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

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

With nothing less than the survival of the civil justice system hanging in the balance, tort reformers and tort law defenders have been locked in a conflict that spans the last four decades. Courts and legislatures at every level (federal, state, and local) are besieged by those who seek to limit or eliminate tort liability, limit or eliminate accountability for personal injury, and limit or eliminate the capacity of those wronged by misconduct of every type to have access to courts, juries, and justice. Defenders of the civil justice system, a loosely coalesced amalgam of consumer groups, attorneys, and academics, devote themselves to protecting that same system.

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 Tort reformers see theirs as a mission of essential change, reform, a quest for modernization of an outdated system that misallocates resources, suppresses innovation, weakens the U.S. economy and the U.S. position in international commerce, destroys jobs, and unduly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

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

As in any prolonged conflict, the mode of attack shifts over time. Once success is achieved in one domain by one side of a conflict (e.g., in a number of states, the elimination of strict liability or limitations on punitive damages), the substantive focus moves to other aspects of the field. Current targets of tort reform are the very nature of legal process including class actions, and the roles of state courts and federal agencies. Of these three areas, the effort to minimize the essential and constitutionally driven role of state courts, a topic central to this article, surfaces in the Fraudulent Joinder Prevention Act of 2016. The House report on this bill makes clear the purpose of the drafters—and also reveals a troubling and false characterization of attorneys in this field: “The current law ... allows trial lawyers to keep their cases in state court [and defeat a motion to remove to federal court] ... so as long as they also sue a local [in-state] defendant .... [T]his body of law has been abused by trial lawyers who fraudulently [join] local defendants, even though ... those defendants have little or no support in fact or law ....” Insulting, prejudicial legislative pronouncements of this nature add nothing to the debate and demonstrate
the determination of tort reformers to force litigation into federal court thus limiting or eliminating the critical role of state courts, local judges, and local juries.

Rather than invite a discourse that might actually illuminate the issues in the field, those supporting tort reform rely on inflammatory verbiage characterizing defendants sued as innocent *164 “hostages” or victims rather than acknowledging that those parties may, in fact, be responsible for the harm the plaintiff sustained. While this is speculation, it is just a matter of time before this one-sided legislative proposal is referred to as the “Innocent Victims Act” or words to that effect.

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

Those pursuing tort reform--entities from manufacturing, retailing, healthcare (pharmaceuticals, medical providers, hospitals, health insurance), those providing professional services (legal, architectural, medical, engineering, and more), and even members of the media seeking to be relieved of the reach of defamation law--seek gross limits on liability, changes in legal process, and certainty in terms of liability exposure. They share the hope that they can know in advance their potential liability so that they can pass along those costs to consumers, breeding into the price of the products they sell and services they provide the full expanse of tort liability.

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

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

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

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

This is about the system of civil justice, with origins in the most fundamental of rights--the right to be free from violence, torment and torture, to possess and hold personal and real property, the right not to be confined without basis, the right to be free from the damaging, dangerous *166 irresponsible acts of others. If that list is familiar, it is because those are the five ancient trespassory torts as well as trespass on the case or negligence--and the roots go back, and back, and back. They are the bedrock of tort law.

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

III. Deterrence Matters
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Civil judgments, settlements, the potential for litigation--the tort system itself--has a beneficial effect on the behavior of those who are the subject of legal action as well as others in the same or similar lines of commerce. In short, the system of tort law is an engine of deterrence. The actual or potential imposition of civil tort liability changes the behavior of others. 26

This is not a fanciful field dealing with esoteric interests. Tort law involves the hard business of loss, of life and death, fairness, justice, economic common sense and economic survival, competition in increasingly globalized markets, and accountability--no small task. 27 This system is about the promise of justice--and for victims, the potent and oft expressed hope that the tort *167 system will be the vehicle that prevents repetition of their tragedy. 28 Families and victims do not want their tragedy to be a loss in vain. 29 Tort law is their hope. Individuals and entities brought to justice establish models for future actions producing positive incentives that lessen the probability that others will suffer the same harm they experienced. That is the reality of deterrence. 30

To deny this effect is to deny the collective reality of the human experience. 31 Frankly, it is hard to conceive of a healthy economic model where rational actors ignore clear warning signs and thus render themselves vulnerable to sanctions or punishment.

