

Spring 2015

Juries, Judges, and the Politics of Tort Reform

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Recommended Citation

83 U. Cin. L. Rev. 903, 948 (2015)

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Citation: 83 U. Cin. L. Rev. 903 2014-2015

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JURIES, JUDGES, AND THE POLITICS OF TORT REFORM

David A. Logan*

I. Introduction.....	903
II. Of Myths and Meat Cleavers: Legislative and Executive Tort Reform.....	907
A. Pro-defendant Changes to Procedure.....	907
B. Pro-defendant Changes to Substantive Tort Law.....	910
C. Pro-defendant Changes to Remedies.....	912
III. Juries, Judges, and Tort Reform.....	915
A. Why Juries.....	915
1. Juries Provide Checks and Balances on Government.....	916
2. Juries are Independent.....	917
3. Juries Bring Broadly-Based Community Values to Dispute Resolution.....	921
4. Juries Are Fair.....	921
5. Juries Legitimize the Judicial Process.....	923
6. Juries Generally “Get it Right”.....	923
B. Why Judges.....	924
1. Experience: The Case-By-Case Perspective.....	924
2. Judges Are Predictable.....	926
3. Judges are Independent.....	927
4. Why State Judges.....	930
IV. Controlling Juries from the Inside Out (Rather than Outside In).....	931
A. Move from Standards to Rules.....	931
B. Invigorate Summary Judgment.....	937
C. Tighten the Rules of Evidence.....	938
D. Improve Jury Performance.....	939
E. Overrule the Jury.....	944
V. Conclusion.....	946

I. INTRODUCTION

For the past four decades pro-business interests have spent tens of millions of dollars in an effort to reshape the civil justice system.¹ Under the banner of “tort reform,” the insurance, manufacturing,

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1. See *infra*, notes 74-85, and accompanying text.

pharmaceutical, and medical industries have vilified the civil jury, one of America's most democratic institutions. They claim that jurors take psychological shortcuts, rely on heuristics, and are overly influenced by their emotions and biases, resulting in a world of "jackpot justice" that deters innovation, prompts defensive medicine, and hamstring economic growth.² This campaign has yielded notable successes, as friendly legislators, often recipients of largess from deep pocket industries, have succeeded in passing a wide range of laws that curtail plaintiffs' rights.³

With a dwindling number of lawyers in state and federal legislatures,⁴ important changes have been adopted by public officials with little first-hand knowledge of what is actually happening in the civil justice system.⁵ Instead, proponents of tort reform recycle examples that range from the laughably unrepresentative (a claim seeking \$10 million for being shown sleeping during a nationally telecast baseball game)⁶ to the superficially accurate but altogether misleading (the florid media reports that McDonald's had to pay millions of dollars to a klutz who spilled hot coffee on herself—though the judge dramatically cut the award and the final settlement was much lower).⁷ Meanwhile, strategic payments from companies and think tanks have underwritten the research of leading academics, providing a patina of intellectual propriety to the pro-

2. Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 40 (2008). See also DAN B. DOBBS, *THE LAW OF TORTS* 34 (2000) ("[J]uries are perceived as an almost lawless threat, bent on exercising their prejudices and inflicting undeserved losses upon unpopular defendants.").

3. See *infra* Part II. These same forces have stepped up efforts to use corporate cash to elect pro-business judges or remove judges deemed sympathetic to plaintiffs. Jonathan D. Glater, *To the Trenches: The Tort War Is Raging On*, N.Y. TIMES, June 22, 2008, at A1, available at <http://www.nytimes.com/2008/06/22/business/22tort.html?pagewanted=all&r=0>. See also *infra* notes 84–87 and accompanying text.

4. The percentage of legislative officeholders who have legal training has declined precipitously, at both the federal and state level. Jeffrey W. Stempel, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesman Politicians and Lawyerly Values*, 5 NEV. L. J. 479, 483–85 (2004–05); Dorothy Gambrell, *The 113th Congress, by the Numbers*, BUSINESSWEEK (Jan. 10, 2013), <http://www.businessweek.com/articles/2013-01-10/the-113th-congress-by-the-numbers>; *Legislators' Occupations in All States, 1976, 1986, 1993, 1995, 2007 (Percentages)*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/legisdata/legislator-occupations-national-data.aspx> (last visited May 20, 2015).

5. See David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 43 (2007) ("Generally, courts are better equipped than legislatures to see what is really wrong with tort law. Courts are more likely to understand how it can best be fixed, and to appreciate how a doctrinal change is likely to affect the actual course of litigation and adjudication.").

6. Elliot Hannon, *Yankees Fan Caught on Camera Sleeping During Game Sues ESPN for Defamation*, SLATE, July 7, 2014, available at http://www.slate.com/blogs/the_slatest/2014/07/07/fan_caught_sleeping_during_games_sues_espn_mlb.html.

7. William McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 130 (2001).

business agenda of their funders.⁸

One thoughtful observer concluded that much public debate consists of “urban legend mixed with the occasional true story, supported by selective references to academic studies [. . .] repeated so often that even the mythmakers forget the exaggeration, half-truth, and outright misinformation employed.”⁹ Indeed, in sharp contrast to such anecdotes is the large body of evidence from many reliable sources that reveals a system that is working reasonably well, but that gets little attention in the media and legislatures.¹⁰

Many of these changes to the common law are blunt instruments that fly in the face of cardinal tenets of our civil justice system—that each plaintiff and each injury is unique and that proof of liability should result in full compensation for the injuries that a culpable defendant caused to this plaintiff.¹¹ Indeed, the “make-whole” requirement, including a full award for noneconomic damages (pain-and-suffering), is central to the American tort system.¹² A very common legislative reform—the damage cap—is also the most serious violator of this principle. Other changes however, especially the evisceration of joint and several liability and the collateral source rule, also have undercut the bedrock principles of deterrence, corrective justice, and full

8. Thomas O. McGarity, *A Movement, a Lawsuit, and the Integrity of Sponsored Law and Economics Research*, 21 STAN. L. & POL’Y REV. 51 (2010) (recounting the successful efforts of corporate defendants to undermine judicial support for punitive damages by funding the research of leading academics, and defunding research which disagreed). The resulting reports were roundly criticized by other academics. STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR 231–35 (2006).

9. TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1 (2005). See also Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1504 (2007) (book review) (“[E]ven quality newspapers distort the world of torts in a way that helps reinforce the anecdotes and generalizations promoted by the tort reformers.”); MENCIMER, *supra* note 8, at 7 (“The vast majority of the reporting on the civil justice system has been lazy and gullible.”).

10. Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 379 (2011) (“A rich and continually expanding literature” reveals “substantial relationships between the strength of the trial evidence and jury verdicts, powerful linear relationships between the severity of a plaintiff’s injury and the eventual jury damage award, and strong . . . relationships between compensatory damage awards and punitive damage awards.”).

11. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 9 (2d ed. 2011) [hereinafter DOBBS’ LAW OF TORTS]. See also John C. P. Goldberg & Benjamin C. Zipursky, *Convergence and Contrast in Torts Scholarship: An Essay in Honor of Robert Rabin*, 61 DEPAUL L. REV. 467, 470–71 (2012) (discussing tort law’s commitment to “individualized treatment of accidents and compensation,” manifest in the goal of “make-whole” compensation adjudicated by juries with broad discretion, as well as the requirement that the plaintiff prove that this defendant caused her injury) (emphasis in original).

12. Goldberg & Zipursky, *supra* note 11, at 482; Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 444–45 (2011). I use the term “make whole” as shorthand for the more technically correct, but awkward, “put the plaintiff back as close as possible to her pre-injury condition.” See Sean Hannon Williams, *Lost Life and Life Projects*, 87 IND. L. J. 1745, 1763 (2012).

compensation that undergird the tort system, with the result of under-compensation for many seriously injured plaintiffs.¹³

That being said, there are examples where our tort system, characterized by open-ended principles that grant substantial discretion to a lay jury, has resulted in large, sometimes huge, damage awards that are difficult to justify. These examples have understandably created anger and confusion, especially for those people and institutions (like physicians and product manufacturers) whose core activities regularly create substantial levels of risk, and thus expose them to large damage claims for bad outcomes.¹⁴ The challenge is figuring out how to weed out the unjustifiable awards while providing full compensation to the seriously injured and deterring unreasonably dangerous future conduct.

