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# QUESTIONING THE COUNTER-MAJORITARIAN THESIS: THE CASE OF TORTS

*Richard L. Abel\**

Liberal polities are built on the bedrock of separation of powers. Legislatures make laws, executives implement them, and courts apply them. Criticism of judicial activism and calls for judges to defer to legislatures rest on this axiom. Yet those normative postulates depend upon unexamined empirical claims. This article uses contemporary tort cases to argue that these assumptions are certainly dubious and probably false. I will begin by articulating the Counter-Majoritarian Thesis ("CMT") as it is advanced in tort judgments.<sup>1</sup> Then I will survey two kinds of confrontations between court and legislature, which appear to contradict the thesis.<sup>2</sup> In the first, innovative tort decisions justified in terms of general societal interests are overturned by legislation serving special interests.<sup>3</sup> In the second, statutes serving special interests force courts to choose between deferring to legislatures or subjecting their actions to critical scrutiny.<sup>4</sup> I will conclude by inverting the CMT, arguing that courts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions.<sup>5</sup> This conclusion frees courts to reform the common law and justifies narrow interpretation and strict scrutiny of legislation that sacrifices general societal interests to special interests.

## I. THE COUNTER-MAJORITARIAN THESIS IN TORT DECISIONS

Although the CMT originates in federal constitutional law,<sup>6</sup> judges often invoke it when declining to modify the common law or con-

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\* Connell Professor of Law, University of California, Los Angeles. I am grateful for comments at a UCLA faculty colloquium (especially Dan Bussel, Ken Karst, Bill Klein, and Bill Rubenstein) and at the conference on "Insurance, Risk & Responsibility" at the University of Connecticut School of Law (especially Ross Cheit).

1. *See infra* Part I.

2. *See infra* Part II.

3. *See infra* Part II.

4. *See infra* Part II.

5. *See infra* Part III.

6. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962); JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL*

demning a majority for doing so. They typically advance the following claims:

1. Legislatures make law; courts apply it.<sup>7</sup> “This court must not assume the role of a super general assembly which can be called into session to enact a rule of law whenever the proponents of that rule are unable to secure its passage in the proper forum.”<sup>8</sup>
2. Legislative inaction expresses an intent that the common law remain unchanged.<sup>9</sup> The majority “rejects over 100 years of tort law” and “long established tort principles.”<sup>10</sup>
  - a. This intent is clearer when the legislature modifies related rules, explicitly declines to modify the rule in question, or is still considering modification.<sup>11</sup>
  - b. Once legislation has been integrated into a common law domain, courts cannot change the components *they* created, because this might affect the legislation.<sup>12</sup>
3. Changes in the bench, far from providing an opportunity for judicial innovation, detract from its legitimacy.<sup>13</sup>
4. The popular will is better expressed by the legislature than the judiciary.<sup>14</sup>
  - a. Legislators hear *all* the affected interests, judges hear only the interests of the parties before them.
  - b. Legislators are democratically responsible because they are elected for short terms; judges are either appointed or elected to long terms in non-partisan races that are devoid of issues and rarely contested.
5. The legislature is better suited to innovate than the judiciary.<sup>15</sup>

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POLITICAL PROCESS 4-12 (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980); STEPHEN C. HALPERN & CHARLES M. LAMB, *SUPREME COURT ACTIVISM AND RESTRAINT* 386-92 (1982); STERLING HARWOOD, *JUDICIAL ACTIVISM: A RESTRAINED DEFENSE* 19-25 (1996); DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 1-12 (1977); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 374-80 (4th ed. 1991); Michael J. Klarman, *Majoritarian Judicial Review: The Retrenchment Problem*, 85 *Geo. L.J.* 491, 492-94 (1997); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 6-7 (1959).

7. *Vater v. County of Glenn*, 323 P.2d 85, 88 (Cal. 1958).

8. *Alvis v. Ribar*, 421 N.E.2d 886, 903 (Ill. 1981) (Ryan, J., dissenting).

9. *Li v. Yellow Cab*, 532 P.2d 1226, 1246-47 (Cal. 1975) (Clark, J., dissenting).

10. *Sindell v. Abbott Labs.*, 607 P.2d 924, 939-40 (Cal. 1980) (Richardson, J., dissenting).

11. *See id.* at 943; *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 463-64 (Cal. 1961) (Schauer, J., dissenting); *Alvis*, 421 N.E.2d at 902-03; *Kelly v. Gwinnell*, 476 A.2d 1219, 1232-33 (N.J. 1984) (Garibaldi, J., dissenting).

12. *See Alvis*, 421 N.E.2d at 902.

13. *See Muskopf*, 359 P.2d at 464.

14. *See id.*

15. *See Rowland v. Christian*, 443 P.2d 561, 569 (Cal. 1968) (Burke, J., dissenting).

a. Superior investigative resources allow the legislature proactively to gather evidence; courts must passively rely on the parties to create the record.<sup>16</sup> Courts should not act upon “seemingly scant knowledge.”<sup>17</sup> The “[l]egislature can collect information . . . .”<sup>18</sup>

b. Legislatures can define problems themselves; courts must allow parties to define the problems for them.

c. Legislatures deal with problems comprehensively; courts do so in a piecemeal fashion. “Policy choices . . . are, it seems to me, best left to the judgment of a General Assembly staffed and equipped to explore, consider, and resolve simultaneously these many-faceted questions.”<sup>19</sup> “[I]t is for the Legislature to create new causes of action and to fix the limits of recovery. . . .”<sup>20</sup> “Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence.”<sup>21</sup>

## II. POPULIST COURTS, CAPTURED LEGISLATURES

The assertion that legislatures are more democratic than courts willfully ignores everything we know about those institutions.<sup>22</sup> Money is essential to gaining and retaining legislative office. A great deal of

16. See *Li v. Yellow Cab*, 532 P.2d 1226, 1247 (Cal. 1975).

17. See *Kelly v. Gwinnell*, 476 A.2d 1219, 1232 (N.J. 1984).

18. *Id.* at 1233.

19. See *Alvis v. Ribar*, 421 N.E.2d 886, 900 (Ill. 1981) (Underwood, J., dissenting).

20. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 823 (Cal. 1980) (Clark, J., dissenting).

21. *Maloney v. Rath*, 445 P.2d 513, 515 (Cal. 1968); *Hammontree v. Jenner*, 20 Cal. App. 528, 532-33 (Cal. Ct. App. 1971) (quoting *Maloney* and citing *Clark v. Dziabas*, 445 P.2d 517, 518 (Cal. 1968)).

22. See WILLIAM B. GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 35-158 (1992); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13-77 (1974); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 372-73 (1983); Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768-819 (1991); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-87 (1975); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213-31 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 10-13 (1971).

The locus classicus, of course, is MANCUR OLSON JR., THE RISE AND DECLINE OF NATIONS 75-117 (1982); MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 132-67 (rev. ed. 1971). See also George J. Stigler, *Free Riders and Collective Action*, 5 BELL J. MGMT. SCI. 359, 359 (1974).

Others draw similar conclusions from decision theory. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-7, 12 n.6 (2d ed. 1988); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 353-71 (1991); William H. Riker &

legislator behavior is governed by the fundraising imperative.<sup>23</sup> Tortfeasors make far larger campaign contributions than victims. True, the plaintiffs' bar can represent victims, sometimes very effectively: witness the failure of tort "reformers" over several decades to pass federal legislation limiting product liability.<sup>24</sup> But the influence of plaintiffs' lawyers can be neutralized by the defense bar, which is organized and financed at least as well and probably better than the plaintiff's bar.<sup>25</sup> Furthermore, though the interests of victims and their lawyers overlap, they are far from identical. Trial lawyers have

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Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 379-98 (1988).

For critiques, see generally Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (noting that reports of the "death of public interest" are greatly exaggerated); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990) (attempting to dispel misconceptions regarding the relationship between legislative enactments and social well-being created by the economic approach); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (discounting the "public choice" tradition for its contempt of the legislative process); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991) (questioning the explanatory power of public choice theory and its ability to aid in the judicial construction of statutes).

