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## **Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice**

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## Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice

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## I. INTRODUCTION

Blame it on the Bee Gees. Or disco in general. Or the water. But something in the '70s led the country away from good sense about music, and something led the country away from good sense about justice, too.

In the '60s Dr. Martin Luther King, Jr. told America, “the arc of the moral universe is long, but it bends toward justice.”<sup>1</sup> Certainly, legal history is characterized by a broadening of access to justice, as well as a recognition that a person’s right to a day in court is virtually an American birthright.<sup>2</sup> In the '70s, some straight-thinking Americans decided they could not tolerate that arc. “[L]iability insurers, product manufacturers, and other repeat-play tort defendants began a concerted effort to enact laws that would limit tort liability that they contended had run amok.”<sup>3</sup> Their work continues, funded at rates that would make a defense contractor blush.<sup>4</sup>

The Supreme Court, which itself had been bending toward justice, also showed signs of becoming an arc-enemy. For two hundred years the American legal system had been governed by the venerable common-law principle, where there is a wrong, there is a remedy.<sup>5</sup> In 1979 the Court decided that the well-honored principle is not so venerable after all.<sup>6</sup> It was enough to make a lover of the common law cry.

As Sonny and Cher would say, “the beat goes on.”<sup>7</sup> The assault on the remedial imperative of the common law continues,<sup>8</sup> masked as an assault on trial lawyers. Why attack the remedial imperative? Corporations — artificial persons — want an ever bigger piece of the pie that feeds real persons. They pro-

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1. Martin Luther King, Jr., Annual Report at the 11th Convention of the Southern Christian Leadership Conference: Where Do We Go From Here? (Aug. 16, 1967), *transcript available at* [http://www.stanford.edu/group/King/publications/speeches/Where\\_do\\_we\\_go\\_from\\_here.html](http://www.stanford.edu/group/King/publications/speeches/Where_do_we_go_from_here.html).
  2. *See, e.g.*, *Queen City Coach Co. v. Burrell*, 85 S.E.2d 688, 692 (N.C. 1955).
  3. John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1164 (2005) (alteration in original).
  4. *See* DAVID CALLAHAN, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, \$1 BILLION FOR IDEAS: CONSERVATIVE THINK TANKS IN THE 1990s (1999), *excerpt available at* <http://www.commonwealinstitute.org/ncrp.callahan.1.htm>; David Callahan, *\$1 Billion for Conservative Ideas*, NATION, Apr. 1999, at 21, *available at* <http://www.thenation.com/doc/19990426/callahan>; Dan Zegart, *The Right Wing’s Drive for ‘Tort Reform,’* NATION, Oct. 2004, at 13, *available at* <http://www.thenation.com/doc/20041025/zegart>; Eric Alterman, *Think Again: How We Got Here* (Apr. 8, 2005), <http://www.americanprogress.org/issues/2005/04/b617015.html>; Don Hazen, *The Right Wing Express*, ALTERNET, Feb. 7, 2005, <http://www.alternet.org/mediaculture/21192/>.
  5. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”).
  6. In *Cannon v. Univ. of Chicago*, the Court held, “[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.” 441 U.S. 677, 688 (1979) (alteration in original).
  7. SONNY & CHER, *The Beat Goes On, on IN CASE YOU’RE IN LOVE* (Atco Records 1967).
  8. *See generally* JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW (2004).

mote the idea that the civil justice system is simply a tool to serve the economy, and that trial lawyers are harbingers of economic ruin. The role of the civil justice system as glue that holds the polity together is denigrated or forgotten, and trial lawyers are portrayed as enemies of the good — sometimes, literally, as terrorists.<sup>9</sup>

Those who campaign for tort reform and against trial lawyers see courts as one-way streets, available for their efforts to hold others accountable,<sup>10</sup> but never to hold themselves accountable.<sup>11</sup> Their rhetoric refers to meritorious lawsuits — those where liability was successfully established — as “frivolous,” and blames wealth-redistributing juries and complicit judges for falling under the sway of heartstring-pulling trial lawyers.<sup>12</sup>

From the earliest stages of the “tort wars,” a half-century ago, the insurance industry set its sights on trial lawyers.<sup>13</sup> Trial lawyers’ success in increasing payouts on automobile claims had captured their ire.<sup>14</sup> The damage to insurers’ economic bottom lines inspired a creative campaign to use all available media — the press, movies, and even television sitcoms — to reinforce the public’s unsavory image of trial lawyers.<sup>15</sup>

The campaign refocused the industry’s dissatisfaction with a civil justice system that had opened its doors more widely, as well as with the increasing profes-

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9. During a speech to Boston College’s Chief Executives’ Club on Feb. 24, 2004, Maurice “Hank” Greenberg, then-chairman of the world’s largest insurer by market value, American International Group, plainly stated: “I call the plaintiffs’ bar terrorists.” Boston College, Carroll School of Management Executive Events Page, <http://www.bc.edu/schools/csom/cga/executives/events/greenberg/> (last visited July 27, 2006).
  10. See, e.g., ERIK MOLLER, NICHOLAS M. PACE & STEPHEN J. CARROLL, *PUNITIVE DAMAGES IN FINANCIAL INJURY JURY VERDICTS* (1997).
  11. Of all the proposals that play the tort-reform tune, none tries to contain business-to-business litigation, which appears to be increasing at a greater rate than tort cases. FEINMAN, *supra* note 8, at 67. If one paid attention merely to the tort-restrictionist lyrics, one would never know that the so-called litigation explosion never occurred. See, e.g., Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049 (2000); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999).
  12. See generally Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989) (describing the tort reform campaign).
  13. The New York State Trial Lawyers Association has documented such attacks as far back as 1958. NEW YORK STATE TRIAL LAWYERS ASSOCIATION, *NYSTLA: THE FIRST 50 YEARS 9–12* (2003), available at <http://www.nystla.org/nicecontent/documents/history-FINAL.pdf> [hereinafter NYSTLA].
  14. See INSURANCE RESEARCH COUNCIL, *INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF INSURANCE CLAIMS 78* (1999). The report found that in 1997, bodily injury claimants represented by counsel recovered an average of \$11,640, compared to \$3190 for those who did not retain an attorney.
  15. NYSTLA, *supra* note 13, at 9–11.

sionalism and heightened capabilities of the trial bar.<sup>16</sup> In doing so, the campaign attempted to tap into preexisting antipathy toward lawyers and courts to further a private, corporate-driven economic agenda that increasingly became a political agenda. This preexisting suspicion of the legal profession is so deeply rooted that even colonial Americans referred to members of the profession as “bloodsuckers,” “pick-pockets,” “windbags,” and “smooth-tongued rogues.”<sup>17</sup> This antipathy existed, and still exists, despite the centrality of legal arguments and lawyers in making the case for self-determination, individual rights, and American independence from Mother England,<sup>18</sup> and it exists, despite Americans’ willingness to resort to the courts to settle our most vexing issues. Thus, as Professor Charles Silver has observed, “[a]ntipathy for lawyers did not develop overnight. It has existed for centuries, and it has been carefully and extensively nurtured in recent decades.”<sup>19</sup>