To argue that the prospect of civil liability has little or no effect on future behavior collides with a common understanding of how we react to the potential of punishment. 32 The presumptive operating assumption of courts is not just that they will be there to provide a neutral accounting-like function to compensate an injured party, but that they will be sending a message heard clearly by those engaged in similar market practices. To think otherwise is to undervalue the obvious and deny the common human experience. 33

Although the goal of “making a plaintiff whole” is essential and laudable, the simple fact is that money is not the only goal. Money approximates loss and covers expenses; money alters financial possibilities and provides remedial potential--but justice requires more; the avoidance of similar harms, or deterrence--the best side of our collective sense of justice and fairness will be preserved. 34 That is the tort system.

*168 Tort law--civil justice--walks with us. 35 Tort law follows our families, sits quietly in the school dining room, and hovers over the workplace. Tort law joins you as you click on your seatbelt in your car or apply the brakes. Tort law is the unmasked presence in the operating room and pharmacy. Tort law is among the authors of increasingly thorough informed consent statements that provides an understanding of treatment to be administered and options to treatment. Tort law lives in appliances and bicycles, hand tools and the endless variations of machinery that shape our lives. Tort law presses toward truth--and tolerates errors and certain mistruths, facilitating free speech. Tort law warns and sanctions those who would steal ideas and innovation or otherwise corrupt the marketplace. Tort law fights the battle for clean air and water and safe food. Tort law urges competency in medicine and an array of learned professions. To insult this field, to pretend it is about greedy lawyers and clients who set out to extract undeserved riches, is outrageous. 36 This is a field of consequence. It is played out in the state courts--and that is where it belongs.

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

In those areas where so-called tort reforms have been implemented, they have stripped deserving persons of their right to justice and remedy and also “had [many] unintended consequence[s].” 37 Tort reform, and especially caps on damages, has reduced “the ability of the *169 most severely injured claimants to get representation. [T]hese provisions inhibit the ideals of access to justice and equality before the law that are fundamental principles of justice.” 38

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

Recognition of the importance of federalism and, concomitantly, the importance of state courts, is evident in the Federalist Papers. “Federalism's first achievement was to enable the American people to secure the benefits of national union without imperiling their republican institutions.” Rather than fear of the power of state courts to impose accountability, the power of state courts to protect the citizens of a state can be seen as, “a celebration of local autonomy [and] in a way a *170 celebration, and a protection, of individual liberty.” When the power of state courts is diluted and federal “controls” are imposed, “[t]he result is a constitutional arrangement that diminishes liberty [and leaves] much of the original Constitution in disarray.”

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

The Supreme Court has long recognized the hazard of undue assertion of federal power. “[T]he scope of [federal] power must be considered in the light of our dual system of government, and may not be extended so as ... effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” From 1789 forward, the 10th Amendment in the Bill of Rights made explicit that the states were to play a vital role in protecting the interests of citizens. “[The] Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.” Maintaining the proper balance between the state and federal courts is not a particularly simple task--but it is an essential endeavor.

*171 V. State Courts, Essential Experimentation, and Federalism

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

The benefits are equally clear and of great consequence. State courts have an opportunity to implement a broad range of options to achieve a prompt and fair resolution of civil disputes. The notion that the states are laboratories designed to improve the civil justice system has been fundamental to our jurisprudence for generations. As the Supreme Court noted in 1937, it is one of the “happy incidents” of our legal system. Beyond that most significant benefit, there is the matter of simple federalism and access to justice: in-state plaintiffs have every right to pursue justice in their home forum for the resolution of a claim sounding in tort. That state courts have an interest in providing a forum for the citizens of their state does not suggest a bias or a lack of fairness, the implicit assumptions in the tort reform argument. Instead, it suggests the proper role of state courts and the importance of viewing the states as independent judicial systems that have the potential to explore differing doctrines, theories, and strategic approaches to address injury. State courts acting to address novel theories or cases of

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first impression become non-binding exemplars from which all other states as well as federal courts can assess the efficacy or proprietary of different remedial theories.