While tort reform has been critiqued from a number of angles, this piece focuses on the institutional capacity of the three branches of government to control jury excess. It concludes that the judiciary is in the best position to shape the civil justice system. It is judges, overseeing the work of juries, who for centuries have used the incremental law-making of the common law method to monitor, and when necessary adjust, the blend of legal standards and rules that reflect the current needs of society. There is no guarantee that relying upon judges will always yield different outcomes than those reached by a legislature. Rather, I make a process argument, preferring law-making through adjudication because it is better-informed, characterized by stronger limits on access to decision makers, and less influenced by moneyed entreaties. Moreover, changes to how the civil justice system handles tort claims are best made at the state level, where judges are more attuned to the needs of the individual state than are Congress or the Supreme Court of the United States.

This Article first discusses the current state of tort reform, which has had its primary loci in the legislative and executive branches, before

13. See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 329–30 (2007) (discussing rationales for the tort system); W. Kip Viscusi & Patricia Born, *Medical Insurance in the Wake of Liability Reform*, 24 J. LEG. STUD. 463, 465 (1995) (“[A] rigid damages cap . . . on noneconomic damages will . . . limit awards to more deserving victims, such as the catastrophically injured.”). See also John C. P. Goldberg, *The Constitutional Status of State Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524, 528–29 (2005) (summarizing the harsh impact of the Virginia medical malpractice cap on compensatory damages). Not all of the reforms to the civil justice system in recent decades have favored defendants, with the move from contributory negligence to comparative fault being a prime counter-example, albeit sometimes a result accomplished via courts using common law analysis. See DOBBS, *supra* note 2, at 504.

14. See e.g., *Sample List of Members*, AM. TORT REFORM ASS'N, <http://www.atra.org/about/sample-members> (last visited June 12, 2014) (listing members of the American Tort Reform Association, a leading champion of the tort reform sought by physicians, manufacturers, and insurance companies).

turning to a discussion of the strengths of juries and judges, and the many tools well-suited, some time-tested and some novel, to render case-by-case justice.¹⁵ It then concludes that having more, rather than less, faith in the judiciary is the best way to guarantee justice in the civil justice system.

II. OF MYTHS AND MEAT CLEAVERS: LEGISLATIVE AND EXECUTIVE TORT REFORM

Professor Richard Abel well summarized the tort reform battles of recent decades.

Insurers and well-organized repeat-player defendants have waged a costly and deceptive campaign over several decades—with media complicity—to disseminate the myths that Americans file large numbers of frivolous cases and juries are excessively generous to victims. . . . Insurers and well-organized defendants . . . have used their political muscle to persuade legislators to give them special protection from liability.¹⁶

The spate of laws intended to reduce the power of civil juries and to reduce the possibility of an injured plaintiff recovering full compensation for injuries can be organized into three categories: changes to procedure, changes to substantive law, and limits on available remedies.¹⁷

A. *Pro-defendant Changes to Procedure*

In recent decades, legislatures have changed important aspects of the procedural landscape of the civil justice system, imposing an array of procedural barriers to plaintiffs getting their day in court.¹⁸ At the federal level, the Class Action Fairness Act (CAFA), which resulted from “an extended and well-organized political campaign,”¹⁹ makes it

15. See Anderson, *supra* note 5, at 3 (“Tort law is still largely common law; courts made it, and they can unmake it.”).

16. Richard L. Abel, *Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 TEX. L. REV. 1547, 1548–49 (2002) (citations omitted).

17. In significant measure, this concerted attack on the civil justice system has grown out of the work of the “Tort Policy Working Group” early in the administration of President Ronald Regan. JAY M. FEINMAN, UNMAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 25–27 (2004).

18. Procedural changes can have serious impacts on the ability of plaintiffs to obtain compensation. See, e.g., Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 THEORETICAL INQUIRIES L. 671, 676 (2014).

19. Edward R. Purcell, Jr., *The Class Action Fairness Act in Perspective*, 156 U. PA. L. REV. 1823, 1823 (2008).

much harder for injured individuals to have access to the significant efficiencies provided by the state class action vehicle and the advantages of the less pro-business judiciary found in many states.²⁰ The early returns from this single but important procedural change have rewarded the business interests that made this a legislative priority, as there has been a marked decline in class action filings (although less change in personal injury class actions).²¹ CAFA is but one example of the procedural changes that have limited access to justice, the others involving decisions by the Supreme Court of the United States that tighten pleading requirements for all civil actions,²² limit the ability of plaintiffs to introduce expert testimony,²³ and a string of other pro-business decisions²⁴ that have made it more difficult for citizens to take advantage of laws that were enacted to protect them.²⁵

20. See Stephen Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008) (the act was part of a Republican tort reform effort that featured “unrelenting attacks on lawyers in general and plaintiffs’ lawyers in particular”).

21. See Nicole Ochi, *Are Consumer Class and Mass Actions Dead – Complex Litigation Strategies after CAFA and MMTJA*, 41 LOY. L.A. L. REV. 965, 974 n.70 (2008). See also *An Assessment of CAFA and the Future of Class Action Reform*, METROPOLITAN CORPORATE COUNSEL, Jan. 1, 2013 (2013 WL 1265755) (reporting that State Farm Insurance has seen class action filings drop by almost two thirds post-CAFA); John Beisner et al., *CAFA Update: The Class Action Jurisdictional World Clarifies*, in PRIVATE OIL & GAS ROYALTIES: THE LATEST TRENDS, DEVELOPMENTS, AND CHALLENGES IN OIL & GAS ROYALTY LITIGATION (2008) (“corporate counsel should continue to report fewer class actions overall”). The Supreme Court of the United States recently read CAFA narrowly in litigation brought by state governments pursuant to the *parens patriae* power. *State of Miss. ex rel Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (because of CAFA, a consumer protection class action brought by the Mississippi Attorney General cannot be removed to federal court even if there were more than 100 Mississippi citizens who would benefit from the litigation).

22. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013) (identifying pro-business developments that combine to significantly decrease the chance of a citizen to have her “day in court”). See generally Louis W. Hensler, III, *Class Counsel, Self-Interest and Other People’s Money*, 35 U. MEM. L. REV. 53, 64–65 (2004) (hostility to class actions, especially on the part of federal judges, has made it “a steep uphill climb to certify any products liability class action”).

23. See David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 44 (2013) (courts now employ “stricter scrutiny of expert testimony” and have imposed “relatively stringent criteria for scrutinizing expert testimony”). *Daubert* is discussed in more detail *infra*, notes 197–203 and accompanying text.

24. Richard Wolf, *Supreme Court Inching to Right: But without Giving that Impression*, USA TODAY, July 1, 2013, at A6 (the current Supreme Court “has been more pro-business than the average Supreme Court over the last 50 years,” quoting leading appellate advocate Neal Katyal); Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, N.Y. TIMES (June 28, 2013), <http://www.nytimes.com/2013/06/28/us/politics/Roberts-plays-a-long-game.html> (the 2012–13 term “cement[ed] its legacy as the most pro-business court in the modern era,” quoting Professor Lee Epstein, who tracks the Supreme Court).

25. The National Conference of State Legislatures pointed out how laws that push cases out of the state system and into the federal system raise serious federalism concerns: These laws adversely impact the availability of “state laws in the areas of consumer protection and antitrust, which were passed to protect the citizens of a particular state against fraudulent or illegal activities, [and now] will almost never be heard in state courts. Ironically, state courts, whose sole purpose is to interpret state

In addition to changes that make it harder for plaintiffs' lawyers to take advantage of the efficiencies of pursuing group claims via class actions in state court,²⁶ there are now more onerous requirements that a plaintiff must satisfy before filing an action seeking damages for medical malpractice.²⁷ Physicians, hospitals, and insurance companies have stressed the importance of medical care to focus legislative attention on their corner of the civil justice system. Some of these laws require plaintiffs to initially pursue alternative dispute resolution (often in the form of an exhaustion requirement, a benefit traditionally limited to government defendants), but the ones with the most bite require binding arbitration (delaying or sometimes eliminating any chance of a jury verdict), again with no demonstrable effect on insurance rates, but delaying the ability of patients to receive compensation.²⁸ These reforms have had a dramatic impact upon a plaintiff's ability to obtain compensation for medical misconduct.²⁹

Additionally, some states require that a civil complaint be accompanied by an affidavit from a qualified expert that supports the plaintiff's theory of liability (again, mostly in medical malpractice actions),³⁰ or that a complaint be adjudicated by experts in the field rather than a lay jury.³¹

laws, will be bypassed and the federal judiciary will be asked to render judgment in those cases." Letter from Michael Blaboni to the Majority and Minority Leaders from National Association of Attorneys General, 151 Cong. Rec. 2650 (Feb. 16, 2005). See also JoEllen Lind, "Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values, 37 AKRON L. REV. 717, 719 (2004) (criticizing "strategy of creating federal tort law through the guise of regulating procedure," in violation of the Erie doctrine).