The tactic is extensively used by tort reformers and their political supporters. One rhetorician at the tort-reform-supporting Manhattan Institute tapped into that reservoir of lawyer hostility by establishing a website, [www.overlawyered.com](http://www.overlawyered.com), that seeks to feed the negative predisposition with tales of unscrupulous lawyers and frivolous lawsuits.<sup>20</sup> Another pundit, Republican pollster and television commentator Frank Lunz, has advised candidates to attack trial lawyers as good politics, adding that it is “almost impossible to go too far in demonizing lawyers.”<sup>21</sup>

At the same time, attacks on judges and courts as “activist” and controlled by the trial bar have increased, and have been bootstrapped to controversial decisions on wedge issues outside the realm of torts. The United States Chamber of Commerce has entered the judicial election fray, sponsoring hard-hitting televi-

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16. In the post-World War II era, courts “lowered barriers to litigation—dismantling immunities, widening standing, and eliminating the requirement of privity in products liability cases—and enlarged remedies.” Marc Galanter, *The Turn Against Law: The Recoil Against Accountability*, 81 TEXAS L. REV. 285, 287 (2002).
  17. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 810–11 (1998) (internal quotations omitted) (citations omitted).
  18. See HENRY STEELE COMMAGER, *THE EMPIRE OF REASON* (1977); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969). Americans have long looked to the judicial branch to resolve knotty disputes. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley & Francis Bowen eds., Henry Reeve trans., Alfred A. Knopf 1945) (1835) (“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”).
  19. Charles Silver, *A Rejoinder to Lester Brickman: On the Theory Class’s Theories of Asbestos Litigation*, 32 PEPP. L. REV. 765, 780 (2005).
  20. Overlawyered.com, <http://www.overlawyered.com> (last visited Oct. 12, 2006). Although the editor of Overlawyered.com, Walter Olson, acknowledges his own affiliation with the Manhattan Institute, he explicitly disclaims Institute affiliation with the website. About Overlawyered.com, <http://www.overlawyered.com/pages/aboutus.html> (last visited Oct. 12, 2006).
  21. Joan Claybrook, *Corporate Accountability: The Power of Citizen Access to the Courts*, 21 PUB. CITIZEN 20, 20–21 (2001), available at <http://www.citizen.org/documents/pcnews30ann.pdf>.

sion advertisements aimed at judges who rule against business interests, and even utilizing non-business issues to make political hay.<sup>22</sup>

Yet, for all its sound and fury about trial lawyers, the campaign is really one against the nature of our civil justice system, where corporate bosses must stand on an equal footing with the “unwashed masses” and suffer the ignominy that comes from being held accountable by those who lack their education, wealth, political clout, or status in the community.<sup>23</sup> The attack on trial lawyers, at bottom, is merely a surrogate for the real object of their disaffection: the civil justice system and its accommodation of peoples’ claims.

The sections that follow detail some of those areas of attack. Part II addresses assaults on the contingency fee system, where lawyers incur costs but do not recoup those expenses, or get paid, unless favorable results are obtained. Part III discusses mandatory arbitration, which by definition is entered into without any real consent, and has become a ubiquitous device for liability limitation. Part IV addresses the current expert witness environment where physicians courageous enough to break the code of silence and testify that colleagues have wrongly harmed patients are being forced to spend huge sums to defend themselves before “peer review” tribunals that send a clear message: don’t testify. Part V discusses legislatures, perhaps caught in bird-flu frenzy, which seem to have decided all immunity is good, even when it fails to serve the public interest. Finally, Part VI discusses the efforts of artificial persons to manipulate and alter rules of evidence and procedure. The deterrent effect of tort law<sup>24</sup> and the imperative it creates for safer products<sup>25</sup> is given no stature. Instead, missing no opportunity to curtail liability, the artificial persons of the world want rules of evidence and procedure to treat their electronic memories more favorably than we treat the real memories of real persons: where a real person has to say what they know, an artificial person would be required merely to say what is convenient.

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22. See MANHATTAN INSTITUTE, JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE 26–29 (2001), available at <http://www.manhattan-institute.org/pdf/mics6.pdf> (describing the use of so-called issue ads to evade restrictions on corporate campaign spending and contribution disclosure laws, as well as utilizing, in one instance, a soft-on-crime approach to unseating an Indiana appellate judge who drew their ire).
  23. Generally, the term “unwashed masses” is used to describe those who are less than equal to a more elite class of citizens who both bathe more regularly and feast on more intellectual or consequential fare. See Allan Ides, *The Jurisprudence of Wringing Hands: A Response to Professor Soifer*, 48 WASH. & LEE L. REV. 419, 420 (1991).
  24. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 10 (1987) (“[A]lthough there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters . . .”) (alteration in original).
  25. See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 384–85 (1994).

## II. ATTACKS ON CONTINGENCY FEES

If representing the rank-and-file were not potentially profitable, there would be no need to seek various types of tort reform to render it unprofitable. For that reason, the contingency fee, the key to the courthouse for those who cannot afford to pay for legal representation upfront, is under constant attack — with the attack focused on the capacity of the fees to generate trial lawyer “wealth.”<sup>26</sup>

It is no coincidence that the contingency fee aligns counsel’s interests with that of the client. As eloquently stated by Judge Frank Easterbrook:

The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect . . . . But [an] imperfect-alignment of interests is better than a conflict of interests, which hourly fees may create.<sup>27</sup>

Pennsylvania Justice Michael A. Musmanno agreed and famously declared:

If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.<sup>28</sup>

In the view of those who attack the system, this alignment of interests is precisely the problem — it enables lawsuits that otherwise never would be filed. In fact, attacks on the contingency fee system stretch back before the tort reform era and recur to this day. It is not those who cannot otherwise afford a lawyer who protest the contingency fee system. Rather, these attacks are mounted by frequent defendants and insurers.<sup>29</sup> That, in itself, is telling.

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26. The attackers do not seem concerned about trial lawyers receiving no fee, or expending great amounts in expert and other costs, as well as opportunity costs, when the case fails.

27. *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

28. *Richette v. Solomon*, 187 A.2d 910, 919 (Pa. 1963).

29. See Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 467 (1998); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 254 (1998).



