL. SCI. & POL. 39 (2006) (hereinafter Bartels, *Water Rising*). “Many Americans were shocked and shamed by the televised images of New Orleans in the wake of Hurricane Katrina Thousands of residents, mostly Black and poor, seemed to be trapped in a Hobbesian state of nature, abandoned by government and civilized society.” Bartels, *Water Rising*, *supra* note 56, at 46.

American “have-nots.” These socio-economic inequalities gave rise to fears of gross political inequality as significant worries of disenfranchisement abounded in the lead up to the first city elections since the hurricane, given the large numbers of poor African-Americans who were resettled outside the city.⁵⁷

However inconvenient it might be, gross inequality is not limited to New Orleans and other areas of drastic natural disaster. Inequality is pervasive in our country. As Appendix Table 1 illustrates, the statistics on inequality show that among rich western nations the U.S. has the highest level of inequality by far.⁵⁸ The U.S. has the largest gap between the bottom 10% of our population and the top 10% of our population as their income relates to the median income (the decile ratio gap).⁵⁹ The U.S. also has the greatest degree of inequality when measured against all income distributions (the Gini coefficient gap)⁶⁰ and our lowest 10% are significantly worse off than their European counterparts.⁶¹ Since WWII this gap has widened at a pace and to a degree unmatched by other economically advanced countries.⁶²

Converting these numbers to a standard grade curve (the bell or C curve commonly used in first year undergraduate courses) might bring them into perspective. Both the U.S.’s decile

⁵⁷ See, e.g., Marc Morano, *Voter Disenfranchisement Predicted in New Orleans*, CNSNEWS.COM, Mar. 9, 2006, <http://www.cnsnews.com/ViewPolitics.asp?Page=%5CPolitics%5Carchive%5C200603%5CPOL20060309a.html>; Jesse Jackson, *Secret rolls undermine N. Orleans vote*, CHI. SUN-TIMES, Mar. 7, 2006, available at http://www.findarticles.com/p/articles/mi_qn4155/is_20060307/ai_n16177797.

⁵⁸ Andrea Brandolini & Timothy M. Smeeding, *Patterns of Economic Inequality in Western Democracies: Some Facts on Level and Trends*, 39 PS: POL. SCI. & POL. 21, 23 (2006); See also *id.* at 22 fig.1.

⁵⁹ The population in the bottom 10% income group receives only 39% of the median income while the top 10% receive 210% of the median income. This results in a decile ratio in which the top 10% income group receives 5.45 times what the bottom group receives.

⁶⁰ *Id.* at 22 (0 being perfectly equal and a 1 or 100% being perfectly unequal). The US CIA fact book put the U.S. at 45% for 2004 with a 2004 estimate of 12% of the population below the poverty line. CIA, THE WORLD FACTBOOK, <https://www.cia.gov/cia/publications/factbook/geos/us.html#Geo> (last visited Jan. 23, 2007). To explain further, perfect equality means everyone has the same income (0) while perfect inequality means that one person has everything and the rest have nothing (1).

⁶¹ Brandolini & Smeeding, *supra* note 58, at 22 fig.1, available at <http://www.lisproject.org/keyfigures>.

⁶² Lawrence Jacobs & Theda Skocpol, *Restoring the Tradition of Rigor and Relevance to Political Science*, 39 PS: POL. SCI. & POL. 27 (2006) (referring to L. MISHLE ET. AL, THE STATE OF WORKING AMERICA (2005)). See also Brandolini & Smeeding, *supra* note 61, at 25 fig.3 & 4. Jacobs and Skocpol report that as of 2003 the most affluent fifth of the population received 47.6% of family income while the top 5% received 21% of that income. Jacobs & Skocpol eds., *supra* note 25.

ratio of 5.38 and its Gini coefficient of .369 are over 2 standard deviations away from the average. This puts both scores in the F range of a C curve. While the next worst group of performing countries (i.e. Spain, Ireland, the U.K. and Italy) is in the C- to D- range, the U.S. is alone in the F range of the curve.

C. Post redistribution inequality

Inequality in America is not merely due to market based inequalities but also due to a lack of intervention to mitigate the inequalities generated by the market.⁶³ As Appendix Table 2 shows, if one only looks at the inequality produced by the market, the U.S. is not much worse than many of these thirteen advanced capitalist states, and in fact Americans are more equal than the United Kingdom and France. However, market interventions by way of taxes and benefits significantly dampen the disparity between the rich and poor in most of these countries. These inequalities are reduced by 47% in France and over 30% in the U.K. while our government only dampens these inequalities by 22%. While the average reduction in inequality is over 30%, the reduction in the U.S. is about 20%.

Further, the data on Gini coefficient reduction through taxes and benefits does not include pensions or the public provision of education or health care, even though low or no cost provision of these benefits greatly reduces inequalities in what one can afford to consume.⁶⁴ Because educational provisions in most states in the U.S. are still based on local property values the distribution of this service entrenches and exacerbates the above inequalities within the U.S. No other country finances education in this way.⁶⁵ There is also a significant gap in the

⁶³ Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSPECTIVES ON POL. 449 (2005), available at <http://www.u.arizona.edu/~lkenwor/pop2005.pdf>. This data does not reflect government spending on infrastructure, the military, or the civil and criminal justice system, which provide a disproportionate benefit to businesses and the wealthy.

⁶⁴ Kenworthy & Pontusson, *supra* note 63, at 455.

⁶⁵ Allan Odden & William H. Clune, *School Finance Systems: Aging Structures in Need of Renovation*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 157, 168-69 (1998). For the intersection of law, race and education see Samuel R.

provision of health care between the U.S. and other O.E.C.D. (Organization for Economic Co-operation and Development) countries which significantly exacerbates the disposable income gap.⁶⁶ This has a significant impact on those who are uninsured or under-insured.⁶⁷ Between 1973 and 2000, the income of the bottom 90% of U.S. tax payers fell by 7 percent while the income of the top 1% grew by 14 percent.⁶⁸

D. Wealth inequality

The bottom line of inequality is not so much how much income one has but how much wealth one has at the end of the day in terms of all one's physical and financial assets minus one's liabilities. Unfortunately the situation is significantly worse if one looks at inequality in wealth rather than merely inequality in income. The U.S. Gini coefficient based on wealth is a staggering .801.⁶⁹ This is worse than the Gini value that would be generated in a ten person

Lucas Paret & Marcel Paret, *Annual Reviews*, 1 ANN. REV. L. & SOC. SCI. 203 (2005), available at <http://arjournals.annualreviews.org/eprint/znK7y9nbHQND7hyTuGfb/full/10.1146/annurev.lawsocsci.1.041604.115931?cookieSet=1>. For facts on educational attainment by race see KAISER FAMILY FOUNDATION, KAISER FAMILY FOUNDATION FACT SHEET: YOUNG AFRICAN AMERICAN MEN IN THE UNITED STATES (2006) (hereinafter KAISER FAMILY FOUNDATION, FACT SHEET), <http://www.kff.org/minorityhealth/upload/7541.pdf>.

⁶⁶ Although Americans spend twice as much for health care than most O.E.C.D. countries, most of the burden is born by the private sector. While the average O.E.C.D. country public expenditure on health as a percentage of total spending on health has consistently been over 70% (1980- 2005), the United States has averaged between 40% and 45% from 1980 to 2005. See OECD Health Data 2006 - Frequently Requested Data: Data on Public Expenditure on Health (2006), <http://www.oecd.org/dataoecd/59/49/35529832.xls>.

⁶⁷ For information on the uninsured see, KAISER FAMILY FOUNDATION, THE GROWING UNINSURED POPULATION AND THE HEALTH CARE SAFETY NET (hereinafter KAISER FAMILY FOUNDATION, GROWING), <http://www.kff.org/uninsured/profile.cfm>. For statistics on provision of health care by race, see KAISER FAMILY FOUNDATION, FACT SHEET, *supra* note 65. Insurance coverage may have a significant impact on law suits. As Reisman states, "where consumers are heavily insured but manufacturers and sellers go bare, there will be fewer product liability actions than in a jurisdiction where victims have little coverage but businesses hold large policies." Mathias Reisman, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 827 (2003). See also Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45, 47 (1999) ("the [British] National Health Service has in the past operated to relieve most tortfeasors from the costs of their victims' medical treatment.").

⁶⁸ Heather Boushey & Christian E. Weller, *Inequality and Household Economic Hardship* 5 (United Nations Dep't of Econ. & Soc. Affairs, Working Paper No. 18, April 2006).

⁶⁹ JAMES B. DAVIES ET AL., THE WORLD DISTRIBUTION OF HOUSEHOLD WEALTH 26 (2006), <http://www.wider.unu.edu/research/2006-2007/2006-2007-1/wider-wdhw-launch-5-12-2006/wider-wdhw-report-5-12-2006.pdf>.

The wealth data here is household wealth as of the year 2000. As the authors of this report note, "Wealth data typically become available with a significant lag, and wealth surveys are conducted at intervals of three or more years. The year 2000 provides us with a reasonably recent date and good data availability." *Id.* at 3 n.4.

group consisting of two people worth a million dollars each while everyone else's combined net worth was eight thousand dollars (one thousand dollars each).⁷⁰ The curve here is compressed compared to the income inequality curve. There are no As and there are no Fs, but the U.S. does sit alone with Switzerland in the solid D range.

E. Lack of mobility

At this point in time in America, about 50% of the differences in wealth in one's parents' generation show up in the present generation.⁷¹ Contrary to the belief of a majority of Americans, their chances of moving up the economic ladder are not as good as they were 30 years ago.⁷² For instance, sons in the bottom three quarters of the socio-economic scale in the 90s had a lower chance of moving up than sons in the 1960s.⁷³ What is more troubling is that household income inequality increased while those working within the household also increased.⁷⁴ Without the contribution of wives, the income of the bottom fifth would have decreased by 13.9% between 1979 and 2000 rather than raising by 7.5%.⁷⁵ Although the U.S.

⁷⁰ The actual gini coefficient generated by these numbers is .796. The same result would be generated by two members of the group having \$1,000 in wealth and eight having only \$1. For an accessible Gini calculator online see Free Statistics Software, Office for Research Development and Education, <http://www.wessa.net/co.wasp> (last visited Jan. 24, 2007).

⁷¹ Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective* 16 THE FUTURE OF CHILDREN 19, 26-27 (2006) (This entire issue published by The Brookings institute and Woodrow Wilson School of Public and International Affairs at Princeton is dedicated to Opportunity in America 1-196). The figure is 40% for intergenerational income inequality. *Id.* at 25-26.

⁷² See e.g., Janny Scott & David Leonhardt, *Class Matters: Shadowy Lines that Still Divide*, N.Y. TIMES, May 15, 2005, <http://www.nytimes.com/2005/05/15/national/class/OVERVIEW-FINAL.html?ex=1273809600&en=2fb756e388191419&ei=5088&partner=rssnyt&emc=rss>. The New York Times poll indicated that over 75% of Americans thought that the chances of moving up the economic ladder were as good or better than they were 30 years ago. Interactive Graphic, *How Class Works*, http://www.nytimes.com/packages/html/national/20050515_CLASS_GRAPHIC/index_03.html (last visited Jan. 24, 2007).

⁷³ Boushey & Weller, *supra* note 68, at 6 (citing Earl Wysong, Robert Perrucci, & David Wright, *Organizations, Resources, and Class Analysis: The Distributional Model and the U.S. Class Structure* (Ind. U. Working Paper, 2004) (comparing the incomes and occupations of 2,749 fathers and sons from the 1970s to the late 1990s)). See also Beller & Hout, *supra* note 71, at 19, 27.

⁷⁴ Boushey & Weller, *supra* note 68, at 6.

⁷⁵ *Id.* The top fifth of incomes was not as heavily impacted by women entering the job market as was the bottom. Wives in families with children in the bottom fifth increased their working hours by 43.9% as compared to only a 27.4% increase in working hours among wives in the top fifth. *Id.*

has achieved an average performance in occupational mobility as compared to other “open” societies or countries that espouse the idea of equality of opportunity, it performs rather poorly when it comes to actual income mobility.⁷⁶ As Beller and Hout note, the United States has high income inequality coupled with low income mobility whereas the Scandinavians have high income mobility and low income inequality.⁷⁷ If American democracy is measured in part by the principle of fair equality of opportunity, or by how well it approximates the ideal embodied in the title, “the land of opportunity,” it is falling well below the mark.

III. POLITICAL INEQUALITY: UNDERMINING DEMOCRACY AND FURTHER ENTRENCHING ECONOMIC INEQUALITY

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

In democratic societies the growing political power of the urban lower-income groups led to a variety of protective and supporting legislation, much of it aimed to counteract the worst effects of rapid industrialization and urbanization and to support the claims of the broad masses for adequate shares of the growing income of the country.⁷⁸

⁷⁶ Beller & Hout, *supra* note 71, at 30.

⁷⁷ *Id.* Note that this is likely a result of how poorly the children in the United States fare in comparison with other rich countries. The U.S. ranks 20 out of 21 countries when it comes to the well-being of its children (with only the U.K. performing worse in this regard). INNOCENTI RESEARCH CENTRE, UNICEF, CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES 2 (2007), *available at* <http://www.unicef-icdc.org/publications/> (this ranking is a combined ranking based on: material well-being, family and peer relationships, health and safety, behavior risks, and both educational well-being and subjective well-being). The four Scandinavian countries are in the top 7 of this ranking, i.e. Sweden is at number 2, Denmark at 3, Finland at 4, and Norway at 7. *Id.* See also Table 5 *infra* p. 71.

⁷⁸ Simon Kuznet, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1, 17 (1955).

However, in recent years lower income groups have failed to secure such “protective and supporting legislation,” and the legislation that is on the books has been scaled back, and under-enforced,⁷⁹ leaving the poor and lower income groups to the vicissitudes of the market. For instance, Bill Clinton’s Welfare Reform of 1996 removed many important features of the U.S. welfare safety net.⁸⁰ If Kuznet is correct, something has gone wrong with American democracy, or at least with the ability of lower-income groups to press to have their needs addressed in the U.S.⁸¹

The impact of the gap between the “haves” and “have-nots” on our democracy is explored in detail in the American Political Science Association task force Reports on Inequality and American Democracy.⁸² As two of the authors state:

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

⁷⁹ One example that resonates with tort reform is the E.E.O.C. See, e.g., Marni Goldberg, *Job-Discrimination Claims Pile Up With Budget Cuts*, CHI. TRIBUNE, June 17, 2006, <http://www.latimes.com/news/nationworld/nation/la-na-eeoc17jun17,1,7666899.story?coll=la-headlines-nation> (The claims backlog at the EEOC, which has lost 20% of its staff since 2001, grew 12% last year resulting in a backlog of over 33,000 claims; the backlog is expected to grow to 48,000 by 2007 while Bush is proposing another 4 million dollar reduction in funding).