23. Robert L. Jackson, *Ethics Often Sidestepped in "Citizen Legislatures,"* L.A. TIMES, Mar. 4, 1999, at A5.

24. That may be about to change. Neil A. Lewis, *Optimism This Time for Bill to Lower Liability Awards*, N.Y. TIMES, June 21, 1999, at 18; Neil A. Lewis, *Chances Good for Caps on Damage Awards*, N.Y. TIMES, Apr. 20, 1997, at 20. The battle continues over limiting liability for Y2K computer lawsuits. Jeri Clausing, *Legislation Limiting Year 2000 Liability Is Introduced*, N.Y. TIMES, Feb. 24, 1999, at C2; David E. Rosenbaum, *Bill on Year 2000 Liability Is Set Aside in the Senate*, N.Y. TIMES, Apr. 20, 1999, at C20; Jube Shiver, *House Backs Bill Limiting Y2K Lawsuits*, L.A. TIMES, May 13, 1999, at A6.

25. In 1975, Chicago lawyers devoted an estimated 6% of their time to plaintiffs and 6% to defendants in personal injury cases. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 24, Table 2.1 (rev. ed. 1994). Twenty years later they devoted 6% to plaintiffs and 7% to defendants. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751, 765 (1998).

In the 1998 California electoral campaigns, the insurance industry contributed \$6.7 million, while trial lawyers contributed \$5.5 million. Dan Morain, *Wealth Buys Access to State Politics*, L.A. TIMES, Apr. 18, 1999, at A1. The latter figure included contributions from securities litigator Bill Lerach, the only personal injury lawyer among the 20 largest individual donors. These figures omit the \$30.4 million contributed by the tobacco industry, \$11.1 million by development, real estate and construction, \$4.9 million by health care, and \$2.4 million by agriculture. *Id.* According to Public Campaign, the gun lobby spent \$15.5 million on candidates, parties, and issue advertising between 1991 and 1999. Advertisement, Public Campaign, N.Y. TIMES, May 27, 1999, at A14.

On influence in Maryland tort "reform" in 1985-1986, see Paul Erik Parker, *The Liability Shortage of 1985-1986: A Study in Legislative Capacity*, Ph.D. dissertation, political science, University of Maryland, 1989.

On the influence of group size and structure, see DENNIS MUELLER, *PUBLIC CHOICE II* 135-45 (1989); ROBERT E. McCORMICK & ROBERT D. TOLLISON, *POLITICANS, LEGISLATION, AND THE ECONOMY* 103-12 (1981).

successfully obstructed true no-fault automobile accident compensation schemes, which arguably would be better for car owners and accident victims than the outrageously wasteful fault-based scheme.<sup>26</sup> Organization is more essential to influencing legislatures than courts. Tortfeasors are well organized, first by the corporate form, then by industry associations. Victims are individuals who cannot be identified in advance and rarely engage in collective action after the fact. Mothers Against Drunk Driving ("MADD") is the exception. Tortfeasors also have better access to the expertise necessary to influence legislators. The following analysis of the *outcomes* of tort adjudication and legislation tends to falsify the CMT.<sup>27</sup>

### A. *Dramshop Act Cases*

Most jurisdictions impose liability on commercial enterprises that serve alcohol to obviously intoxicated persons who injure others. In the name of the generally accepted tort goals of deterrence, loss-spreading, and moral judgment, four state supreme courts (California, New Jersey, Iowa, and Minnesota) extended liability to social hosts.<sup>28</sup> In each state, the legislature then eliminated, or substantially curtailed, that liability.<sup>29</sup> In one, the court reasserted *common law* liability, prompting the legislature to abrogate that liability as well.<sup>30</sup> Courts reluctantly acquiesced in these actions, while reiterating the policy arguments for liability.<sup>31</sup> When a lower court declared that "imposing civil liability discourages the illegal furnishing of liquor to minors,"<sup>32</sup> the state supreme court conceded that "no one would seriously disagree" but added ruefully: "We incorporated that policy in both *Ross* and *Trail*, only to have their full impact nullified by legisla-

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26. See Ross Cheit, *State Adoption of Model Insurance Codes: An Empirical Analysis*, 23 *PUBLICUS* 49, 62 (Summer 1993); Edward L. Lascher, Jr., *Loss Imposition and Institutional Characteristics: Learning from Automobile Insurance Reform in North America*, 31 *CANADIAN J. POL. SCI.* 143, 150 (1998); EDWARD L. LASCHER, JR., *THE POLITICS OF AUTOMOBILE INSURANCE REFORM: IDEAS, INSTITUTIONS, AND PUBLIC POLICY IN NORTH AMERICA* 38-39 (1999).

27. Evidence about *process* is also relevant to my argument: actual influence on both litigation (amicus briefs) and legislation (campaign contributions, role in drafting, participation in hearings, advertising, media coverage, lobbying, etc.). I am engaged in research on those topics.

28. *Coulter v. Superior Court*, 577 P.2d 669, 671 (Cal. 1978); *Williams v. Klemesrud*, 197 N.W.2d 614 (Iowa 1972); *Trail v. Christian*, 214 N.W.2d 618 (Minn. 1973); *Ross v. Ross*, 200 N.W.2d 149 (Minn. 1972); *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984).

29. CAL. BUS. & PROF. CODE §§ 25602(b), (c) (West 1997); Iowa Liquor and Beer Control Act, First Session, 64th General Assembly, ch. 131, § 152; Act of June 2, 1977, ch. 390, § 1, 1977 Minn. Laws 887; N.J. STAT. ANN. § 2A:15-5.5-.8 (West 1987).

30. See IOWA CODE ANN. § 123.49(1)(b) (West 1997) (abrogating *Clark v. Mincks*, 364 N.W.2d 226, 229 (Iowa 1985)).

31. *Cole v. City of Spring Lake Park*, 314 N.W.2d 836, 840 (Minn. 1982).

32. *Holmquist v. Miller*, 352 N.W.2d 47, 52 (Minn. Ct. App. 1984).

tive amendments.”<sup>33</sup> The California Supreme Court sorrowfully noted that “notwithstanding the clear documentation of the appalling nature of the nationwide drunk driving problem, the Legislature with the Governor’s approval enacted legislation which was expressly designed to ‘abrogate’ each of our three foregoing decisions.”<sup>34</sup> The exceptions to liability were “a patchwork of apparent inconsistencies and anomalies,” not “wise, sound, necessary, or in the public interest.”<sup>35</sup> Dissenters continued to insist that liability would reduce drunk driving accidents.

Judges differed in their attitudes toward legislatures. Some found legislative preemption, even in *inaction*.<sup>36</sup> Others perceived no such intent, viewing inaction as a license for judicial creativity.<sup>37</sup> “If we were to restrict this section of the Act to ‘licensees’. . . we would nullify the very purpose of the Act” to protect “the public welfare, health, peace and morals of the people of the Commonwealth.”<sup>38</sup> The latter refused to read the *repeal* of the state Dramshop Act as precluding common law remedies, arguing that the legislature had to do this explicitly.<sup>39</sup> Some attributed greater institutional competence to legislatures: “[A]ny extension of liability should be carefully considered after all the factors have been examined and weighed in our legislative process, that is, after extensive hearings, surveys and investigations.”<sup>40</sup> But among the many legislatures curtailing liability, only New Jersey actually held hearings.<sup>41</sup> Other judges declared that “[i]t requires no legislative fact-finding to establish that risk-creating conduct existed on the facts alleged.”<sup>42</sup> Indeed, courts were better suited to modify the law.

Adaptation of the law of torts to the myriad risk-creating agencies and devices of modern society requires continuous application of easily understood basic principles to a plethora of divergent and continually emerging factual combinations. The task is singularly suited to the judicial process and in the grand tradition of the com-

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33. *Holmquist v. Miller*, 367 N.W.2d 468, 471-72 (Minn. 1985).

34. *Cory v. Shierloh*, 629 P.2d 8, 10 (Cal. 1981).

35. *Id.* at 12-13.

36. *See Clark v. Mincks*, 364 N.W.2d, 226, 232-33 (Iowa 1985) (McGiverin, J., dissenting); *Runge v. Wattes*, 589 P.2d 145, 147 (Mont. 1979).

37. *See Coulter v. Superior Court*, 577 P.2d 669, 673 (Cal. 1978).

38. *Klein v. Raysinger*, 470 A.2d 507, 513-14 (Pa. 1983) (Roberts, C.J., dissenting).

39. *See Halvorson v. Birchfield Boiler, Inc.*, 458 P.2d 897, 901-03 (Wash. 1969) (Finley, J., dissenting).

40. *Edgar v. Kajet*, 375 N.Y.S.2d 548, 552 (N.Y. App. Div. 1975).

41. State of New Jersey, Commission on Alcoholic Beverage Liability, Final Report (Sept. 18, 1985).

42. *Halvorson*, 458 P.2d at 902 (Finley, J., dissenting).

mon law. . . . The resolution of the problems involved would be a task requiring impracticable prodigies of legislative effort.<sup>43</sup>

They also pointed to the collective action problem faced by victims seeking to influence legislatures.