One of the most prominent recent attacks was mounted by the tort-reform group Common Good, which petitioned the supreme courts of a dozen states to change the rules governing contingency fees by limiting them in cases where defendants made an early settlement offer.<sup>30</sup> The petitions uniformly were unsuccessful.<sup>31</sup> Common Good hardly hides its objectives; it states that a major element of its mission is convincing “judges and legislatures to create clear standards on who can sue for what.”<sup>32</sup> In an absurdly skewed and decidedly defendant-oriented view of the civil justice system, Common Good labels “[o]ur system of justice . . . a tool for extortion.”<sup>33</sup>

A similar tack was adopted by the Florida Medical Association (“FMA”). The FMA successfully proposed a state constitutional amendment intended to cap contingency fees in medical malpractice cases at thirty percent of the first \$250,000 awarded, and ten percent of any amounts above \$250,000.<sup>34</sup> After voters approved the FMA initiative, which was framed as “The Claimant’s Right to Fair Compensation,”<sup>35</sup> the doctors stealthily proposed a new ethical rule that was aimed at preventing clients from waiving their right to restrict their attorney’s fee.<sup>36</sup>

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30. Adam Liptak, *In 13 States, A United Push to Limit Fees of Lawyers*, N.Y. TIMES, May 26, 2003, at A10.

31. Most courts rejected the petitions out of hand. Only the Utah Supreme Court took the petition seriously enough to assign consideration of the petition to a bar committee. That committee received briefing and oral argument, only to unanimously reject the petition, a recommendation that the Utah Supreme Court accepted. Letter from Robert A. Burton, Chair, Utah Supreme Court Advisory Comm. on the Rules of Prof'l Conduct, to Steven T. Densley, Attorney, Strong & Hanni, and Nancy Udell, Gen. Counsel, Common Good (Jan. 28, 2004) (on file with authors).

32. Common Good Frequently Asked Questions, What Are You Proposing?, <http://cgood.org/learn-faq.html> (last visited Oct. 20, 2006).

33. Common Good Statement, <http://cgood.org/assets/attachments/108.pdf> (last visited Nov. 3, 2006).

34. FLA. CONST. art. I, § 26.

35. *Id.*

36. Petition, *In re Amendment to the Rules Regulating the Fla. Bar*, No. SC05-1150, 2006 WL 2771252 (Fla. Sept. 28, 2006). The FMA hired a former Florida Supreme Court chief justice to advance the petition. He gathered signatures from members of his law firm and from FMA or allied lobbyists who were lawyers. Gary Blankenship, *Board Asks Court Not to Adopt Petition to Limit Contingency Fees in Med Mal Actions*, FLA. BAR NEWS, July 1, 2005, at 14, available at <http://www.floridabar.org> (click publications, then Fla. Bar News, then archives). Under the rules of The Florida Bar, one way to advance such a proposal is through a petition filed by fifty bar members in good standing. FLA. BAR. REG. R. 1-12.1(f). At oral argument about the proposal, hard questions were posed to the FMA lawyer about his failure to disclose the fact that although he had advanced the petition as a member of the Bar, he was operating on behalf of a paying client; the court questioned the propriety of using the petition procedures to advance the interests of a client. Transcript and Video of Oral Argument, *In re Amendment*, No. SC05-1150, 2006 WL 2771252 (Fla. Sept. 28, 2006), available at <http://www.wfsu.org/gavel2gavel/archives/05-11.html#NOV1>. Subsequently, the court ordered the Florida Bar to develop and submit a proposed amendment to the rule, which would create a proper procedure for client waivers. *In re Amendment*, No. SC05-1150, 2006 WL 2771252, at \*1 (Fla. Sept. 28, 2006). In 2006, the court approved a waiver procedure. *Id.* at \*5.

The gambit proved unsuccessful. Recognizing that the amendment created a personal constitutional right in the medical malpractice claimant, plaintiffs' counsel began to seek client waivers to assure that such cases would not be rendered uneconomic to pursue. They were able to seek these waivers because, under Florida precedent,<sup>37</sup> various personal constitutional rights, including the right to trial by jury, the right to access to the courts, and the right to due process of law, are all subject to waiver.<sup>38</sup> A Florida intermediate appellate court has recognized:

Although the constitution and the statute do not expressly recognize a person's right to waive their [homestead] protection, it has long been recognized that an individual is free to knowingly and intelligently forego a right which is intended to protect only the property rights of the individual who chooses to make the waiver.<sup>39</sup>

The proposed ethical rule prohibiting waiver and attempting to make a personal constitutional right inalienable was without warrant in the constitutional text. The Florida Supreme Court saw the issue in precisely that light. Finding the right to be personal, and thus subject to waiver, it ordered the Florida Bar to propose a rule that would permit, rather than prohibit, waiver.<sup>40</sup>

While these two modern attempts at limiting contingency fees in order to discourage litigation have failed, more attempts will unquestionably be made in the future. Although aimed at the pocketbooks of trial lawyers, the attempts to limit contingency fees ultimately result in increased difficulty for potential plaintiffs to find representation for their complex cases, and therefore they, not trial lawyers, have become the object of these attacks.

### III. THE EXPANSION OF MANDATORY ARBITRATION

Mandatory arbitration — the requirement in adhesion contracts that disputes must be resolved in private, by private decisionmakers — is the beast that might eat the civil justice system. Beloved by credit card issuers, sub-prime lend-

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37. *In re Shambow's Estate v. Shambow*, 15 So.2d 837, 837 (Fla. 1943) ("It is fundamental that constitutional rights which are personal may be waived."); *see also* *City of Treasure Island v. Strong*, 215 So.2d 473, 479 (Fla. 1968) ("[I]t is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver . . .") (alteration in original); *Bellaire Sec. Corp. v. Brown*, 168 So. 625, 639 (Fla. 1936) ("A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution."); *S.J. Bus. Enter., Inc. v. Colorall Tech., Inc.*, 755 So.2d 769, 771 (Fla. Dist. Ct. App. 2000) ("The law has long recognized an individual's right to waive statutory protections as well as constitutional or contractual rights.").

38. *See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 642 (Fla. 1999) (recognizing that an agreement to arbitrate waives constitutional rights to trial by jury, due process, and access to the courts).

39. *Hartwell v. Blasingame*, 564 So.2d 543, 545 (Fla. Dist. Ct. App. 1990) (citation omitted).

40. *In re Amendment*, No. SC05-1150, 2006 WL 2771252, at \*1 (Fla. Sept. 28, 2006); *see* discussion *supra* note 36.

ers, non-union employers, and any industry that wants to avoid class-action liability, it is ubiquitous in modern American life. In purchasing a personal computer, for example, a little slip of paper at the bottom of the shipping box may establish that you indicate your agreement to arbitrate any dispute by turning on the computer.<sup>41</sup>

Borne of a Supreme Court decision that a sitting majority of the Court has acknowledged was wrongly decided, it will live until Congress kills it.<sup>42</sup> The Court has made clear that it is not about to destroy the Frankenstein's monster it created. Given the political clout of the limited liability investment interests that support it, the beast is apt to have a long life.