Charles Fried noted that, “by disaggregating governmental power, there may be an impetus toward innovation, toward experimentation.” To limit state courts by relentlessly pushing personal injury controversies either into arbitration or federal forma runs afoul of one of the most fundamental virtues of federalism. There is no better expression of this virtue than the Court's decision in *New State Ice Co. v. Liebmann*: “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. *It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*”

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

The arguments for strong and independent state tort law are fully compatible with the notion of maintaining, where appropriate, aggressive regulatory structures. In numerous fields, e.g., health care, environmental law, transportation law, securities law, and telecommunications, it is vitally important that federal agencies are able to accomplish their delegated tasks. Curiously, even in that regard, those seeking tort reform have, almost inexplicably, sought to undermine those federal agencies that can protect consumer interests.

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

If there is anything remotely defensible about the aforementioned legislation, it might be that it acknowledges the difficulty of sorting out those injuries that are most properly addressed through a federal regulatory structure and those that are most properly addressed in a state tort action. This difficulty was recognized by the Supreme Court more than half a century ago: “The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.” That difficulty, however, is hardly the basis for one of the most hypocritical legislative initiatives of the last hundred years.

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

Unless there has been a sea change and suddenly, judicial activism is a virtue and unelected judges have mystically been granted enhanced constitutional authority, the bill is nothing more than a transparent attack on legal mechanisms set up to insure accountability. If there is anything to consistency, this bill should be seen as an endorsement of judicial activism, the bane of those supporting tort reform for decades. More than a century ago, Professor James Thayer laid down the gauntlet,
attacking judicial activism as inconsistent with any coherent construction of constitutional law, a quest that has been central to the conservative agenda—until now.  

Judicial activism had been declared evil: “[J]udicial activism, the results-oriented approach to judging ... is simply inconsistent with representative self-government and the rule of law. It is similar to, and even more dangerous than, the decline of constitutionalism among lawmakers ....” Now, presumably, it has been ... tort reformed?  

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

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

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

Two final bills round off the anti-accountability agenda. The ironically named Regulatory Accountability Act would impose complex cost-based rules on regulation, including health and safety rules, where such analysis is literally impossible. Lastly, the SEC Regulatory Accountability Act would impose on the Securities Exchange Commission the obligation to study all alternative means to achieve a regulatory goal prior to the adoption of a rule, a requirement that does not exist at any other agency. In fact, it is axiomatic in administrative law that while fair and rational decisionmaking compels agencies to consider reasonable alternatives, that does not and cannot mean any and every alternative. Given the creativity of those opposing regulation, it is fair to say that there could be endless alternatives one could dream up to bring to a halt agency action. Thus, a regulatory obligation of that nature would make it impossible for an agency to do much of anything--which, presumably, is the goal of the sponsors.  

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

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

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

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

Among many other aspects of legal process, the FRCP govern removal from state court to federal court when, inter alia, a case is initiated by an in-state plaintiff against an out-of-state defendant. Removal will fail if another defendant is joined who is in-state, thus defeating diversity. To avoid having a case heard in state court, those supporting tort reform crafted the FJPA, a bill designed to address fraudulent joinder, facilitating removal from state court to federal court, addressing the possibility that the plaintiff will somehow, “fraudulently” shift defendants, adding an in-state defendant to defeat diversity. In fact, wrongful fraudulent joinder is covered thoroughly and effectively under the FRCP. The need for this “fix” is not just suspect, it is nonexistent. Federal Rule 17(a) requires that lawsuits proceed with the “real party in interest” and addresses joinder and party substitution explicitly. Federal Rule 21 deals specifically with misjoinder or fraudulent joinder.

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

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

The FJPA is not supported by any credible empirical evidence, reflects a patent bias against federalism, is antithetical to fundamental notions of the rights of states to govern their citizens, and presupposes both bad faith and the inability of state and federal court judges to apply the current FRCP regarding in personam jurisdiction and removal. Motives underlying the FJPA are not subtle--the goal is to push cases to federal court where the chance the defendant will prevail is greater. Thus, for producers of defective goods or providers of services who fail to exercise due care, it only makes sense to seek the forum least friendly to plaintiffs.

