

## Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions

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Let's begin with the obvious. I am not, never have been, and never hope to be a torts professor. The analysis I will offer here will not be based in deep familiarity with tort doctrines, or years of experience with civil justice reform efforts. I hold a Chair in legal history, but I teach most of my courses in the Kellogg Graduate School of Management, and I will try to approach the problem of separation of powers and civil justice reform by considering a variety of historical and practical perspectives. Put another way, my approach to the problem will be that of the concerned outsider, or perhaps more appropriately, the concerned citizen. Without a doubt, citizens now have much about the law with which to be concerned in general, and with civil justice reform in particular. Let's take the general issue first. We are, I think, in the middle of perhaps the most severe crisis of legitimacy of law and legal institutions that we have faced since *Dred Scott*.<sup>1</sup>

It's a cumulative crisis, having its roots in the "switch in time" that allegedly "saved nine" in 1937,<sup>2</sup> that accelerated its growth with the decisions of the Warren and Burger Courts in the 1960s and 1970s, and with the decisions of state courts in products liability at approximately the same time. By the 1980's, much more than the roots had developed, and, to carry forward my metaphor, we were looking at a mighty oak of illegitimacy, with branches in constitutional law, torts, contracts, and many other doctrines. With the O.J. case a few years back,<sup>3</sup> we discerned that something was rotten in criminal law too.<sup>4</sup> A similar stench could be

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<sup>1</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>2</sup> GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 214 (4th ed. 2001) (noting that Justice Roberts' position in *National Labor Relations Board v. Jones & Laughlin Steel Co.* was known as "the switch in time that saved Nine").

<sup>3</sup> *People v. Simpson*, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995).

<sup>4</sup> See, e.g., H. Patrick Furman, *Publicity in High Profile Criminal Cases*, 10 ST. THOMAS L. REV. 507, 508 (1998) (noting that cases, like the O.J. Simpson case, demonstrate that there are very real problems "arising from how lawyers and the criminal justice system

discerned by many of us in the Clinton impeachment trial, where the President remained in office, though, as Richard Posner has shown, an ordinary citizen would have been beginning a three-year term in a federal prison.<sup>5</sup> In the past weeks we have also seen strong attacks on the legitimacy of the decisions by the Florida Supreme Court and by the United States Supreme Court in connection with the Presidential election recounts in Florida.

What happened? What's the nature of this crisis of legitimacy for law and legal institutions? At one level what happened is that the law lost its connection with timeless values, and the law became something to be used for the achievement of disparate social goals rather than an end in itself. This is not easy for people living in America in the early twenty-first century to grasp. Indeed, it's now almost in our legal bones, so to speak, to regard the law as a means to some other end. This was Roscoe Pound's big contribution, in the sociological jurisprudence he was pushing in the beginning of the twentieth century, and by the 1930's the trend received its more modern nomenclature—legal realism.<sup>6</sup>

#### I. LEGAL REALISM AND THE FRUSTRATION OF CIVIL JUSTICE REFORM

Legal realism, called by my Dean, David Van Zandt, in a provocative piece the only “American” jurisprudence,<sup>7</sup> is many things. It is, for example, sometimes described merely as a way of looking at the law, to find out how it actually works—it seeks to distinguish what Roscoe Pound called the “law in the books” from the law in action.<sup>8</sup> But I am interested in another aspect of legal realism—one that is most clear in the works of the radical legal realists like Jerome Frank,<sup>9</sup> and their successors, the critical legal studies scholars, the feminists, and the critical race scholars. These people, in one way the heirs of Oliver Wendell Holmes, Jr. and Roscoe Pound, both of whom wanted to bring the law more in keeping with the needs of the times, would have horrified Pound, at least. At the end of

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handle high profile criminal cases . . . which reveal tensions, *sub rosa*, in our democracy, and which must be addressed if we are to avoid further erosion of public trust in our criminal justice system”).

<sup>5</sup> RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999).

<sup>6</sup> For this story see, e.g., N.E.H. HULL, *ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1997); DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* (1974).

<sup>7</sup> David Van Zandt, *The Only American Jurisprudence*, 28 HOUS. L. REV. 965, 991 (1991) (stating that “the only truly American jurisprudence is the source of these questions and, quite often, the answers . . . [about] how legal institutions are affected by human behavior and whether those effects are desirable”).

<sup>8</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>9</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

his life, probably realizing what he had wrought, Pound, then the greatest figure in American jurisprudence, a sort of combination Richard Posner and Alan Dershowitz, turned against the legal realists. He thought they were undermining the stability of American law, and its essentially conservative features.<sup>10</sup>

I think it is the perspective of the legal realists, a perspective that led us to what I have described as a crisis of legitimacy for law and legal institutions, that animates the foes of civil justice reform.<sup>11</sup> These modern legal realists, like the radical legal realists Pound feared, seem to see the process of judging not as the objective application of neutral rules, which lead to certain and just outcomes, but rather as a purposive activity, influenced consciously or unconsciously (depending on the judge) by the particular ideology or particular special interest of the particular judge. They see judges in nineteenth and twentieth century America having used the law for repressive purposes, and they call for judges to reformulate the law for progressive purposes.