The story has been told elsewhere in greater depth,<sup>43</sup> but the Cliffs Notes version goes like this: In the early part of the 20th century, state courts often were unwilling to specifically enforce arbitration agreements.<sup>44</sup> Prodded by large commercial entities that wanted agreements between each other to be enforceable, Congress passed the Federal Arbitration Act ("FAA").<sup>45</sup> The language and history of the act indicate that it was written as a set of procedural rules for federal courts.<sup>46</sup>

Long after the Depression and the Civil Rights era established that the Commerce Power is broad, the Court decided that section 2 of the FAA, which mandates enforcement of certain arbitration clauses, is a substantive rule of contract law applicable in state courts.<sup>47</sup> As a matter of statutory construction, the decision clearly is wrong,<sup>48</sup> and a majority of the members of the Rehnquist court agreed.<sup>49</sup> But the Court in general does not reverse itself on longstanding statu-

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41. Caroline Mayer, *Fine Print Erases Consumers' Right to Sue*, SEATTLE TIMES, May 24, 1999, at A1.

42. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). *But see* discussion *infra*, note 49.

43. *See, e.g.*, David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541 (2004).

44. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926) (in which the drafters of the Federal Arbitration Act explain its background).

45. 9 U.S.C. §§ 1–16 (2000).

46. *See, e.g.*, 9 U.S.C. § 4 (2000) (setting rules for enforcing arbitration agreements in federal courts). The FAA does not provide an independent basis for federal jurisdiction. By its terms, § 4 applies only to cases over which a federal court has an independent basis of jurisdiction, excluding many of the cases to which § 2 has been held to apply.

47. *Southland Corp.*, 465 U.S. at 1.

48. *See* Schwartz, *supra* note 43.

49. Justice O'Connor, joined by Chief Justice Rehnquist, in *Southland*, argued in dissent that "Congress intended to require federal, not state, courts to respect arbitration agreements." 465 U.S. at 23 (O'Connor, J., dissenting). Justice Stevens noted that Justice O'Connor was correct in her analysis of congressional intent. *Id.* at 17 (Stevens, J., concurring in part and dissenting in part). In *Allied-Bruce Terminix Co. v. Dobson*, a dissenting Justice Scalia said that "[a]dherence to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes," and noted that while he would no longer dissent from cases citing it as precedent, he would vote to overrule it. 513 U.S. 265, 284–85 (1995) (Scalia, J., dissenting) (alteration in original). Justice Thomas also dissented in *Allied-*

tory interpretations and it clearly has indicated that it does not intend to do so here.<sup>50</sup> Even so, it has long been assumed that state courts could determine whether an arbitration clause exists depending on whether the underlying contract was valid under state law.<sup>51</sup> However, the Court's most recent decision in this area reversed the Florida Supreme Court, which had refused to enforce an arbitration clause in a contract it had found to be criminal as a matter of Florida law.<sup>52</sup> The Supreme Court said that, in the first instance, an arbitrator, not a court, must decide whether the contract containing the arbitration clause is void.

The practical effect of all this is striking. It is difficult to ascertain just how ubiquitous mandatory arbitration clauses are in American life, in part because their use is expanding so rapidly, and in part because the promoters of arbitration are the proprietors of the collected results.<sup>53</sup> One cleverly conceived experiment created an imaginary character, Joe, and looked at how dispute resolution in his life had been privatized through the use of adhesion contracts.<sup>54</sup> Thirty-five percent of the contracts he encountered in everyday life had mandatory arbitration clauses, as did nearly seventy percent of the contracts in the financial services industry (credit cards, banking, etc.).<sup>55</sup> Think about how many purchases are made by credit card, and think about how few disputes about them can be litigated.

The results of all this are troubling. The costs of arbitration can inhibit plaintiffs from bringing claims.<sup>56</sup> Industries use arbitration clauses to protect themselves from class actions,<sup>57</sup> with great success.<sup>58</sup> An arbitration clause effec-

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*Bruce*, and opined there that "the Federal Arbitration Act (FAA) does not apply in state courts." *Id.* at 285 (Thomas, J., dissenting).

50. See *IBP, Inc. v. Alvarez*, 126 S.Ct. 514, 523 (2005) (stare decisis is particularly powerfully applied when dealing with longstanding construction of a statute); *Allied-Bruce*, 513 U.S. at 284–85 (Scalia, J., dissenting); *Southland*, 465 U.S. at 17 (Stevens, J. concurring in part and dissenting in part).
51. See 9 U.S.C. § 2 (2000).
52. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006).
53. Linda J. Demaine & Deborah Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 60–62 (2004). The authors relate a hilarious exchange, familiar to anyone who has encountered the nameless, faceless electronic responses that pass as customer service in modern business plans, in which the company first responded to a consumer request for information about arbitration by noting that it did not engage in arbitrary disputes, and subsequently asked that the authors distinguish between "an arbitrary dispute and an arbitration clause so we can better answer your question." *Id.* at 61.
54. *Id.* at 58.
55. *Id.* at 62.
56. See Matthew T. Ballenger, *The Price of Justice: The Role of Cost Allocation in the Employment Arbitration Fairness Analysis*, 18 LAB. LAW. 485 (2003) (discussing prohibitive costs in the labor law context).
57. See Michael R. Pennington, *Every Health Insurer's Litigation Nightmare*, BRIEF, Summer 1999, at 47, 52.
58. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Caroline E. Mayer, *Hidden in Fine Print: You*

tively can insulate from liability any industry that causes harms individually small but collectively large, robbing the law of its power to disgorge ill-gotten gain. Industries use arbitration clauses to insulate themselves from public scrutiny. Claims of discrimination,<sup>59</sup> retaliation,<sup>60</sup> and professional negligence<sup>61</sup> can be hidden from public view; if Big Tobacco had put arbitration clauses onto cigarette packs, they might never had to admit that they knew that smoking causes lung cancer.

Industries use arbitration clauses to limit the amounts they have to pay when they are found responsible for misdeeds.<sup>62</sup> Victims are robbed of redress, and, as importantly, the public is deprived of the opportunity to judge the reprehensibility of misconduct: a jury of one's peers is not a feature of arbitration.

The consequences for the body politic are potentially enormous.<sup>63</sup> Some rules of law are simply placeholders, designed to extrapolate terms in agreements and to allow commerce to continue. For example, if a contract doesn't specify the number of widgets, we will extrapolate a reasonable amount and enforce the otherwise sound agreement. We care little whether disputes involving these rules are privately resolved. But many other laws applicable to private disputes embody policy judgments about how we want people to behave. We care whether an employment contract specifies a wage below a mandated minimum or specifies different wages for persons of different races. Placing the resolution of such disputes into the hands of persons who are not accountable to the public, operating in a system that is not transparent and that yields no precedent, deprives the public of assurance that its rules of behavior are followed. Adherence to the rule of law requires faith in the rule of law. Mandatory arbitration erodes that faith.