[I]t is almost a rule-of-thumb—worthy of judicial notice—that the legislative branch usually reacts only to organized vocal public interest. There is no such organized vocal interest or effort on the part of the socially significant number of miscellaneous persons injured today through the drunkenness of a socially significant number of motor vehicle operators.<sup>44</sup>

### B. *Automobile Guest Statutes*

As automobiles proliferated after World War I, the insurance industry persuaded legislatures to make recklessness a prerequisite for driver liability to a gratuitous guest. A half century later, victims challenged those statutes. Some judges viewed even *judicial* protection of owners as “settled law amenable only to the legislative power . . . . [R]ejection now, by this court, would constitute judicial intrusion upon the lawmaking function.”<sup>45</sup> Others humbly acknowledged their limited ability to “play the prophet” in devising the rule originally.<sup>46</sup> If time did not verify the prophecy then “the power which generated the rule must be exerted to correct it.”<sup>47</sup> Judges who invalidated automobile guest statutes justified such activism by reference to both legislative action (adoption of comparative fault,<sup>48</sup> policies favoring liability, and compulsory insurance) and inaction (following restrictive judicial interpretations of the guest statutes). Some felt compelled to sustain the statute if it tended to advance any conceivable goal.<sup>49</sup> Such judges took judicial disagreements about legislative purpose as grounds for concluding that the legislation could serve multiple purposes.<sup>50</sup> Others ridiculed this approach. If the legislature made its objectives clear, courts could not create fictitious alternatives, such as protection of the uninsured guest driver, or an analogy between owners who themselves drove negligently and owners who failed to control negligent drivers. “Although by straining our imagination we could possibly derive a theoretically ‘conceivable,’ but totally unrealis-

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43. *Id.*

44. *Id.*

45. *Lippman v. Ostrum*, 123 A.2d 230, 234 (N.J. 1956).

46. *See Cohen v. Kaminetsky*, 176 A.2d 483, 486 (N.J. 1961).

47. *Id.*

48. *See McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2d 14, 19-20 (Wis. 1962).

49. *See Schwalbe v. Jones*, 534 P.2d 73, 84 (Cal. 1975) (Sullivan, J., dissenting).

50. *See Cooper v. Bray*, 582 P.2d 604, 614 (Cal. 1978) (Richardson, J., dissenting).



tic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose."<sup>51</sup> Critical judges saw automobile guests as an inherently suspect category.<sup>52</sup> Judicial modification of the law — creating loopholes through strict construction,<sup>53</sup> rendering anomalous the denial of claims by owner passengers by striking down the basic law — introduced irrationality, which courts then used to invalidate the entire statute.<sup>54</sup> Legislative re-enactment of portions not invalidated was an admission of "political realities," which invited the court to invalidate the rest.<sup>55</sup> Requiring a relationship between the statute and the end by which it was justified, these judges found that guest statutes neither encouraged hospitality nor discouraged fraud.<sup>56</sup> Both deferential and critical judges supported their arguments with evidence outside the record (suggesting that their votes reflected views about substance rather than process).<sup>57</sup>

### C. *Other Legislative Restrictions of Judicially Expanded Tort Liability*

In a variety of other areas, courts expanded liability to unorganized victims, only to have organized defendants persuade legislatures to curtail it. When California held that psychotherapists could be liable for injuries inflicted by a patient,<sup>58</sup> the therapeutic community convinced the legislature to limit liability to situations "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim."<sup>59</sup> When an intermediate California appellate court said in dictum that a parent might be liable to a Tay-Sachs infant for wrongful life,<sup>60</sup> the legislature promptly banned any action "against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to be born alive."<sup>61</sup> When California eliminated the distinctions between the duties owed to

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51. *Brown v. Merlo*, 506 P.2d 212, 219 n.7 (Cal. 1973).

52. *Id.* at 216 n.2.

53. *Id.* at 215.

54. *Schwalbe v. Jones*, 546 P.2d 1033, 1041 (Cal. 1976) (Tobriner, J., dissenting).

55. *See id.* at 1046.

56. *See id.* at 1034-38, 1045.

57. *See id.* at 1036-37.

58. *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334, 340 (Cal. 1976).

59. CAL. CIV. CODE § 43.92 (West Supp. 1999).

60. *See Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829 (Cal. 1988).

61. CAL. CIV. CODE § 43.6 (West Supp. 1999).

trespassers, licensees, and invitees,<sup>62</sup> the legislature immunized landowners from negligence liability to victims convicted of one of twenty-five felonies.<sup>63</sup> When the Wisconsin Supreme Court followed California's lead, lumber companies persuaded the legislature to immunize landowners from negligence liability to gratuitous users for recreational purposes.<sup>64</sup> When Wisconsin courts construed the statute narrowly, the legislature excluded consideration of less than \$150 and included public lands that charged an entrance fee.<sup>65</sup> When Hawaii allowed recovery for negligent infliction of emotional distress mediated by damage to property,<sup>66</sup> the legislature added the requirement of consequential physical injury or mental illness.<sup>67</sup> When New Jersey subjected products to a "risk-utility" analysis and held asbestos manufacturers liable for risks they could not have known at the time of manufacture,<sup>68</sup> the legislature significantly limited both rules.<sup>69</sup> Legislatures overturned decisions in four states extending product liability to the sale of blood,<sup>70</sup> and the Maryland legislature precluded such claims before they were made.<sup>71</sup>

Liability for gunshot injuries vividly illustrates the relative influence of victims and the National Rifle Association ("NRA") in judicial and legislative fora. When the Maryland Supreme Court held a gun maker liable for a shooting,<sup>72</sup> the legislature overturned the rule.<sup>73</sup> Although the District of Columbia court declined to follow its neighbor,<sup>74</sup> District voters did so by referendum—a political process less easily corruptible by money than legislation.<sup>75</sup> When Atlanta (like four other cities) sued gun manufacturers for the costs of treating gunshot victims, the lobbying arm of the NRA promptly persuaded the Georgia

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62. See *Rowland v. Christian*, 443 P.2d 561, 565 (Cal. 1968).

63. CAL. CIV. CODE § 847 (West Supp. 1999).

64. See Dean P. Laing, Comment, *Wisconsin's Recreational Use Statute: A Critical Analysis*, 66 MARQ. L. REV. 312, 322 (1983).

65. *Id.* at 341.

66. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981); *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970).

67. HAW. REV. STAT. ANN. § 663-8.9 (Michie 1988).

68. *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982).

69. N.J. STAT. ANN. §§ 2A:58C-1-7 (West 1987).

70. *Miles Labs., Inc. v. Doe*, 556 A.2d 1107, 1120 (Md. 1989).

71. 1987 Md. Laws 493; 1986 Md. Laws 259; 1982 Md. Laws 21.

72. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985).

73. MD. ANN. CODE, art. 27 § 36-I (1996).

74. *Delhanty v. Kinckley*, 686 F. Supp. 920 (D.D.C. 1986).

75. D.C. CODE ANN. § 6-2382-84 (1999); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982).

legislature to abort such lawsuits. The lobby bragged that "we are going to devote a lot of time and resources" to similar efforts in other jurisdictions.<sup>76</sup> "In the next year, I think we can probably get 25 or 30 more states to do the same thing."<sup>77</sup> The gun industry pulled its annual Shot Show (which draws some 30,000 people) out of New Orleans after that city filed suit.<sup>78</sup> A bill pending in Florida would make it a felony for a local official to sue the gun industry. In June, 1999, Texas Governor George W. Bush signed a bill outlawing gun lawsuits by cities and counties.<sup>79</sup> A Georgia Republican (and NRA board member) has introduced a bill into Congress to bar such suits.<sup>80</sup> Nevertheless, the massacre of thirteen at Columbine High School in Littleton, Colorado, in April 1999, has prompted a host of gun-control bills in state legislatures and Congress.<sup>81</sup>

Laws limiting medical malpractice liability were passed at the behest of health care providers and their insurers.<sup>82</sup> The Illinois Civil Justice Reform Amendments of 1995 were supported by local governments, school and park districts, the National Federation of Independent Businesses, the Illinois Farm Bureau, the not-for-profit sector, the Illinois State Medical Society, and the "more than 30,000 Illinois businesses . . . and more than 20,000 professionals" of the Illinois Civil Justice League.<sup>83</sup> The bill, which began as "a technical change in a provision relating to product liability actions,"<sup>84</sup> and which merely substituted "a" for "any," had grown to sixty-seven pages when it was released to the House as "amended" two months later. It was approved by the House Executive Committee the next day without change and passed the House a day later.<sup>85</sup> After two days of hearings, the Senate Judiciary Committee adopted it without change, and

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76. David Firestone, *Gun Lobby Begins Concerted Attacks on Cities' Lawsuits*, N.Y. TIMES, Feb. 2, 1999, at A1.