⁸⁰ See JACOB HACKER ET AL., TASK FORCE ON INEQUALITY AND AMERICAN DEMOCRACY, INEQUALITY AND PUBLIC POLICY 14 (2004), <http://www.apsanet.org/imgtest/feedbackmemo.pdf>. As Thomas Piketty and Emmanuel Saez note in *Income Inequality in the United States, 1913-1998*, CXVIII THE Q. J. OF ECON. 1, 1-2 (2003), “Kuznet’s curve is widely held to have doubled back on itself, especially in the United States, with the period of falling inequality observed during the first half of the twentieth century being succeeded by a very sharp reversal of the trend since the 1970s.”

⁸¹ Or, the U.S. is in a new industrial revolution (i.e. the computer revolution). See Piketty & Saez, *supra* note 80, at 2, 24.

⁸² TASK FORCE REPORTS, *supra* note 25.

the advantaged roar with a clarity and consistency that policymakers readily hear and routinely follow.⁸³

This undermines the principle of political equality, or what Rawls calls the fair value of the political liberties, by allowing socio-economic disadvantage to translate into political disadvantage and the erosion of the fair value of one's political liberties.

According to some studies, the poorest 1/3 of Americans has virtually no influence on national legislation and the bottom 2/3 has less than half the influence of the top 1/3.⁸⁴ Bartels summarized his unpublished findings from the 101st Congress of 1989 to the 103rd Congress of 1994 to show that while there was a good deal of responsiveness to middle and high income constituents, senators completely ignored constituents in the bottom third economic bracket.⁸⁵ The figures are stark, with nearly twice as much responsiveness being shown for high income constituents than for middle income constituents and absolutely no weight given to the lower 1/3 of the population.⁸⁶ One may have expected that this would hold true for Republican members of Congress, given the stereotype that Republicans are for the rich while Democrats are for the poor.⁸⁷ Bartels' statistics do in fact show that Republicans are nearly twice as responsive to the

⁸³ Jacobs & Skocpol, *supra* note 25, at 27. See also Kay Lehman Schlozman, *On Inequality and Political Voice: Response to Stephen Earl Bennett's Critique*, 39 PS: POL. SCI. & POL. 55, 56 (2006) (referring to SCHLOZMAN ET AL., *supra* note 45, at 30-33).

⁸⁴ Bartels, *Water Rising*, *supra* note 56, at 40; See also Stephen Macedo & Christopher Karpowitz, *The Local Roots of Inequality*, 39 PS: POL. SCI. AND POL. 59, 60 (2006); Larry M. Bartels, *Economic Inequality and Political Representation* (2005) (hereinafter Bartels, *Economic*) (unpublished manuscript, on file with Princeton University), www.princeton.edu/~bartels/economic.pdf; Martin Gilens, *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* (2003) (hereinafter Gilens, *Public Opinion*) (unpublished manuscript, on file with Princeton University), <http://www.princeton.edu/~csdp/events/pdfs/Gilens.pdf>. See also Martin Gilens, discussing *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* at The Center for Study of Democratic Politics, Princeton University, conference on Global Inequality (Nov. 7-8, 2003).

⁸⁵ Bartels, *Water Rising*, *supra* note 56, at 40.

⁸⁶ See *id.* at 40 fig. 1.

⁸⁷ Although there is some truth to the former assertion, Bartels' work shows that there is little truth the latter assertion.

views of wealthy constituents as are Democrats.⁸⁸ While one might expect that Democrats would spread their responsiveness between the middle and lower income constituent, they in fact split their responsiveness nearly 50/50 between middle and high income constituents and, like Republicans, are completely unresponsive to low income constituents.⁸⁹ This view is supported by historians of voting law and practices and by former democratic cabinet members. As Alexander Keyssar notes in his work on the history of voting in America, Democrats have spent more energy courting suburban swing votes and trying to keep Wall Street happy than trying to mobilize the masses of poor non-voters.⁹⁰

Bartels also noted that the unpublished work of Martin Gilens supported his finding.⁹¹ Gilens has since published his expanded research and the results are even more startling than Bartels' findings.⁹² Although he found a moderately strong relationship between what the public wants and what the government does,⁹³ he also found that when Americans with different income levels had differing policy preferences the policy outcomes strongly reflected the preferences of the most affluent but not those of poor or even middle-income Americans.⁹⁴ Thus, Gilens' published work goes much further than questioning whether the democratic system works for the poor to whether the system can be characterized as democratic at all.

⁸⁸ Bartels, *Economic*, *supra* note 84, at 20-24, 44-46 tbls.4-6, 53 fig.3 .

⁸⁹ The actual ratio is 54/46, and thus Democrats can boast that they are moderately more the party of the middle class than of the upper class. Bartels, *Economic*, *supra* note 84, at 53 fig.3.

⁹⁰ KEYSSAR, *supra* note 11, at 4, 321. Keyssar also refers to the work of Robert Reich, Clinton's secretary of labor (ROBERT B. REICH, *LOCKED IN THE CABINET* (1997)) noting that Reich's memoirs have a number of references to the fact that the Clinton administration's political strategies subordinated social policy to the preferences of Wall Street. KEYSSAR, *supra* note 11, at 4, 321.

⁹¹ Bartels, *Water Rising*, *supra* note 56, at 40 (referring to Gilens, *Public Opinion*, *supra* note 84).

⁹² He has almost doubled his data set from 754 to 2000 questions and expanded the years from 1992 to 1998 to between 1981 and 2002. Martin Gilens, *Inequality and Democratic Responsiveness*, 69 *PUB. OPINION Q.* 778, 778-96 (2005) (hereinafter Gilens, *Inequality*). Note that these years substantially overlap with the Rehnquist Court and with the beginning of regressive tort reform.

⁹³ He notes, however, that even with proposed changes receiving 90% public support there is only a 46% chance the policy makers will adopt the policy. Gilens, *Inequality*, *supra* note 92, at 786

⁹⁴ See Gilens, *Inequality*, *supra* note 92, at 788-789.

Lawrence Jacobs and Benjamin Page found similar results when it came to U.S. foreign relations.⁹⁵ These authors tested the impact of four different factors on U.S. foreign policy (public opinion, labor, members of epistemic communities (educators and leaders of private foreign policy organizations and think tanks [hereinafter experts]), and business).⁹⁶ They used four different types of regression models and found that under the four models, business was by far the most dominant influence on U.S. foreign policy (across the House, the Senate and the executive/administration).⁹⁷ Public opinion had virtually no impact,⁹⁸ and the impact of experts was dubious.⁹⁹ It was unclear whether their opinions were causes or effects of the views of policy makers,¹⁰⁰ and how much of their views was the product of the influence of business and labor.¹⁰¹ If the impact of business and labor, on expert opinions is plugged into their analysis, the impact of business on foreign policy raises from .52 to just over .70 while the impact of labor raises from .16 to about .29.¹⁰² While labor has some impact, it is still dwarfed by the impact of business.

The results of this study again bring into question democratic responsiveness and accountability.¹⁰³ If public opinion has little to no influence on foreign policy, the real impact of experts is dubious and business has two to three times the impact of labor, then one must question the true vitality of American democracy. Given the standards articulated above, these

⁹⁵ Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107 (2005).

⁹⁶ *Id.* at 110.

⁹⁷ *Id.* at 114-117.

⁹⁸ *Id.* at 114 tbl.1, 115 tbls.2-3, 116 tbl.4.

⁹⁹ *Id.* at 117, 114 tbl.1, 115 tbls.2-3, 116 tbl.4.

¹⁰⁰ *Id.* at 117.

¹⁰¹ *Id.* at 119.

¹⁰² *Id.* at 119; *see id.* at 120 tbl.5. For a treatment of this phenomenon in the context of tort reform see FEINMAN, *supra* note 9, at 175.

¹⁰³ The authors note that their finding may have troubling normative implications for “adherents to democratic theory who advocate substantial government responsiveness to the reasoned preferences of citizens.” *Id.* at 121 (referring to such adherents as ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989) and BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICA’S POLICY PREFERENCES* (1992)).

signs of non-responsiveness and grossly unequal responsiveness threaten democracy conceived in these terms.¹⁰⁴

Of course, it is difficult to be heard if one does not have a voice. Political voice is exercised through voting, spending or contributing, and actual contact with politicians. Social scientists have identified voter turnout as the potential cause of both the failure to alleviate the inequality gap¹⁰⁵ and the failure to respond to lower income constituencies.¹⁰⁶ Others have argued that affluence and actual contact with politicians or the lack thereof may be more significant in determining the responsiveness of politicians to different constituencies.¹⁰⁷

According to Kenworthy and Pontusson, the median-voter model predicts that with increases in market inequality the distance between median and mean income increases (the mean or average wage goes up more than the wage in the middle, or median wage) and as a result, support for government spending increases and thus the inequality gap is narrowed.¹⁰⁸ As documented above, while the model works in Europe, it has failed in the U.S. How does one account for the failure? One viable explanation for the why Europe does and the U.S. do not close the gap is voter turnout. In the countries surveyed by Kenworthy and Pontusson the differences in responsiveness to inequalities roughly track voter turnout rates.¹⁰⁹ In other words, the higher the voter turnout, the more redistribution from rich to poor.¹¹⁰

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

¹⁰⁴ Bartels, *Water Rising*, *supra* note 56, at 39.

¹⁰⁵ Kenworthy & Pontusson, *supra* note 63, at 456-461, 459 (emphasis added), 462 fig.9. This is the contemporary variant of Kuznet's work cited above. Kuznet, *supra* note 78.

¹⁰⁶ John Griffin & Brian Newman, *Are Voters Better Represented*, 67 J. POL. 1206 (2005).

¹⁰⁷ Bartels, *Economic*, *supra* note 84, at 26-27.

¹⁰⁸ Kenworthy & Pontusson, *supra* note 63, at 456 (referring to Allan Meltzer & Scott Richard, *A Rational Theory of the Size of Government*, 89 J. POL. ECON. 914 (1981)).

¹⁰⁹ Kenworthy & Pontusson, *supra* note 63, at 459, 462 fig.9.

¹¹⁰ Compare table 2, *infra* at ___ and table 3, *infra* at __. The explanation is strengthened in the U.S. case by the data presented below, which shows that the poor have much lower voter turnout rates than those in the middle class and above.

The average voter turnout for elections in the 16 countries in the Appendix Table 4 is about 76%.¹¹¹ Although the 2004 U.S. national elections saw a somewhat respectable turnout of almost 60%, that number was unusually high for U.S. national elections.¹¹² The average turnout for U.S. congressional elections from 1945 to 2001 was 48%, which is quite low compared to the average. The turnout at local elections tends to hover at about 30% and below.¹¹³ Statistics collected by Michael P. McDonald from state elections from 1980-2004 show voter participation rates from between 47% and 50%.¹¹⁴ Even if state officials are responsive to voters, these numbers call into question the democratic pedigree of state legislative tort reform.

Writing prior to the 2000 elections, Alexander Keyssar noted that historically, low voter turnout correlated with class and education and that “the people who are least likely to be content and complacent (and most likely to need government help) are those who are least likely to vote.”¹¹⁵ This debunks the idea that Americans don’t vote because they are generally content. He goes on to state that low voter turnout persists among the same groups to whom the franchise was limited throughout much of American history, namely, the poor, the young, certain minorities and those with less education—i.e. the ‘have-nots.’¹¹⁶

¹¹¹ Derived from statistics of averages of voting age population ratios across 169 countries in parliamentary elections from 1945-2001 compiled by the International Institute for Democratic and Electoral Assistance. RAFAEL LÓPEZ PINTOR ET AL., *VOTER TURNOUT RATES FROM A COMPARATIVE PERSPECTIVE* 75, 83-84 (2002), <http://www.idea.int/publications/vt/upload/Voter%20turnout.pdf>. Note that not only is the U.S. significantly below every other country on this list, it ranks 139th out of the 169 countries in the survey. *Id.*

¹¹² The U.S. census report puts the number higher because it excludes those people of voting age who are not eligible to vote like certain immigrants and felons/ ex felons. KELLY HOLDER, U.S. CENSUS BUREAU, *VOTING AND REGISTRATION IN THE NOVEMBER 2004 ELECTION: POPULATION CHARACTERISTICS 1* (2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

¹¹³ Macedo & Karpowitz, *supra* note 84, at 59-60 (referring to STEPHEN MACEDO ET. AL., *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION AND WHAT WE CAN DO ABOUT IT* 66 (2005) and Zoltan Hajnal & Jessica Trounstine, *Where Turnout Matters: The Consequences of Uneven turnout in City Politics*, 67 J. POL. 515 (2005), as well as others).

¹¹⁴ United States Election Project, *Voter Turnout Statistics, Turnout 1980-2006*, <http://elections.gmu.edu/Turnout%201980-2006.xls> (last visited Jan. 24, 2007). *See also* Michael P. McDonald, *State Turnout Rates Among Those Eligible to Vote, 1980-2000*, 2 ST. POL. AND POL’Y Q. 1999 (2002).

¹¹⁵ KEYSSAR, *supra* note 11, at 321.

¹¹⁶ *Id.* The notable exception is women. HOLDER, *supra* note 112, at 2.

These observations were borne out in the 2004 elections. Those in the over \$50,000 income bracket had a 77% voter turnout as opposed to those making less than \$20,000, who had a 48% voter turnout.¹¹⁷ The poor were greatly overrepresented among non-voters while those making over \$100,000 a year are greatly underrepresented among non-voters.¹¹⁸ The employed had a 66% turnout as opposed to a 50% turnout for the unemployed.¹¹⁹ Those with Bachelor's degrees had about twice the voter turnout as those without high school degrees (78% vs. 40%).¹²⁰ Those in the 18-24 year old bracket who do not have a high school degree had a rate of fewer than 25% while those in the same bracket with college degrees had a 67% rate.¹²¹ Non-Hispanic white citizens had turnout rates at 67% while black citizens were at 60%, Hispanic citizens at 47% and Asian citizens at 44%.¹²²

As one might predict, the increase in voter turnout for the 2004 election was not due to higher turnout rate from Blacks, Asians, Hispanics or from the poor, but from non-Hispanic whites who increased their turnout from 60.5% in 2000 to 67% in 2004, and those making over \$50,000 per year who increased their turnout from 72% in 2000 to 77% in 2004.¹²³

As noted above, voter turnout has also been used to explain the closely related phenomenon of a lack of responsiveness. Griffin and Newman found that voters are better represented than non-voters.¹²⁴ Given that the middle and upper income groups have better voter

¹¹⁷ HOLDER, *supra* note 112, at 5. The income based statistics stop at \$100,000 and over and so it is difficult to know what the numbers are like for the very wealthy.