Perhaps the best example of this, in the context of tort reform, is Professor Richard Abel's piece praising those judges who have held tort reform acts to be unconstitutional.<sup>12</sup> Professor Abel simply rejects the former prevailing notion that legislators are the political actors who are closest to the people because they are directly elected, and claims instead that they have been captured by special interests. In the case of legislation promoting civil justice reform, Professor Abel argues that the special interests involved are large corporations and insurance companies who are seeking to limit what they perceive as astronomical tort judgments against them.

#### A. *Who is Supposed to Make Law in a Republic?*

Professor Abel, articulating what I believe is a sentiment shared by most foes of civil justice reform, argues that the judiciary now best represents the people because the judiciary is not afraid to take on the special interests, and, apparently, because the judiciary somehow has a finer-tuned sense of right and wrong.<sup>13</sup> Professor Abel's piece has the

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<sup>10</sup> See, e.g., ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* (1958).

<sup>11</sup> For two recent attacks on civil justice reform and paeans to state courts who have found such measures unconstitutional, written from a legal realist perspective, see Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 *DEPAUL L. REV.* 533 (1999); Philip H. Corboy et al., *Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators*, 30 *LOY. U. CHI. L.J.* 183 (1999).

<sup>12</sup> Abel, *supra* note 11.

<sup>13</sup> Abel, *supra* note 11, at 556 (Legislators are captives of "special interests," while judges serve as "guardians of a general interest").

extraordinary virtue of posing just the right question, although I disagree with his answer to that question.<sup>14</sup> The question is: Who is supposed to make law in our Republic?<sup>15</sup> We all agree that ours is a government based on popular sovereignty, and thus only someone who acts in the name of the people can legitimately make law. Abel believes that the judiciary is now the most democratic branch, but as I say I'm not so sure. Perhaps it might also be noted that there are some differences between a republic and a democracy, and, if we really want to implement popular sovereignty in our Republic in the proper manner, we should do so according to proper republican, rather than democratic, principles.

Now what does that mean? What's the difference between a "republic" and a "democracy?" One difference is obvious—in a democracy the people act directly, in a republic they act through representatives. This is enough, perhaps, to remind us that we do not have a democracy because there is no way 250 million Americans are likely to act in concert to do anything, let alone pass laws. But I think the difference between a democracy and a republic is more profound, as I tried to suggest in a recent monograph.<sup>16</sup> A republic, the historians have recently taught us, is a society which is committed to the notion that the rule of law governs, that arbitrary actions on the part of government officials are not tolerated, and that representatives are supposed to act in the interests of all the people, and not simply to favor particular constituents.<sup>17</sup> A republic can only exist, according to our founding ideology, where citizens have the proper civic virtue, where altruism, and not selfishness is bred in both the citizenry and their representatives. This may or may not be an unattainable ideal, but nevertheless, it's what our Framers wanted.

So let's start with the proposition that our Republic was founded on the notion that the people's representatives are supposed to act in the best interests of the whole polity. Then let's see if we can use that notion to help us understand if we are really looking at a threat to separation of powers and to the proper functioning of the judiciary when we consider legislative measures designed to implement civil justice reform. I think this idea about civic virtue in the citizenry has an analogue in what used to

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<sup>14</sup> Abel, *supra* note 11, sets out to answer the question whether tort doctrines are best left in the hands of courts or legislatures. He concludes that courts should not defer to legislatures in the making of tort law. *Id.* at 556.

<sup>15</sup> Abel examines only tort issues, but he does so to argue that the assumptions that legislatures should make laws, executives should implement them, and courts should apply them "are certainly dubious and probably false." Abel, *supra* note 11, at 533.

<sup>16</sup> See generally STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION AND ABORTION RECONSIDERED (1994).

<sup>17</sup> See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 (1972).

be expected of lawyers, an expectation that we still at least pay lip service to. This is the idea that members of the bar are supposed to be officers of the court, and that they are supposed to meet their obligations to the justice system in the service of all, not just their clients. They are to represent their clients with warm zeal, but they are not supposed to do anything that they know is harmful to the law itself.<sup>18</sup>

Curiously, Roscoe Pound, the most important jurist who pushed us in the direction of legal realism (a jurisprudence I believe is dangerous), also grasped this basic idea of lawyers' obligations to society as a whole. He railed against what he called the "sporting theory" of litigation, in which litigating attorneys use clever and devious traps in our legal institutions, not to promote a search for truth, but to turn a trial to their client's advantage.<sup>19</sup> Pound would have been alarmed with current trends in litigation, and the current behavior of many trial lawyers, and their champions such as Professor Abel.