77. *Id.*

78. *Id.* A total of nine cities, Wayne County (Michigan), and two groups of cities led by Los Angeles and San Francisco had sued as of May 1999. See Fox Butterfield, *California Cities to Sue Gun Makers Over Sales Methods*, N.Y. TIMES, May 25, 1999, at A20.

79. *Bush Signs Bill Banning Anti-Gun Lawsuits*, N.Y. TIMES, June 19, 1999, at A11.

80. Lizette Alvarez, *A Republican Seeks to Ban Suits Against Gun Makers*, N.Y. TIMES, Mar. 10, 1999, at A16.

81. Mike Allen, *Gun Owners Fear Connecticut Bill on Gun Seizures*, N.Y. TIMES, May 25, 1999, at A9; Frank Bruni, *The New Politics of Gun Control*, N.Y. TIMES, May 30, 1999, § 4, at 4; Sam Howe Verhovek, *Gun Control Laws Gaining Support in Many States*, N.Y. TIMES, May 31, 1999, at A1.

82. See *infra* Part III.

83. See Kirk W. Dillard, *Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation*, 27 LOY. U. CHI. L.J. 805, 807 n.11 (1996); *infra* Part III and accompanying text.

84. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1065 (Ill. 1997).

85. *Id.*

the Senate passed it a few days later without any of the seventy amendments offered by opponents.<sup>86</sup>

Perhaps the most notorious example is the 1987 “back-of-the-napkin” deal in which the California legislature eliminated product liability for “inherently unsafe” “common consumer” products that are “intended for personal consumption” and “known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.”<sup>87</sup> At a meeting in Frank Fats Restaurant in Sacramento, Assembly Speaker Willie Brown brought together the California Trial Lawyers Association, insurance industry, California Medical Association, California Chamber of Commerce, and manufacturers’ lobbyists (including the Association for California Tort Reform). The notes scrawled on the back of a napkin were turned into a bill in less than forty-eight hours and brought to a vote on the last night of the legislative session, after Brown refused the request of consumer groups for further discussion.<sup>88</sup> Ten years later, when California wanted to join the twenty-two states suing tobacco companies, it amended the act to exclude tobacco from common consumer products.<sup>89</sup> Using Orwellian language, it declared that the act had “never applied to, an action brought by a public entity” and did not apply even if “the injured individual’s claim against the defendant may be barred by a prior version of this section.”<sup>90</sup> The state’s share of the settlement was about \$25 billion.<sup>91</sup>

#### D. Immunities

Immunities usually protect discrete, organizable categories of tortfeasors at the expense of dispersed, prospectively unidentifiable, hard-to-organize victims. However, courts have curtailed or eliminated most of the immunities they originally created: charitable, intrafamilial, and sovereign.<sup>92</sup> Soon after California abolished common law sovereign immunity, however, the legislature enacted a complex

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86. Illinois Civil Justice Reform Amendments of 1995, Ill. Pub. Law No. 89-7 (1995); *Best*, 689 N.E.2d at 1065, 1067-79.

87. See CAL. CIV. CODE § 1714.45 (West 1998); JAMES RICHARDSON, WILLIE BROWN: A BIOGRAPHY 348-49 (1996).

88. RICHARDSON, *supra* note 87, at 347-49.

89. CAL. CIV. CODE § 1714.45 (West 1998).

90. *Id.*

91. Barry Meier, *Tobacco Windfall Begins Tug-of-War Among Lawmakers*, N.Y. TIMES, Jan. 10, 1999, at A1.

92. In California, see, for example, *Klein v. Klein*, 376 P.2d 70 (Cal. 1962) (family); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961) (sovereign); *Malloy v. Fong*, 232 P.2d 241 (Cal. 1951) (charitable); *Silva v. Providence Hosp. of Oakland*, 97 P.2d 798 (Cal. 1939) (charitable).

web of specific immunities.<sup>93</sup> The year after the New Jersey Supreme Court abrogated charitable immunity,<sup>94</sup> the legislature reinstated it.<sup>95</sup> When a twelve-year-old boy committed suicide after being sexually abused by his parochial school teacher and scoutmaster, the court felt compelled to respect the immunity.<sup>96</sup> The three dissenting justices invoked "the strong policy reasons that withhold immunity to a charitable entity from liability for wrongful conduct not related to the charity's legitimate purpose or with respect to a victim who does not otherwise benefit from the works of the charity. . . ."<sup>97</sup>

In all the examples above, courts protected plaintiffs and legislatures protected defendants. But this article is not a brief for constantly expanding tort liability. Rather, my argument is that, in confrontations with organized interests, disorganized interests are more disadvantaged in legislatures than in courts because of immutable institutional characteristics. Sometimes courts contract liability to protect unorganized tortfeasors and legislatures expand it at the behest of organized victims. After the New York Court of Appeals created the "firefighter rule," denying those injured in fighting fires recovery against property owners whose negligence caused the conflagration,<sup>98</sup> the legislature abrogated it (presumably at the instance of the powerful firefighters' union).<sup>99</sup> When the court reaffirmed the rule with respect to police officers,<sup>100</sup> the legislature again allowed actions based on statutory violations.<sup>101</sup> When the court construed the statute as prospective,<sup>102</sup> the legislature made it retroactive.<sup>103</sup> When the court rejected a claim based on violation of a statute codifying common law duties,<sup>104</sup> the legislature allowed such an action.<sup>105</sup> When courts denied claims unless police service was distinct from the statu-

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93. See Arvo Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163, 163 (1963); James A. Cobey, *The New California Governmental Liability Statutes*, 1 HARV. J. LEGIS. 16, 18 (1964).

94. See *Benton v. YMCA*, 141 A.2d 298 (N.J. 1958); *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276 (N.J. 1958); *Dalton v. St. Luke's Catholic Church*, 141 A.2d 273 (N.J. 1958).

95. See N.J. STAT. ANN. § 2A:53A-7 (West 1987).

96. See *Schultz v. Roman Catholic Archdiocese of Newark*, 472 A.2d 531, 532, 536 (N.J. 1984).

97. *Id.* at 543 (Handler, J., dissenting).

98. See *Kenavan v. City of New York*, 517 N.E.2d 872, 874 (N.Y. 1987).

99. See N.Y. GEN. MUN. LAW § 205-a (McKinney 1989).

100. See *Santangelo v. State*, 521 N.E.2d 770, 771 (N.Y. 1988).

101. See N.Y. GEN. MUN. LAW § 205-e (McKinney 1989).

102. See *Guadagno v. Baltimore & Ohio R.R. Co.*, 548 N.Y.S.2d 966, 967 (N.Y. App. Div. 1989).

103. 1994 N.Y. Laws c. 644, 1; 1992 N.Y. Laws c. 474, 2; 1990 N.Y. Laws c. 762, 1.

104. See *Ramos v. Doesn't Matter Realty Corp.*, 579 N.Y.S.2d 541, 543 (N.Y. App. Div. 1991).

105. See N.Y. GEN. MUN. LAW § 205-e(3) (McKinney 1989).

tory violation,<sup>106</sup> the legislature abrogated that requirement, observing angrily that

our courts have continued to differ on the scope of the remedy afforded . . . . This act is intended to ensure once and for all that section 205-e of the general municipal law is applied by the courts in accordance with its original legislative intent to offer an umbrella of protection for police officers. . . .<sup>107</sup>

Although this had some effect, courts continued to protect landowners against suits by employees of the New York City Transit Authority<sup>108</sup> (because it was a public benefit corporation rather than a government division) and to construe narrowly the requirement of a statutory violation.<sup>109</sup>

### E. *Agreements Not to Sue*

The CMT maintains that legislatures are inherently superior rule-making institutions, to which courts *always* must defer. By contrast, I see both institutions as flawed, democratically and technically, but in different ways. The New York experience with agreements not to sue illustrates this mixed picture. Courts declined to enforce agreements reflecting gross imbalances in bargaining power: with public transportation and utilities (both monopolies) and in employment.<sup>110</sup> Many of the agreements they did enforce were the outcomes of relatively equal bargaining power: commercial landlords and tenants,<sup>111</sup> landowners and builders,<sup>112</sup> or maintenance firms.<sup>113</sup> But courts also seemed ideologically committed to freedom of contract, disregarding the actual bargaining power of patrons of parking garages, gyms, and other recreational facilities.<sup>114</sup> Legislatures, for their part, seemed quite solici-

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106. See *St. Jacques v. City of New York*, 633 N.Y.S.2d 97, 101 (N.Y. App. Div. 1995); *Zanghi v. Niagara Frontier Transp. Comm'n*, 611 N.Y.S.2d 407, 408 (N.Y. App. Div. 1993); *Sciarrotta v. Valenzuela*, 581 N.Y.S.2d 351, 352 (N.Y. App. Div. 1992); *Sledge v. City of New York*, 570 N.Y.S.2d 134, 135 (N.Y. App. Div. 1992).