¹¹⁸ *Id.* at 10 tbl.C.

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.*

¹²¹ *Id.* at 6.

¹²² *Id.* at 7.

¹²³ Compare HOLDER, *supra* note 112 with AMY JAMIESON ET AL., U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000: POPULATION CHARACTERISTICS 3, 5 (2002), <http://www.census.gov/prod/2002pubs/p20-542.pdf>.

¹²⁴ Griffin & Newman, *supra* note 106.

turnout rates than the poor, this may account for at least some of the difference in responsiveness.

There is a whole host of explanations for why certain minorities, the poor, and uneducated have such low voter turnouts. Those explanations include:

- lack of stake in the system (little to gain),¹²⁵
- the complex non-user-friendly procedures,¹²⁶
- conflicts with work, school or childcare obligations,¹²⁷
- the fact that voting is not mandatory,¹²⁸ and
- the fact that the U.S. has a two party system, under which neither party caters to the interests of the poor.¹²⁹

Almost all of these factors have a disproportionate negative impact on the poor and uneducated. If elected officials were concerned about the groups that have such low voter turnout, a number of simple reforms would make it easier to go to the polls. As common sense suggests, given that those who do not vote did not elect the people currently in office, there is not much incentive for those in office to enact reforms to bring them to the polls.¹³⁰

¹²⁵ Clinton's own secretary of labor said that "the great mass of non-voters . . . didn't vote in 1996 because they saw nothing in it for them." REICH, *supra* note 90, at 330.

¹²⁶ KEYSSAR, *supra* note 11, at 321; *see also* MARTIN WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 162 (2002). Wattenberg finds it impressive how good our turnout is given how complicated our process is compared to other countries. *Id.*

¹²⁷ This is because our elections are held during the work week and not on a public holiday. *See* WATTENBERG, *supra* note 126, at 169-71. Wattenberg notes that in President Clinton's last official message to Congress he wrote, "We should declare election day a national holiday so that no one has to choose between their responsibilities at work and their responsibilities as a citizen." *Id.* at 170-71 (citing William Jefferson Clinton, 42nd President of the United States, *The Unfinished Work of Building One America*, Message to Congress (Jan. 15, 2001)).

¹²⁸ In the 9 countries where compulsory voting is enforced, the turnout rate is over 85% compared to nearly 75% in the 10 states that do not enforce their mandatory voting laws. Compare this to the average of approximately 68% for the remaining 147 states that do not have compulsory voting. PINTOR ET AL., *supra* note 111.

¹²⁹ KEYSSAR, *supra* note 11, at 321. As he further notes, Clinton's own secretary of labor said that "the great mass of non-voters . . . didn't vote in 1996 because they saw nothing in it for them." *Id.* *See also* REICH, *supra* note 90, at 330.

¹³⁰ Here, the democratic process has very little hope of correcting itself.

Setting aside the problems created by the two party system,¹³¹ which would be both practically and politically difficult to change, many other changes would be simple, for instance:

- making ballots less complicated,¹³²
- making elections mandatory,¹³³
- making election day a national holiday,¹³⁴
- putting it on a weekend,¹³⁵ or
- simply extending the hours.¹³⁶

These would significantly improve democratic participation.

B. Other more stratified forms of political participation

Bartels tested the hypothesis that voter turnout was the cause of lack of responsiveness along with a few other contenders, e.g., “political knowledge” and “contact with senators and/or staff” and found the latter (contact with senators and/or staff) to have the most significant impact on responsiveness.¹³⁷ By comparing his work with Sidney Verba’s, he was also able to roughly test the hypothesis that campaign contributions impacted on responsiveness, and found that in two of the eight issue areas the projected disparities in responsiveness matched the disparities in

¹³¹ See e.g. AREND LIJPHART, PATTERS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX DEMOCRACIES (1999); see also Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT’L POL. SCI. REV. 297 (1997) (Special issue: Contrasting Political Institutions), available at http://www.cuhk.edu.hk/gpa/wang_files/Dem09.pdf.

¹³² WATTENBERG notes that in Europe there are generally much fewer choices to make on ballots, making them much easier to complete. WATTENBERG, *supra* note 126, at 166.

¹³³ See PINTOR ET AL., *supra* note 111; see also WATTENBERG, *supra* note 126, at 164; and Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997). Note that compulsory voting laws do not require that one actually vote, but they do require that one show up to vote unless one has an appropriate excuse or justification for not doing so. WATTENBERG, *supra* note 126, at 164.

¹³⁴ WATTENBERG, *supra* note 126, at 170-71.

¹³⁵ *Id.* at 169.

¹³⁶ *Id.* at 172 (drawing on the Japanese experience).

¹³⁷ Bartels, *Economic*, *supra* note 84, at 24-29, 47 tbl.7.

income contribution while in the others, the disparities did not quite match the dollar for dollar disparities although, unsurprisingly, they did tend in the same direction.¹³⁸

Despite low voter turnout rates, voters are the most numerous and most representative group of political activists.¹³⁹ At the other end of the representative spectrum are campaign contributors, who are the least representative.¹⁴⁰ Eighty five percent of those making a donation to a presidential candidate of over \$1,000 had at least a BA, and 95% of the substantial donors to presidential candidates in 2000 made over \$100,000.¹⁴¹ The race, sex and age discrepancies in donations of over \$200 to presidential candidates reflect similar discrepancies, with 96% of donations coming from Whites, 70% coming from males and over 99% of donations coming from those over 30. Those in the 18-30 bracket contributed only 1% while those over age 46 contributed 83%.¹⁴²

Looking across the spectrum of participation, the statistics show that those making over \$75,000 per year are between two and six times more likely to participate in politics through campaign work, direct contact, protests, affiliation with political organizations, informal community activities, and campaign contributions than those making under \$75,000 per year.¹⁴³ Those making over \$75,000 per year have approximately twice as much direct contact as those making under \$75,000 per year. The numbers are not as drastic for race, but they do show

¹³⁸ *Id.* at 28-29 (using SIDNEY VERBA ET AL., VOICE AND INEQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 194, 565 (1995))

¹³⁹ SCHLOZMAN ET AL., *supra* note 45, at 22, 38 tbl.3.

¹⁴⁰ *Id.* at 22.

¹⁴¹ *Id.* at 22. This group comprised only 12% of the population. *Id.*

¹⁴² *Id.* at 38 tbl.3.

¹⁴³ *Id.* at 23 fig.1. Class based stratification affects the entire range of political activities. KEYSSAR, *supra* note 11, at 321-322 (referring to VERBA, ET AL., *supra* note 148, at 1-13, 23-24, 511-33). “The affluent and well-educated are not only able to afford the financial costs of organizational support but they are in a better position to command the skills, acquire the information, and utilize connections that are helpful in getting an organization off the ground or keeping it going.” SCHLOZMAN ET AL., *supra* note 45, at 20.

significant disparities between Whites, African Americans and Latinos.¹⁴⁴ The discrepancy in political activity between those in the 18-24 age range and those in the ranges of 24-49 and 50-59 was about 1-2.¹⁴⁵ Note that the E. U., Council of Europe and the E.U. Ministers of Youth have expended considerable efforts to get youth below voting age to participate in politics, through direct integrations into the political processes, youth organizations, action oriented participation and through ombudsman representing the interests of children.¹⁴⁶

Education, is a central element in the relationship between socio-economic status and participation because it affects many other determinants of socio-economic status as well as the other determinants of participation, e.g., job, income, knowledge, civic and organizational skills, as well as connections with other politically active people who are more likely to enlist their aid in political activities.¹⁴⁷

Given the growing inequality in America, the low voter turnout among the poor and uneducated, the lack of access of middle and lower income Americans to politicians, and the resulting lack of influence on “representatives” it is not surprising that legislation in general, and

¹⁴⁴ Gilens, *Inequality*, *supra* note 92, at 24 tbl.2. *See also id.* at 24 fig.3. In terms of mean number of political activities Anglo-White men had 2.36 compared to 1.94 for Black men and 1.61 for Latino men. Among women, Whites had 2.08, Black’s 1.86, and Latinas .9. *Id.*

¹⁴⁵ *Id.* at 25 fig.4. It shows 1.26 political acts performed by those in the 18-24 age range compared with 2.17 in the 30-39 range, 2.54 in the 40-49 range, 2.52 in the 50-59 range, 2.35 for 60-69, with the numbers understandably dropping off for those over 70 to 1.82.

¹⁴⁶ *See, e.g.*, European Commission, Political Participation Starts at School, <http://ec.europa.eu/research/press/2006/pr2003en.cfm> (last visited Jan. 18, 2007); *See also* EUROPAISCHES ZENTRUM, THE EUROPEAN CENTER FOR SOCIAL WELFARE POLICY & RESEARCH, POLITICAL PARTICIPATION OF YOUTH: A REMEDY AGAINST MARGINALIZATION AND SOCIAL EXCLUSION, http://www.icnyp.net/www/files/political_participation_of_youth.pdf (last visited Jan. 18, 2007).

¹⁴⁷ Gilens, *Inequality*, *supra* note 92, at 26. Access to selective colleges is highly skewed by race and ethnicity, and even more skewed by socio-economic status. ANTHONY P. CARNEVALE & STEPHEN J. ROSE, CENTURY FOUNDATION, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 10-11, 69 tbl.1.1 (2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf. Carnevale and Rose found that “74 percent of the students at the top 146 highly selective colleges came from families in the top quarter of the SES scale (as measured by combining family income and the education and occupations of the parents), just 3 percent came from the bottom SES quartile, and roughly 10 percent came from the bottom half of the SES scale. If attendance at these institutions reflected the population at large, 85,000 students (rather than 17,000) would have been from the bottom two SES quartiles.” *Id.* at 11.

tort reform in particular, would not tend to the needs and preferences of a majority of Americans but would cater to the preferences of the few.

C. *Disenfranchised citizens (Illegal Americans)*¹⁴⁸

Since 1975, incarceration rates in the United States have quadrupled and over 5.3 million felons and ex felons are prohibited from voting.¹⁴⁹ Two and a half percent of the general population is denied the vote.¹⁵⁰ The demographics for the prison population significantly overlap with those in society who have low voter turnout and low political participation in general. Richard Freeman of Harvard University and the National Bureau of Economic Research reports that the prison population is disproportionately black and young with low education and literacy levels.¹⁵¹ Information on released prisoners indicates that 14% have less than 8 years of schooling and 67% have less than high school.¹⁵² Nearly half of the prison population consists of black males and 68% of all prisoners are below the age of 34.¹⁵³

¹⁴⁸ The term “illegal American” is used because it tracks the pejorative term “illegal immigrant.” It is a way marking them as “illegal” rather than as, say, hard working exploited immigrants. The label “illegal” is not generally used to categorize people when they break the law. For instance, there is little talk about the “illegal employer” problem in America. Felony disenfranchisement, particular post-release, is a way of marking people as outlaws or second class citizens.

¹⁴⁹ Manza and Uggen put the number at 5.3 million with 39% having completed their sentences. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 77 (2006). See also KATHERINE I. PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES* (2005). As of June 2005, there were 4.8 people incarcerated out of every 1,000, which is almost one out of every 200 people. U.S. Department of Justice, Bureau of Justice Statistics, Prison Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Jan. 24, 2007). The percentages for Black males at the end of 2004 was over 3% compared to white males at less than .05% of their population. *Id.*

¹⁵⁰ LALEH ISPAHANI, ACLU, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 3 (2006), http://www.aclu.org/images/asset_upload_file825_25663.pdf.

¹⁵¹ RICHARD FREEMAN, *CAN WE CLOSE THE REVOLVING DOOR? RECIDIVISM VS. EMPLOYMENT OF EX-OFFENDERS IN THE U.S.A.* (The Urban Inst. Reentry Roundtable Discussion Paper No. 2 2003), available at <http://www.ssw.umich.edu/events/CASD/freeman.pdf>.

¹⁵² *Id.* at 7 tbl.3.

¹⁵³ *Id.* at 15 tbl.1.

Ex offenders do not do well in the job market. They have low employment rates and they tend to earn less than others with similar demographics.¹⁵⁴ Further, nearly one third has a physical impairment or mental condition and 21% have some physical or mental condition that impairs work ability.¹⁵⁵ As Freeman states, “Since persons with physical and mental health problems, limited education, and poor literacy do badly in the US job market independently of a criminal record, [it should come as no surprise that] ex-offenders fare poorly in the job market.”¹⁵⁶ It should also come as little surprise that under these conditions, most prisoners end up back in prison.¹⁵⁷

The felon/ex-felon is a distinct, insular and growing minority in American society. Although they represent an extreme case, their disenfranchisement is compounded by the fact that they have very little mobility, very little stake, and even less say in the future of American society.¹⁵⁸

Looking at the phenomenon comparatively, the U.S. incarcerates between five and eight times the number of people incarcerated in other advanced industrial nations.¹⁵⁹ The overwhelming majority of Western European states have no ban on voting at all,¹⁶⁰ or only ban voting for specific criminals who commit certain serious crimes, and usually as explicit

¹⁵⁴ *Id.* at 9-10 (referring to Richard Freeman, *Economics of Crime*, in THE HANDBOOK OF LABOR ECONOMICS Ch. 52 (Orley Ashenfelter & David Card eds., 1999)); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 477 (2002).

¹⁵⁵ *Id.* at 10, 11 tbl.5.

¹⁵⁶ *Id.* at 13.

¹⁵⁷ *Id.* at 2 (citing PATRICK LANGAN & DAVID LEVIN, U.S. DEPARTMENT OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>).

¹⁵⁸ This is also true of the over 10 million unauthorized immigrant living in the U.S. For the numbers see JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 1 (2005), <http://pewhispanic.org/files/reports/46.pdf>. Unauthorized immigrants provide a cheap, hard working and docile labor force. Their presence keeps authorized immigrants and U.S. citizens relatively docile while keeping their wages low. They also provide a scapegoat for our woes and threats to our security, even though they put much more into our economy than they take out (including social security and taxes) and there have been few if any terrorists threats coming from unauthorized immigrants, especially from Mexico. The nineteen 9/11 terrorists entered the country legally. 9/11 COMMISSION REPORT 27 (2004).