26. An array of state laws limit the availability of class actions under state law. See Brief for Respondent apps. A-B, Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010) (listing federal and state statutes that limit the remedy available in a class action, as well as representative state statutes prohibiting class actions for particular claims).

27. Joshua M. Koppel, Comment, *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 265 (2012). See also David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 402-03 (2010) (noting that changes to procedure can impact substantive outcomes in tort cases).

28. Jean Macchiaroli Eggen, *Medical Malpractice Screening Panels: An Update and Assessment*, 6 J. HEALTH & LIFE SCI. 1, 26-28 (2013) (reviewing legislative changes that make recovery for medical negligence more difficult and reporting that many of the reforms have neither reduced insurance premiums nor improved medical care). See generally Phillip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453 (2007) (describing proposals to replace juries with "expert" decision-makers, like panels of medical professionals).

29. Gilles, *supra* note 18, at 690.

30. See *Medical Liability/Medical Malpractice Laws*, NAT'L CONF. OF STATE LEGIS., <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-medical-malpractice-laws.aspx> (last updated Aug. 15, 2011) (identifying states that have adopted pre-filing requirements).

31. Peters, *supra* note 28 (describing proposals to replace juries with "expert" decision-makers, like panels of medical professionals). See also Ellen Wertheimer, *Calling it a Leg Doesn't Make it a Leg: Doctors, Lawyers, and Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 154, 183 (2008). For a

Another significant curtailment of plaintiffs' rights is the widespread adoption of statutes of repose, which provide greater temporal certainty for defendants than traditional statutes of limitation, but can snuff out causes of action before a person even knows that he or she has been injured.³² Again, these harsh changes have been the result of special interest lobbying on behalf of repeat players in the civil justice system like physicians and product manufacturers, but some states have gone further and added architects and builders to the list of favored actors.³³

Finally, some states have taken a more indirect approach: Limiting the availability of contingent fees for certain types of cases (again, typically medical malpractice), making it less likely that lawyers will be willing or able to subsidize litigation against deep-pocket defendants.³⁴

B. Pro-defendant Changes to Substantive Tort Law

State tort law has also been undermined by what has been termed "silent" or "stealth tort reform." Beginning in the 1980s and accelerating during the administration of President George W. Bush, the doctrine of preemption has used federal regulation to bar injured people from taking advantage of state law remedies.³⁵ The primary target of executive branch action seeking to oust state law has been pharmaceuticals and medical devices, on the view that regulation by the FDA prevents state courts from imposing "additional, inconsistent" requirements.³⁶ This was a reversal of decades of federal understanding

federalism-based critique of such provisions, see Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217 (2010).

32. Unlike a statute of limitation, which typically does not begin to run until a person knows or should have known of a wrongful act, a statute of repose begins to run from a date certain, like the purchase of a product, and thus may extinguish a cause of action before a plaintiff has any inkling of being a victim of misconduct. DOBBS' LAW OF TORTS, *supra* note 11, at § 219. While statutes of repose are often considered "substantive" for the purposes of conflicts of laws analysis, they are discussed here because they do not change a plaintiff's prima facie case. See David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 44 (2005).

33. DOBBS, *supra* note 2, at 557–58. See also KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 165 (2008) (no evidence that statutes of repose have reduced litigation); Owen, *supra* note 32, at 42–43.

34. See Lee Harris & Jennifer Longo, *Flexible Tort Reform*, 29 HAMLINE J. PUB. L. & POL'Y 61, 79–84 (2007) (discussing limits on contingent fees adopted in various states).

35. David C. Vladek, *Deconstructing Wyeth v. Levine: The New Limits on Implied Conflict Preemption*, 58 CASE W. RES. L. REV. 883 (2009).

36. See Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359, 360 (2014) ("Federal preemption of state law can hamper the promotion of health and safety."); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227–28 (2007) (identifying efforts by the Food and Drug Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration to block state tort claims and predicting "a future where federal agency

regarding the scope of federal administrative power, in addition to virtually all case law.³⁷ In general, preemption arguments have a mixed track record, but overall they have closed the doors of state courthouses to thousands of injured people.³⁸ Less well-known are the efforts to circumvent congressional will via executive orders.³⁹

Also noteworthy are the legislative efforts to shield specific defendants—again, typically in the products liability context—from civil liability. For example, in response to the creative lawyering that led to huge settlements of claims against the tobacco industry, special statutory protections were sought, and often obtained, to shield manufacturers of handguns, biomaterials, and even purveyors of fast food, from damages actions.⁴⁰

Finally, legislatures have codified particular judge-made doctrines that limit liability, restricting or in some cases short-circuiting the ability of the courts to use the common law process to revisit old rules in new contexts.⁴¹

regulations come armed with directives that displace competing or conflicting state regulations or common law as a matter of course.”). See also James T. O’Reilly, *Losing Deference in the FDA’s Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 963 (2008).

37. Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1090 (2007). This politically motivated reversal represents a textbook example of the “regulatory capture” that comes when the regulators and the regulated have employees moving back and forth. See Andrew E. Costa, *Negligence Per Se Theories in Pharmaceutical & Medical Device Litigation*, 57 ME. L. REV. 51, 87 (2005).

38. Compare *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (FDA’s premarket approval process for medical devices preempted state common law claims for negligence, strict liability, and implied warranty) with *Wyeth v. Levine*, 555 U.S. 555 (2009) (FDA Act does not bar state law claim of improper drug labeling). See generally Michael P. Moreland, *Preemption as Inverse Negligence Per Se*, 88 NOTRE DAME L. REV. 1249 (2013); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013).

39. Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 526–31 (2012) (discussing how various executive orders that attempt to limit federal intrusion into state regulatory prerogatives have not had uniform success).

40. See, e.g., Biomedical Access Assurance Act of 1998, 21 U.S.C. § 1604; Protection of Lawful Commerce in Firearms Act, 15 U.S.C. §§ 7901-03; 18 U.S.C. §§ 922, 924 (2005). See also Cara L. Wilking & Richard A. Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 FOOD & DRUG L. J. 229, 230 (2013) (listing state “Commonsense Consumption Laws” that ban obesity-related lawsuits).

41. Mark A. Geistfeld, *Legal Ambiguity, Liability Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539, 567–68 (2011) (“A number of states have also codified existing liability rules, a reform that does not reduce liability but nevertheless reduces legal ambiguity by preventing courts from further expanding liability through the exercise of their common law authority.”). See also David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the “Flagrant Trespasser,”* 37 WM. MITCHELL L. REV. 1448, 1463–67 (2011) (describing the common law process).

C. *Pro-defendant Changes to Remedies*

The most frequent tactic of tort reformers has been to place limits upon the historical ability of juries to award a full measure of compensatory damages. Most states have passed legislation that caps the amount a plaintiff may recover as compensation, regardless of the seriousness of the harm suffered.⁴² This has occurred despite the fact that a core purpose of the tort system is to provide the injured plaintiff a full measure of damages in order to “make him whole.”⁴³ Such changes are draconian, especially to those most seriously injured.⁴⁴ Recognizing this fundamental unfairness, some state courts have held that damage caps violate state constitutional rights.⁴⁵

Tort reformers have also successfully campaigned to limit both the size and availability of punitive damages, the non-compensatory remedy intended to punish a defendant for egregious misconduct, and to provide a strong measure of deterrence, both general and specific, to such conduct in the future.⁴⁶ Even though there is abundant data that such awards occur infrequently in personal injury actions (and that when they do occur the awards are often dramatically reduced by judges),⁴⁷ lobbyists for pro-business groups have mounted a sophisticated multi-pronged attack to change both statutory law and long-standing common

42. DOBBS' LAW OF TORTS, *supra* note 11, at § 486. Some states cap all compensatory damages, while a majority only caps non-economic damages. *Id.* A survey of empirical data shows that caps on noneconomic damages disproportionately reduce the size of tort judgments to women. Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 945–49 (2008).