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

Imagine a plaintiff suffering from a personal injury residing in any small town anywhere in the United States. Imagine that plaintiff retaining local counsel and being advised that a suit can be filed in the local courts to pursue their claim. Now, once the litigation process has started, imagine that plaintiff learning that the case has been stripped from their local courthouse and move to a federal court, often hours away, to be tried before judges not necessarily from that state--and then being advised that the probability of prevailing is simply less. That is not the plight of a few “national defendants” who are suddenly forced into state court. That is the plight of plaintiffs from many, many communities throughout the country.
The FJPA is tort reform at its worst. If successful, it's hard to see how the FJPA would achieve anything beyond making it difficult to hold certain defendants accountable in state court. It was characterized by Congressman John Conyers as a “bill [that] attempts to solve a non-existent problem ... [raising] fundamental federalism concerns .... [and denying] state courts the ability to decide and ultimately to shape state law.”

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

Rather than take advantage of the efficiency, the defendant (along with a host of other groups supporting tort reformers) fought the consolidation, taking the matter to the California Supreme Court—and lost. The Court addressed the matter thusly: “To be sure, a single court hearing the claims of hundreds of plaintiffs is a significant burden on [a] court. But the overall savings of time and effort [to the parties and] to the judicial system, both in California and interstate, far outweigh the burdens placed on the individual forum court.”

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

VII. Preemption

In one core area in this field, preemption, the Supreme Court and Congress have already provided a dramatic and systematic limitation on tort liability. Preemption of state tort claims can be the result of express congressional action or by implication, e.g., congress has fully occupied the field, it is not possible to implement the federal regulatory scheme if state tort actions are permitted, or finding that tort actions require a result different from and inconsistent with essential component parts of a federal regulatory program.

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

*183 Looking briefly at just pharmaceuticals, the problem of preemption becomes obvious--and of constitutional moment. States have the responsibility to protect health, safety, and welfare of its citizens, i.e., police powers. Preemption renders that protection outside the reach of state tort law ... and the Separation of Powers Restoration Act could render protect of citizens through FDA regulation highly limited. In the pharmaceutical field, the broad-based elimination of the right to pursue a personal injury claim should be the exception, not the norm. As the Court noted in Wyeth, the operating “assumption [is] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Three decades earlier, the court affirmed the importance of a “federal-state balance,” cautioning that the power of states to protect their citizens should “not be disturbed unintentionally by Congress or unnecessarily by the courts.” A few years later, the Court instructed that making a preemption determination should be an exercise in ascertaining the plain and
clear meaning of a statute, the “purpose of Congress,” which should be the “ultimate touchstone” in determining whether a field was expressly or, by essential implicated, occupied thus preempting state tort claims.  

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

A recent analysis of this dynamic by Professors John C.P. Goldberg and Benjamin C. Zipursky finds that preemption, “has given [a range of] defendants vast protections from state law tort liability.” In cases involving defective products generally, “a plaintiff's rights to recover damages ... under common law are greatly diminished from what they were in the early 1990s .... [T]he Supreme Court has now effectively immunized the manufacturers of generic drugs ... from products liability claims [generally and for claims regarding] ... medical devices that go through the FDA's full preclearance procedures.” Goldberg and Zipursky conclude: “Preemption is now front and center in modern tort law .... [The Court] has gradually moved, albeit inconstantly, in a direction that is as hostile to negligence and products liability plaintiffs as it is to libel plaintiffs.”