#### *B. Does Attacking Corporations Serve the Public Interest?*

These current trends in litigation, and the current behavior among trial lawyers and academics, appears to me (and perhaps to many state legislatures that have passed civil justice reform measures) to reveal a coordinated strategy of attack on corporations large and small. The aim of this strategy is redistribution of wealth, not just to the trial lawyers themselves (though this may be a primary goal), but also to a particular class of consumers of products. The tobacco litigation may be the best instance of this behavior, but we can see it as well in the Dalkon Shield case, the asbestos cases, and even the coordinated attack on Microsoft.

As indicated, there seems to be an assumption among the foes of civil justice reform that those pushing for reform, primarily insurance companies and other potential corporate defendants, are lucre-seeking monsters, with interests adverse to those of the rest of society.<sup>20</sup> In short, they assume that these corporate defendants, in advocating civil justice reform, are simply seeking to further their own selfish plutocratic ends and are acting in an undemocratic manner. The fact of the matter, however, is that it is now difficult to distinguish between corporations and everyone else in society because an increasing number of Americans, directly or indirectly, are investors in corporations of all types. Not only do an increasingly larger

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<sup>18</sup> *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (noting that "the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and the standards of professional conduct").

<sup>19</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738-39 (1906).

<sup>20</sup> See, e.g., Corboy et al., *supra* note 11, at 184, 245; Abel, *supra* note 11, at 535-36.

number of Americans have portfolios, which include shares in corporations, most Americans participate in pension plans that invest in corporate shares. In addition, most Americans are covered by insurance companies who invest in corporations (which investment effects the costs of premiums), or, at some time in their life, attend schools, colleges, or universities a portion of whose endowment is invested in corporations.

In a sense, then, we've achieved a sort of "socialism through the back door," since nearly all of us have some direct or indirect ownership of corporations and this means of production. There may be a flaw, then, in the suggestion that corporate civil justice reform advocates have interests adverse to the public interest, since, generally speaking, it is difficult to distinguish the corporations from their owners, the public. Thus, it may not be at all certain that opponents of civil justice reform, who seek to redistribute money from corporations to individual plaintiffs or plaintiffs' classes, are acting in the public interest.

### C. A Shift in Legal Standards

In spite of the fact that the interests of corporations might be the interests of all of us as direct or indirect investors, there has been, over the past few decades, a profound shift in the legal standard of responsibility for corporate and other business actors. This shift in standards has made possible the colossal damage recoveries that worry civil justice reformers. We are all aware of the shift from negligence as the standard to "strict liability." For most of the nineteenth century and half of the twentieth, manufacturers or other potential defendants were, for the most part, only liable if they had failed to exercise ordinary prudence—failed in other words, to behave in a reasonable manner.<sup>21</sup> A reasonable person, it was assumed, made mistakes because he or she was only human. Thus, as long as one was reasonable, one incurred no liability. Then, beginning with the decision of the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,<sup>22</sup> and now codified and accepted in *Restatement (Second) of Torts* § 402A (1965), the rule is that manufacturers are liable if their products leave the factory in an unreasonably dangerous condition, even if they, themselves, have not been negligent. In other words, the focus has shifted from the care exercised by the manufacturer to the manufacturer's actual output. Even if the manufacturer was as prudent as any other reasonable person, if by some quirk the product turns out to be unreasonably dangerous—not by design, perhaps, but for whatever reason—the manufacturer is liable.

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<sup>21</sup> PROSSER AND KEETON ON TORTS 681-84 (W. Page Keeton ed., 5th ed. 1984).

<sup>22</sup> 377 P.2d 897 (Cal. 1963); see also Roger L. Traynor, *The Ways & Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

Once we go beyond a requirement of no negligence, once we go beyond prudence to a requirement of no unreasonably dangerous products, we've taken a giant step toward virtually demanding perfection in our defendants, the sort of perfection that is unobtainable on this Earth. To me, at least, it looks as if in the world of the plaintiff's bar, the idea is to demand perfection, and when the inevitable imperfection occurs, to demand damages. No wonder we've got a litigation explosion. I think something similar was going on in the recent Florida election, when the Democrats were demanding their recounts, and were searching each ballot rejected by the voting machines for a perfect indication of the voter's intent. Elections have historically been things of imprecision because humans are involved in designing ballots and voting machines, and humans make mistakes. Vice President Gore's theory, though, was that in conducting elections the aim was to determine voter intent, to find a way of compensating for mistakes and imprecision, and thus to arrive at perfection. It can't be done, and thus the almost endless election litigation finally proved too much for the United States Supreme Court and the Florida courts.