43. RESTATEMENT OF TORTS (SECOND) § 901 cmt. a (1979) (“[T]he law of torts attempts primarily to put an injured person as nearly as possible equivalent to his position prior to the tort.”). For a discussion of some of the complications raised by this “compensation principle,” see Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 275–84 (2008).

44. DOBBS' LAW OF TORTS, *supra* note 11, at § 468. As a practical matter, caps require the most seriously injured to bear losses above the cap amount, allowing the insurer to avoid those same losses. Damage caps have also been shown to correlate positively with poorer patient outcomes and a disproportionate impact on recoveries by women plaintiffs. Shepherd, *supra* note 42, at 945–49.

45. A recent example is Florida. See *McCall v. United States*, 134 So.2d 894 (Fla.) (2014) (statutory cap on wrongful death noneconomic damages recoverable in medical malpractice actions violates the right to equal protection under state constitution). See also J. Chase Bryan, et al., *Are Non-Economic Caps Constitutional?*, 80 DEF. COUNS. J. 154 (2013) (surveying states). Empirical evidence also suggests that caps have not reduced the damages actually awarded to injured plaintiffs; Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 391–92 (2005).

46. DOBBS' LAW OF TORTS, *supra* note 11, at § 468. See also *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (“This Court has long made clear that “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”) (internal quotation and citation omitted).

47. Jennifer K. Robbenolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 165–66 (2002).

law principles.⁴⁸

Legislative changes to the common law of punitive damages have raised the level of proof of wrongdoing that the plaintiff must introduce (from “preponderance” to “clear and convincing”); specified, and often circumscribed, the type of wrongful behavior subject to a punitive award; bifurcated the determination of liability from the amount of damages; restricted the ability of the jury to be informed of the defendant’s net worth; and, finally, capped the total punitive award that may be imposed.⁴⁹ Not all of these reforms have withstood judicial scrutiny, as a number of state courts found them inconsistent with provisions of state constitutions.⁵⁰

Perhaps the most significant—and certainly the most-publicized—change to the law of punitive damages has been the success of a sustained, well-funded, and decades-long campaign to have the Supreme Court of the United States limit the ability of juries to award punitive damages.⁵¹ This campaign, which included the controversial tactic of paying for, and then relying upon the resulting scholarship,⁵² has borne fruit:⁵³ the Court has recognized both procedural and substantive due process limits on punitive awards. Emblematic of this campaign is the reversal of a multi-billion dollar punitive award imposed upon Exxon for the catastrophic oil spill in Valdez Bay, Alaska, despite acknowledging that in general juries award punitives with “overall restraint.”⁵⁴ The decision inches the Court closer to granting corporate America’s goal of requiring a 1-to-1 relationship between the compensatory and punitive award,⁵⁵ and because of federal supremacy,

48. See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES SUNDAY MAGAZINE, March 16, 2008, at MM38, available at <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?pagewanted=all>.

49. See, e.g., David A. Logan & Wayne A. Logan, NORTH CAROLINA TORTS § 8.40 (2003) (discussing the changes to the common law of punitive damages imposed by the North Carolina “Act to Establish Standards and Procedures for the Recovery of Punitive Damages in Civil Actions”).

50. DOBBS’ LAW OF TORTS, *supra* note 11, at § 468.

51. For a fascinating description of one aspect of this effort—the development of an elite cadre of highly skilled and experienced advocates who specialize in Supreme Court advocacy on behalf of wealthy corporate clients—and how it has yielded a string of important victories, see Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487 (2008).

52. See *Exxon Shipping Co. v. Baker*, 554 U.S. 417, 501 n.17 (2008) (Court declines to rely upon empirical studies of jury behavior, and the resulting law review articles, “[b]ecause this research was funded in part by Exxon.”). See also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 272–79 (2003–04) (criticizing scholarship that is beholden to pro-business interests).

53. See Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83 (2007) (discussing cases).

54. See *Baker*, 554 U.S. at 501–02 (punitive damage awards in maritime cases must satisfy a 1-to-1 ratio; Court expresses no opinion on whether such a ratio is also compelled by the Constitution).

55. See *Petition for Writ of Certiorari, Wyeth LLC v. Schofield*, 2011 WL 1155235 (U.S. Mar. 24, 2011) (No.10-1177); *Petition for Writ of Certiorari, Holiday Inn Franchising, Inc. v. Hotel*

locks in protections for corporate defendants unable to get protection via state legislation.⁵⁶

Another modification to traditional tort law has been legislative changes to one of the most important guarantors of full compensation: the doctrine of joint and several liability.⁵⁷ For decades, a defendant whose misconduct merged with that of another culpable actor was deemed liable for all of the damage, allowing a plaintiff to receive full compensation even if a co-defendant was judgment-proof. Now, in most states, a plaintiff will not receive full compensation for his injury because an institutional co-defendant (often the only party with sufficient assets or insurance to satisfy a jury award) is only liable for its share of the damages.⁵⁸

Similarly, many seriously injured plaintiffs no longer have the protection of the collateral source rule, which precluded a windfall to a defendant when a plaintiff had the good fortune to have first-party insurance or some other source that reduced his actual out-of-pocket expenses for medical care.⁵⁹ Finally, some states have made it impossible for a seriously injured plaintiff to receive full compensation for their injuries in a timely manner by allowing the defendant to pay out the award over a legislatively-determined period of years.⁶⁰

In sum, the confluence of the political influence of repeat-player defendants and their allies in the executive, legislative, and judicial branches has resulted in significant, and in some cases, unfair changes to many long-recognized and important aspects of the tort system. Part III argues that widespread legislative and executive incursions into the tort system should be scrapped in favor of the having those closest to the civil justice system—judges—monitor jury performance and, when necessary, use the common law method to make incremental adjustments to the procedural, substantive, and remedial law of our civil justice system.

Franchises, Inc., 2012 WL 405461 (U.S. Feb. 6, 2012) (No. 11-974).

56. Jeff Kerr, *Exxon Shipping Co. v. Baker: The Perils of Judicial Punitive Damages Reform*, 59 EMORY L. J. 727, 734 (2010).

57. See Alexee Deep Conroy, Note, *Lessons Learned from the "Laboratories of Democracy": A Critique of Federal Medical Malpractice Reform*, 91 CORNELL L. REV. 1159, 1179 (2006).

58. This often results in both under compensation and under deterrence. See Geistfeld, *supra* note 41, at 568.

59. Conroy, *supra* note 57, at 1179-80. See also *Collateral Source Rule Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/collateral-source-rule-reform> (last visited June 12, 2014).

60. Such "periodic payment" plans have been adopted in 30 states. See Ronen Avraham, *Database of State Tort Law Reforms* (5th ed., U. Tex. L., L. and Econ. Research Paper No. e555, May 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711#PaperDownload.

III. JURIES, JUDGES, AND TORT REFORM

A. *Why Juries*

One of the most distinctive aspects of the American legal system is the role of the jury, especially in civil cases. Even in other common law countries, decision-making by laypeople is usually limited to criminal trials.⁶¹ Juries reflect the evolution of our ancestral system of government away from law as a tool of the divine, to a tool of the secular.⁶² Indeed, the role of juries in civil cases was considered by William Blackstone to be “the glory of the English law” and “the most transcendent privilege which any subject can enjoy, that he not be affected either in his property, his liberty, or his person, but by unanimous consent of twelve of his neighbors and equals.”⁶³ John Adams identified the crucial link between juries and democracy: “Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.”⁶⁴

The civil jury was considered so crucial to the Framers of the Constitution that it was enshrined in the Seventh Amendment,⁶⁵ and a similar right is recognized in all states.⁶⁶ In the modern era, Chief Justice Warren Burger, no fan of jury trials, nevertheless observed: “Jury trial is one of the institutions we borrowed from England, an almost sacred part of our constitutional heritage, and an article of faith.”⁶⁷ Akhil Amar concluded that the jury system “summed up—

61. William Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WISC. L. REV. 931, 931.

62. LEON GREEN, *JUDGE AND JURY* 413 (1930).

63. 3 WILLIAM BLACKSTONE, *COMMENTARIES* *379. See also W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 795 (2005) (“In the torts arena particularly, the jury’s predominance began even earlier, perhaps as early as the fifteenth century.”).

64. JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 302 (1996) (citation omitted). See also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (2000) (“Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”).

65. The absence of a guarantee of a jury trial in civil cases was a basis for Antifederalist opposition to the Constitution. Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 972 (2012). James Madison, the drafter of the Seventh Amendment wrote: “Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” See 1 *Annals of Cong.* 454 (1789).

66. Elizabeth Thornberg, *Designer Trials*, 2006 J. DISP. RES. 181, 183.

67. Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 207–08 (1985). The Chief Justice criticized modern juries in large measure because they do not reflect a cross-section of the community and because its members are ill-equipped to understand the complex issues often presented.

indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”⁶⁸

Besides being an important aspect of the rights asserted by independence-era Americans, there are a number of additional institutional justifications for the centrality of the civil jury.

1. Juries Provide Checks and Balances on Government

At base, juries protect citizens from “the abuse of power of legislatures, judges, the government, business, or other powerful entities.”⁶⁹ Through its power to render verdicts, juries serve a “checking function” on government actors: Checking judges when the jury is asked to apply the common law, and checking legislatures and the executive when applying statutes. In this way, the jury is a “meliorator of harshness or dispenser of equity” when the application of the law to specific facts is fundamentally unfair in particular cases.”⁷⁰ And, because juries are drawn from a constantly changing group of citizens, representing a cross-section of the populace, the egalitarian members of the venire serve a function analogous to that of the United States House of Representatives, drawn from 435 districts tied to population, when it “checks” the elitist Senate.⁷¹

Indeed, no other institution of our government places so much power in the hands of ordinary citizens. By applying the law to facts, juries serve as “mini-legislators,” making decisions that have the sanction of government authority and are binding on parties, even the government.⁷² This “gamble” reflects a commitment to the core concept that in a

Id.

68. Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991). See generally Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of our Government*, 55 WM. & MARY L. REV. 1241 (2014) (detailing how the civil jury is a “structural element in American government”). The civil jury is rare outside of the United States. J. Mark Ramseyer, *Liability for Defective Products: Comparative Hypotheses and Evidence from Japan*, 61 AM. J. COMP. L. 617, 652 (2013).

69. AM. BAR ASS'N & BROOKINGS INST., CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 9 (1992).

70. DOBBS, *supra* note 2, at 35.

71. George Washington is said to have likened the Senate to a saucer into which one poured one's hot tea to let it cool before returning it to the cup. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 285 (1996).

72. “The lay jury is empowered to make binding decisions on the relevant facts in a way inconsistent with the preferences of a government official (the judge) as well as other ‘experts’ in the legislative and executive branches, [resulting in] a form of direct democracy.” OSCAR G. CHASE, LAW, CULTURE AND RITUAL 55–56 (2005). See also Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029, 1031 (2014) (“Indeed, the jury provides one element of ordinary common sense in a system governed by experts, a melody of populism in an institution otherwise dominated by the harmony of elites.”).

democracy true power resides in the individual, and stands in sharp contrast to the mediated democracy reflected in such arrangements as the Electoral College and the disproportionate representation provided small states in the United States Senate.⁷³

2. Juries are Independent

State and federal legislators operate in a system of privately financed election campaigns, which invites the strategic use of money to influence outcomes.⁷⁴ As a corollary, wealthy individuals and institutions have always played a disproportionate role in our government.⁷⁵ This phenomenon accelerated at a seminal moment in 1971, when leading corporate lawyer Lewis Powell (before his appointment to the Supreme Court of the United States) authored a lengthy memo to the Chamber of Commerce, setting out a blueprint for a multi-faceted strategy to protect business interests from attacks by consumer advocates. He recommended that corporations and corporate leaders become more involved in both the political and the legal arenas,⁷⁶ and in the ensuing four decades, corporate America has spent tens of millions of dollars attempting to hamstring the ability of the executive branch to regulate directly, and to constrain the ability of the civil justice system to regulate indirectly.⁷⁷

One contemporary embodiment of Powell's strategy is the American Legislative Exchange Council (ALEC), heavily funded by large corporations and affiliated pro-business individuals and groups.⁷⁸

73. See JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1–2 (2000). (The jury can also be viewed as a “harbinger of the democratic era . . . one of the first definite breaks between divine and secular dispensation.”)

74. Samuel Issacharoff, *On Political Corruption*, 124 *HARV. L. REV.* 118, 126 (2010).

75. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 *U. ILL. L. REV.* 599 (2008) (tracing history of efforts to control the influence of money in American politics). See generally OSWALD SPENGLER, *THE DECLINE OF THE WEST: AN ABRIDGED EDITION* (Helmut Werner & Arthur Helps eds., Charles Francis Atkinson trans., 1932) (noting that an increased influence of money in political life has historically played a role in the decline of societies).

76. Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Charman, Education Comm., U.S. Chamber of Commerce (Aug. 23, 1971) (transcription available at http://reclaimdemocracy.org/powell_memo_lewis/) (recognizing the need to change public perceptions of corporate America, via “eminent scholars writers and speakers” publishing pro-business articles in scholarly and mainstream publications, funding paid advertisements in the media, and taking bold steps so that “political power . . . [is] assiduously cultivated”).

77. See THOMAS O. MCGARITY, *FREEDOM TO HARM* 6 (2013) (detailing the “laissez faire revival” of the past four decades and how “the business community and a handful of conservative foundations seized the offensive by creating the idea and influence structures needed for a sustained attack on the protective government infrastructure.”).

78. Diane L. Fahey, *The Movement to Destroy the Income Tax and the IRS: Who Is Doing it and Why they are Succeeding*, 15 *FLA. TAX. REV.* 157, 193–94 (2014).

ALEC drafts and then promotes model state legislation and then wines and dines legislators (and their families) at ALEC conventions, held at posh resorts.⁷⁹ This strategy has proven effective: Over 1,000 ALEC-drafted model laws are introduced in state legislatures annually, with almost 20% becoming law.⁸⁰

Corporate spending in political campaigns is geared to influencing electoral outcomes, and thereby influencing the output of government branches, state and federal, legislative and executive.⁸¹ There are also intimate ties between members of Congress and their staffs, and the law firms and lobbyists that court them. Such coziness is a powerful complement to aggressive and sophisticated lobbying that big money purchases, and stacks the deck against the interests of individual citizens.⁸² As a result, lawmaking at the state and national level, and thus the disbursement of public goods, is subject to deep-pocket influence, a condition likely to accelerate given the *Citizens United* decision striking down important federal campaign giving restrictions.⁸³

79. Most of the attention has focused on ALEC's role in creating model bills, drafted by lobbyists working closely with allied lawmakers, which advance a pro-business, socially conservative agenda. But it is also the case that special interests effectively turn ALEC's lawmaker members into stealth lobbyists, providing them with talking points, signaling how they should vote, and collaborating on bills affecting hundreds of issues like school vouchers and tobacco taxes. Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobby*, N.Y. TIMES, Apr. 21, 2012, at A1, available at <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-andlobbyists.html?pagewanted=all>. A study from 2012 concluded that the Virginia legislature passed 50 laws promoted by ALEC, mostly word-for-word transcriptions. See *The Big Money behind State Laws*, N.Y. TIMES, Feb. 13, 2012, at A22, available at <http://www.nytimes.com/2012/02/13/opinion/the-big-money-behind-state-laws.html> (summarizing report published by ProgressVA).

80. Allison Boldt, *Rhetoric vs. Reality: ALEC's Disguise as a Nonprofit Despite its Extensive Lobbying*, 34 HAMLIN J. PUB. L. & POL'Y 35, 54 (2012). This problem is exacerbated by the impotence of laws that are intended to prevent former members of Congress and their staffers from cashing in on their connections by joining law firms and lobbying groups that seek to influence legislation. See Eric Lipton, *The Revolving Door: An Annotated Case Study*, N.Y. TIMES, Feb. 2, 2014, at A1, available at <http://www.nytimes.com/interactive/2014/02/02/us/politics/02revolving-door-documents.html> ("Since 2007, when Congress revised ethics rules, more than 1,600 House or Senate staff members have registered to lobby in less than one year of their departure from Congress.").