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

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

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

**VIII. Concluding Comments**

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

From the Magna Carta forward, a formula emerged: claims should be resolved locally without violence, and an organized system of writs would help orchestrate those claims. Judges would need to be objective and familiar with the community's unique characteristics or belief structure, and judgments, ultimately, would rest with both a jury of one's peers and then the court itself. From this, concepts of fairness and equity emerged as did the importance of local justice that provided neither party undue favor. In addition, concerns about the power of the sovereign in the Magna Charta translate well to historic concerns about the federal government noted earlier in this paper.
The aforementioned process and values translate into 21st century civil justice with remarkable consistency. Limitations on federal power, as noted in this paper, are part of the foundational quest of the Revolution in this country. The importance of state law, state courts, local juries, local judges, is enshrined constitutionally and doctrinally through federalism. The importance of individual communities participating in the process of decision-making and ultimately finding safe resolution for disputes carries over exquisitely into the present. By Supreme Court pronouncement, history, and unquestionable public policy, state courts are and ought to be the primary forum for resolution of disputes between those who claim injury and those accused of injuring.

The tort system in the 21st-century maintains the core of the procedural mechanisms and principles that flow as immutable truth over time. This is a system to preserve, not vilify. This is a system that protects all of us and allows for fair resolution of disputes. It is hardly the plaything of selfish actors.

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

That practical and theoretical nightmare, the Separation of Powers Restoration Act, would destroy the fundamental relationship between the judiciary, the executive, and the legislature. Just what that the bill would restore is hard to say. Certainly, it would restore nothing remotely resembling any extant separation of powers model. Moreover, it requires one to believe that its proponents, business interests that have railed against judicial activism for generations, have decided, quite suddenly, that judicial activism is suddenly the right way to go. Beyond endorsing a model of judicial action that contravenes the most basic constitutionally prescribed structure of government, the bill would greatly diminish the juridical competence of agencies to articulate enforceable norms. The bill vests discretionary power with federal court judges who have no claim to expertise, no substantive background, no historical perspective on the regulatory structure, thus depriving the public of a critically important and central form of governance.

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

Footnotes

a1 Professor of Law, American University, Washington College of Law. The views expressed in this article are purely those of Professor Popper and do not reflect the views, resources, or support of American University. Professor Popper would like to thank Annie Anderson, Lindsay Adler, and Karina Velez for their very hard work on this article and the American Association for Justice Robert L. Habush Endowment for assistance with student support.

See Bernstein, The 2x2 Matrix of Tort Reform’s Distributions, 60 DEPAUL L. REV. 273 (2011); Stephen Daniels & Joanne Martin, “The Impact That It Has Had Is Between People's Ears”: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers, 50 DEPAUL L. REV. 453 (2000) (describing the use of public relations campaigns by reformers to alter the public's perception of “what is perceived as an injury; whether and whom to blame for an injury; what to do about it; and even how to respond to what others (especially plaintiffs and their lawyers) do with regard to naming and blaming.”).


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

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


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

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


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


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


F. Patrick Hubbard, The Nature and Impact of the Tort Reform Movement, 35 HOFSTRA L. REV. 437, 475-76 (2006) (“Given the deterrent goal of tort law, the tort system is inherently a scheme designed to regulate by deterring wrongful conduct ... stopping regulation through litigation would be a revolutionary abandonment of the basic deterrent goal of torts.”); Spotlight: How Does Tort Reform Violate Conservative Principles?, CTR. FOR JUST. & DEMOCRACY AT NEW YORK L. SCH. (Sep. 16, 2015), https://centerjd.org/content/spotlight-how-does-tort-reform-violate-conservative-principles (“‘Tort reform’ interferes with the right to a civil jury trial ... [i]t relieves wrongdoers of personal responsibility to pay for injuries they cause, shifting costs onto taxpayers ... [a]nd it regulates a free-market approach for holding negligent companies and other wrongdoers accountable for the deaths and injuries they cause.”);

See also Squibb Co., 1 Cal. 5th at 812 (arguing that allowing plaintiffs to coordinate their cases in instances of mass tort injuries is essential because of the “special problems for the proper functioning of the courts and the fair, efficient, and speedy administration of justice” that such claims pose).

McClellan, supra note 9 and accompanying text.

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


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


31 Popper, supra note 26.


34 Gardner, supra note 32 at 62.

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

36 Feldman, supra note 6 and accompanying text.

37 Steven Cohen, On Tort Reform, It's Time to Declare Victory and Withdraw, FORBES (Mar. 12, 2015, 9:59 AM), http://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw/#753fe22917de; DeVito & Jurs, supra note 1 at 590 (“Whether examining the effects of tort reform on the legal system or on the larger world, the empirical evidence supporting tort reforms seems mixed at best, which leads to the conclusion that the benefits of tort reform have been significantly oversold.”).