#### IV. THE HARASSMENT AND INTIMIDATION OF EXPERT WITNESSES

In the early 1980s, the American Association of Neurological Surgeons ("AANS") — a group for which one court has characterized a quarter of a million dollars a year as merely "moonlighting income"<sup>64</sup> — decided that persons who appear as expert witnesses in cases involving AANS members should have their testimony subjected to extrajudicial peer review. Traditionally, peer review had taken place only when medical care resulted in an adverse event. Such review

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*Can't Sue Us: Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1.

59. See *Sex Bias Suit Ordered Settled*, WASH. POST, Aug. 25, 1999, at A7.

60. See *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99 (Ill. 2006).

61. See *Milon v. Duke Univ.*, 559 S.E.2d 789 (N.C. 2002).

62. See U.S. GEN. ACCOUNTING OFFICE, *EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES* 25 (1994) (expressing concern about bias among arbitrators).

63. See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (2004).

64. *AUSTIN v. AM. ASS'N OF NEUROLOGICAL SURGEONS*, 253 F.3d 967, 971 (7th Cir. 2001).

initially was designed to identify medical errors and establish procedures aimed at avoiding them in the future. It also was capable of identifying physicians who should not be practicing medicine. The results of peer review proceedings are not public, and are immunized from liability.<sup>65</sup>

When the AANS decided to “peer review” testimony, it never said that its intent was to give pause to plaintiffs’ expert witnesses. Still, in the twenty years between the initiation of the AANS program and the 2001 *Austin v. AANS* decision, which involved a challenge to the authority of the AANS to conduct such reviews, twenty-four of the twenty-seven cases the AANS reviewed had been brought by physicians who had been defendants in malpractice cases.<sup>66</sup>

In the late 1990s, the American Medical Association (“AMA”) decided that peer review of expert testimony would be a good function for medical associations in general.<sup>67</sup> At the time when the AMA adopted a resolution to that effect, its membership was in steep decline.<sup>68</sup> It also was fighting a political war against full recovery for victims of medical malpractice. A way to reign in doctors who crossed the thin blue line to testify about malpractice might have seemed an attractive way to rally the troops.

Expert witness peer review has taken many forms. One is the AANS model, which is limited to review by a cadre of members of the group. That model has been adopted by numerous other specialty societies.<sup>69</sup>

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65. See Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101–11152 (2000).

66. Plaintiff’s Brief in Opposition to Defendant’s Motion for Summary Judgment, at 4, *Austin v. AANS*, 120 F. Supp. 2d 1151 (N.D. Ill. 2000) (No. 98 C 7685), reprinted in DONALD C. AUSTIN, TRIALS AND TRIBULATIONS 551, 554 (1994). Judge Posner, in his opinion in the Circuit Court, found that this was no evidence of bias. No consideration was made in the opinion with regard to the effect of the existence of the program, even absent a showing of bad motive. Although often cited in support of these programs, the *Austin* case merely affirms a holding that the complaining physician failed to state a claim under Illinois law. *Austin*, 253 F.3d at 971.

67. In 1997 the AMA House of Delegates adopted Resolution 221. The resolution led to adoption of a policy that deemed physician expert testimony to be the practice of medicine subject to peer review, and called for the study of mechanisms by which such peer review could be implemented. American Medical Association, H-265.993 Peer Review of Medical Expert Witness Testimony, <http://www.ama-assn.org> (search for H-265.993 and follow second link) (last visited Sept. 21, 2006).

68. In 1962, the AMA represented nearly seventy percent of American physicians. Yuji Noto, American Medical Association (AMA) and Its Membership Strategy and Possible Applications for the Japan Medical Association (JMA) 14 fig.13 (June 1999) (unpublished Takemi Fellow research project, Harvard School of Public Health), available at <http://www.hsph.harvard.edu/takemi/rp157.pdf>. This percentage has declined continuously since the 1960s, dropping to only twenty-eight percent today. Stokely Baksh, *AMA Gets Facelift to Attract New Members*, UNITED PRESS INT’L, June 22, 2005, available at <http://www.upi.com/archive/view.php?archive=1&StoryID=20050616-033709-7222r>.

69. Since 1997, the following organizations have adopted or amended rules dealing with expert witness testimony:

- American Academy of Allergy, Asthma & Immunology (AAAAI) 2006.
- American Academy of Dermatology (AAD) 2003.
- American Academy of Family Physicians (AAFP).
- American Academy of Neurology (AAN) 2004.
- American Academy of Ophthalmology (AAO) 2003.

The Florida Medical Association (“FMA”), a private organization, adopted a peer review program that extends to any physician who testifies in Florida, regardless of whether she is licensed in Florida or is a member of the FMA. The Florida Court of Appeals recently ruled, in *Fullerton v. FMA*, that the immunities available for peer review in the Health Care Quality Improvement Act<sup>70</sup> and a similar Florida law<sup>71</sup> do not apply to peer review of testimony.<sup>72</sup> Those statutes were designed to deal with rendering care to patients, not rendering words in court.

State medical licensure boards also have asserted authority over expert witness testimony.<sup>73</sup> The Mississippi licensure board has recently adopted a rule purporting to prescribe rules of conduct for any physician who testifies in any medical malpractice case involving a Mississippi defendant, regardless of whether the case is pending in state or federal court, and regardless of whether the case is even pending in Mississippi.<sup>74</sup> An assertion of authority over expert witnesses by the Texas Medical Board has been challenged in *Doe v. Texas Medical Board*.<sup>75</sup> The North Carolina Court of Appeals recently exonerated a neurosurgeon, Dr. Gary Lustgarten, who had been condemned by the licensure board,<sup>76</sup> but not before the innocent doctor spent six figures on defense costs.<sup>77</sup>

What is wrong with these programs? Whether by purpose or only in effect, they stem the free flow of testimony to courts, and they impinge protected free speech.<sup>78</sup> Their purpose — promulgated by politically and economically powerful

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- American Academy of Orthopaedic Surgeons (AAOS) 2004.
  - American Academy of Otolaryngology-Head and Neck Surgery (AAOHNS) 2004.
  - American College of Emergency Physicians (ACEP) 1998.
  - American College of Medical Genetics (ACMG) 2000.
  - American College of Obstetricians & Gynecologists (ACOG) 2003.
  - American College of Occupational and Environmental Medicine (ACOEM) 2002.
  - American College of Physicians (ACP) 2005.
  - American College of Surgeons (ACS) 2004.
  - American Society for Clinical Pathology (ASCP) 2003.
  - American Urological Association (AUA) 2006.
  - Society of Thoracic Surgeons (STS) 2005.

70. 42 U.S.C. §§ 11101–11152 (2000).

71. FLA. STAT. ANN. § 766.101 (West, Westlaw through 2006 Second Regular Sess.).

72. *Fullerton v. Fla. Med. Ass’n, Inc.*, 938 So.2d 587, 592 (Fla. Dist. Ct. App. 2006).