107. N.Y. GEN. MUN. LAW § 205-e(3) (McKinney 1989).

108. See *Stella v. New York City Transit Auth.*, 657 N.Y.S.2d 702, 703 (N.Y. App. Div. 1997).

109. See, e.g., *Desmond v. City of New York*, 669 N.E.2d 472 (N.Y. 1996) (holding that internal police department guideline that established a general policy against high speed vehicular pursuit where safety risks outweigh law enforcement was not a "requirement" under the relevant statute).

110. See *Conklin v. Canadian-Colonial Airways*, 194 N.E. 692 (N.Y. 1935); *Johnston v. Fargo*, 77 N.E. 388 (N.Y. 1906); *Emery v. Rochester Tel. Corp.*, 282 N.Y.S. 280 (N.Y. App. Div. 1935).

111. See *Sutton Hill Assocs. v. Landes*, 775 F. Supp. 682, 684 (S.D.N.Y. 1991).

112. See *Board of Ed., Union Free Sch. Dist. No. 3, Town of Brookhaven v. Valden Assoc., Inc.*, 400 N.Y.S.2d 152 (N.Y. App. Div. 1977).

113. See *Florence v. Merchants Cent. Alarm Co.*, 412 N.E.2d 1317, 1318 (N.Y. 1980).

114. See *Ciofalo v. Vic Tanney Gyms, Inc.*, 177 N.E.2d 925 (N.Y. 1961) (gym); *Baschuk v. Diver's Way Scuba, Inc.*, 618 N.Y.S.2d 428 (N.Y. App. Div. 1994) (recreational facility); cf. *Geise*

tous of parties with weak bargaining power: tenants,<sup>115</sup> car owners,<sup>116</sup> party givers,<sup>117</sup> home owners,<sup>118</sup> and exercisers.<sup>119</sup> Sometimes, however, their abrogation of exculpatory clauses may have been influenced by defendants, such as landowners, who are better organized than victims.<sup>120</sup> This complex interaction suggests that neither institution can demand deference from the other.

### III. WHOLESALE LEGISLATIVE ABRIDGEMENT OF TORT CLAIMS: MEDICAL MALPRACTICE, PRODUCT LIABILITY, AND BEYOND

Each of the previous sections addressed a narrow area of tort law in which courts typically championed unorganized interests in the name of basic tort principles (deterrence, loss-spreading, moral judgment), while legislatures typically responded to organized special interests without offering principled justification. In the last two decades the battleground has widened. The stakes are higher: first medical malpractice, then product liability, and now the entire universe of tort law. Powerful, well-financed organizations of tortfeasors and insurers have waged an ongoing campaign to convince the public that there is a "tort litigation crisis," whose cause is tort law and jury verdicts, not negligence and injuries, and to persuade legislators to restrict liability.<sup>121</sup> Judges are split between adopting a deferential stance and subjecting such legislation to critical scrutiny.

#### A. Deference

Writing both for majorities upholding statutes and as dissenters from judgments invalidating them, many judges deferred to legislation curtailing tort remedies. They accepted legislative findings of a tort

v. Niagara County, 458 N.Y.S.2d 162 (N.Y. App. Div. 1983) (refusing to uphold an exculpatory clause signed by the plaintiff in suit against parking garage).

115. See N.Y. REAL PROP. LAW § 234 (McKinney 1989).

116. See N.Y. GEN. OBLIG. LAW § 5-325 (McKinney 1989).

117. See *id.* § 5-322.

118. See *id.* § 5-322.1.

119. See *id.* § 5-326.

120. See N.Y. REAL PROPERTY LAW § 235 (McKinney 1989).

121. See Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321, 322 (1986); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 L. & CONTEMP. PROBS 269, 273 (Autumn 1989); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1094 (1996); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998); Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Famine of 1986*, 11 STUD. L., POL. & SOC'Y 95, 112 (1991); Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39.

liability or insurance crisis. “[I]t is not the judiciary’s function . . . to reweigh the ‘legislative facts’ underlying a legislative enactment.”<sup>122</sup> As evidence of the emergency, some simply repeated claims by the medical and insurance industries that insurance companies were withdrawing or setting prohibitive rates and that health care providers, unable to obtain insurance at reasonable cost, were going bare or limiting or terminating practice.<sup>123</sup> Judges invoked commentators and pointed to the concurrence of other states.<sup>124</sup> Some judges declined to decide whether the crisis actually existed, insisting that doubtful findings of fact had to be accepted, and criticized their judicial brethren for citing empirical data questioning the crisis.<sup>125</sup> “Whatever flaws exist in the legislative findings, the proper forum to correct them is the Texas legislature and not this court.”<sup>126</sup>

Judges declared that promoting public health by making medical care available at reasonable prices was obviously a legitimate state purpose.<sup>127</sup> Judges held that the legislation was in the “public interest” and not intended to relieve the burden on health care providers.<sup>128</sup> Some judges saw no need to determine the legislative purpose.

Judges also deferred to the legislature’s explanation for the causes of the problem it had defined. The Indiana Medical Malpractice Act “reflects a specific legislative judgment that a causal relationship existed at the time between the settlement and prosecution of malpractice claims against health care providers and the actual and threatened diminution [sic] of health care services.”<sup>129</sup> Judges declined to question whether the costs of medical negligence should be paid by malpractice or workers compensation insurance. “Policy judgments of this nature are clearly within the legislative prerogative.”<sup>130</sup> Judges found it “obvious” that increases in the number and size of malpractice claims raised the cost of medical services and encouraged defen-

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122. *American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.*, 683 P.2d 670, 678 (Cal. 1984).

123. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1086-87 (Fla. 1987); *Taylor v. Karrer*, 244 N.W.2d 201, 204 (Neb. 1976); *Morris v. Savoy*, 576 N.E.2d 765, 775-76 (Ohio 1991) (Holmes, J., dissenting); *Mominee v. Scherbarth*, 503 N.E.2d 717, 736-40 (Ohio 1986) (Holmes, J., dissenting).

124. *Mominee*, 503 N.E.2d at 736-40.

125. *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 178-93 (Ala. 1991) (Maddox, J., dissenting).

126. *Lucas v. United States*, 757 S.W.2d 687, 701 (Tex. 1988) (Gonzalez, J., dissenting).

127. *Prendergast v. Nelson*, 256 N.W.2d 657, 662 (Neb. 1977); *Beatty v. Akron City Hosp.*, 424 N.E.2d 586, 594 (Ohio 1981).

128. *Prendergast*, 256 N.W.2d at 669; *Lucas*, 757 S.W.2d at 701.

129. *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 590 (Ind. 1980).

130. *Barme v. Wood*, 689 P.2d 446, 451 (Cal. 1984).



sive medicine.<sup>131</sup> They acquiesced in the legislative choice of remedy.<sup>132</sup> "In addressing complicated social and economic problems, the Legislature must be free to attempt a remedy even when the results are uncertain."<sup>133</sup> Judges accepted legislative assertions that abrogation of the collateral source rule and damage caps would reduce the cost of premiums, and thus of medical care. "The reduction in verdicts would presumably result in a reduction in premiums for malpractice insurance, making it affordable and available, helping to assure the public of continued health care services."<sup>134</sup> Mandatory arbitration was a rational response.<sup>135</sup> Limiting contingent fees would reduce frivolous suits and unrealistic settlement demands.<sup>136</sup> The legislature "could have reasonably believed that without some measure of cost reduction, future medical malpractice claimants would experience difficulty in obtaining collectible judgments . . . ."<sup>137</sup> To do so would revive the discredited substantive due process of the 1930s United States Supreme Court.<sup>138</sup> Given profound disagreements about the best response, judges declined to question particular choices. "Any ten professionals . . . would have ten different proposals to attempt to resolve the problems existing."<sup>139</sup> The Florida Medical Malpractice Reform Act "bears a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state."<sup>140</sup> Indeed, "the Legislature is free to experiment and to innovate and to do so at will, or even 'at whim.'"<sup>141</sup>

Judges reiterated the two conventional arguments for deference. First, the court contended that invalidating the Alabama Medical Liability Act

would empower this Court to supplant its own concept of what is good or bad for what the legislature has decreed, and, by judicial interpretation, to violate that great principle that is the bedrock of

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131. *Fein v. Permanente Med. Group*, 695 P.2d 665, 680 (Cal. 1985).