*D. A Radical View of Individualism*

And there's more to this demand for perfection. Behind the legal theory of perfection, involved also in the recent litigation explosion, is what I think ought properly to be called a radical view of individualism. We see it best captured, perhaps in the famous "mystery passage" from *Planned Parenthood v. Casey*,<sup>23</sup> the Supreme Court case that upheld *Roe v. Wade*<sup>24</sup> and affirmed a constitutional prohibition on state legislation prohibiting abortion, or at least state legislation that placed an "undue burden" on women seeking abortions. In its unsigned three-person plurality opinion, the Court said: "*At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.*"<sup>25</sup> According to this conception, meaning itself is defined by the individual. No wonder there is a trend for every individual who feels aggrieved in our society to believe that there ought to be a legal remedy for virtually every perceived slight, every injustice, every bit of economic, physical, or emotional distress inflicted on one person by another. No wonder, then, that we are increasingly litigious. No wonder that there is fear of proliferating lawsuits.

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<sup>23</sup> 505 U.S. 833 (1992).

<sup>24</sup> 410 U.S. 113 (1973).

<sup>25</sup> *Casey*, 505 U.S. at 851 (emphasis added).

But the mystery passage is dead wrong. Concepts, meaning, and the mystery of human life are all things we work out in cooperation and consultation with others. If twentieth century social science has taught us anything (and this may be a big if), it has taught us that meaning is socially constructed—it is the culture, it is our associations with others that work to constitute notions of liberty, to define all other concepts, and to render meaning in life. I suspect that a radical concept of individualism, such as we find among modern plaintiffs' lawyers undervalues the organic nature of society and the cooperative economic efforts.

## II. SEPARATION OF POWERS, INDIVIDUALISM AND COMMUNITY:

### *Best v. Taylor Machine Works*

Against this jurisprudential and philosophical backdrop, we need to consider the problem of separation of powers, and how the doctrine has been construed in cases, such as the recent Illinois Supreme Court decision, that have found civil justice reform measures to be unconstitutional violations of separation of powers. In *Best v. Taylor Machine Works*,<sup>26</sup> the court declared that tort damage caps violated the Illinois separation of powers scheme because the Illinois common law courts have the power of remittitur, and to have the legislature seek to reduce damage judgments wholesale would be to take away the judiciary's remittitur role.<sup>27</sup> According to the venerable common law doctrine of remittitur, courts may act to reduce excessive jury awards. The Illinois Supreme Court's holding seems to suggest that separation of powers requires that the ability of the judiciary to tailor relief in individual cases must not be taken away.<sup>28</sup> But this seems to fly in the face of the fact that legislatures are in the business of fashioning general rules that remove discretion in the courts. As one commentator has pointed out, such a view about the sanctity of remittitur would mean that workers' compensation statutes are unconstitutional because they similarly reduce the ability of judges to reduce damage judgments.<sup>29</sup>

It seems to me that the Illinois Supreme Court in *Best* overvalues individualism and the needs of particular tort plaintiffs, and somehow creates the impression that the traditional judicial role requires total

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<sup>26</sup> 689 N.E.2d 1057 (Ill. 1997).

<sup>27</sup> *Id.* at 1079-80.

<sup>28</sup> See *Best*, 689 N.E.2d at 1078-80.

<sup>29</sup> Samuel Jan Brakel, "Besting" Tort Reform in Illinois (and Other Misnomers): A Reform Supporter's Lament, 28 CAP. U. L. REV. 823, 826 (2000) (asserting that "a limit that applies *a priori* and equally to all claimants seeking a select category of damages before a judge or jury is held to violate the prerogative of judges to reduce inappropriate awards in individual cases decided by juries").



freedom to fashion or at least to reduce damage awards. In *Best*, the separation of powers problem was the purported interference with the judiciary's exercise of remittitur. Now, however, we can cast the problem more broadly in keeping with the focus of our panel: Can it really be said that civil justice reform threatens the independence of the judiciary? In particular, does changing the common law of torts to impose such reform measures as damage caps, statutes of repose, professional immunity, or the abolition of the collateral source rules threaten the traditional role of the judiciary? Illinois is not alone, and the claim that the passage of these measures does interfere with judicial independence and with the doctrine of separation of powers certainly has figured prominently in the opinions of other courts which have declared that such measures violate state constitutions.<sup>30</sup>

#### *A. Separation of Powers in Historical Context*

I have already tried to suggest that the Illinois Supreme Court's view of separation of powers seems to involve devotion to a conception of individualism that may not really reflect the public interest. That the manner in which Illinois and other courts have construed constitutional separation of powers provisions has been done in a dubious fashion is made even clearer when one considers the theory of separation of powers in its historical context, particularly with regard to the doctrine as it is embodied in the United States Constitution.