73. *See, e.g., Doe v. Tex. Med. Bd.*, No. 13-06-00325-CV (Tex. App. appeal filed May 19, 2006), <http://www.13thcoa.courts.state.tx.us/opinions/case.asp?FilingID=16094>.

74. MISS. STATE BD. OF MED. LICENSURE REG. XXXII (2006), *available at* <http://www.msblml.state.ms.us/regulations/2007%20expert%20witness%20complete%20reg.pdf>.

75. *Doe*, No. 13-06-00325-CV.

76. *In re Lustgarten*, 629 S.E.2d 886, 892 (N.C. Ct. App. 2006).

77. Telephone Interview with Dr. Gary Lustgarten (July 2006).

78. Giving testimony as a witness in judicial proceedings is protected by the First Amendment. *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987). Free speech protection extends to expert witnesses. *Kinney v. Weaver*, 301 F.3d 253, 282 n.24 (5th Cir. 2002) (asserting that the fact that

groups to advance economic self-interest — should be suspect. Their effect is clear, at least anecdotally. Plaintiffs’ medical malpractice attorneys report that securing medical expert testimony is continually more difficult. Physicians under contract to testify have, under peer pressure, sought release from their obligations, even on the eve of trial. Physicians who have previously testified relate that they are becoming more reluctant to testify in the future, given experiences such as Dr. Lustgarten’s in North Carolina.<sup>79</sup>

The danger we all face from such programs is recognized by the common law testimonial privilege. We are so concerned that testimony be unfettered that we do not allow remedies even against witnesses who have perjured themselves:

“[T]he dictates of public policy . . . require[ ] that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.” A witness’s apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. Even within the constraints of the witness’s oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence. But the truth-finding process is better served if the witness’s testimony is submitted to “the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.”<sup>80</sup>

## V. THE CREATION OF NEW IMMUNITIES

Other immunities have been handed out to favored classes. These immunities afforded to special interests with enormous political clout, are utterly inconsistent with the arc of justice.<sup>81</sup> In recent times, hospital emergency rooms have

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parties “testified as expert witnesses does not diminish the First Amendment interest in ensuring that the speech is uninhibited”), *aff’d in relevant part*, 367 F.3d 337 (5th Cir. 2004) (en banc), *cert. denied*, 543 U.S. 872 (2004).

79. See generally Steve Ellman, *Code of Silence: Medical Associates Step Up Scrutiny of Doctors Who Testify for Medical Malpractice Plaintiffs*, MIAMI DAILY BUS. REV., June 25, 2003, available at <http://www.dailybusinessreview.com/AwardStories/CodeOfSilence.html>.

80. *Briscoe v. LaHue*, 460 U.S. 325, 333–34 (1983) (finding absolute immunity for police officers who allegedly gave perjured testimony) (alteration in original) (citations omitted).

81. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793) (A judicial system, when it does its job, “leaves not even the most obscure and friendless citizen without means of obtaining justice.”).



benefited from constitutionally problematic immunity provisions enacted in Nevada<sup>82</sup> and Georgia.<sup>83</sup> Yet even more questionable is the immunity Congress granted gun manufacturers and dealers in 2005, preventing third-party liability from attaching to their marketing and sales practices, as charged in a series of public nuisance lawsuits brought by municipalities.<sup>84</sup> The enacted law demonstrates how far into the exercise of judicial authority a legislature may be willing to intrude in order to support the litigation posture of a political patron industry.

While advancing a pretextual claim about burdens on interstate commerce, Congress more accurately identified its real purpose in enacting the gun immunity law when it characterized the litigation it disfavors as the “use [of] the judicial branch to circumvent the Legislative branch.”<sup>85</sup> The odd idea that a person adversely affected under existing legal principles must be a supplicant to the legislature, even when that assembly is under the sway of an opponent, rather than a petitioner in a neutral court, indicates that Congress has little idea what separation of powers is really about. That enmity directed at judicial declarations of the law of the state also unmasks the nature of Congress’s undertaking: it is an attempt to take on the role of “super-judiciary” and overrule any “maverick” judge who would entertain this type of action by declaring Congress’s own understanding of the common law extant in every state.<sup>86</sup> In contrast, while Congress opined that such lawsuits are without “foundation in hundreds of years of the common law and jurisprudence of the United States,”<sup>87</sup> the American Law Institute has reached precisely the opposite conclusion,<sup>88</sup> as have courts of last resort in

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82. NEV. REV. STAT. § 41.503 (2005). The statute creates a cap of \$50,000 on civil liability damages for hospitals, trauma centers, and the physicians who render care in such facilities for treatment of immediate traumatic injury.

83. GA. CODE ANN. §§ 51-1-29.5(a), (d) (2006). The statute, as a practical matter, entirely immunizes emergency room staff and entire hospitals when the patient is admitted to the hospital through the emergency room.

84. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901–7903) [hereinafter PLCAA]. The theory of these lawsuits is explained in Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247 (1999).

85. PLCAA § 2(a)(8), 119 Stat. at 2096 (alteration in original).

86. PLCAA § 2(a)(7), 119 Stat. at 2096. Liability actions against gun manufacturers and dealers “are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States, . . . do not represent a bona fide expansion of the common law, . . . [and could only be imposed] by a maverick judicial officer or petit jury.” *Id.* (alteration in original).

87. *Id.*

88. The American Law Institute found that liability for criminal acts foreseeably caused by one’s own negligence has been an integral part of the traditional notions of third-party liability. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 449 (1965) (“If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.”).

the states.<sup>89</sup> The Constitution, however, grants Congress only legislative powers — and enumerated ones at that. Its authority under a system of separated powers does not extend to determinations of the merits of a legal argument, an individual case, or a class of cases.<sup>90</sup>

The disingenuously named gun law, the Protection of Lawful Commerce in Arms Act (“PLCAA”), prohibits “qualified civil liability actions” against gun manufacturers or sellers unless, *inter alia*, the defendant “knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . .”<sup>91</sup> Hence, the act prohibits actions based upon judicial construction of a state’s law, including its common law, but permits the identical actions when based on a legislative act.

Congress, however, holds no authority to select among branches of state government that branch which can declare federally cognizable law. It is axiomatic that “the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”<sup>92</sup> It is equally true that “rules of decision established by judicial decisions of state courts are ‘laws’ as well as those prescribed by statute.”<sup>93</sup> As such, a congressional enactment, like the PLCAA, that denies state courts the authority to declare the law and requires exclusive reliance on state legislatures for the definitive pronouncement of that state’s law invades state sovereignty, and must be regarded as unconstitutional. After all, it is “[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”<sup>94</sup>

By recognizing state legislative authority to authorize such lawsuits while denying state judicial authority to construe existing law to permit the very same lawsuits, the PLCAA plainly violates the principle that “states are free to allocate the lawmaking function to whatever branch of state government they may choose.”<sup>95</sup> On this point, the U.S. Supreme Court has been emphatic: “While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to

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89. See, e.g., *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).