132. *Eastin v. Broomfield*, 570 P.2d 744, 752 (Ariz. 1977).

133. *Lucas v. United States*, 757 S.W.2d 687, 720 (Tex. 1988).

134. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 558 (Iowa 1980).

135. *Beatty v. Akron City Hosp.*, 424 N.E.2d 586, 595 (Ohio 1981).

136. *Roa v. Lodi Med. Group, Inc.*, 695 P.2d 164, 170-71 (Cal. 1985).

137. *Lucas*, 757 S.W.2d at 701.

138. *Mominee v. Scherbarth*, 503 N.E.2d 717, 737 (Ohio 1986). For an argument that the cases from *Lochner* to *Parrish* were invalidating "special legislation," see G. EDWARD WHITE, *THE MYTHS OF SUBSTANTIVE DUE PROCESS: REVISITING LOCHNER V. NEW YORK* (University of Virginia School of Law Working Paper Series 98-25, Winter 1998).

139. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 267 (Kan. 1988) (McFarland, J., dissenting).

140. *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981).

141. *Prendergast v. Nelson*, 256 N.W.2d 657, 668 (Neb. 1977).

our government, that there are three co-equal branches of government, and that the legislature makes the laws, the executive enforces the laws, and the judiciary interprets the laws.<sup>142</sup>

“For us to ‘unfind’ that there is a crisis on the state of this record is to act like a ‘super legislature’ in violation of the separation of powers doctrine.”<sup>143</sup> “No member of this court or of any other court in this nation can question the right of the elected representatives of the people . . . to create or abolish within certain limitations a cause of action under the common law.”<sup>144</sup> Legislation expressed the “people’s right of self-government.” Were courts

to strike down those classifications which a majority of judges felt unwise or unsound, the constitutionally mandated division of powers between such branches of our government would be substantially altered. . . . The least democratic branch of government would become the most powerful, with a resulting diminution in the people’s right of self-government.<sup>145</sup>

Second, whereas courts were limited to the “isolated vantage of the litigation process,” legislatures deliberated, creating study commissions and debating and amending bills.<sup>146</sup>

### B. Critical Scrutiny

If some judges were content to mouth clichés about deference to the legislature, others engaged in critical scrutiny. Improved access to health care was uncertain. “[O]ne can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved.”<sup>147</sup> “In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease.”<sup>148</sup> It was “logically perverse” to pursue this goal by inflicting a “palpable burden” on victims, especially minors and the most seriously injured.<sup>149</sup> There was “no logically supportable reason why the most severely injured mal-

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142. *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 183 (Ala. 1991) (Maddox, J., dissenting).

143. *Lucas v. United States*, 757 S.W.2d 687, 701 (Tex. 1998) (Gonzalez, J., dissenting).

144. *Mominee v. Scherbarth*, 503 N.E.2d 717, 738 (Ohio 1986) (Wright, J., dissenting).

145. *Lucas*, 757 S.W.2d at 705 (Phillips, C. J., dissenting).

146. *Id.* at 707; *Moore*, 592 So. 2d at 182; *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 266-67 (Kan. 1988).

147. *Smith v. Department of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987).

148. *Lucas*, 757 S.W.2d at 691.

149. *Fein v. Permanente Med. Group*, 695 P.2d 665, 701 (Cal. 1985) (Bird, C.J., dissenting); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978).

practice victims should be singled out to pay for special relief to medical tortfeasors and their insurers.”<sup>150</sup> “This imprudent legislation provides benefits to the wrongdoer at the expense of his victim.”<sup>151</sup> The statutes were special legislation: insufficiently evenhanded, under-inclusive, and making arbitrary distinctions among victims.<sup>152</sup> The Illinois damages cap “contains three arbitrary classifications that have no reasonable connection to the stated legislative goals.”<sup>153</sup> The “prohibition against special legislation does not permit the entire burden of the anticipated cost savings to rest on one class of injured plaintiffs.”<sup>154</sup> A notice requirement was “special treatment afforded medical care providers.”<sup>155</sup> Abrogation of the collateral source rule “arbitrarily and unreasonably discriminates in favor of health care providers.”<sup>156</sup> Caps must apply to “all plaintiffs and all defendants . . . evenhandedly. The familiar figure holding the scales of justice wears a blindfold. She should not be required to peer around it to ascertain whether the defendant is a ‘health care provider’ before deciding what judgment to pronounce.”<sup>157</sup>

[T]he state has neither a compelling nor a legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system. If such a hypothesis were once approved, any profession, business, or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those whom they have damaged. Under such a system, our constitutional guarantees would be gradually eroded, until this state became no more than a playground for the privileged and influential.<sup>158</sup>

Although there was no justification for limiting these modifications to medical malpractice, the statutes offered special treatment to health care providers, thereby benefitting wrongdoers. This “panic motivated legislation” was passed at the behest of special interests, just like the automobile guest statutes a half-century earlier, which were

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150. *Fein*, 695 P.2d at 701 (Bird, C.J., dissenting); see also *Morris*, 576 N.E.2d at 771 (quoting *Nervo v. Pritchard*, Stark App. No. CA-6560, June 10, 1985).

151. *American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.*, 683 P.2d 670, 689 (Cal. 1984) (Mosk, J., dissenting).

152. *Fein*, 695 P.2d at 703-05 (Bird, C.J., dissenting).

153. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1075 (Ill. 1997).

154. *Id.* at 1077.

155. *Arneson*, 270 N.W.2d at 135-36.

156. *Id.*

157. *Etheridge v. Medical Ctr. Hosp.*, 376 S.E.2d 525, 539 (Va. 1989) (Russell, J., dissenting).

158. *Kenyon v. Hammer*, 688 P.2d 961, 976 (Ariz. 1984).

now being invalidated.<sup>159</sup> “The special protection granted to the narrowly defined class of ‘health care providers’ stands alone: a unique monument to the effectiveness of a particularly vocal group, which sought and found a privileged position in the courts.”<sup>160</sup> Judges even expressed “considerable doubt if the purpose of the limitations as declared in the Act,” “to assure that a liability insurance market be available . . . at a reasonable cost,” was “in fact the true object of legislative concern.”<sup>161</sup> “It is irrational to grant special immunities for the purpose of providing cheaper negligence insurance for health care providers, when, unlike several other states, Iowa does not even require them to carry malpractice insurance.”<sup>162</sup> Far from deferring to legislatures, these judges subjected such facially discriminatory statutes to strict scrutiny, demanding a “fair and substantial relation” to a “compelling state interest.”<sup>163</sup> “Under the strict scrutiny test” adopted by Arizona, a compelling state interest “must be found from legislative or adjudicative facts and not from hypothesis, speculation or ‘deference’ to some unspecified legislative conception.”<sup>164</sup> These judges refused to accept the legislative finding of a “crisis.”<sup>165</sup>

If saying so could make it so, unquestioning acceptance of the legislative findings that a medical malpractice crisis did and does exist in Florida would be understandable, if not warranted. But this Court, in making its determination of constitutionality, is not bound by whatever preamble the legislature decides to attach to justify a statute . . . .

[W]e are remiss in simply accepting legislative findings without question, because if no crisis exists, no statute could rationally relate to its alleviation as justification for special treatment of the medical malpractice case.<sup>166</sup>

A federal report found it “highly doubtful that any established carrier has not entered the malpractice field because of weakness in the reinsurance market.”<sup>167</sup> The Iowa legislature “itself was in no way persuaded by the factual data gathered and the conclusions reached by

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159. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 561 (Iowa 1980) (Reynoldson, C.J., dissenting).

160. *Etheridge v. Medical Ctr. Hosps.*, 376 S.E.2d 525, 538 (Va. 1989) (Russell, J., dissenting).

161. *Jones v. State Bd. of Med.*, 555 P.2d 399, 409-10 (Idaho 1976).

162. *Rudolph*, 293 N.W.2d at 564.