When we declared our independence from Great Britain, we had to come up with our own manner of preserving the rule of law, and because we rejected monarchy and aristocracy, we had to create a way of preserving the rule of law without traditional English institutions. In Britain, the theory was that one preserved the rule of law by setting up a government in which all orders of society were represented—the monarch, the aristocracy, and the people, or as classical political philosophers put it—the one, the few, and the many.<sup>31</sup> From Aristotle on, the political problem to be solved was how to avoid the pitfalls of government by any one of the three. Government by the one, monarchy, tended to degenerate into tyranny; government by the few, the aristocracy, tended to degenerate into oligarchy; and government by the many, the people, tended to degenerate into mob rule or anarchy. And yet government by the one had the virtue of

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<sup>30</sup> There apparently have been at least seventy-six "major judicial decisions" invalidating aspects of tort reform legislation in twenty-six states. *Id.* at 824.

<sup>31</sup> For a discussion of classical concepts of balancing the three interests in society in government, particularly in the thought of Aristotle, see Andrew Lockyer, *Aristotle: The Politics*, in *THE POLITICAL CLASSICS: A GUIDE TO THE ESSENTIAL TEXTS FROM PLATO TO ROUSSEAU* 56-66 (Murray Forsyth & Maruice Keens-Soper eds., 1988).

speed and efficiency, by the few of wisdom, and by the many of common sense, and, if you did it right, of honesty. The trick was to get all three together, so that the virtues of each could somehow withstand the foibles of the others. This was the ideal of “balanced” government, and, from Aristotle on, the idea was to let the orders in society check and balance each other. Edmund Burke, for example, believed this achieved perfection at the time of the Glorious Revolution of 1688, when Monarch, Aristocracy, and Commons—the one, the few, and the many—achieved a sort of parity in governing.<sup>32</sup>

In what was to become this country, however, we decided that the dangers of monarchy and aristocracy were too great, and we wanted to base a government only on the will of the people. It took us a while to figure out how to do this, without having the popular branch of government, the legislature, overwhelm the other two, and end up passing laws that put, in particular, contracts and property at risk. The result was the federal Constitution of 1787 and the state constitutions that emulate that model. While legislative supremacy had, acknowledged or not, been the theory of early American government from 1776 to 1787, now we had the theory that every American school child used to learn, the theory of “checks and balances” among three coequal branches of government—the legislature, the executive, and the judiciary. All were supposed to operate pursuant to the will of the people. The people were supposed to ratify the Constitution, then the legislature was supposed to pass laws in keeping with the Constitution, the executive was supposed to take care that the laws be faithfully executed, and the judiciary was to be the referee, to make sure that the legislature and the executive did what they were supposed to. They were to exercise, in Hamilton’s words, judgment, not will.<sup>33</sup>

#### *B. The Federalist’s Notion that Judges Should not Make Law*

Now to go further down this road. The theory of coequal branches has often been confused a bit with the theory of separation of powers. There was some political theory out there, from Montesquieu and others, mentioned in the *Federalist*, that the way to avoid tyranny was for the legislature to be the only branch legislating, the judiciary to keep itself to following the strict will of the people and not making law, and the executive to refrain from doing anything but carrying out the express popular will as well. To mix legislative and judicial powers, for example, or to mix executive and judicial powers (as had been done in England, according to Americans) was a recipe for tyranny. Thus, some critics of

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<sup>32</sup> See, e.g., FRANK O’GORMAN, EDMUND BURKE: HIS POLITICAL PHILOSOPHY 129-131 (1973).

<sup>33</sup> THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the 1787 Constitution, who feared that the judges would aggregate to themselves the power of making law, resisted a federal judiciary.<sup>34</sup>

Perhaps it ought to be acknowledged that our federal Constitution did not follow the strict Montesquieuian notion of separation of powers. Our Constitution makes the branches co-equal, but it mixes the powers of government. The executive nominates the members of the judiciary,<sup>35</sup> and one house of the legislature confirms them. The executive has a veto power over legislation (though the legislature, by a supermajority can override a veto),<sup>36</sup> and the legislature can remove the executive or members of the judiciary, in a proceeding over which the Chief Justice occasionally will preside.<sup>37</sup> Nevertheless, and in spite of the fact that we mix some powers of government, in order to have a system of checks and balances, *the one thing the theory of the federal Constitution clearly does not permit is for the judiciary to make the law.* As Hamilton points out in *The Federalist No. 78*, the only job of the judiciary is to determine what the people have expressed as law either through their legislature or through their constitution.<sup>38</sup>

Now it is true that virtually everyone in law schools today believes that judges do make law, and that is the lesson that legal realism has taught us. Still, until recently, no court in the land would have taken the position that this is proper. Judges are, we always say officially, only to judge, not to legislate. One vigorous defense of the *Best* case, however, suggests that the Illinois Supreme Court, in common law tort cases at least, is functioning, in effect, as a “lawmaking partner” to the legislature in making law. Accordingly, it is impermissible for legislatures to aggregate the law-making rule to themselves.<sup>39</sup>