¹⁵⁹ ISPAHANI, *supra* note 150, at 6.

¹⁶⁰ Seventeen European states do not ban voting at all, nine of which are Western European states. *Id.*

additional aspects of their prison sentence.¹⁶¹ While some twelve European states completely ban voting for incarcerated prisoners,¹⁶² ten of these twelve states are former Eastern Bloc countries who have a history of limited enfranchisement.¹⁶³ Of the two Western European countries, Spain and the United Kingdom, Spain rarely disenfranchises its prisoners,¹⁶⁴ and the practice of blanket bans in the United Kingdom has recently been condemned by the European Court of Human Rights in *Hirst v. United Kingdom (No 2)*.¹⁶⁵ Further, while some countries disqualify ex-felons from voting, “the sanction is purposefully and narrowly targeted, and the number of disenfranchised people is probably in the dozens or hundreds. In the United States, the disqualification is automatic, pursues no defined purpose and affects millions.”¹⁶⁶

Not only has the European Court of Human Rights condemned practices like that in the U.S., but so have the Supreme Court of Israel,¹⁶⁷ the Supreme Court of Canada,¹⁶⁸ and the Constitutional Court of South Africa.¹⁶⁹ These countries recognize that denying prisoners the right to vote is not undesirable merely because it harms the individual who loses the right, but

¹⁶¹ *Id.* at 7. Eleven states fall in this category, with eight of them coming from Western Europe (Greece is counted in this tradition).

¹⁶² *Id.* at 8.

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Hirst v. United Kingdom (No 2)*, 681 Eur Ct. H.R. (2005) (discussing a U.K. law denying the vote to all prisoners, stating “Such a general, automatic, and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide the margin might be, and is incompatible with Article 3 of Protocol No. 1.”); ISPAHANI, *supra* note 150, at 8.

¹⁶⁶ ISPAHANI, *supra* note 150, at 6.

¹⁶⁷ *Hilla Alrai v Minister of Interior HC2757/06 P.D. 50(2) 18* (1996) (refusing to disenfranchise Yigal Amir, the individual convicted of assassinating Yitzak Rabin, the Israeli Prime Minister. “[W]ithout the right to elect, the foundation of all other rights is undermined Accordingly every society should take great care not to interfere with the right to elect except in extreme circumstances.”).

¹⁶⁸ *Sauvé v. Canada* [2002] 3 S.C.R. 519 (striking down a law which denied the right to vote to those serving more than two years “Denying the vote denies the basis of democratic legitimacy . . . if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows.” *Id.* at para 32).

¹⁶⁹ National Institute of Crime Prevention and the Re-Integration of Offenders (NICRO), Erasmus and Schwagerl v. Minister of Home Affairs (CCT 03/04 2004) (striking down the Electoral Laws Amended Act 34 of 2003, which denied the right to vote for those serving prison sentences that did not have the option of a fine); August and Another v Electoral Commission and Others (CCT 8/99 1999) (holding that the Electoral Commission, by not providing the means and mechanisms for prisoners to vote, had breached the prisoner’s rights to vote under the Constitution).

because it harms the democratic legitimacy of the state. As McLachlin CJ, writing for the majority in *Sauvé v. Canada* said:

The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claims to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.¹⁷⁰

Denying prisoners the right to vote, particularly after they have served their time is a throw-back to pre-democratic times, when “democracy” was reserved for certain classes of people. The current trend sends the message that prisoners, and even ex-prisoners, are no longer a part of the same “democratic” America. This is particularly troubling given that this class is greatly overrepresented by minorities, those who are economically disadvantaged, educationally deprived and who have mental and physical disabilities. Taking away this right sends the message that these people are second class citizens, in effect, “illegal Americans.”

IV. THE TORT REVOLUTION AND COUNTER-REVOLUTION

The current wave of tort reform has been variously referred to as “tort deform,” “tort retrenchment,” “corporate cost shifting” or “corporate welfare.” While some would like to depict the recent trend in tort law as a semi-autonomous development in the law to meet the

¹⁷⁰ *Sauvé v. Canada* [2002] 3 S.C.R. 519, para 34.

needs of the day, this is not an accurate view. The current wave of tort “reform” is tied to a systematic and coordinated campaign,¹⁷¹ “by an army of corporations, foundations, lobbyists, litigation centers, think tanks politicians and academics,”¹⁷² to unmake or undo developments over the last 100 years across the common law.¹⁷³ This wave has its roots in a comprehensive view of the role of government in society that was in its heyday over 100 years ago, namely the laissez-faire view.¹⁷⁴ The idea is a return to a time of minimal government interference with capitalists and their market and a return to pre-modern or classical legal thought under which judges are mere neutral referees, rather than guardians of justice. Here, individual negative rights embodying such notions as “freedom of contract” and “buyer beware” trump public policy, embodying ideas such as “corporate responsibility” and “consumer safety,” and the idea that government sometimes needs to intervene to ensure that people actually are free. As pointed out above, this is a return to Lochner era values.¹⁷⁵ It is worth remembering that the Lochner era came to an end, in part, because of democratic developments and the realization that unchecked private power in the hands of the few could be just as large a threat to the actual freedom and equality of the people as unchecked public power.

¹⁷¹ FEINMAN, *supra* note 9. According to Feinman, Federalist Society members boasted that they occupied all of the assistant attorneys general positions and more than half of all other political appointments within the Regan-Meese Justice Department. Further, one fourth of all federal judicial candidates under the second Bush administration were recommended by the Federalist society and most of the lawyers in the White House Counsel’s office have been active members. *Id.* at 189.

¹⁷² *Id.* at 189.

¹⁷³ Jay Feinman traces this campaign all the way back to Ronald Regan’s inaugural address, where he stated that “Government is not the solution to our problems; government is the problem.” FEINMAN, *supra* note 9, at 1. The tort reform campaign came together in the Tort Policy Working Group within the Regan-Meese justice department. *Id.* at 186 (citing the TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986)). See also Dawn Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L. J. 363 (2003). For a comprehensive database on state tort reform totaling over 1,000 pages see RONEN AVRAHAM, DATABASE OF STATE TORT LAW REFORMS (2006) (Northwestern Law & Econ Research Paper No. 902711), available at <http://ssrn.com/abstract=902711>.

¹⁷⁴ FEINMAN, *supra* note 9, at 172 (citing JOHN B. JUDIS & TUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY 151-52 (2002)).

¹⁷⁵ *Id.* at 3-5, 7-18. Compare with Law, *supra* note 30 (making similar comments regarding the Rehnquist Court).

A common critique of the recent “tort reform campaign” is that it is based on misinformation, if not lies.¹⁷⁶ As Feinman states, “The problem with the conservative campaign, however, is that it is false. Not debatable, or a matter of opinion or political viewpoint, but false.”¹⁷⁷ Its falsity is based in many little lies that exaggerate cases, overstate the amount of and the effect of frivolous lawsuits, the impact of regulations on property rights and as well as the impact of liberal adjudication on the sanctity of contract.¹⁷⁸ When combined they feed into the big lie that the common law has been hijacked by greedy plaintiffs and lawyers as well as by liberal activist judges.¹⁷⁹

The tort reform campaign has been largely advanced by large corporate interests, who, as shown above, have the means necessary to make their voices heard.¹⁸⁰ They often use mass media as a vehicle for spreading their ideas.¹⁸¹ Most of these “tort reform” advocates have little reason beyond their own self interest in endorsing the tort reform agenda.¹⁸² These so-called reformers have the “singular purpose of furthering their political agenda by enraging the public over a civil justice system supposedly gone awry.”¹⁸³ Corporations have portrayed themselves as blameless victims, while portraying individuals (and their lawyers) as the aggressors.¹⁸⁴ They accomplish this by distorting the facts and turning “bizarre cases that almost happened into a

¹⁷⁶ See Lind, *supra* note 37, at 719; Abel, *supra* note 37, at 556; Goldberg, *supra* note 15; Priest, *supra* note 37, at 683; Eaton, *supra* note 37; Witt, *supra* note 37; Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 721 (1998) (hereinafter Galanter, *Oil Strike*).

¹⁷⁷ FEINMAN, *supra* note 9, at 190.

¹⁷⁸ *Id.* at 191.

¹⁷⁹ *Id.* at 191.

¹⁸⁰ See HALTOM & MCCANN, *supra* note 40, at 8; Rustad & Koenig, *supra* note 21; Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397 (2000); Galanter, *Oil Strike*, *supra* note 176. For example, one estimate states that in 1999 the insurance industry alone spent 85.6 million for lobbying. HALTOM & MCCANN, *supra*, at 48.

¹⁸¹ See HALTOM & MCCANN, *supra* note 40, at 8; Rustad & Koenig, *supra* note 21, at 51.

¹⁸² Peck et al., *supra* note 1, at 398.

¹⁸³ *Id.*

¹⁸⁴ Galanter, *Oil Strike*, *supra* note 176, at 733 (1998); Rustad & Koenig, *supra* note 21, at 4.

report of something typical and prevalent.”¹⁸⁵ As Haltom and McCann note, there are generally four characteristics of “tort tales” that “tort reformers” tell:

- elegance (they communicate moral messages that are instantly understandable);¹⁸⁶
- stereotypic characterization (plaintiffs are blameworthy, defendants are not);
- holler of the dollar (plaintiffs are always greedy); and,
- extraordinary occurrences symbolize ordinary outcomes (as if they were normal occurrences).¹⁸⁷

These types of unfounded claims are typical of the ammunition that tort reformers use.¹⁸⁸ For example, while tort reformers “claim” that punitive damages are out of control,¹⁸⁹ studies have shown that they are only awarded in about six percent of the cases that plaintiffs win.¹⁹⁰

Given the data and arguments put forth above in Parts II-III, one does not need to be a conspiracy theorist to predict that a well organized and funded campaign to institute reform for the “haves” by the “haves” in the area of tort law would be successful even if it was not good for the majority of Americans. The pervasive disinformation that accompanies this movement has no doubt acted like grease on a pig for those fighting against these “reforms” while acting like grease on the cogs of the machine for those pushing the reforms. This undermines the democratic

¹⁸⁵ Galanter, *Oil Strike*, *supra* note 176, at 728. For example, Galanter refers to a case where a woman claimed she lost her psychic abilities due to a CAT scan and a million dollar verdict was given but later thrown out. *Id.* at 726-27. Rustad and Koenig refer to the McDonald’s case where the fact that the coffee spilt was a 180 degrees, caused third degree burns and the plaintiff needed skin grafts is often left out of the story. Rustad & Koenig, *supra* note 21, at 719. Further, it is seldom reported that the 2.9 million dollar verdict against McDonald’s was reduced to 480,000. *Id.* Feinman refers to a case where a man sued the dairy industry and Safeway stores claiming that drinking milk increased his risk of stroke. FEINMAN, *supra* note 9, at 24. In reality, however, the claim was dismissed. *Id.*

¹⁸⁶ As Marc Galanter put’s it, “The jaundiced view resonates with cultural themes of individualism and self-reliance and has a strong nostalgic component.” Galanter, *Oil Strike*, *supra* note 176, at 720.

¹⁸⁷ HALTOM & MCCANN, *supra* note 40, at 62-63. For an interesting example of this strategy see American Tort Reform Association, Looney Lawsuits, <http://www.atra.org/display/13> (last visited Jan. 24, 2007). Also, in 1995 the ATRA received half of its budget from tobacco companies. HALTOM & MCCANN, *supra*, at 46.

¹⁸⁸ Further, tort reformers consistently ignore positive aspects of the tort system, such as deterrence. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 90 (1993) (hereinafter Galanter, *Nowhere*).

¹⁸⁹ FEINMAN, *supra* note 9, at 69.

¹⁹⁰ *Id.* See also *infra* note 269 for other low estimates on the award of punitive damages.

principle that political choices be the result of deliberation among political equals. Distorted deliberations make it nearly impossible for people to give voice to their interests or preferences since the disinformation often results in people thinking they want choice A when they really would prefer choice B if they knew all the facts. Although there have been countless studies refuting most of the key assertions used to justify the “tort reform” movement, the jaundiced view of the American civil justice system portrayed by this movement system still flourishes, and, no doubt, it does so because these “tort tales” are cast as legends that resonate with the basic themes of individual responsibility and self reliance which are so core to American political and legal culture.¹⁹¹ The result is a perverse form of corporate welfare where companies are able to shift responsibility for their conduct off of their shoulders and onto the shoulders of individual consumers.

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

Before beginning the exploration of tort reform it might be wise to respond to a preliminary objection. One may argue that since the bulk of progressive tort reform during the 60s and 70s was judicially created and most of the tort reform since the 1980s is legislative, the latter trend of regressive tort reform must have a better democratic pedigree than the former.

¹⁹¹ Galanter, *Oil Strike*, *supra* note 176, at 721. As Kevin O’Leary notes in KEVIN O’LEARY, *SAVING DEMOCRACY* (2006), democratic theorists as diverse as Jon Elster, Jurgen Habermas and John Rawl’s all hold the view that “political choice, to be legitimate, must be the outcome of deliberation about ends among free and equal rational agents.” O’LEARY, *supra*, at 163 (quoting Jon Elster, *Introduction*, in *DELIBERATIVE DEMOCRACY* 5 (Jon Elster ed., 1998)).

This is dubious for at least two reasons. First, it is by no means settled that the bulk of progressive tort reform in the former period was judicial (see Part IV.A. below). More importantly, given the evidence above that America's traditional "democratic" institutions (the executive and legislative branches) are skewed, or corrupted from the perspective of democratic values, then it follows that courts, which are generally insulated from interest group power politics and which are required to justify their decisions to the public through written decisions, may have a better chance of delivering decisions that are democratically justifiable. This is particularly true in the area of personal injury tort law where by and large the plaintiff class is unorganized and under funded, and the defendant class is well organized and well funded.¹⁹² Potential victims have neither the motive nor the easy means for organizing. Most people do not think of themselves as potential plaintiffs and thus are not generally mobilized to press their concerns, while most businesses and their associations do factor in the potential of being a defendant and thus, they have both the motive and the means to press their interests in tort reform through experts, lobbying, and campaign contributions.¹⁹³ Abel also notes that the plaintiff's bar does not necessarily have the interests of plaintiffs in mind in its battle with the defense bar over tort reform, for instance when it comes to no-fault automobile compensation schemes.¹⁹⁴

One way around the lack of influence in the judicial sphere is by contracting out of court and into arbitration where businesses, particularly businesses that are repeat players, have a distinct advantage.¹⁹⁵ The other tactic is try to break down the barriers that insulate courts as

¹⁹² Of course this is not true of business to business torts, but business to business torts are largely unaffected by tort reform. Nockleby & Curreri, *supra* note 1, at 1080-85.