81. See, e.g., Raquel Alexander et al., *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 441 (2009) (estimating that the return on investment in political influence over tax policy matters to be as high as 22,000 percent). While labor unions and trial lawyers also give generously to favored candidates, the total amounts are easily outstripped by pro-business contributions. See Zach Holden, *Overview of Campaign Finances, 2011-2012 Elections*, FOLLOWTHEMONEY.ORG, http://beta.followthemoney.org/research/institute-reports/overview-of-campaign-finances-20112012-elections/#section_5 (last visited July 13, 2014).

82. Hanoch Dagan, *Political Money*, 8 ELECTION L.J. 349, 359 (2009) ("From the perspective of the people who use money to promote political causes, as well as from all other relevant angles, the daily life of interest group politics between elections is indistinguishable from the more salient moments of political campaigns."). See also Issacharoff, *supra* note 74, at 132, n.77 (corporations appear to spend as much on lobbying the executive and legislative branches as upon elections).

83. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 335-36 (2010) (restrictions on campaign expenditures by corporations and unions violate their First Amendment free speech rights).

While it is generally recognized that officials in the legislative and executive branches have become more dependent upon, and thus responsive to, the influence of money, less-noticed by the public is the impact upon the judicial branch, at least at the state level, of the increasing frequency of million dollar judicial campaigns.⁸⁴ Almost two-thirds of the states elect judges, and the cost of such campaigns has soared. A study by the Brennan Center for Justice concluded that in the 2012 election cycle spending on television ads hit new highs, spending by “independent” groups escalated, and national pressure groups were increasingly involved in state judicial elections, especially in states with supreme courts closely divided between liberals and conservatives.⁸⁵

This investment pays off: Judges who receive large contributions from pro-business interests tend to rule in favor the positions of their donors.⁸⁶ Pro-business interests have also reshaped the law by hiring leading academics to generate “independent scholarship” that provides a patina of scholarly legitimacy to amicus briefs in high-stakes litigation.⁸⁷

This ban was extended to state restrictions in *American Tradition Partnership, Ltd. v. Bullock*, 132 S.Ct. 2490 (2012), and to limits on how much an individual donor may contribute to candidates for federal office, political parties, and political action committees in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). See also Derek Willis, *Outside Groups Set Spending Record in Midterms*, N.Y. TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/upshot/outside-groups-set-spending-record-in-midterms.html?abt=0002&abg=0> (campaign spending has continued to accelerate).

84. JAMES SAMPLE, ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE 5* (2010) (detailing that annual spending on judicial elections increased from \$6 million in 1990 to over \$45 million in 2008). See also DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004* (Jesse Rutledge ed., 2005) (describing modern trend of expensive, hard-hitting judicial campaigns with focus on matters having little to do with actual job performance of judges). The flood of money is going even further down the ballot. See Reid Wilson, *Big Money Partisanship Invades Quiet Realm of Secretary of State Elections*, WASH. POST, Mar. 11, 2014, at A02, available at http://www.washingtonpost.com/politics/big-money-partisanship-invades-quiet-realm-of-secretary-of-state-elections/2014/03/11/62e2f4e6-a941-11e3-8599-ce7295b6851c_story.html (detailing how PACs are pouring money into races for Secretary of State because that the traditionally low profile office may play an important role in hot button issues, like voter-identification initiatives).

85. See ALICIA BANNON, ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12* (2013). See also JED H. SHUGERMAN, *THE PEOPLE’S COURTS: THE RISE OF JUDICIAL ELECTIONS AND JUDICIAL POWER IN AMERICA* (2011) (detailing the influence of corporate money on the court system). Fortunately, the Supreme Court of the United States has recognized that the influence of money in judicial elections must be limited. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding that a \$3 million campaign contribution to a successful judicial candidate who refused to recuse and later ruled in favor of the contributor violated federal due process protections).

86. Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1063, 1064–65 (2010) (“Studies have shown that elected judges disproportionately rule in favor of their campaign contributors.”); Anderson, *supra* note 5, at 7 (empirical evidence shows that a Texas Supreme Court majority elected with the support of the business community held for the defendants 87% of the time in tort cases).

87. See Bob Sloan, *ALEC, the Koch Led CABAL & “The Amicus Project” – Fed Court Interference*, DAILY KOS (July 24, 2012), <http://www.dailykos.com/story/2012/07/24/1103641/-ALEC-the-Koch-Led-CABAL-The-Amicus-Project-Fed-Court-Interference#> (describing the Amicus Project

The civil jury requires corporations to play on a level playing field, a position to which they are not accustomed.⁸⁸ The jury selection process⁸⁹ and the rules of evidence prevent direct manipulations by sophisticated, deep-pocketed pleaders once in trial.⁹⁰ While corporations and trade groups have saturated the airwaves and print media with pro-corporate and anti-plaintiff advertising, they at least cannot similarly engage with citizens on a jury once a judicial proceeding begins, so that the jury remains relatively impervious to direct corporatist entreaties.⁹¹ In this sense, the jury still reflects the colonial notion of direct democracy, in which important public decisions made by citizens “unbossed and unbought.”⁹²

funded by ALEC). Perhaps the most notorious use of academics was funding provided to Cass Sunstein and Kip Viscusi, which ended up in briefs paid for by Exxon that successfully advocated federal constitutional limits on punitive damages. See also Shireen A. Barday, Note, *Punitive Damages, Remunerated Research, and the Legal Profession*, 61 STAN. L. REV. 711 (2008).

88. Sheldon Whitehouse, *The Dwindling Civil Jury*, NAT. L.J., June 30, 2013, at 30. Indeed, this exercise of populism is consistent with the view of the Framers: “The Anti-Federalists’ insistence on the Seventh Amendment was driven in significant part by a desire to protect debtors from the creditors in the big cities. According to this view, the pharmaceutical companies or auto manufacturers of the early twenty-first century are the big-city creditors of the late eighteenth century.” Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L. J. 1331, 1345–46 (2012).

89. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citation omitted) (“One touchstone of a fair trial is an impartial trier of fact—a jury capable and willing to decide the case solely on the evidence before it.” Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors.”). See also Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645, 646 (1997) (“First, voir dire exists for one straightforward and simple reason: to provide a screening step in the litigation process which will reduce the possibility of disputes being resolved by citizens whose backgrounds, attitudes or predispositions may interfere with a fair and impartial resolution of those disputes.”).

90. A trial involves “rational fact-finding within the framework of the substantive law,” with the determination of relevant facts done without consideration of “irrelevant” evidence that could mislead the trier of fact. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 2.1 (2d ed. 1987). This goal is implemented through application of the rules of evidence, most importantly FRE 401 (defining “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence”) and FRE 403 (calling for the exclusion of evidence if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”). *Id.*

91. Corporations and their allies have tried to influence prospective jurors through sophisticated and at times pervasive advertising campaigns portraying the civil justice system as bankrupting businesses and local governments. Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L. J. 447, 451 (2004) (discussing the public relations campaigns used to prejudice the jury pool against plaintiff claims); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 455 (2006) (“Because it is composed of lay persons and because of its ad hoc, for-this-case-only character, a jury’s decision process is hard to manipulate with economic resources.”).

92. John Grisham’s 2008 novel *THE APPEAL* provides a harrowing account of the impact of money on state judicial elections.

3. Juries Bring Broadly-Based Community Values to Dispute Resolution

Modern America is heterogeneous, and the jury, drawn from a cross-section of the community, may well be “the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system.”⁹³ Accordingly, the output of the civil litigation process is likely to reflect a consensus about the values of our many communities.