Encountering this kind of an argument I find it difficult to do anything but throw up my hands, because, as a student of the late eighteenth century, if I’ve learned anything about Americans’ attitudes toward their Constitution and law, it would seem to be that when we embraced the separation of powers we did so to guarantee the rule of law, not to

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<sup>34</sup> For American resistance in the 1780s to the notion of judges making law, see generally WOOD, *supra* note 17, at 453-463, and for resistance to the federal judiciary established in the 1787 Constitution, see, e.g., I THE DEBATE ON THE CONSTITUTION 168, 231, 540, 610, 910-911 (Bernard Bailyn ed., 1993).

<sup>35</sup> U.S. Const. art. II, § 2.

<sup>36</sup> U.S. Const. art. II, § 2.

<sup>37</sup> U.S. Const. art. I, § 3.

<sup>38</sup> THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>39</sup> Corboy et al., *supra* note 11, at 244. Corboy et al. argue that widespread judicial promulgation of strict products liability doctrine “represents tacit acceptance of the reality that judges make law—and judges should not apologize for making law. When judges make this type of policy, they are not abandoning judicial restraint, but are performing an accepted and necessary judicial function.” *Id.* at 235.

guarantee judges as law-makers. Indeed, the theory of the rule of law, that adjudication is done on the basis of rules previously formulated, would seem to bar any creative role for the judiciary at all.<sup>40</sup>

*C. The Common Law and Judicial Discretion to Make Law*

In this day and age, when the notion that judges make law is commonly accepted and embraced by the academy, it is not easy to make this point, but surely the fact that most courts are unwilling to acknowledge a law-making function reminds us of this rule-of-law ideal. Further, in states such as Illinois, which trump civil justice reform in the name of their courts' common law powers, there seems to be a conception of the common law which is very different from the kind that was taught to my generation of law students. The common law we learned (and nineteenth century Americans believed), was a set of principles of longstanding authority, principles that had been settled by custom, principles that may well have had divine origin and sanction (as Blackstone believed),<sup>41</sup> and principles that could be implemented by judges without the judges acting as law-makers. When they applied the common law rules, they claimed that they were following the rules previously laid down, just as they were when they followed statutes.

Further, there was no doubt in nineteenth century legal scholars' minds that the common law was adopted by Americans through statutes, and that legislatures could alter the common law. Indeed, Illinois has a clear reception statute, which expressly indicates that the common law governs *until changed by the legislature*.<sup>42</sup> What the Illinois Supreme Court did in *Best*, however, was to take a common law power, remittitur, and claim that the legislature could not take it away. It is difficult to understand how this claim can be taken seriously, and there are some who

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<sup>40</sup> See, e.g., LEARNED HAND, THE BILL OF RIGHTS 73-74 (1959) (noting that judge made law violates the democratic principle that law should be made by the people's elected representatives).

<sup>41</sup> I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 41 (1765) (describing the "law of nature . . . dictated by God himself [which is] binding all over the globe, in all countries, and at all times").

<sup>42</sup> Since 1874, the text of the Illinois reception statute has been:

[T]he common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

5 ILL. COMP. STAT. ANN. 50/1-1 (West 1993).

refuse to do so.<sup>43</sup> The Illinois Supreme Court appears to have made the common law part of the Illinois Constitution, in spite of the fact that the common law was received by a statute and, by that same statute, expressly made amendable by legislation.

*D. State Court Disagreement over the Constitutionality of Civil Justice Reform*

Although Illinois's decision can perhaps be taken as representative, but, as indicated, there are now dozens of decisions finding various civil justice reform measures unconstitutional on state constitutional grounds, often grounds linked to the common law and its institutions. In Oregon, for example, a court has told us, as have courts in Alabama, Ohio, and Washington, that damage caps are unconstitutional because such legislative measures violate state constitutional rights to trial by jury.<sup>44</sup> In Florida, however, a state not known for the shrinking violets on its bench, the courts have taken the position that damage caps are permissible because it is for the legislature to say the consequences of a jury's finding. The Florida Supreme Court appears to recognize that juries are common law institutions, as are practices such as remittitur, and the legislature's general law making power, in the nineteenth century at least, would have been recognized to circumscribe what a jury could do.<sup>45</sup> Indeed, the nineteenth century was the period when juries were clearly told that their job was to follow instructions of the judges, and not to make law;<sup>46</sup> that was for the legislature, it was understood. As part of the broader crisis of legal legitimacy that I alluded to earlier, we seem to be passing through a period when we are uncertain what the roles of legislatures, juries, and judges actually are, and the civil justice reform decisions reflect the confusion.