¹⁹³ See Abel, *supra* note 37, at 536-37.

¹⁹⁴ *Id.* at 537.

¹⁹⁵ See Part IV.B.4 *infra* for the Supreme Court's support of this move; See also Bryant G. Garthy, *Tilting the Justice System from ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002).

much as possible, and this takes place in part through concerted efforts to get pro-tort reform judges elected and appointed. For instance, the movement to dismantle strict liability in products cases in California came after 1986 when three liberal judges were voted off the bench and replaced with conservatives.¹⁹⁶ The politicization of the judiciary took off under former President Reagan and continues to thrive today.¹⁹⁷ As David Law notes “commentators have singled out Reagan for taking the politicization of the judiciary to new heights by implementing a centralized high-level process for the ideological vetting of judicial candidates.”¹⁹⁸ According to Goldman, Reagan was very successful in appointing circuit court justices that remained faithful to his conservative agenda.¹⁹⁹ This has been reinforced ever since by the active participation of conservative groups in the process of judicial nominations.²⁰⁰

A. Tort Reform in General

1. Progressive democratic tort reform

The earliest sign of democracy reinforcing reform of tort law began in the early 1900s when workmen’s compensation schemes started to spread. The schemes attempted to find

¹⁹⁶ Stephan D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with ‘New’ Torts*, 49 DEPAUL L. REV. 455 (1999).

¹⁹⁷ Note the early department of justice reports under Reagan. OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION iii (1988), <http://islandia.law.yale.edu/acs/conference/meese-memos/year2000.pdf> (focusing on 15 key areas of constitutional controversy likely to go before the Court between 1988 and 2000, “the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court.”).

¹⁹⁸ David Law, *Appointing Federal Judges: The President, The Senate and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 485-86 (2005) (referring to Elliot E. Slotnick, *Federal Judicial Selection in the New Millennium, Prologue*, 36 U.C. DAVIS L. REV. 587, 589-90 (2003); and Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667, 678 (2003) (remarking upon Reagan’s reputation for attending to the ideology of his judicial nominees)).

¹⁹⁹ SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 116, 307 (1997).

²⁰⁰ FEINMAN, *supra* note 9, at 189. See also Nina Totenberg, Conservative Groups Push for More Judicial Confirmations, NPR, June 28, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5517409> (Conservative groups are urging President Bush and Senate Republicans to push harder to get more of the president’s judicial nominees approved. Social conservatives wanted more confirmations before the November elections in case the GOP loses Senate seats.).

collective justice for workers who were severely disadvantaged by the extant rules of the tort system.²⁰¹ However, other than workmen's compensation and Cardozo's opinion in *MacPherson v. Buick Motor Co.*, not much reform took place until the "Democratic Expansionary Era" after the Second World War.²⁰²

This period saw the court moving from a view of the tort system as providing case by case corrective justice to a view of the system as a mechanism for collective justice, or providing justice across classes of cases.²⁰³ This is partially what allowed the courts to think not only of putting people back into the place they were before the tort, but of other social goals like deterring wrongs and providing incentives for manufacturers to make their products safer for society.²⁰⁴ Courts stopped merely accepting that the status quo distributions of power and wealth were just and began tailoring corrective justice to collective and distributive justice concerns.

Democratic developments during the era resulted in the removal of immunity at both the federal level and the state level.²⁰⁵ It began with the Federal Tort Claims Act 1946 28 U.S. § 2875 and most states followed with similar legislation opening up their court for suits, thereby,

²⁰¹ The extant rules included such defenses as the fellow servant exception to master servant liability, voluntary assumption of risk, and contributory negligence. See ARTHUR LARSON, 1-2 LARSON'S WORKERS' COMPENSATION LAW §§ 2.03, 2.07-2.08 (2005), <http://www.lexis.com>. Some courts did temper these defenses in the late 1800s and early 1900s allowing more workers to gain compensation, however the bulk of workers injured on the job were left without compensation or with very little compensation. *Id.* at § 2.04, 2.07. See also Part IV. *infra*. See LARSON, *supra*, at §4, 7. These were also years of progress for the women's suffrage movement. Note that women's rights to tort compensation were also limited from the 1800s to the modern period. See Rustad & Koenig, *supra* note 21, at 34-35. See also Margo Schlanger, *Injured Women Before Common Law Courts: 1860- 1930*, 21 HARV. WOMEN'S L.J. 79 (1998).

²⁰² *Macpherson v. Buick Motor Co.*, 11 N.E. 1050, 1051-55 (N.Y. 1916) (holding that Buick owed a duty of care to the ultimate purchaser despite the absence of privity); Rustad & Koenig, *supra* note 21, at 38

²⁰³ FEINMAN, *supra* note 9, at 53 (Feinman puts the starting date at 1920). The previous era (the late 1800s to early 1900s) is often recognized as an era where the compensatory function of tort law was constricted. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 61 (1980).

²⁰⁴ There of course is the challenge that this should be left to legislators to decide. *Cf.* Abel, *supra* note 37.

²⁰⁵ Sovereign immunity from suit was abandoned in France by 1905. The first case to undermine the doctrine occurred in 1873 with the Tribunal des Conflicts cases of l'arrêt Blanco TC 8 Feb 1873, D.1873.17 (according jurisdiction to the administrative courts for actions brought against the state for damages caused by actions of persons employed in the public service) and the doctrine was solidified by 1905 in the case of Tomaso Grecco, CE 10 Feb 1905, D.1906.3.81. See DUNCAN FAIRGRAVE, STATE LIABILITY IN TORT: A COMPARATIVE STUDY 12-13 (2001).

making the state and the people equal before the law.²⁰⁶ The 1960s saw the passing of the 1964 Civil Rights Act, which provided statutory tort actions for discrimination in employment, housing, education, or in public accommodations on the basis of race, sex, national origin, or religion.²⁰⁷ Developments also came in the area of consumer protection and products liability,²⁰⁸ which were crystallized in the Restatement Second of Torts in 1965.²⁰⁹ Comparative fault did not begin to overtake the draconian rule/defense of contributory negligence (which in many cases completely barred a plaintiff from bringing a claim if she was at all negligent) until the 1970s.²¹⁰ The general no duty rule in torts (the rule that one is not responsible for others and has no positive duties towards them) was also narrowed during the 1970s when courts started imposing duties on people in “special relations” with others (e.g., psychiatrists and patients, common carriers and passengers, schools and their pupils, landlords and tenant, and business and their customers).²¹¹ These reforms helped consolidate democracy by providing enforcement mechanisms for hard won democratic rights as well as by making it easier for those whose rights had been violated to access the justice system and vindicate those rights.

2. Regressive tort reform

The Tort Policy Working Group from the Ronald Reagan-Edwin Meese justice department, one of the main catalysts of the counter-revolution in torts, came to life, in part,

²⁰⁶ See FEINMAN, *supra* note 9, at 56-57; DAN DOBBS, THE LAW OF TORTS §268 (2001). England also followed suit in 1947 with the Crown Proceedings Act of 1947, although vestiges of immunity still exist. FAIRGRAVE, *supra* note 205, at 12, 14-16.

²⁰⁷ 42 U.S.C. §§ 2000e-2000e-17 (2001) (Equal Employment Opportunities).

²⁰⁸ Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962). See also FEINMAN, *supra* note 9, at 55-56. Rustad and Koenig note a whole range of progressive decisions by the California courts during this era. Rustad & Koenig, *supra* note 21, at 45-49.

²⁰⁹ Restatement (Second) of Torts § 402A (1965).

²¹⁰ Nockleby & Curreri, *supra* note 1, at 1069-70.

²¹¹ *Id.* at 1065-69.

because of the liability insurance crisis of the 1980s.²¹² The Group identified a number of ‘causes’ of the so called “crisis”²¹³ and a set of recommendations or strategies for attacking the “crisis.” They summarily excluded all other explanations besides the civil justice system and thus, unsurprisingly, their recommendations or strategies focused only on attacking that system, by:

- 1) making it harder for injury victims to get into court,
- 2) making it more difficult to win once they are there, and
- 3) restricting damage recoveries for plaintiffs who do win.²¹⁴

This, in perhaps oversimplified terms, has guided the tort reform movement ever since.²¹⁵

a. Keeping plaintiffs out of court

There are a whole range of mechanisms or tactics that help reduce the number of claims made by potential plaintiffs (other than reducing negligence and making products safer). One mechanism for keeping plaintiffs out of court has been to make it less attractive for lawyers to take cases, by putting limits on contingency fees,²¹⁶ and creating “early offer” mechanisms (which include attorney fee limits) for economic damages which would preclude or make it very difficult to receive non-economic damages like pain and suffering.²¹⁷ Another tactic is to make it

²¹² FEINMAN, *supra* note 9, at 25.

²¹³ The decline of fault as the basis for liability, the undermining of causation, the explosive growth in damage awards, and the high transaction costs of the system. *Id.* at 26.

²¹⁴ *Id.* at 25, 27. For a compelling argument that the liability insurance crises of the 70s, mid 80s and in 2001 were all due to the market interest rate returns on insurance company investments rather than personal injury claims see JOANNE DOROSHOW & J. ROBERT HUNTER, INSURANCE “CRISIS” OFFICIALLY OVER – MEDICAL MALPRACTICE RATES HAVE BEEN STABLE FOR A YEAR 3 (2006), <http://insurance-reform.org/pr/MMSOFTMARKET.pdf>; *see also*, Frank A. Perrecone & Lisa R. Fabiano, *The Fleecing of Seriously Injured Medical Malpractice Victims in Illinois*, 26 N. ILL. U. L. REV. 527 (2006).

²¹⁵ *Id.* Note, the structure of this overview follows the structure of FEINMAN, *supra* note 9, at 27-46, but is not limited to its substance.

²¹⁶ *Id.* at 27-28.

²¹⁷ *Id.* at 29-30.

difficult for states to hire attorneys for complex litigation (e.g., tobacco and gun cases).²¹⁸ And finally, one can make it harder for people to join together in class actions.²¹⁹

This last tactic has is embodied in the Class Action Fairness Act of 2005 which takes many class actions out of the state courts and puts them into the federal courts.²²⁰ The "federalization" of class actions may act to deny or impede plaintiff's access to justice for a number of reasons,²²¹ including the relative difficulty of certifying classes in federal courts,²²² and the fact that the federal courts are overcrowded and appeals may cause undue delay.²²³ Further, to the extent that conservatives have managed to take over the federal judiciary and/or to secure anti-litigation justices on the federal bench, one would expect more bias against plaintiffs in general and against class actions in particular.²²⁴ As will be shown below, access to courts can also be limited through the enforcement of arbitration agreements that often preclude class

²¹⁸ *Id.* at 30-31.

²¹⁹ *Id.* at 31-32.

²²⁰ Pub. L. No. 109-2, 119 Stat. 4 (2005) (to be codified at 28 U.S.C. §§ 1332(d), 1335(a)(1), 1453, 1603(b)(3), 1711-15). The literature on the act is extensive. *See, e.g.*, Robert H. Klonoff & Mark Herrmann, Symposium: *Class Actions in the Gulf South and Beyond, The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695 (2006); *see id.* at 1696 n.1 for an extensive list of academic commentary on the Act (forty plus pieces). As Klonoff and Herrmann state, "It is well known that under CAFA, most major class actions, including virtually all multistate class actions, will now be heard in federal court." *Id.* at 1696.

²²¹ Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006).

²²² The federal courts' reluctance to issue class certification is well documented (referring to S. Rep. No. 106-420, at 57-59 (2000) (noting minority senators' views on CAFA)) (noting also that a review of forty-three class action cases involving life insurance marketing practices found that cases were nearly twice the certification in state court as in federal court) (referring to PUBLIC CITIZEN, UNFAIRNESS INCORPORATED: THE CORPORATE CAMPAIGN AGAINST CONSUMER CLASS ACTIONS 85 (2003), <http://www.citizen.org/documents/ACF2B13.pdf>).

²²³ Kanner, *supra* note 221, at 1654. For the view that class actions are undemocratic because they have led to substantive changes in the law, which did not go through the legislative process, see Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

²²⁴ For an account of the Republican efforts to appoint conservatives to the bench since Reagan see, for example, Law, *supra* note 30, at 485-86 (noting that Reagan succeeded in making ideological considerations paramount: by one observer's count, over three-quarters of his circuit court appointees furthered his conservative agenda, with the balance appearing to reward the party faithful. *Id.* at 490.

actions,²²⁵ and that, by definition, limit access to the courts, both in the first instance and as a matter of review.

b. Making it harder for plaintiff to win cases

The more direct route to reducing claims is to change the liability rules to make it harder for plaintiffs to win when they get to court. This has happened by making liability less strict in products liability cases,²²⁶ setting up procedural obstacles in medical malpractice cases,²²⁷ and by providing immunity from suit for certain industries.²²⁸ This has been the case with gun manufacturers²²⁹ as well as biomaterials manufacturers.²³⁰ This will also make it less likely that plaintiffs and their lawyers will sue in the first place.

c. Capping damages and making punitive damages harder to get

Finally, one of the most active areas of tort reform has centered around limiting damages, and this has happened by placing limits on joint and several liability,²³¹ limiting the collateral

²²⁵ See Part IV.B.4 *infra*.

²²⁶ See FEINMAN, *supra* note 9, at 34-40. See Part IV *infra*. In fact the move is to return certain forms of products liability to a negligence standard.

²²⁷ See, e.g., Thomas Baker who, commenting on the effect of the Harvard Medical Malpractice Study (HMPS), notes that “policymakers have seized on the weakest aspect of the HMPS, the analysis of the validity of medical malpractice claims, and used that analysis to justify imposing caps on damages in medical malpractice cases and additional procedural hurdles for medical malpractice claimants. For that reason the practical impact of the HMPS may well have been to expand the gap between the large number of people who are injured by medical malpractice and the few people who are compensated and to increase the likelihood that the compensation that is received will be inadequate.” Thomas Baker, *Reconsidering the Harvard Medical Malpractice Study: Conclusions About the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501, 511 (2005).

²²⁸ This also echoes the reinvigorated state immunity doctrine of the Supreme Court. See Part IV.B.5 *infra*.

²²⁹ FEINMAN, *supra* note 9, at 33; Daniel Feldman, *Legislating or Litigating Public Policy Change: Gunmaker Tort Liability* 12 VA. J. SOC. POL'Y & L. 140 (2004); *But see* the repeal of immunity in California, John Fowler, *Will a Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?*, 34 MCGEORGE L. REV. 339 (2003).