90. See generally *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

91. PLCAA § 4(5)(A)(iii), 119 Stat. at 2097.

92. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

93. *West v. Am. Tel. & Tel.*, 311 U.S. 223, 236 (citing *Erie*, 304 U.S. at 64).

94. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); see also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (“How power shall be distributed by a state among its governmental organs is commonly, if not always a question for the state itself.”).

95. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981) (citations omitted).

confer upon Congress the ability to require the States to govern according to Congress' instructions."<sup>96</sup>

The federal government can neither dictate the form of government a state adopts, nor require that a state respect federal separation of powers principles within its government.<sup>97</sup> It then follows that Congress may not require that the laws of a state be a product of legislative action, rather than authoritative construction by its courts. The U.S. Supreme Court has recognized only one justification for overriding a state's sovereign power to order its own affairs: when text of the federal Constitution explicitly provides for a different arrangement.<sup>98</sup>

Because Congress may not choose which branch declares the law of the state, Congress may not, consistent with constitutional requirements, require a state to exercise its authority to make law through the legislature rather than through the courts and may not constrict state judicial power to declare "what the law is."<sup>99</sup> Nor may Congress override the construction that courts give to state law.<sup>100</sup> Yet that is precisely what Congress attempted to do with the gun law. Congress made plain its concern that third-party liability would be imposed on gun manufacturers and dealers by a "maverick judicial officer or petit jury" in a manner that was not supported by "hundreds of years of the common law and jurisprudence of the United States [or] a bona fide expansion of the common law."<sup>101</sup> This statutory expression of congressional preference for legislative determinations over judicial ones is not a legitimate exercise of federal power and an overt expression of hostility to judges.

The Constitution also does not invest Congress with any judicial powers, yet, through the gun act, Congress plainly arrogated to itself the authority to construe the meaning and applicability of existing state law and then rule legislatively based on that interpretation. Fundamental separation of powers doctrine, though, holds that Congress may not adjudicate a case in order to reach a result contrary to what courts have already held.<sup>102</sup>

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96. *New York v. United States*, 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States.").

97. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

98. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76–77 (2000) (relying upon U.S. CONST. art. II, § 1, cl. 2, which gives a special role to state legislatures in administering federal elections to deny any role to a state supreme court).

99. *See Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

100. *See Erie*, 304 U.S. at 78 ("Congress has no power to declare the substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." (citing *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893))).

101. PLCAA § 2(a)(7), 119 Stat. at 2096.

102. *See Plaut*, 514 U.S. at 219–25 (discussing the colonial practice of legislative review of judicial decisions and the Constitution's Framers rejection of that practice).

In *United States v. Klein*, the Supreme Court held that Congress cannot direct the outcome of a pending case without changing the underlying substantive law governing the lawsuit.<sup>103</sup> Directing the outcome, it held, constituted an unconstitutional exercise of judicial power by the legislative branch.<sup>104</sup> Although Congress may “enact[ ] new standards” and leave “to the courts the judicial functions of applying those standards,”<sup>105</sup> it may not otherwise “adjudicat[e][ ] particular cases legislatively.”<sup>106</sup> The gun law similarly violates this separation of powers principle by ordering courts to dismiss pending cases because Congress, attempting to construe the common law of every state, believes that there is no legitimate basis for such a lawsuit. Congress established no contrary law; merely a directive that courts “immediately dismiss[ ]” such cases.<sup>107</sup>

In *Klein*, the Court concluded that the disputed law could not be regarded as a proper exercise of congressional authority over jurisdiction because it took the form of a congressional command to the courts to reach a particular outcome in a defined set of cases — an attempt, in the Court’s words, to “prescribe rules of decision to the Judicial Department of the government in cases pending for it[.]”<sup>108</sup> The Court particularly criticized the law because Congress deemed a judicial determination it did not like as untenable.<sup>109</sup> It concluded that Congress could not thus “prescribe a rule for the decision of a cause in a particular way”<sup>110</sup> without “pass[ing] the limit which separates the legislative from the judicial power.”<sup>111</sup> The Court contrasted a case where Congress permissibly changed the underlying law, “[n]o arbitrary rule of decision was prescribed,” and “the court was left to apply its ordinary rules to the new circumstances created by the act.”<sup>112</sup> *Klein* stands for “the principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case.”<sup>113</sup> The PLCAA’s immediate dismissal requirement plainly violates this rule. It leaves courts “no adjudicatory function to perform”<sup>114</sup> and directs the “ultimate decision” in

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103. 80 U.S. (13 Wall.) 128 (1871).

104. *Id.* at 145–47.

105. *Nichols v. Hopper*, 173 F.3d 820, 823 (11th Cir. 1999) (alteration in original).

106. *Ruiz v. United States*, 243 F.3d 941, 948 (5th Cir. 2001) (alteration in original); *see also* *Hadix v. Johnson*, 144 F.3d 925, 939–40 (6th Cir. 1998); *Mount Graham Coal. v. Thomas*, 89 F.3d 554, 557–58 (9th Cir. 1996).

107. PLCAA § 3(b), 199 Stat. at 2097 (alteration in original).

108. *Klein*, 80 U.S. (13 Wall.) at 146 (alteration in original).

109. *Id.* at 147.

110. *Id.* at 146.

111. *Id.* at 147 (alteration in original).

112. *Id.* at 146 (alteration in original).

113. *Paramount Health Sys. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (citing *Klein* 80 U.S. (13 Wall.) at 146–47).

114. *United States v. Sioux Nation*, 448 U.S. 371, 372 (1980) (citing *Cherokee Nation v. United States*, 270 U.S. 476 (1926)).

pending cases.<sup>115</sup> On October 23, 2006, an Indiana trial court invalidated the Act on separation of powers grounds.<sup>116</sup>

## VI. BENDING THE RULES TO ADVANTAGE ONE SIDE

Proponents of the interests of artificial persons have also been seeking to bend the rules of procedure and evidence toward the interests of their clients, and have done this through active lobbying of both federal and state rulemakers.

Take federal rules first. New rules relating to electronic discovery were recently promulgated.<sup>117</sup> In commentary reacting to these rules, the plaintiffs' bar took the position that, in general, there was little that needed to be addressed by rule and that most problems being encountered by the courts were being dealt with expeditiously under existing rules.<sup>118</sup> The artificial persons' defense bar took the position, in general, that hellfire and damnation were imminent if changes to the rules were not made.<sup>119</sup> The federal rulemaking committee found it prudent to avoid hellfire and damnation.