Cases upholding the validity of damage caps or other Tort Reform measures have been rendered in Virginia,<sup>47</sup> California,<sup>48</sup> Massachusetts,<sup>49</sup> Mississippi,<sup>50</sup> and New York<sup>51</sup>—all states with bold common law courts.

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<sup>43</sup> See, e.g., Brakel, *supra* note 29, at 825-26.

<sup>44</sup> Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995); State ex rel. Ohio Acad. of Trial Lawyers v. Steward, 715 N.E.2d 1062 (Ohio 1999); Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

<sup>45</sup> For the ascendance of the legislature as a law-making body and the decline of the view in America that the common law was divinely ordained, see generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

<sup>46</sup> See, e.g., RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 190-91, 198 (1971).

<sup>47</sup> Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525 (Va. 1989).

<sup>48</sup> Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985).

<sup>49</sup> English v. New England Med. Ctr., Inc., 541 N.E.2d 329 (Mass. 1989).

<sup>50</sup> Mohundro v. Alcorn County, 675 So. 2d 848 (Miss. 1996).

<sup>51</sup> Doe v. State of New York, 189 A.D. 2d 199, 595 N.Y.S.2d 592 (N.Y. App. Div.

These courts apparently do not believe that legislative measures to ease the burden on tort defendants must violate separation of powers, but these decisions are in stark contrast to those of other courts, most notably that of Ohio and Illinois. In addition to the Illinois Supreme Court decision in *Best*, the Ohio Supreme Court is the only other court to find a comprehensive civil justice reform measure totally unconstitutional, in part, on separation of powers grounds. Thus, when the Ohio legislature reintroduced and passed a measure involving damage caps,<sup>52</sup> after an earlier Ohio Supreme Court decision had found them unconstitutional,<sup>53</sup> the court, in a five-to-three decision, declared that it was a violation of separation of powers for the Ohio legislature to, in effect, usurp the court's role of determining what was constitutional and what was not.<sup>54</sup> This seems a bit bizarre, as each branch of government is presumably under a duty to behave in accordance with the Constitution, which would seem to assume a duty to determine whether the actions one had taken were constitutional. Such, then, is the plasticity of the separation of powers rationale.

*E. What is the Democratic Solution? What is the Economic Solution?*

If one looked only at the divergent court opinions, there would seem to be equally powerful arguments both for and against the preservation of civil justice reform measures by American state legislatures. Which are more convincing? The enemies of tort reform say that these legislative measures threaten separation of powers, and thereby threaten judicial independence, and are thus a threat to democracy, since the judiciary is the last bastion for the protection of the people. Setting aside the question whether we should be worried about republicanism rather than democracy, it still seems that this view of democracy, as I have indicated earlier, assumes that democracy is all about shifting wealth from corporations or insurance companies to injured plaintiffs. If all or nearly all of us have some direct or indirect ownership shares in these tort defendants, however, such redistribution, especially when it involves huge punitive damage amounts figured on the assets of corporations, would seem to favor particular individuals (tort plaintiffs and their lawyers), and harm the rest of

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1993).

<sup>52</sup> Am. Sub. H.B. No. 350, 1996 Ohio Legis. Serv. 244 (Banks-Baldwin).

<sup>53</sup> *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994).

<sup>54</sup> *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1104-06 (Ohio 1999).

us. Such redistribution, then, is difficult to regard as a vital part of democracy—instead, it seems like shifting of wealth from the many to the few.

And, apart from issues of redistribution, if democracy (or republicanism) is still conceived as the ability of the people to make rules for themselves, classically, at least, it makes more sense to believe that when the legislature speaks, it speaks with the voice of the people to a greater extent than do the courts. When both judges and courts are elected, of course, the argument is somewhat muddled, but intuition suggests that the people probably know more about the candidates for legislative office than they do those for judicial office, and thus their selection of legislators is probably better reflective of their will. Indeed, if data that suggest that judicial candidates are more often the favorites of special interest groups, particularly trial lawyers, are correct,<sup>55</sup> then the democratic justification for upholding the rule of judges who disdain tort reform loses force. The argument for democracy seems to favor letting legislatures decide.