²³⁰ FEINMAN, *supra* note 9, at 33-34. See also James D. Kerouac, Note, *A Critical Analysis of the Biomaterials Access Assurance Act of 1998 as Federal Tort Reform Policy*, B.U. J. SCI. & TECH. L. 327 (2001).

²³¹ See, e.g., the National Association of Mutual Insurance Companies' report on Joint and Several Liability Rule Reform. Nat'l Ass'n of Mut. Ins. Cos., Joint and Several Liab. Reform States, <http://www.namic.org/reports/tortReform/JointAndSeveralLiability.asp> (last visited Jan. 24, 2007).

source rule,²³² and capping non-economic damages,²³³ including both punitive damages,²³⁴ and pain and suffering damages.²³⁵ In addition to placing caps on punitive damages, tort reform has also included legislation that increases the burden of proof on the plaintiff in order to receive punitive damages.²³⁶ As Michael L. Rustad explains,

Forty-five out of the fifty-one jurisdictions either do not recognize punitive damages or have enacted one or more restrictions on the remedy since 1979. These reforms include capping punitive damages, bifurcating the amount of punitive damages from the rest of the trial, raising the burden of proof, allocating a share of punitive damages to the state, and restricting use of evidence of corporate wealth. The handful of jurisdictions that have yet to enact tort reforms are mostly punitive damages cold spots rather than tort hellholes.²³⁷

²³² See Nat'l Ass'n of Mut. Ins. Cos., Collateral Source Rule Reform, <http://www.namic.org/reports/tortReform/CollateralSourceRule.asp> (last visited Jan. 24, 2007). Note that according to Kevin S. Marshall and Patrick W. Fitzgerald, forty-four states have enacted legislation allowing for the consideration of the payment of collateral source benefits. Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL'Y 57, 61 app.1 (2005) (arguing that tort reform designed to undermine the collateral source rule is the product of defense oriented public interest group lobbying and has resulted in arbitrary wealth transferring legislation that not only undermines the legitimate purposes of tort law, namely, compensation, indemnity, restitution and deterrence, but is economically unsound).

²³³ See, e.g., Nat'l Ass'n of Mut. Ins. Cos., Non-Economic Damage Reform, <http://www.namic.org/reports/tortReform/NoneconomicDamage.asp> (last visited Jan. 24, 2007).

²³⁴ See, e.g., Nat'l Ass'n of Mut. Ins. Cos., Punitive Damage Reform, <http://www.namic.org/reports/tortReform/PunitiveDamage.asp> (last visited Jan. 24, 2007).

²³⁵ See, e.g., FEINMAN, *supra* note 9, at 40-46. Medical malpractice reform is one very significant area of regressive reform. Nockleby & Curreri believe that reform efforts in this area can be traced to the abandonment of the locality rule of practice which undermined the "conspiracy of silence" by holding doctors to a national standard of care. Nockleby & Curreri, *supra* note 1, at 1023.

²³⁶ See, e.g., JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 4:60 CLEAR AND CONVINCING EVIDENCE STANDARD (3rd ed.) (WL database updated April 2006); See also 22 AM. JUR. 2d Damages § 706 VI. Practice and Procedure B. Evidence 1. Burden; Sufficiency of Proof, Punitive or exemplary and multiple damages (WL database updated May 2006) (requiring clear and convincing evidence and in some jurisdictions, proof beyond a reasonable doubt).

²³⁷ Rustad, *supra* note 40, at 1300.

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

d. Illegal Americans revisited

It should come as little surprise that there has been regressive tort reform at the federal level in the area of prison litigation that achieves all three goals, i.e. making it harder for prisoners to get into court, making it more difficult to win once they are there, and restricting damage recoveries for them when they do win.²³⁸ As James Robertson notes,

The [Prison Litigation Reform Act] constrains inmates by requiring them to exhaust administrative remedies before bringing suit; pay filing fees; and forgo damages for emotional injuries absent a prior physical injury. While the Act permits the judiciary to sua sponte dismiss claims failing to state a cause of action, its power to grant prospective relief cannot extend beyond correcting the right in question; and the relief can be terminated within two years or, in some instances, sooner. In addition, the Act caps fees for attorneys and special masters.²³⁹

²³⁸ Prison Litigation Reform Act Pub. L. No. 104-134, 110 Stat. 1321 (1996).

²³⁹ James Robertson, *The Jurisprudence of the PLRA: Inmates as "Outsiders" and the Counter-majoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 188-189 (2002). President William Clinton signed this bill into law.

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

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

For the greater part of the history and evolution of American tort law, the U.S. the Supreme Court has not been a central actor. Few, if any, of the major advances in tort law during the 60s and 70s are credited to that institution.²⁴⁰ This is because tort law is traditionally either a part of state common law or state and federal statutory law. Heavy involvement by the Supreme Court in either of these areas raises the possibility of activism, either in the form of the court overstepping boundaries based on federalism concerns or overstepping boundaries based on separation of powers concerns. Of course, it may be contended that either the states or Congress has overstepped rather than the Supreme Court. In either event, significant legal change in the area of civil litigation and torts at the Supreme Court level signals that something more significant than the normal ebb and flow of state based tort reform initiatives is afoot. While the wave of tort reform beginning in the 1980s is not generally credited to the Supreme Court,²⁴¹ the Court has played a very strong supporting role in that movement, both in its rhetoric,²⁴² and in its decisions during the last two decades. The court has had a significant impact on the broader category of civil litigation, and this impact is commensurate with

²⁴⁰ See, e.g., Rustad & Koenig, *supra* note 21, at 105 app.1. The notable exception is in the area of the first amendment.

²⁴¹ Most of it has been carried out state by state through legislation and in their courts. See e.g., FEINMAN, *supra* note 9, at 44.

²⁴² Note the many jibes in the cases limiting the ability of plaintiffs to seek relief in the courts. Siegel, *supra* note 29, at 1124 n.102 (mainly coming from Scalia). Note also the rhetoric in the punitive damages cases of damages "running wild." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (hereinafter *Haslip*).

regressive tort reform in general. The Supreme Court, has, in effect put its imprimatur on the movement.

Andrew Siegel in a careful and thorough piece paints a picture of the Rehnquist Court as a Court with an overarching hostility to litigation.²⁴³ As Siegel states, “In case after case and in wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation.”²⁴⁴ Siegel’s point is not to dismiss the voluminous existing explanatory narratives of the Court such as, federalism, conservatism, or even judicial supremacy, but to show that they are incomplete and misleading without an understanding of the Court’s hostility to litigation.²⁴⁵

This hostility is not an even handed hostility to all litigants alike. It manifests itself most prominently to the disadvantage of plaintiffs, and common people, and to the advantage of defendants and legal fictions, namely states and other corporate entities.²⁴⁶ Siegel finds it curious that this hostility coexists with “the Court’s concurrent commitment to an aggressive form of judicial supremacy”²⁴⁷ and he explores a range of explanatory vectors, not least of which is the strong correlation between a conservative social vision and the cases in which the Court has shown the most hostility to litigation as well as when it seems to most zealously promote its own supremacy.²⁴⁸ Other explanatory vectors include an oversimplified view of

²⁴³ Siegel, *supra* note 29, at 1097. Although Siegel is not the first to identify this attitude, he is the first to draw it out as an overarching theme of the court. For earlier, more partial references to the idea, See Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L. J. 691, 706-19 (2000) (identifying "hostility to litigation" as one of the themes behind the court's 1999 sovereign immunity decisions).

²⁴⁴ Siegel, *supra* note 29, at 1117. While I track Siegel’s treatment of the Court’s hostility to litigation the treatment below focuses on how that hostility translates into undermining democratic values.

²⁴⁵ *Id.* at 1102.

²⁴⁶ As Siegel notes, “Any survey of the Rehnquist Court's hostility to litigation, however cursory, must begin with the obvious: In myriad ways, the Court has made life very difficult for civil plaintiffs.” *Id.* at 1117. Siegel notes that while the court is generally hostile to litigation, it treats “plaintiffs’ litigation” as particularly “demeaning and disreputable.” *Id.* at 1201.

²⁴⁷ *Id.* at 1098.

²⁴⁸ *Id.* at 1199-1200.

separation of powers,²⁴⁹ and the structure and sociology of the American legal profession within which there is a tendency for the best trained and best connected lawyers (including the members of the Court and their associates) to congregate in civil defense and constitutional litigation rather than in personal injury.²⁵⁰

The democracy based explanation, which is not directly pursued by Siegel, but which is consistent with both Supreme Court elitism and certain aspects of a conservative social vision, is that the Court lacks sufficient concern for democratic values. The point is not to simply trot out the old hobby horse of counter-majoritarianism (i.e., the court is an activist Court with little respect for other democratic institutions)²⁵¹ but that many of the Court's decisions undermine democratic accountability and fail to accord equal concern and respect for everyone who is affected by its decisions.

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

²⁴⁹ *Id.* at 1200-1201. Although Siegel sees this as one possible explanatory vector, he notes that it is not an explanation that is consistent with a number of the court's decisions. *Id.* at n.458 (referring to the discussion in the text accompanying footnotes 109-110. The implausibility of this explanation is further explored below).

²⁵⁰ *Id.* at 1202.

²⁵¹ See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L. J. 481, 495 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 130 (2001). Note that courts are not categorically counter-majoritarian. Given the evidence above concerning the "representative" branches and Richard Abel's work, there is no reason to think that the courts are less likely to provide democratically justifiable decisions in the area of torts. Abel, *supra* note 37.

1. Constricting remedies

A number of authors have commented on the Court's constriction of remedies for those whose rights have been violated.²⁵² Andrew Siegel, who analyzes four paradigm cases,²⁵³ out of many,²⁵⁴ in which the Rehnquist Court has undermined the traditional view that rights imply remedies for their violation,²⁵⁵ notes that in every case there was an acknowledged or assumed injury to a defined legal interest and there was Supreme Court precedent supporting relief.²⁵⁶

The Court, at times, attempts to justify these decisions on democratic grounds.²⁵⁷ Siegel phrases the court's democratic justification in terms of ensuring that coercive sanctions are not imposed without careful communal deliberation.²⁵⁸ This line of argument is rooted in separation of powers concerns, namely concerns that the courts not encroach on the prerogatives of representative institutions to make the law and determine whether there should be remedies for the breach of law.²⁵⁹ In a number of these cases, the Court appears to engage in a dialogue with

²⁵² See Goldberg, *supra* note 15; Christopher J. Roederer, *Another Case in Lochner's Legacy, The Court's Assault on New Property*, 54 DRAKE L. REV. 321, 341-42, 342-351, 360 (2006); Andrew Siegel & Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. J. 223 (2003).

²⁵³ *Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action exists to enforce the disparate impact regulations barring entities who receive federal funds from adopting policies that have the "effect" of discriminating on the basis of race); *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) (Bivens action (private remedy for Constitutional right violation not available for a federal prisoner held in a private correctional facility in a claim against the corporation for violation of the Eighth Amendment's prohibition on "cruel and unusual punishment."); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (a remedial provision of the Employee Retirement Income Security Act of 1974 (ERISA) does not provide a right of recovery); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (private individuals harmed by violations of the Family Educational Rights and Privacy Act of 1974 (FERPA) cannot seek redress under 42 U.S.C. § 1983).

²⁵⁴ Siegel lists several cases but does not include *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (dismissing respondent's case for failing to establish that she had a property right in the enforcement of a mandatory restraining order, thereby failing to establish that she had a right that was worthy of procedural due process protection which would provide a right to sue under 42 U.S.C. § 1983).

²⁵⁵ Siegel, *supra* note 29, at 1118-1129.

²⁵⁶ *Id.* at 1122.

²⁵⁷ *Id.* at 1129.

²⁵⁸ *Id.*

²⁵⁹ Siegel refers to *Corr. Servs. Corp. v. Malesko*, 534 U.S. 204, 67-69 (2002) which discusses a number of cases limiting remedies to civil litigants on the grounds of separation of powers. Siegel, *supra* note 29, at n.119.

Congress and or the states, imploring them to speak more clearly if they wish to create private remedies.²⁶⁰

However, it is difficult for this explanation of the Court's decisions to hold up, given the Court's assault on §1983 claims, for that assault is in direct conflict with the spirit and the letter of §1983 under which Congress explicitly provided for the right to a remedy for the violation of federal law, including constitutional law.²⁶¹ This is not only evidenced by some of the cases mentioned above, including *Gonzaga* and *Castle Rock*, but also in cases where the court has expanded official immunity from damages under §1983 and its decisions which make it harder to recoup attorneys fees under §1983.²⁶² These decisions fly in the face of democratic concerns, not only by undermining "democratically" passed legislation but by undermining mechanisms designed to help consolidate and protect democratic rights.

A similar pattern is found in the Court's expansion of the doctrine of qualified immunity over the last twenty years which has resulted in more stringent standards for determining a clearly established right as well as greater tolerance for errors of judgments on the part of officials claiming the immunity.²⁶³ The result is that it is harder in these cases for victims who have had recognized rights violated to vindicate those rights.²⁶⁴

²⁶⁰ Siegel refers to *Gonzaga University v. Does*, 536 U.S. 273, 280-81 (2002) (describing the need for congress to speak clearly of its intention to create a private remedy). Siegel, *supra* note 29. See also *Castle Rock*, 125 S. Ct. at 2806 (quoting Colo. Rev. Stat. § 18-6-803.5(a)-(b) (1999)). It is questionable whether the Court in *Castle Rock* was genuine. See Roederer, *supra* note 252, at 341-42, 342-351, 360.

²⁶¹ Oddly, the Court uses arguments and policy drawn from implied right of actions cases (under which separation of powers concerns justifiably act to limit the court in creating rights of action) to limit §1983 claims. This is odd because §1983 was specifically enacted to provide rights of action and thus the Court is undermining the separation of powers when it denies such claims. See Siegel, *supra* note 29, at 1126; Roederer, *supra* note 252, at 321-69.

²⁶² See Siegel, *supra* note 29, at 1126, 1130.