163. *Kenyon v. Hammer*, 688 P.2d 961, 975 (Ariz. 1984).

164. *Id.* at 979.

165. *Jones*, 555 P.2d at 412; *Prendergast v. Nelson*, 256 N.W.2d 657, 675 (Neb. 1977) (White, J., dissenting).

166. *Pinillos v. Cedars of Lebanon Corp.*, 403 So. 2d 365, 369-70 (Fla. 1981) (Sundberg, C.J., dissenting).

167. *Jones*, 555 P.2d at 413 (citing U.S. DHEW, Report to the Secretary's Commission on Medical Malpractice (1973)).

the two committees.”<sup>168</sup> Other legislatures relied on data that did not support their conclusions.<sup>169</sup> Some did not even try to substantiate the assertion that claims were driving up premiums, forcing insurers to leave the market. “[T]he Legislature had before it no evidence that the immense sacrifices of victims would result in appreciable savings to the insurance companies” nor any “access to data specifically relating to noneconomic damages” (which it had capped).<sup>170</sup> Some legislatures relied on national statistics, which were inapplicable to that state.<sup>171</sup> Judges invoked evidence both in the record and outside, as well as the authority of commentators, for the propositions that: there were few tort claims and even fewer large ones;<sup>172</sup> premiums were low and not rising rapidly (perhaps even falling);<sup>173</sup> they were a small, even insignificant, proportion of medical costs;<sup>174</sup> insurers were not withdrawing; and health care providers had ample access to insurance coverage and were not engaging in defensive medicine or curtailing or terminating practice.<sup>175</sup> “One commentator in this state has claimed that the ‘crisis’ was a creation of the insurance interests . . . .”<sup>176</sup> A crisis could not be chronic and might have diminished or ended since passage of the legislation.<sup>177</sup> In any case, even a crisis could not justify unconstitutional legislation. “We will become a court of men instead of a court of law, guided by an alleged crisis instead of the wording of the Constitution. The legislature interpreted our prior decisions as saying ‘Do whatever you want to do, as long as your decision is buttressed by a crisis.’”<sup>178</sup>

Judges also doubted the legislative explanation for any difficulties in insuring health care providers. There were multiple causes: the actual incidence of medical negligence;<sup>179</sup> changes in substantive law (the real “tort reform”), leading to increases in the number and size of

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168. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 564 (Iowa 1980).

169. *Jones*, 555 P.2d at 412; *Morris v. Savoy*, 576 N.E.2d 765, 770 (Iowa 1991).

170. *Fein v. Permanente Med. Group*, 695 P.2d 665, 700 (Cal. 1985).

171. *Jones*, 555 P.2d at 416; *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978).

172. *Morris*, 576 N.E.2d at 770-71.

173. *American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.*, 683 P.2d 670, 693-94 (Mosk, J., dissenting).

174. *Moore v. Mobil Infirmary Ass'n*, 592 So. 2d 156, 181 (Ala. 1991); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 267-68 (Kan. 1988) (McFarland, J., dissenting).

175. *Mominee v. Scherbarth*, 503 N.E.2d 717, 725-26 (Ohio 1986).

176. *Pinillos v. Cedars of Lebanon Corp.*, 403 So. 2d 365, 371 n.4 (Fla. 1981).

177. *Id.* at 371.

178. *Smith v. Department of Ins.*, 507 So. 2d 1080, 1099 (Fla. 1987) (Adkins, J., concurring in part, dissenting in part).

179. *Jones v. State Bd. of Med.*, 555 P.2d 399, 414 (Idaho 1976).

judgments;<sup>180</sup> juror evaluations of injuries; actuarial problems in predicting small numbers of events;<sup>181</sup> interest rate fluctuations; bad investments;<sup>182</sup> and profiteering by insurance companies.<sup>183</sup> Some commentators attributed the "alleged 'liability crisis'" to "a conspiracy by insurers to increase rates to cover faulty investment and underwriting decisions."<sup>184</sup>

If the diagnosis was wrong, so was the prescription. Although judges denied questioning the wisdom of the legislation,<sup>185</sup> they did require legislatures to demonstrate that statutes actually would solve the problem. "To permit the legislature to act as the sole arbiter of such juxtaposition [of the \$400,000 damages cap to the goal of reducing the cost of health care] would be to vacate our judicial role."<sup>186</sup> The Texas Medical Professional Study Commission, relied on by the legislature, "could not conclude there was any correlation between a damage cap and the stated legislative purpose of improved health care. . . . One independent study has concluded that there is no relationship between a damage cap and increases in insurance rates . . . ."<sup>187</sup> Legislatures had to offer data showing the size of noneconomic damages and the insurance savings if these were capped. "[T]he lack of wisdom of a statute which shifts the risk of practicing medicine from a health-care provider to the health-care recipient who is required to subsidize the provider's costs in spite of the fact that he is the party least able to bear such costs is self-evident."<sup>188</sup> The Illinois Supreme Court was "unable to discern any connection between the automatic reduction of one type of compensatory damages awarded to one class of injured plaintiffs and a savings in the systemwide costs of litigation."<sup>189</sup> The North Dakota Supreme Court (claiming the support of Wisconsin, Kansas, and Nebraska) insisted on a "close correspondence between statutory classification and legislative goals."<sup>190</sup> The damage cap did not promote the "assurance of availability of competent medical and hospital services at reasonable

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180. *Samsel v. Wheeler Transport Servs., Inc.*, 789 P.2d 541, 559-60 (Kan. 1990) (Herd, J., dissenting).

181. *Jones* 555 P.2d at 414.

182. *Id.* at 413; *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 564 (Iowa 1980).

183. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 166 (Ala. 1991).

184. *Etheridge v. Medical Ctr. Hosps.*, 396 S.E.2d 525, 538 (Va. 1989) (Russell, J., dissenting).

185. *Moore*, 592 So. 2d at 168; *Mominee v. Scherbarth*, 503 N.E.2d 717, 728 (Ohio 1986).

186. *Moore*, 592 So. 2d at 168; *Mominee*, 503 N.E.2d at 728.

187. *Lucas v. United States*, 757 S.W.2d 687, 689-92 (Tex. 1988).

188. *Mominee*, 503 N.E.2d at 728; (Brown, J., concurring); *see also Morris v. Savoy*, 576 N.E.2d 765, 770 n.4 (Ohio 1991).

189. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1077 (Ill. 1997).

190. *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978).

cost . . .”<sup>191</sup> The Alabama Supreme Court asked “whether the benefit sought to be bestowed upon society outweighs the detriment to private rights occasioned by the statute.”<sup>192</sup> “It clearly appears that [the Alabama Medical Liability Act], by balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, represents an unreasonable exercise of the police power.”<sup>193</sup> Because the trial court was entitled to find there was no “availability or cost crisis” in North Dakota, the “drastic limitation on recovery . . . is a violation of the Equal Protection provision . . . .”<sup>194</sup> The damage cap “lacks any ‘reasonable and substantial relation’ to the legislative objective.”<sup>195</sup> “We are unable to find . . . any evidence to buttress the proposition that there is a rational connection between awards over \$200,000 and malpractice insurance rates. There is evidence of the converse, however.”<sup>196</sup>

Judges questioned each empirical claim by the legislature. Both premiums and medical costs continued to rise rapidly despite these laws.<sup>197</sup> “[E]xperience since 1975 has demonstrated the fallacy of the Legislature’s assumption that the reduction of malpractice premiums paid by hospitals would result in a meaningful containment of hospital costs.”<sup>198</sup> Indeed, the legislation might have the perverse effect of raising premiums.<sup>199</sup> These laws reduced compensation but failed to discourage unmeritorious cases, encourage meritorious ones, or facilitate settlement.<sup>200</sup> There was no evidence that refusing to toll the statute of limitations for minors or incompetents lowered insurance premiums, especially since the insurance industry’s own data showed that such claims were very rare; the Superintendent of Insurance was not even required to determine the statute’s effect.<sup>201</sup> Because of the infrequency of large awards, damage caps would not significantly lower premiums. Instead, these laws might perversely reduce the

191. *Id.* at 135.

192. *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 166 (Ala. 1991).

193. *Id.*

194. *Arneson v. Olson*, 270 N.W.2d at 136.

195. *Etheridge v. Medical Ctr. Hosps.*, 376 S.E.2d 525, 538 (Va. 1988).

196. *Morris v. Savoy*, 576 N.E.2d 765, 770 (Ohio 1991).