These days, however, arguments for democracy often are less important than arguments based on economics. Who has the best economic argument? Those opposing tort reform, or those in favor? The proponents of tort reform point to what is in effect a “tort tax” levied on products, designed to spread the costs of litigation to consumers. At one level, of course, this tort tax ought simply to be viewed as part of the enterprise cost, and might logically be thought to be the cost that the enterprise itself should bear, since it is the enterprise that is causing the damage. This would make sense, if tort suits really do reflect actual injury caused by products, but not if the tort suits are either groundless or more expensive (because of punitive damages) than the damage that is actually being caused by the product.<sup>56</sup> Pricing products too high, of course, would reduce demand for them, and reduce their availability to those of modest means, or to those who might use them in the most economic manner. This was the fear generated during the torts crisis of a few years ago, which led to worry that other economies, particularly Asian ones, not subject to an American-style tort tax, would outstrip ours.<sup>57</sup> Somehow this didn’t happen, but it merely has been postponed by unanticipated highly profitable technological developments. Once our economy turns down, as

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<sup>55</sup> STEPHEN B. PRESSER ET AL., WHITE PAPER: THE CASE FOR JUDICIAL APPOINTMENTS (1999), available at <http://www.fed-soc.org/judicialappointments.htm> (last visited Apr. 5, 2001).

<sup>56</sup> On the problems caused by runaway punitive damage verdicts, see generally Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (1999).

<sup>57</sup> For the elaboration of this argument see, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

it may be doing now, the effects of such a tort tax could prove harmful. In any event, it is undeniable that some sectors of the economy suffered harm, in some cases irreparable (*e.g.* asbestos), in other cases merely temporary dislocations. Until we know more about the actual inefficiencies and efficiencies of tort suits, it is difficult to proclaim that they are economically helpful or harmful. The anecdotal evidence of efforts to secure civil justice reform by insurance companies, corporations, and others; however, certainly suggests that they understand the adverse economic consequences to them.

#### CONCLUSION

What then are the solutions to what seems to be an intractable impasse in states such as Illinois and Ohio between a reformist legislature and an anti-reformist activist judiciary? Our recent presidential election escapade has proven the need for the courts to be the final arbiter of the interpretation of the Constitution, so we ought to be reluctant to mount an assault on prerogatives of judicial review. It might be worth recalling, however, that the United States Supreme Court only found it necessary to declare the winner in the last presidential election because a state court, Florida's, had mandated a scheme for vote-counting that, according to the United States Supreme Court, violated the Fourteenth Amendment.<sup>58</sup> Five Justices felt that given the constitutional problems involved in the recount, and given the timing requirements of picking electors of federal and state law, the recount had to cease. At least three Justices were also willing to voice the position that what the Florida court had done was to make law in violation of the basic principle of separation of powers, and, in particular, in violation of the federal Constitution and federal law, which accord the power of picking Presidential electors to the state legislatures.

We are all federalists here, and our view emphasizes that we should be wary of federal power and desirous of preserving state sovereignty. Our panel is concerned with separation of powers, one of two great American Constitutional principles, but as federalists we are committed to dual state and federal sovereignty—the other of the two. Because we are wary of federal overreaching, we tend not to look to the federal courts for solutions to political problems, but *Bush v. Gore* suggests that there are some times when this is inevitable.<sup>59</sup> If too many state courts insist on preserving an ahistorical, illegitimate law-making power to frustrate civil justice reform,

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<sup>58</sup> *Bush v. Gore*, 121 S. Ct. 525, 533 (2000).

<sup>59</sup> *See id.* (noting that, although the Justices are “conscious of the vital limits on judicial authority, . . . when contending parties invoke the process of the courts, it becomes [the Court’s] unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront”).



perhaps it is not too far-fetched to imagine a federal court solution to the problem. After all, if separation of powers as understood by the Framers was essential to republican government, and if courts making law violates that true concept of separation of powers, perhaps the Constitution's Guarantee Clause ought to be invoked by state legislatures or executives to overturn state court decisions which frustrate civil justice reform.<sup>60</sup> This may be unlikely, because the clause guaranteeing each state a republican form of government has not yet been boldly so used, and who knows what the precedential limits of such an argument might be. There are almost as many conceptions of republican government as there are academics taken with the concept of "republicanism," and because I'm not sure my historical understanding of republican government would prevail, I advance this suggestion with some trepidation.

Still, I see nothing wrong with criticizing judicial overreaching, but it might be that the simplest solution is to find judges less inclined in that regard, and to place them on the bench, either by returning to a mode of selection by appointment closer to the federal scheme, or by encouraging participation in judicial election contests by those who favor civil justice reform. If the problem is that judges are finding civil justice reform measures unconstitutional, of course, there is always the option of amending the state constitutions, difficult and arduous though that may be. There is an increasing academic hostility to constitutional amendments, but I do not believe such hostility was a part of the Framers' design. They recognized that no constitution could ever be perfect, and thought that amendments, not judicial fiat, was the manner in which the Constitution ought to meet the changing needs of the times. Indeed, perhaps state (and federal) constitutional amendments are something to be encouraged, because it is the best way for the people to understand that it's their constitution, and they have a responsibility for using it to achieve the public policies they need. As I see it, then, the great danger of our time is not the risk to separation of powers because of legislative misconduct, but is instead the risk to republican self-government posed by judicial legislation.

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<sup>60</sup> U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").