Controversially, the amendments create a "safe harbor" that protects a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party's computer system (Rule 37).<sup>120</sup> The amendment to Rule 37 has the potential to sanction the destruction of information critical to demonstrating that bad acts happened.<sup>121</sup> An amendment on privilege was

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115. *Sioux Nation*, 448 U.S. at 370–71; *cf.* FED. R. CIV. P. 41(b) (stating that a dismissal generally "operates as an adjudication on the merits").

116. *City of Gary v. Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Ind. Oct. 23, 2006) (order on file with authors).

117. The Supreme Court approved the rules on Apr. 12, 2006 and the rules became effective Dec. 1, 2006. U.S. Courts Federal Rulemaking, Supreme Court Action, <http://www.uscourts.gov/rules/index.html#supreme0406> (last visited Nov. 14, 2006). The amendments are available at U.S. Courts Federal Rulemaking, Pending Rules Amendments, <http://www.uscourts.gov/rules/newrules6.html#cv0804> (last visited Nov. 14, 2006) [hereinafter Amendments].

118. See Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH & INTELL. PROP. 171, 192 (2006) (citing F. PAUL BLAND, JR., ARTHUR H. BRYANT, & VICKI NI, COMMENTS OF THE TRIAL LAWYERS FOR PUBLIC JUSTICE AND THE TLPJ FOUNDATION TO THE ADVISOR COMMITTEE ON THE CIVIL RULES (2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-239.pdf>) (stating that links to all 253 written comments submitted during the official public comment period are available at <http://www.uscourts.gov/rules/e-discovery.html>).

119. See generally *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure* (Jan. 12, 2005, S. F.) (testimony of corporate representatives), <http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf#page=4>.

120. FED. R. CIV. P. 37(f).

121. See Withers, *supra* note 118, at 207.

only a partial victory for the business community, which wanted a rule that allowed it to assert or breach privilege at will.<sup>122</sup>

Not satisfied with partial victory, the defense bar carried its fight to Congress, which in turn asked the evidence committee to consider rules on privilege.<sup>123</sup> Federal rules on privilege raise dainty constitutional issues, especially in diversity cases governed by state substantive law, and the Rules Enabling Act reserves to Congress the power to enact them.<sup>124</sup> Generally the Advisory Committee on Civil Rules does not consider rules related to privilege at all.<sup>125</sup> But having been asked by the chair of the House Judiciary Committee to develop new rules on privilege, the Committee will do so, through its normal processes, and, assuming Supreme Court approval, will then send the proposal to Congress for enactment.<sup>126</sup>

The Committee has before it one issue that has become one of corporate America's favorite whines: whether the attorney-client privilege can be selectively waived.<sup>127</sup> Guidelines governing certain corporate prosecutions and certain administrative agency enforcement actions suggest lower penalties when the target of the action cooperates with the enforcer.<sup>128</sup> One measure of cooperation can be whether the target waives the attorney-client privilege. Eager to placate their watchdogs but unwilling to forfeit any future claim to privilege, corporations have suggested a doctrine of selective waiver: the privilege could be waived

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122. *See* Amendments, *supra* note 117. Background on the discussion is noted in Minutes of Civil Rules Advisory Committee, May 22–23, 2006, at 4, <http://www.uscourts.gov/rules/Minutes/CV05-2006-min.pdf>.

123. *Compare* Interview by Editor, The Metropolitan Corporate Counsel of J. Walter Sinclair, Pres., Lawyers for Civil Justice, METRO CORP. COUNSEL, Dec. 2005, at 26, *available at* <http://www.metrocorpcounsel.com/pdf/2005/December/26.pdf>, *with* Securities Fraud Deterrence & Investor Restitution Act of 2003, H.R. 2179, 108th Cong., § 4 (2003) (proposing amending the Securities & Exchange Act of 1934 to allow persons to produce information to the SEC without waiving privilege as to third parties).

124. *See* 28 U.S.C. § 2074 (2000).

125. *See* § 2074(b) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

126. HON. JERRY E. SMITH, CHAIR ADVISORY COMMITTEE ON EVIDENCE RULES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 2 (May 15, 2006), *available at* <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf> (stating that the “Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection”).

127. *See id.*

128. *See id.* at 7; *see also* Memorandum from Larry D. Thompson, Deputy Attorney General to Heads of Department Components, United States Attorneys, (Jan. 20, 2003), *available at* [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf) [hereinafter Thompson Memorandum]; *United States v. Stein*, 435 F. Supp. 2d 330, 336–37 (S.D.N.Y. 2006) (discussing Thompson Memorandum and its predecessor document, the Holder Memorandum).

for purposes of the enforcement action, but the privilege would be available for any other purpose.

Selective waiver addresses the wrong problem. If the waiver guidelines are encouraging prosecutorial overreaching, the solution is not to vitiate one of the core protections the law affords to persons — the right to confer confidentially with their lawyer — but to control the overreaching. We will see what the Committee does.

Like measles, the desire to make rules is contagious. It has infected the states. In the wake of federal rule changes, the National Commission on Uniform State Laws has proposed a “Uniform Discovery of Electronic Records Act.”<sup>129</sup> State judges discussing the federal rules have seen no need for similar changes at their level.<sup>130</sup>

## VII. CONCLUSION

When powerful forces in American life began to be held accountable for not paying minimum wage, for profiting mightily from renting substandard housing, or from charging predatory rates for loans, they didn’t attack the popular laws that created the causes of action under which they were held liable. Instead, they attacked the politically vulnerable Legal Aid lawyers who prosecuted those claims.<sup>131</sup> With trial lawyers, it’s the same playbook. The public doesn’t want unsafe cars or flammable pajamas or toxic drinking water. So the purveyors of those things do not attack the popular laws; they attack the lawyers who pursue these claims.

Artificial persons might not have emotions. But they have agendas. They also have tenacity, and they have resources. They have long sought to bend the body politic in their direction, and in modern times they are trying hard to bend the civil justice system their way, too.

But the arc of the moral universe is still long, and there are still real people, trial lawyers among them, who work hard to keep it bending toward justice.

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129. A draft of the Uniform Discovery of Electronics Record Act from Sept. 21, 2006 is available at [http://www.law.upenn.edu/bll/ulc/udoera/2006novembermeeting\\_draft.htm](http://www.law.upenn.edu/bll/ulc/udoera/2006novembermeeting_draft.htm) (last visited Nov. 20, 2006).

130. THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS: REPORT OF THE 2005 FORUM FOR STATE APPELLATE COURT JUDGES (Richard H. Marshall ed., forthcoming 2007). The Conference of Chief Justices has promulgated flexible guidelines that state court judges can use. WORKING GROUP ON ELECTRONIC DISCOVERY, CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION (2005), *available at* <http://www.ncsconline.org/What'sNew/E-Discovery%20Guidelines.pdf>.

131. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (finding a restriction on Legal Services lawyers unconstitutional, and noting, “Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys”).