²⁶³ *Id.* at 1130-31 n.123 (also see the cases cited therein); see *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curium). But see the handful of cases where the Court has limited overly expansive interpretations/ applications of immunity by circuit courts for example, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (holding that the circuit court erred in applying a "rigid gloss" to the qualified immunity standard that denied relief to tort plaintiffs if there was no prior case with "materially similar" facts where a constitutional violation had been established); *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (unanimously holding, contrary to the position of a number of circuits, that an order

2. Access to Fee Shifting

Fee shifting legislation allowing for those suing to vindicate civil rights to claim attorney's fees when they prevailed in their cases constituted a very important and progressive development for civil litigants.²⁶⁵ This development accompanied the Civil Rights Act of 1964 and was later incorporated into the Civil Rights Attorney's Fees Act of 1976. That reform helped to ensure that the rights won on paper, and which evidence the coming of age of American democracy, could actually be vindicated in practice. This reform not only made it easier for victims to obtain counsel, bring claims, and receive remedies for the wrongs they suffered, but it had the further purpose and effect of keeping those hard won democratic gains on track. Plaintiffs in these cases are not merely vindicating private wrongs but helping vindicate and deter public wrongs.

Again, however, the Rehnquist Court has whittled away at this mechanism for vindicating those rights which help keep democracy on track. It has done so by narrowing down the class of "prevailing plaintiffs" and it has done this by devaluing the importance of having the Constitution, and one's rights under the Constitution, vindicated. In other words the devaluation of constitutional rights is not merely the result of this practice, but is in fact the means through which it is achieved. The Court has denied "prevailing party" status to plaintiffs in cases where

denying summary judgment in a qualified immunity case because of uncertainty about the factual sufficiency of the allegations was not immediately appealable).

²⁶⁴ Siegel, *supra* note 29, at 1131-32. *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 482-84 (2002); Jackson, *supra* note 243, at 691, 707 (locating the Supreme Court's 1999 sovereign immunity decisions in the context of a variety of other anti-litigation initiatives of the Rehnquist Court and offering the Court's "hostility to litigation" as one of many overlapping themes motivating those decisions). David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989) (arguing that the doctrine is based on right wing judicial activism). The push for the immunity of corporate entities is not confined to the state. FEINMAN, *supra* note 9, at 33-34.

²⁶⁵ *See, e.g.*, Siegel, *supra* note 29, at 1136. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243, tit. II & tit. VII; *see, e.g.*, Fair Housing Amendment Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622, 1623, 1636; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328.

the decision that the plaintiffs' rights had been violated were not entered into a formal declaratory judgment or injunction, when although entered into judgment they did not provide a "substantial benefit" to the claimant, where the claimant only receives nominal damages, and/ or where the claimant whose suit compels the abandonment of an illegal practice or rule is not accompanied by a binding judicial decree.²⁶⁶

These cases appear to deny the congressionally mandated relief on rather narrow and technical grounds which are not supported by the separation of powers or the democracy-reinforcing purposes of the provisions themselves. The cases which narrowly read "prevailing party" to exclude those whose rights are vindicated but whose damages are nominal or insubstantial, completely undervalues the federal and constitutional rights these provisions were designed to help safeguard. The fact that money damages are inadequate or inappropriate in some of these cases, or that specific performance is more appropriate does not mean that a vindication of the right is less important or valuable. It demeans the legislation and the rights it was designed to protect to act as if it was designed to only protect losses that could be, or are, converted into money damages. Further, to deny the shifting of fees in these cases does the most damage to the purpose of the legislation, which was to encourage these types of suits.²⁶⁷ This is because it is exactly in those cases where there are few monetary damages that it will be most difficult for plaintiffs to secure adequate legal representation. Without monetary damages or fee shifting the attorney's fees must come from the plaintiff.

²⁶⁶ See e.g., Siegel, *supra* note 29, at 1137. See also *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam); *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *Buckhannon Bd. & Care Home v. W. Va. Dept's of Health & Human Res.*, 532 U.S. 598, 605(1994).

²⁶⁷ See *Kay v. Ehrler*, 499 U.S. 432, 436 (1991).

3. Punitive Damages

The Supreme Court has also weighed in on punitive damages. The Rehnquist Court, unlike any Court before, has sought to limit the availability of punitive damages. Siegel is correct to point out that punitive damages are something of a lightning rod for tort reform advocates, yet he is incorrect to think that this is because they “represent a substantial share of the costs of our current regime.”²⁶⁸ Punitive damages are in fact very rare²⁶⁹ and although awards may be extreme in some cases, the numbers are not significant in light of the vast majority of cases.²⁷⁰

The changes in this area have gone from requiring certain procedural safeguards to substantive limits on the amount of damages.²⁷¹ Not unlike the fee shifting limitation, here the

²⁶⁸ Siegel, *supra* note 29, at 1148. See, e.g., Rustad & Koenig, *supra* note 21, at 60-65. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006) (hereinafter Eisenberg et al., *State Courts*), available at <http://ssrn.com/abstract=912309>. As Eisenberg has stated elsewhere, “Misperceptions about juries and punitive damages are especially strong. Contrary to popular belief, juries rarely award such damages, and award them especially rarely in products liability and medical malpractice cases. Rather, juries tend to award punitive damages in intentional misconduct cases. When juries do award punitive damages, they do so in ways that relate strongly to compensatory awards.” Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) (hereinafter Eisenberg et al., *Empirical Study*).

²⁶⁹ Eisenberg found that judges award punitive damages in about 4% of decided cases and juries in about 5% of decided cases. Eisenberg et al., *State Courts*, *supra* note 268, at 268. However, given that these numbers reflect cases in which plaintiffs win, they only represent about half of all cases tried, and since less than 5% of cases go to court, while the rest settle, and this makes the number of punitive damages cases quite de minimus (below 3 in 10,000).

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

²⁷¹ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (striking down a damage award as excessive); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426, 448 (2001) (holding that appellate courts should review trial court determinations as to the constitutionality of punitive damage awards de novo); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (striking down a damage award as excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (holding that the lax standard for appellate review of punitive damages mandated by the Oregon Constitution violated the Due Process Clause of the Fourteenth Amendment); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446, 465-66 (1993) (reviewing a punitive damage award for excessiveness but finding it within constitutional limits); *Haslip*, 499 U.S. at 23-24 (reviewing both Alabama’s method of assessing punitive damages and the magnitude of an award in a particular case but finding no constitutional problem); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damage awards and declining to set aside a punitive damage award as excessive); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988) (discussing but declining to answer on prudential grounds major constitutional questions regarding punitive damage awards). See Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L.

Court pegs its substantive limits to compensatory damages,²⁷² thus making cases that do not involve high levels of economic damages harder to bring.²⁷³ Again, like in the fee shifting cases, limiting punitive damages, particularly in this fashion, reduces the efficacy of punitive damages as a way of deterring the egregious behavior of defendants. Whereas above the Court was undermining the role that fee shifting played in securing federal and constitutional rights, here, limitations on punitive damages also limits the public policy role that punitive damages play in deterring some of the worst forms of corporate irresponsibility.²⁷⁴

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

The Court has also gone out of its way to broadly construe the Federal Arbitration Act. As was noted above, contracting out of courts and into arbitration is one way of circumventing an institution that is unresponsive to special interest pressures. There may be a tendency to think that since arbitration is as a form of alternative dispute resolution it is thereby progressive.²⁷⁵ At the very least some might think that it is no less progressive than regular litigation and should be given equal footing. Although the Court's recognition of arbitration may have begun as an effort to put arbitration on an equal footing with litigation, it has ended up as "a policy-driven assault

REV. 1 (2004). Another punitive damages case, *Philip Morris USA v. Williams* (05-1256), is before the Supreme Court this term.

²⁷² In *State Farm*, although the Court would not make a bright line ratio, it stated that "...in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 410. However, the Court did note that "ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Id.* (citing *Gore*, 517 U.S. at 581-82).

²⁷³ Siegel, *supra* note 29, at 1147.

²⁷⁴ See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L. J.* 347, 355 (2003); DAN B. DOBBS, *THE LAW OF TORTS* §381 (2000); FEINMAN, *supra* note 9, at 42- 46. Siegel notes that the Court is particularly hostile to litigation in cases like punitive damages where litigation is meant to achieve greater societal purposes. Siegel, *supra* note 29, at 1160 n.255.

²⁷⁵ As Garthy notes, "mandatory arbitration . . . gained support from idealistic academic studies . . . promoting "procedural justice." The idea was that arbitration allows individuals to tell their stories, and therefore litigants perceive the process as a more legitimate form of justice than the usual result of litigation—a negotiated settlement. Both mediation and arbitration contain a tradition—now seemingly muted—that the results are supposed to be better than strict enforcement of the law." Garthy, *supra* note 195.

on the wisdom and propriety of litigation as a mechanism for resolving such disputes.²⁷⁶ There is little question that arbitration has its benefits, particularly in terms of costs to the parties. For equal bargaining partners arbitration may in fact be superior to litigation.

The Court's practice, however, has been to ignore the bargaining disparities of the parties. As Siegel states, "[i]t has consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs."²⁷⁷ There are at least five significant effects of allowing companies to bind consumers (and smaller, less powerful companies) to arbitration. First, the company gets to choose a venue that is more congenial. Second, it gets a forum that has less due process than a court has,²⁷⁸ e.g. in terms of discovery, the right to a jury,²⁷⁹ and judicial review. Third, it can oust the possibility of punitive damages. Fourth, it can eliminate the possibility of victims joining together in class

²⁷⁶ Siegel, *supra* note 29, at 1141.

²⁷⁷ Siegel, *supra* note 29, at 1117-1118. The literature critiquing the court on this point is vast. *See e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996) (arguing that the Supreme Court's arbitration jurisprudence will allow "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WISC. L. REV. 33, 36 (1997) ("The Supreme Court has created a monster."); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (critiquing arbitration case law for increasingly favoring arbitral forums without regard for basic fairness or rule of law norms); *See also e.g.*, Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); David M. Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B. U. L. REV. 745 (1999); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); Margo E. K. Reder, *Arbitrating Securities Industry Employment Discrimination Claims: Restructuring a System to Ensure Fairness*, 2 U. PA. J. LAB. & EMP. L. 19 (1999); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WISC. L. REV. 831 (2001).

²⁷⁸ "Just as important to anyone concerned with the morality of law is the fact that the arbitrator can decide a case without regard for the law or the facts in a case. There is no predictable outcome, no procedural protection." Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205, 1236 (2000). *See also* Garthy, *supra* note 195.

²⁷⁹ This arguably undermines one of the main democratic components of our system of justice (both civil and criminal).

actions to bring suit.²⁸⁰ Finally, as Richard Posner states, parties are not entitled to awards that are “correct or even reasonable, since neither error nor clear error, nor even gross error is a ground for vacating an award.”²⁸¹ All of these factors benefit the few at the expense of the majority. As Garthy suggests,

It is not the simplistic bias of decision-making structured for the employers or companies to win. Instead, the bias is found in a system in which only a few constituencies are comfortable making their arguments and confident that their concerns will be understood, even if they lose some cases. The bias is also in a process that selects neutrals that will be safe for the leading lawyers and clients- whoever controls the selection- and rejects those who appear too political, too unreliable, or too risky even on the basis of cultural stereotypes.²⁸²

This is about as undemocratically tailored as a justice system can be. It is perfectly suited for employers and companies who are repeat players and everyone else, must simply take it, or go without.²⁸³ Deborah Post, in describing the 7th Circuit case of *Hill v. Gateway 2000 Inc.*,²⁸⁴

²⁸⁰ Eliminating class actions means that many consumers with small harms simply won't pursue claims, thereby allowing business to defraud large numbers of consumers in small amounts. FEINMAN, *supra* note 9, at 104. It is only through joining as a class that they can in any way approximate the power of big business. *Id.* at 80; *see also* Post, *supra* note 278, at 1226. In *Gateway*, Justice Easterbrook upheld an “arbitration agreement” that was not negotiated, but simply shipped with the plaintiff's computer binding the plaintiff/consumer to its terms unless the consumer shipped the computer back to the manufacturer at the consumer's own cost within 30 days (a rolling shrink wrap). *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) *cert. denied* 522 U.S. 808, 118 S. Ct. 47 (1997); *see also* FEINMAN, *supra* note 9, at 88. This is just one way of forming binding contracts with little to no notice, much less bargaining. In addition to the normal boilerplate adhesion contract, others include shrink-wraps, browse-wraps and click-wraps in which the agreement is packaged with the product, put on a website or on the computer screen to click. FEINMAN, *supra* note 9, at 86.

²⁸¹ *IDS Life Insurance Company v. Royal Alliance Associates, Inc.*, 266 F. 3d 645, 650-651 (7th Cir. 2001).

²⁸² Garthy, *supra* note 195, at 933.

²⁸³ Just as the Court abandoned its fidelity of separation of powers, the Court here abandons its fidelity to federalism when into comes into conflict with its desire to limit access to the courts through the FAA. Siegel, *supra* note 29, at

states, “The Gateway case . . . threatens the democratic process on two levels. Not only does it create a model of contract formation that gives entire control over the terms of the agreement to one side, it also deprives the less powerful party, the individual consumer, of the only mechanism she has to directly confront behavior that is predatory, abusive or simply overreaching.”²⁸⁵

5. States Rights

One of the most dramatic areas of constitutional change has been in the area of “states rights.” The Court has brought new life to state sovereign immunity in a whole host of cases through a diverse set of mechanisms.²⁸⁶ The result, as with many of the cases above involving rights of action, qualified immunity, and arbitration, is that colorable claims are dismissed without regard for their merit.²⁸⁷ The result is that victims of illegal government conduct are denied access to justice.²⁸⁸ It also means that one important mechanism for holding government accountable to the people is eroded, and with it, respect for the rule of law.

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

²⁸⁴ *Gateway*, 105 F.3d 1147.

²⁸⁵ *Post*, *supra* note 279, at 1235.

²⁸⁶ Siegel summarizes the area: “the Court has reaffirmed and firmly constitutionalized the expansive and counter-textual reading of the Eleventh Amendment . . . , held that Congress may not abrogate states' Eleventh Amendment immunity under any of its Article I powers, developed a fairly intrusive test to determine whether Congress has properly abrogated the states' immunity pursuant to its Fourteenth Amendment powers, and applied that test with increasing rigor and scepticism. At the same time, the Court has--without relying on the Eleventh Amendment or any other textual provision--held that the Constitution's structure requires that the states be accorded sovereign immunity from suits in their own courts (absent their consent) and from federal administrative proceedings that bear significant indicia of adjudication. In a variety of less well-known cases, the Court has also narrowed the well-established doctrine whereby individuals may, notwithstanding sovereign immunity, seek injunctions against state officials in their official capacity, made it easier for state officials to obtain dismissal of lawsuits on sovereign immunity grounds at an early stage in the litigation process, and overruled precedent suggesting that a state does not possess full Eleventh Amendment immunity when it engages in routine commercial activity.” Siegel, *supra* note 29, at 1153-54 n.219-228.

²⁸⁷ Siegel, *supra* note 29, at 1163.