Similarly, juries bring the layperson’s sense of justice and fair play into the heart of the judicial process. The jury reflects the current understandings of the larger community, and may serve as a counterweight to the encrusted authority that judges represent.⁹⁴ And by giving fellow citizens the important task of determining culpability—typically a central question in civil litigation—it reflects a community willing to take responsibility for its judgments.⁹⁵

4. Juries Are Fair

The role of the jury is especially important given the corrective justice basis for tort law. As Catherine Wells argues, jury adjudication is an essential element of reaching a fair resolution of corrective justice disputes, by “allowing the jury to evaluate a wide range of issues and by requiring that it operate in a decisional context that produces locally objective judgments.”⁹⁶ For example, the members of a jury are better situated than legislators to determine the appropriate amount of compensation for the pain and suffering inflicted on the plaintiff by the defendant, often the most open-ended aspect of a damages award.⁹⁷

Juries also protect individuals injured by an overreaching government. This concern, so central to the American Revolution, can now be directed at the massive scope of corporate power in citizens’

93. Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974 (2004).

94. See, e.g., CHASE, *supra* note 72, at 56 (“Although the civil jury is of course an organ of government, it nonetheless has an antistatist quality because it allows the people to decide matters differently than the other institutions of government might wish.”). The jury provides an opportunity to incorporate community sentiment into the civil justice system. See generally NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007).

95. See Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999).

96. Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2411 (1990).

97. Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L. J. 553, 589-90 (2009).

lives. Most people dislike bullies, and the jury provides a chance to balance the scales.⁹⁸

A related strength of the jury is the benefit that accrues from the melding of multiple perspectives into a single verdict. Research comparing group and individual decision-making supports the “law of large numbers”—groups offer more stable and more accurate estimates of the preferences of the population in general than individuals or small groups.⁹⁹

The available empirical data rebuts the common perception that juries are biased in favor of plaintiffs and against corporate defendants. In the primary study of this question, Valerie Hans surveyed hundreds of jurors after their participation in trials and concluded that “[j]urors are often suspicious and ambivalent toward people who bring lawsuits against business corporations. Jurors and the public are deeply committed to an ethic of individual responsibility, and they worry that tort litigation could be fraying the social fabric that depends on a personally responsible citizenry.”¹⁰⁰

Finally, juries provide an important check on the bureaucratization and over-professionalism of the legal system.¹⁰¹ Because they are drawn from the larger community, important matters are evaluated by people with “fresh eyes,” because “regular exposure to particular types of cases, defenses, and even specific litigants may create expectations in judges that are hard to overcome.”¹⁰² Moreover, granting the jury an important role in norm-setting and enforcement is an antidote to the tendency toward “legal centralism” that sees the state as the sole creator of operative rules of entitlement among individuals.¹⁰³

98. Ellen W. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 466 (2004). See also Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U. L. REV. 69, 73 (2007) (most empirical evidence suggests that juries exhibit some degree of anti-corporate bias when assessing liability and/or damages). But see Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 730 (2006) (the success rate for plaintiffs varies dramatically, with juries siding with doctors almost 3/4 of the time in malpractice cases, while claims arising out of animal attacks resulting in a plaintiff win more than 2/3 of the time).

99. Hans & Eisenberg, *supra* note 10, at 377.

100. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 216 (2000).

101. See CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM, *supra* note 69, at 9.

102. VIDMAR & HANS, *supra* note 94, at 342.

103. See ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4 (1991). Thomas Jefferson expressed a similar sentiment when he commented that were he “called upon to decide whether people had best be omitted from in the Legislature or the Judiciary department, [he] would say it is better to leave them out of the Legislative[.]” for the “execution of the laws is more important than the making [of] them.” Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 282–83 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

5. Juries Legitimize the Judicial Process

In order for a citizenry to have confidence in its government, there must be a sense that government is intrinsically fair. An open trial, in which citizens play an important role, enhances both the understanding of government and confidence in our system of justice.¹⁰⁴

Citizen participation, in turn, serves to “secure a greater measure of trust in all governmental institutions.”¹⁰⁵ Indeed, the experience of serving on a jury often results in a citizen bringing back to her community a newfound respect for the judicial process, creating a valuable feedback loop.¹⁰⁶ More generally, juries can be considered “shock absorbers,” providing an outlet for public frustration with the administration of law.¹⁰⁷

In addition, jury trials take place in public, with free access by citizens and their agents in the media. This means that the public is educated about the judicial system, and their government more generally. In sum, jury trials make citizens more active and informed participants in their government.¹⁰⁸ Given the steep drop-off in jury trials over recent decades, an important opportunity for citizens to see their government at work is being lost.¹⁰⁹

6. Juries Generally “Get it Right”

Scholars have evaluated the claim of flawed decision-making by

104. See CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM, *supra* note 69, at 9. See also Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 93 (2003) (“Citizen participation in the disposition of civil cases . . . has served many purposes, but its enduring purpose has been to secure a greater measure of trust in judicial institutions.”); VIDMAR & HANS, *supra* note 94, at 66 (“ . . . through rendering fair and just verdicts, [juries] provide legitimacy for the legal system.”).

105. See Carrington, *supra* note 104, at 93.

106. Sward, *supra* note 98, at 466 (“[T]he jury has long been justified as an excellent educational tool.”). See also Brent T. White, *Putting Aside The Rule Of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 CORNELL INT'L L.J. 307, 361 (2010) (“Jury service, in other words, may ultimately be the best way to educate the public about the law and legal ideas, to foster a rule of law culture, and to generate faith in the courts.”); Stephano Bibas, *Transparency and Participation in Criminal Procedures*, 81 N.Y.U. L. REV. 911, 929 (2006) (citing authorities).

107. GREEN, *supra* note 62, at 376.

108. AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 54 (1998). See also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 364 (Cal. 1999) (“[I]t is clear today that substantive courtroom proceedings in ordinary civil cases are ‘presumptively open’”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (dictum) (“historically both civil and criminal trials have been presumptively open”).

109. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 175 (“The vanishing trial phenomenon suggests diminishing opportunities for people to observe trials in their communities, thereby eroding a mainstay of American democratic life.”).

juries for almost half a century.¹¹⁰ Researchers have used an array of methods, including comparing jury verdicts with judicial evaluations, analysis of verdict patterns and trends, questionnaires and interviews with jurors and other trial participants, and mock jury studies. The conclusion of the vast majority of these studies is that civil jurors perform their duties competently.¹¹¹

Two specific findings are worth highlighting. First, researchers have concluded that the strength of the evidence is by far the most important factor in explaining a trial's outcome. Second, juries and judges evaluate similar evidence similarly. This is true regardless of the complexity of the issues raised.¹¹²

Accordingly, despite the barrage of misleading information to the contrary, the civil jury is "valuable" as a "proven, effective, and important means of resolving civil disputes."¹¹³ Part III(B) turns to the characteristics of the jury's partner in the civil litigation process—judges—and explains why control of juries is best exercised by the authors of the common law rather than by legislators.

B. Why Judges

1. Experience: The Case-By-Case Perspective

A judge's job involves resolving disputes and most trial and appellate judges have experience handling tort cases.¹¹⁴ Some federal judges sit as both trial and appellate judges,¹¹⁵ while service on a trial court is a

110. Hans, *supra* note 2, at 41–42.

111. Jennifer K. Robbenholt, *Evaluating Juries By Comparison To Judges: A Benchmark For Judging?*, 32 FLA. ST. U. L. REV. 469, 470 (2005) ("Reviews of empirical research examining jury decision making ... attest to the overall competence of juries as decision makers."); Richard C. Waites & David A. Giles, *Are Jurors Equipped to Decide the Outcome of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 41 (2005) ("More than forty years of research into jury competency reveals that juries are exceedingly competent, even when individual jurors appear to have difficulty understanding or navigating through the jury charge, no matter what method of research design is utilized.")

112. Hans, *supra* note 2, at 42–45.

113. CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM, *supra* note 69, at 2. The groups also went on record as opposing a central goal of tort reformers—statutory caps for damages because they "remove important aspects of decision making from the jury." *Id.* at 4.

114. While the vast majority of litigation occurs in courts of general jurisdiction, there are specialty tribunals at the federal level like the United States Court of Appeals for the Federal Circuit (which handles patent claims), and a handful of states, such as Texas, that carve out certain types of cases for separate disposition. TEX. CONST. art. 5, §§ 3, 5 (dividing jurisdiction between the Texas Supreme Court and the Court of Criminal Appeals).