197. *See Moore*, 592 So. 2d at 165-71; *Kenyon v. Hammer*, 688 P.2d 961, 961-79 (Ariz. 1984); *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W. 2d 550, 561-68 (Iowa 1980) (Reynoldson, C.J., dissenting); *Mominee v. Scherbarth*, 503 N.E.2d 717, 736-40 (Ohio 1986) (Wright, J., dissenting).

198. *American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.*, 683 P.2d 670, 686 (Cal. 1984) (Mosk, Associate J., dissenting).

199. *Roa v. Lodi Med. Group, Inc.*, 695 P.2d 164, 181-83 (Bird, C.J., dissenting).

200. *Kenyon*, 688 P.2d at 976-79; *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978).

201. *Kenyon*, 688 P.2d at 976-79; *Arneson*, 270 N.W.2d at 135-36; *Mominee*, 503 N.E.2d at 274-76.

quality of medical care by lowering the liability incentive.<sup>202</sup> It was bad policy to burden workers compensation insurers rather than medical malpractice insurers. “[T]o shift the burden of those rising [medical malpractice] costs to employers . . . is not a rational approach to achieve the purported goal of better health care for the residents of California. Indeed, from a public policy perspective, it is counterproductive.”<sup>203</sup>

These judges saw themselves championing weak, powerless, individual victims against organized wealthy defendants’ lobbies. Where deferential judges allowed legislatures to act “at whim,” these judges refused to subordinate the “constitutional right of access to the courts for redress of injuries” to “majoritarian whim.”<sup>204</sup> They felt an “obligation . . . to protect the Kansas Constitution from encroachment by legislative action.”<sup>205</sup> During the preceding bicentennial year “our people have learned the importance of protecting the individual from encroachment by the majority of those in positions of power, no matter how well-meaning. Without the concept of equal justice for all, our basic liberties would have disappeared from the scene years ago.”<sup>206</sup> The state and federal bills of rights “are there to protect every citizen, including a person who has no clout, and the little guy on the block. They are there to protect the rights of a brain-damaged baby, a quadriplegic farmer or business executive, and a horribly disfigured housewife who is a victim of medical malpractice.”<sup>207</sup> A limit on plaintiffs’ lawyers’ contingency fees without a comparable limit on the fees of defense lawyers “implicates the fairness of the judicial process itself.”<sup>208</sup> The power to cap (damages) was the power to destroy (causes of action). “[I]f the legislature may constitutionally cap recovery at \$450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps \$50,000, or \$1,000, or even \$1.”<sup>209</sup> Far from deliberating, legislatures rushed through unamended long, complicated bills drafted by industry representatives.<sup>210</sup> Judges claimed, paradoxically, that it was more “respectful” to invalidate an

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202. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 561-68 (Iowa 1980) (Reynoldson, C.J., dissenting).

203. *Barme v. Wood*, 689 P.2d 446, 452 (Cal. 1984) (Mosk, J., dissenting).

204. *Smith v. Department of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987).

205. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 256 (Kan. 1988).

206. *Id.* at 257.

207. *Id.* at 258.

208. *Roa v. Lodi Med. Ctr. Group, Inc.*, 695 P.2d 164, 186 (Bird, C.J., dissenting).

209. *Smith*, 507 So. 2d at 1089.

210. *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1067-69 (Ill. 1997).



entire statute and let the legislature rewrite it than to engage in "ad hoc adjustments."<sup>211</sup>

#### IV. HOW SHOULD COURTS DEAL WITH TORT LEGISLATION?

The assertion that courts should defer to legislatures in making tort law is fatally flawed. True, judges are less responsive to the electorate than legislators. In practice, however, the need to raise money for reelection drives legislators into the pockets of special interests. Judges, by contrast, often come to conceive of themselves as guardians of a general interest.<sup>212</sup> Their relative electoral irresponsibility, paradoxically, protects them from capture by special interests.<sup>213</sup> (Recognizing this, organizations of tortfeasors and insurers are planning to use their considerable muscle to influence the election of state supreme court justices).<sup>214</sup> Statutes are rarely accompanied by a persuasive, even a good-faith, attempt to demonstrate their contribution to the general good. Judicial decisions, by contrast, always try to do so, however imperfectly they may succeed.<sup>215</sup> Legislatures sometimes deliberate, commissioning research to identify problems and alternative solutions, holding hearings to encourage public input, amending bills to recognize divergent interests and views, and producing comprehensive responses to social problems. More often, however, they do nothing of the sort. The numerous state statutes limiting medical malpractice liability in the 1970s were rushed through with little discussion and a great deal of mindless and inappropriate imitation. Special interests conduct much of what passes for "research" and perform much of the legislative drafting. Many legislators know little about the bills on which they are voting. The process is often invisible. By contrast, major law reform cases often attract considerable publicity. A wide range of amicus briefs allows many viewpoints to be expressed.<sup>216</sup> Majority opinions, concurrences, and dissents present thorough analy-

211. *Fein v. Permanente Med. Group, Inc.*, 695 P.2d 665, 668 (Bird, C.J., dissenting).

212. For examples of this in the unlikely setting of South Africa, see RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994* (1995).

213. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 501-02, & n.1 (3d ed. 1986).

214. *Illinois Tort "Reform" Controversy Illustrates Partisan Movement to Restrict Court's Jurisdiction*, CIVIL JUSTICE DIGEST, Winter 1998, at 1.

215. For 30 years I have vigorously criticized tort law, both in the classroom and in writing. See, e.g., Richard L. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, chap. 20 (D. Kairys ed., 3d ed. 1998).

216. But the very characteristics that advantage groups in the legislative process may also advantage them in litigation. Stephen M. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313 (1991); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1975).

ses of the issues. The numerous decisions critically scrutinizing legislation limiting tort liability represent an approach to judicial review of state constitutionality embraced by a large number of diverse, respected jurisdictions.<sup>217</sup>

How, then, should courts make tort law?<sup>218</sup> A strong critique of the CMT would invert it, declaring that courts *always* favor unorganized interests and legislatures the organized. This is neither true<sup>219</sup> nor necessary to my argument. I think it incontrovertible, however, that in confrontations between organized and unorganized interests, legislatures sometimes favor the former and courts the latter. Several propositions follow from this, in order of increasing controversy (and correlative tentativeness).

1. Judges must continue to refine the common law of torts.
  - a. The age of the rule being modified is irrelevant.
  - b. Legislative silence signifies nothing about legislative intent.
  - c. Legislative modification signifies no legislative intent about common law rules not modified.
2. Judges may narrowly construe legislation whose wisdom they question, since the legislature can always correct an interpretation with which it disagrees.

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217. See *supra* Part III.B and accompanying text.

218. A number of scholars have advanced arguments for more stringent judicial review. See, e.g., RICHARD A. EPSTEIN, *TAKINGS* (1985); MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 14-17 (1966); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 318-26 (1980); Erwin Chemerinsky, *The Supreme Court, The 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 85-86 (1989); Frank H. Easterbrook, *The Supreme Court, The 1983 Term Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 42-45 (1984); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 153-56 (1989). See also Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 748-50 (1984); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 303-05 (1988); Macey, *supra* note 22; Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 867-72 (1980); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 290-91 (1982); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 65 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1729-30 (1984); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 475-76 (1989). For an argument that interest-group and public choice theories, even if empirically verified, offer no support for revising standards of judicial review, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 105-09 (1991).

219. With Sacramento controlled by Democrats for the first time in decades, trial lawyers hope to raise the damage caps on medical malpractice awards established in 1975. Dan Morain, *Bills Would Lift Some Caps on Malpractice Awards*, L.A. TIMES, Mar. 20, 1999, at A3. They also hope to impose liability on HMO's for denial of care. Carl Ingram, *Senate Panel OKs Bill on HMO Liability*, L.A. TIMES, Apr. 7, 1999, at A3, available in 1999 WL 2146767.

3. In reviewing the constitutionality of legislation modifying the common law of torts:

a. Judges may expect the legislature to declare its purpose explicitly and may weigh the legislation in terms of its contribution to that purpose.

b. If the legislation rests on factual propositions, judges may evaluate the evidence supporting them (perhaps with a strong presumption of validity).

c. If the legislation facially discriminates against unorganized interests, even though they are diffuse dispersed majorities,<sup>220</sup> and in favor of organized ones, scrutiny should be more critical.

If courts cease to hide behind legal process shibboleths based on insupportable normative positions and unsubstantiated empirical assumptions, perhaps they will devote more energy to devising and testing substantive justifications for the rules they create and apply.

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220. Contrast the solicitude extended to "discrete insular minorities" in *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); cf. Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).