38 DeVito & Jurs, supra note 1 at 596.

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

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

41 Edward S. Corwin, The Passing of Dual Federalism, 36 VIRGINIA L. REV. 1, 22 (1950) (quoting The Federalist, No. 9 at 48 (Lodge ed. 1888)).

42 Charles Fried, Federalism--Why Should We Care?, 6 HARV. J.L. & PUB’L POL’Y 1, 2 (1982).


47 See Epstein & Loyola, supra note 43 (“Under the supremacy clause, the national government could trump the states, but to keep that from turning into a tyranny of the national majority, federal supremacy was carefully confined to the limited powers enumerated in Article I.”).

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54 See Galligan, Jr., supra note 1199 (“Finally, courts deciding tort cases frequently rely upon and respect the jury as the common sense voice of the community on questions of fact and certain critical normative issues.”).

55 Fried, supra note 42.

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


58 New State Ice Co., 285 U.S. at 311 (emphasis added).

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

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

61 Epstein & Loyola, supra note 43.


64 See S. 2724 (amending the Administrative Procedure Act, giving de novo review power to unelected federal court judges, undoing the vitally important Chevron doctrine, with the following proposed change: Section 706 of title 5, United States Code, is amended, in the matter preceding paragraph (1), by striking “all relevant questions of law, interpret
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constitutional and statutory provisions' and inserting “de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.”).


66 Polish Nat'l All. v. NLRB, 322 U.S. 643, 650 (1944) (internal quotation marks omitted).

67 See Eric Wolf, Flint Hearing Gets Testy, POLITICO (Mar. 18, 2016, 10:00 AM), http://www.politico.com/tipsheets/morning-energy/2016/03/pro-morning-energy-wolf-213296#ixzz43Hhwf3dM (“The Separation of Powers Restoration Act would require judges to consider all cases before them on a “de novo” basis—that is, no longer giving deference to an agency's decisions, only weight”).


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


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


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


Fed. R. Civ. P. 81(c). Federal statutory law is also instructive. See 28 U.S.C. § 1332 (2012) (asserting that district courts have original jurisdiction over civil actions between citizens of different states); see also 28 U.S.C. § 1441(a) (providing that actions filed in state court can be removed to federal court whenever federal court has original jurisdiction).

28 U.S.C. § 1441(b) (“A civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”).


See Clermont & Eisenberg, supra, note 51 at 593.

See Clermont & Eisenberg, supra note 51 at 593.


Squibb Co., 1 Cal. 5th at 790.


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


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


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115 Goldberg & Zipursky, supra, n. supra note 35, at 45-56.

116 Id.

117 Id.


121 Croom, supra note 119, at 5.

122 Kessler & Vladeck, supra note 120, at 463 (internal citations omitted).

123 Id. at 495.

124 Goldberg & Zipursky, supra note 115 at 437 (“tort law is central in the operation of our legal system.”).


126 W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS 617 (5th ed. 1984) (dating nuisance cases back to the 13th Century).
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128 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 172 (2d ed. 1898) (asserting that the Magna Charta reflected current practices; “On the whole, the charter contains little that is absolutely new. It is restorative.”).


130 Nathan S. Chapman & Michael W. McConnell, Essay and Feature: Due Process as Separation of Powers, 121 YALE L.J. 1672, 1681 (2012) (finding the “Magna Charta eliminated the King's power to deprive his subjects of rights without authorization by existing law and adjudication by a court.”).


133 Edward S. Corwin, The Passing of Dual Federalism, 36 VIRGINIA L. REV. 1, 22 (1950) (quoting The Federalist, No. 9 at 48 (Lodge ed. 1888)).

134 Michael M. O'Hear, Federalism and Drug Control, 57 VAND. L. REV. 783 (2004) (arguing the importance of federalism particularly as it applies to public safety and pharmaceutical products).

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

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

44 RULREC 160