²⁸⁸ *Id.*

The justification for the revival of state immunity is a somewhat odd anthropomorphism of the state.²⁸⁹ The idea is that states are somehow endowed with sovereignty, the likes of which make them susceptible to moral harm or assaults to their dignity. The concept is a throwback to the days in which Kings and Queens ruled the land, when they were “the sovereign” wholly capable of suffering indignity at the hands of others. There is considerable debate as to whether or not dignity actually was the animating idea behind the 11th Amendment and sovereign immunity.²⁹⁰ The historical argument as to whether or not dignity was crucial to the 11th amendment and state sovereign immunity is somewhat wayward to the concerns of this article. Like many issues in legal history, there is ample authority on both sides.

Even if dignity was the original rationale for the 11th Amendment, it was a different notion of dignity than the one called forth by the Court today. The dignity referred to before consisted of the notion that sovereigns were equal and that it was inappropriate (or undignified) to subject one sovereign to the courts of another sovereign.²⁹¹ This purportedly undermined the equality of sovereigns.²⁹² However, the modern focus is on the indignity of being brought into court (even the state’s own court). While the former view sounded in notions about the equality of sovereigns, if Siegel is correct, the modern notion is not animated by equality, but by a sort of elitism which places the state sovereign above its citizens. As Siegel notes, “As the Court sees it,

²⁸⁹ Siegel notes that Justice Thomas has provided the fullest articulation of the dignity principle, “[t]he preeminent purpose of state sovereign immunity is to accord the States the dignity that is consistent with their status as sovereign entities.” *Id.* (citing Fed. Mar. Comm’n, *FMC v. South Carolina State Ports Authority*, 535 U.S. 743 (2002)). Siegel, *supra* note 29, at 1157.

²⁹⁰ Note that the dignity rationale for sovereign immunity was only used sporadically. It came up in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and then in *In re Ayers*, 123 U.S. 503 (1887). It was only raised again in 1959 where it was not relied upon. *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 276 n.1 (1959). As the court pointed out in that case, “More than the dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!” *Id.* (citing MARIAN D. IRISH ET AL., *THE POLITICS OF AMERICAN DEMOCRACY* 123 (1959)).

²⁹¹ This was the kind of dignity at play which was rejected by Chief Justice Marshall in *Cohens v. Virginia*. Siegel, *supra* note 29, at 1160.

²⁹² Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

compelling an unwilling state to defend a private lawsuit for damages threatens state dignity for much the same reason and in much the same way that subjecting a private party to such a suit diminishes the dignity and threatens the status of that private party”²⁹³ In other words, it is part of a visceral reaction to having to defend oneself in court.

However, modern states, be they national or federal, like corporations and associations, are artificial entities and do not possess the moral qualities needed to have dignity. While the earlier conception of equal dignity of states vis-a-vis other states resonates with democratic impulses (although it too raises concerns in our global interdependent world),²⁹⁴ the modern form of the idea, is decidedly undemocratic. Again, the idea is a throwback to pre-democratic times, when the sovereign made, imposed and was above the law. This is inconsistent with notions of equality before the law. The Court, in effect, is choosing to protect the “dignity” of the state over the rights of plaintiff citizens. It is undermining “the rule of law” and equality before the law, thereby elevating “rule by the sovereign” and undermining democratic accountability.²⁹⁵

V. CONCLUSION

Given the findings in Parts II and III above, there is little hope that this work, or anyone else’s academic work, is going to revitalize American democracy on its own. The present downward spiraling cycle will not be easy to reverse. This is not to say that critical work has no

²⁹³ Siegel, *supra* note 29, at 1162.

²⁹⁴ See, e.g., DARREL MOELLENDORF, *COSMOPOLITAN JUSTICE* (2002) (critiquing John Rawls statist approach to global justice on Rawlsian grounds).

²⁹⁵ Although beyond the scope of this paper, the present administration’s attack on the rule of law should be noted. The attack has taken many forms since the beginning of the “war on terror”, but a few recent examples include the president’s abuse of signing statements to selectively enforce the law as well as proposed amendments to the War Crimes Act to insulate government officials from suits based on war crimes committed against detainees. See, e.g., Press Release, American Bar Association, Blue-Ribbon Task Force Finds President Bush’s Signing Statements Undermine Separation of Powers (July 24, 2006), <http://www.abanet.org/media/releases/news072406.html>; and Jeffrey Smith, *Detainee Abuse Charges Feared: Shield Sought From '96 War Crimes Act*, WASHINGTON POST, July 28, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/27/AR2006072701908_pf.html.

place or no chance of impact. There is some hope that this piece, like the works of professors Abel, Baker, Feinman and Rustad, among others, will at least demystify what is at stake in modern tort reform. Demystification is a necessary, although insufficient step towards transparency, accountability and a revitalized democracy. Although many authors have come close to challenging tort “reform” on democratic few if any have chosen to be blunt. The arguments above were designed to place the present course of tort “reform” in sharp relief against the unreflective idea that the American ship of state and law has been sailing a steady democratic course for over two hundred years. Sometimes it takes a clear sighting of the precipice before people are willing to change course.

A prime example is captured in the American Law Institute Restatement (Third) of Products Liability. Although the reporters’ sincerity is dubious in a number of respects,²⁹⁶ their “restatement” of the law placed the course of products liability in sharp relief against the path of the ALI Restatement (Second) of Torts §402A. Their, perhaps overzealous, crystallization of:

- the death of strict liability in product design and failure to warn cases (§2);
- the death of the consumer expectations test, and the requirement that the plaintiff prove the existence of reasonable alternative design (§2(b));
- the nearly complete immunity given to prescription drugs (§ 6(c)); and
- the pass given to “unavoidably unsafe” products such as drugs, cigarettes and alcohol,²⁹⁷

²⁹⁶ The fact that they attempt to maintain that their restatement is not political, but merely a restatement of existing laws is as hard to accept as their assertion that the choice between the risk-utility approach to products liability and the consumer expectation approach is merely a pragmatic choice, a matter of getting it right, like figuring out the boiling point of water, rather than a choice deeply rooted in political as well as principled considerations of justice. See James A. Henderson Jr. & Aron D. Twersky, *What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT’L L.J. 1, 14. (1999).

²⁹⁷ Earlier outlines of the present work included a section depicting the rise of consumer protection and strict liability in democratically accountable Europe and the fall of strict liability and consumer protection in “manufacturer’s accountable America.” Luke Nottage in his comparative study of products liability in Japan the U.S. E.U., and Australia, depicts EU law as making steady pro-consumer progress from the 1960s to the present, Australia making rather steady progress from the 60s until about 2000, Japan making very little pro-consumer progress until 1994,

made it very clear just how far off course the law of products liability was going from the path of the Second Restatement, and what was being lost from the perspective of consumer protection and corporate responsibility. Whether one thinks the Third Restatement was merely a cold but brutally accurate obituary or a politically motivated attempt to put a bounty on the head of strict liability,²⁹⁸ it brought the issue out in stark relief. As Ellen Wertheimer notes, “The Third Restatement made it impossible for courts to ignore what they had done, and many did not like what they saw.”²⁹⁹

What they saw, once the dust settled, was that the risks and losses did not go away, but were simply shifted. In fact, those risks and losses were shifted onto the shoulders of innocent consumers who are not only at a disadvantage from the perspective of making products safer, but who also are not equally equipped to insure for, absorb or spread the losses they suffer.³⁰⁰

when it adopted its Product Liability Law which was modeled on the E.U. directive, and the United States, whose pro-consumer product liability law peaked in the early 80s and started a rather steep decline until the present. Luke Nottage, *Comparing Product Safety and Liability Law in Japan: From Minamata to Mad cows – and Mitsubishi*, in *PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE* 336 (Duncan Fairgrieve ed., 2005). See also Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 994 (1998); Josephine Liu, *Two Roads Diverged in a Yellow Wood: The European Community Stays on the Path to Strict Liability*, 27 FORDHAM INT'L L.J. 1940 (2004). Cf. Reisman, *supra* note 67, at 801 (somewhat more cautious about the E.U. being more protective of consumers); and cf. Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45, 53-61 (1999) (arguing that the E.U. also uses a negligence standard in design and failure to warn cases).

²⁹⁸ See, FEINMAN, *supra* note 9, at 40. The idea that §2(b) represents a wish list for manufacturers has been repeatedly cited since it was first stated by Frank Vadall in 1997. See, e.g., *id.*; Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 927 n.116 (2005); Aaron Arnold, Note, *Rethinking Design Defect Law: Should Arizona Adopt the Restatement (Third) of Torts: Products Liability?*, 45 ARIZ. L. REV. 173, 174 (2003); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1727 n.116 (2003) (quoting *Green v. Smith & Nephew AHP, Inc.*, 629 N.W. 2d 727, 751 n.16 (Wis. 2001) (quoting Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Product Liability section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 261 (1997))).

²⁹⁹ Wertheimer, *supra* note 298. Although she does note that some courts did follow the Third Restatement even though it conflicted with earlier precedent. *Id.*

³⁰⁰ As Reisman notes, “In the United States, accident victims are not nearly protected comprehensively. In 1997, 16 % of all Americans and 37 % of the low-income population had no health coverage at all, and the number kept rising. Only 66 % of the adult workforce has disability benefits, and these benefits are usually less than ample. All States have enacted workers compensation schemes but the compensation they pay is fairly low and often insufficient to make ends meet. Overall, social and workers insurance cover only about three-fifths of the economic consequences of accidents, forcing victims to bear the remaining 40 % themselves.” Reisman, *supra* note 67, at 828.

Although the campaign to see the corporate producer as the symbol of American freedom -- like a mustang, tethered to a shrub in the desert of social-welfare tort law, being fed upon by greedy parasitic lawyers and consumers -- persists,³⁰¹ the reality is that, when horses run wild, people get trampled. Under the Third Restatement, those who trample (who profit from putting products into the stream of commerce, who are best placed to test and make products safe or warn of their hazards, and are best placed to insure against, absorb and spread the risks and losses) now have a much better chance at avoiding responsibility and liability for those losses. This not only raises the risk of being trodden upon (by undermining the deterrent effect of products liability law) but it also raises the risk that once trodden upon, the consumer must bear the loss.

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

³⁰¹ See, e.g., Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, 645 ("The free enterprise system is the engine that drives America's healthy economy, the benefits of which necessarily include inherent risks. Unfortunately, many facets of America's civil justice system operate to shift all of those risks to the entrepreneurs who produce the consumer goods and services that make people's lives easier or more pleasant The tort system has undergone a transformation from one designed solely to redress wrongs to one focusing more and more on criminal-style retribution and redistribution of wealth."). Although it is doubtful that this statement was ever true, it may have come closer to the truth some 30 years ago, but not today.

APPENDIX

Table 1

Economic Inequality: Lowest 10% compared to medium income; Highest 10% compared to Medium income; the Decile ratio of P90/P10; and the Gini Coefficient.³⁰²

COUNTRIES	P10	P90	P90/P10	GINI
Finland 2000	57%	164%	2.87719	0.247
Netherlands 1999	56%	167%	2.98214	0.248
Norway 2000	57%	159%	2.78947	0.251
Sweden 2000	57%	168%	2.94737	0.252
Germany 2000	54%	173%	3.2037	0.252
Austria 2000	55%	173%	3.1455	0.26
Luxembourg 2000	66%	215%	3.25758	0.26
Denmark 1992	54%	155%	2.8704	0.263
Belgium 2000	53%	174%	3.283	0.277
Switzerland 2000	54%	182%	3.3704	0.28
France 1994	54%	191%	3.537	0.288
Canada 2000	48%	188%	3.9167	0.302
Ireland 2000	41%	189%	4.6098	0.323
Italy 2000	44%	199%	4.5227	0.333
Spain 2000	44%	209%	4.75	0.34
United Kingdom 1999	47%	215%	4.5745	0.345
United States 2000	39%	210%	5.3846	0.369
Average	51.76%	184%	3.65	0.28765
Standard Deviation	6.94	19.83	0.812	0.04

Table 2

Inequality: Gini Coefficients before and after taxes and benefits³⁰³

State	Market Gini	Post-benefits	reduction
Finland	38	25	34%
Netherlands	39	25	36%
Sweden	45	25	44%
Austria	43	26	39%

³⁰² Brandolini & Smeeding, *supra* note 58, at 22 fig.1.

³⁰³ Table based on data extracted from A Brandolini & T Smeedling Figure 2 (based on the Luxemburg Income Study). Brandolini & Smeedling, *supra* note 58, at fig.2.

Germany	46	26	42%
Belgium	47	28	41%
France	49	29	47%
Canada	41	30	27%
Switzerland	39	30	20%
Ireland	44	32	27%
Italy	46	33	27%
Spain	47	34	28%
United Kingdom	50	35	31%
United States	47	37	22%
Average	44.36	29.64	33.21%

Table 3
Inequalities in Wealth: Gini Coefficients Based on Net Worth³⁰⁴

State	Gini
Japan	.547
Spain	.565
Italy	.609
Australia	.622
Netherlands	.649
Canada	.663
Germany	.671
France	.73
United Kingdom	.73
United States	.801
Switzerland	.803
Average	.6718
Stand. Deviation	.0864

Table 4
VAP statistics by country³⁰⁵

Country	VAP Parliamentary voter turnout 1945-2001

³⁰⁴ Table based on data taken from Davies et al., *supra* note 69, at tbl.10b.

³⁰⁵ Derived from statistics of averages of voting age population ratios across 169 countries in parliamentary elections from 1945-2001 compiled by the International Institute for Democratic and Electoral Assistance. PINTOR ET AL., *supra* note 111, at 75, 83-84.

Italy	92%
Belgium	85%
Austria	84%
Sweden	84%
Netherlands	84%
Denmark	84%
Canada	83%
Germany	80%
Norway	79%
Finland	78%
Spain	76%
Ireland	75%
United Kingdom	74%
France	67%
Luxembourg	64%
Switzerland	52%
United States	48%
Average	76%

Table 5
Unicef Child Well-Being Table³⁰⁶

1	Netherlands
2	Sweden
3	Denmark
4	Finland
5	Spain
6	Switzerland
7	Norway
8	Italy
9	Republic of Ireland
10	Belgium
11	Germany
12	Canada
13	Greece
14	Poland
15	Czech Republic
16	France
17	Portugal

³⁰⁶ Derived from INNOCENTI RESEARCH CENTRE, *supra* note 77, at 2 (this ranking is a combined ranking based on: material well-being, family and peer relationships, health and safety, behavior risks, and both educational well-being and subjective well-being).

18	Australia
19	Hungary
20	United States
21	United Kingdom