115. See 28 U.S.C. § 43(b) (2012) (allowing Supreme Court Justices to sit as judges of the courts of appeal to which they are assigned as circuit justices). Then-Associate Justice Rehnquist famously sat by designation as a district court judge in a 1986 civil trial in the Eastern District of Virginia. On appeal, a three-judge panel reversed his decision (not surprisingly, via a per curiam opinion). *Heislup v. Town*

common stepping stone to a seat on an appellate court at the state level.¹¹⁶ When judges resolve individual cases, and when talking with fellow judges, they can identify patterns of jury behavior, providing a much better basis for reforming the law than misleading media reports and the oddball cases that can be the grist of legislative debates.¹¹⁷

The ability of judges to develop this broad and deep appreciation for the workings of the civil justice system is enhanced by relatively low turnover. Federal judges have “life tenure” and often hear cases well past age 70.¹¹⁸ State judges also have significant job protection, ranging from life tenure to the need to stand for reelection every six to twelve years. In short, judges generally stay in their jobs far longer than legislators and executive branch employees, and thus develop a broad and deep pool of relevant experience.¹¹⁹

of Colonial Beach, Va., 813 F.2d 401 (4th Cir. 1986). Federal Court of Appeals judges also sit as trial judges by designation. 28 U.S.C. § 291(b) (2012) (allowing court of appeals judges to try cases). This is not a rare occurrence. *See, e.g.,* SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp. 2d 1011 (N.D. Ill. 2003) (Judge Posner); Loral Fairchild Corp. v. Victor Co., 208 F. Supp. 2d 344 (E.D.N.Y. 2002) (Judge Rader). Almost half of the federal appellate judges previously served as trial judges. Suzanna Sherry, *Logic without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 149 (2006). Indeed, Professor Sherry argues that the federal courts would do a better job if there was more movement among courts, which would provide appellate judges with an even deeper understanding of the litigation process. *Id.* at 147–49.

116. Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards Of Appellate Review*, 64 WASH. & LEE L. REV. 707, 735 (2007) (“As a general proposition, appellate judges are often former trial judges.”); Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, n.140 (2000) (“Many appellate judges were once trial judges, and thus have either once sat at the trial level with the judge whose behavior counsel is challenging on appeal, or as former trial judges, may relate to, and sympathize with, the trial judge’s behavior.”).

117. Justice Holmes recognized the unique perspective of the trial judge. “A judge who has long sat at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 124 (Belknap Press of Harvard Univ. Press 2009) (1881). This source of systemic knowledge of the civil justice system greatly exceeds that of legislators.

118. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 647 n.17 (2005) (“The Constitution guarantees both life tenure to Article III judges and that their salaries cannot be diminished during their term of service. Such judges may be removed only through impeachment, a device that is rarely used. The only other formal statutory mechanism—aside from appellate review of lower court judgments—is to file a complaint against a judge, handled through confidential processes within the federal judiciary.”); Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 767 (2009) (federal judges serve an average of 24 years).

119. *See Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited June 12, 2014) (providing state-by-state judicial selection regimes). Regardless of the particular approach used in states, and that an initial appointment may be for only a year or two, the vast majority of state judges serve terms ranging from 6–12 years, considerably longer than those available to most state legislators, and few leave the bench involuntarily.

2. Judges Are Predictable

Judges bring to their job substantial experience with the law and, at least after a period of time on the bench, generate a track record that can yield something very important to litigants and their lawyers: predictability.¹²⁰ Even with limitations on judge-shopping, conventional wisdom about the characteristics of judges abounds and can impact the strategic decisions of litigants.¹²¹

Judicial predictability is also enhanced by the process of how the law governing a case is determined: Cases are decided only after deliberation (often with other judges and law clerks) and a close consideration of the relevant statutes and judicial decisions.¹²² At the trial level, judges are duty-bound to follow the existing law. Appellate judges, who necessarily have more lawmaking capacity, typically go to great lengths to tie their decisions to existing law. Moreover, when a judge departs from previous law, the usual approach is to recognize distinctions rather than directly overruling precedent. These institutional characteristics enhance predictability and generally prevent the law from being in great flux, or worse yet, appearing to be merely the result of the exercise of raw political power.¹²³

120. Herbert M. Kritzer, *The Law is the Mere Continuation of Politics by Other Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 441–46 (2007); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 853.

121. Hans & Eisenberg, *supra*, note 10, at 377. Lawyers now can easily gather mounds of information about judges, including all of his or her reported decisions, via computerized databases like Westlaw and Lexis. See Ian Gallacher, “Aux Armes, Citoyens!” *Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. TOL. L. REV. 1, 3, n.9 (2008).

122. See Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 250 (2002) (judges not only evaluate texts but “have the specialized capacity to interpret[] texts, specify[] ideas, and offer [] legal reasoning,” whereas legislatures do not); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1968–69 (2008) (“Judicial decision making is the quintessential example of a deliberative process. Judges explain their decisions in written opinions. Explanations are based on law, which includes precedents, binding texts, and reasoning about how those sources of law bear on the issue presented to the court. . . . As the ‘least dangerous branch,’ the judiciary depends on the persuasiveness of its justifications under the law for its legitimacy.”); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 37–45 (2001) (discussing how stare decisis and written opinions check judicial discretion).

123. See *El-Shifa Pharmaceutical Industries Co. v. U.S.*, 55 Fed. Cl. 751, 763 (2003) (“However, we are loathe [sic] to agree that as trial judges we are not bound to follow clear precedent because its reasoning is deficient or in apparent conflict with other precedent that can—we must be candid—be distinguished. In our precedent-based, common law [sic] structure, trial and intermediate courts are bound to follow decisions on the law articulated by superior courts.”); *Anastasoff v. United States*, 223 F.3d 898, 904–05 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc) (“The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.”).

3. Judges are Independent

Part III(A)(2) detailed how jury decision making is less likely to be influenced by special interest money than when officials must stand for election.¹²⁴ This Part explains how the same is true with respect to judges relative to officials in the executive and legislative branches.

Advocates in a legal proceeding are constrained: Besides the rules of evidence, there are strict limits on the ability of interested parties to engage in *ex parte* communications with the decision makers, either judge or jury.¹²⁵ There are also ethical limitations on a judge's ability to decide a case in which he or she has a financial interest.¹²⁶ More generally, the ability of interested parties to generate "grass roots" support or other organized pressure, while common to the legislative process, is alien to the resolution of litigation.¹²⁷ In short, the fact that judges, especially those appointed rather than elected, are not subject to direct political pressure makes them more likely than other public officials to withstand the entreaties of deep-pocketed special interests.¹²⁸ Further, judges are expected to base their decisions on the law and not other considerations and, at least at the appellate level, to provide explication for the positions taken in writing, and on the public record.¹²⁹

The contrast to the elected branches is stark.¹³⁰ Despite various "open government" laws and initiatives, the role of vested interests in

124. See *supra* notes 74–87 and accompanying text.

125. See MODEL RULES OF PROF'L CONDUCT R. 3.5 (2011); MODEL CODE OF JUD. CONDUCT R. 2.9 (2011).

126. See MODEL CODE OF JUD. CONDUCT R. 2.11.

127. See Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 537 (1999) ("Organization is more essential to influencing legislatures than courts."). There is also the ability to create the *appearance* of grass roots support through crafty funding and misleading labeling. MCGARITY, *supra* note 77, at 58–59 (discussing the creation of "astroturf lobbying efforts" intended to hide the fact that corporations attempt to influence government decisions).

128. See Abel, *supra* note 127, at 545–36 ("The assertion that legislatures are more democratic than courts willfully ignores everything we know about those institutions. Money is essential to gaining and retaining legislative office. A great deal of legislator behavior is governed by the fundraising imperative."); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 AZ. L. REV. 917, 934 (1996) ("Even given the increasing significance of contested judicial elections at the state level, state court judges remain far less burdened by the requirements of electoral politics than state legislators. Judges therefore do not need to cater to voters in the same way that legislators do.").

129. Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 10 (1983) (quoting former Chief Judge of the First Circuit Frank Coffin as stating that "a fully articulated written opinion represent[s] some guarantee against loose thinking, sloppy workmanship, and arbitrariness") (internal quotation marks omitted); Nelson, *supra* note 122, at 37–45 (discussing how *stare decisis* and written judicial opinions constrain judicial discretion).

130. Abel, *supra* note 127, at 533 ("[C]ourts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unable or unwilling to offer reasons for their actions.").

legislative and executive outcomes is pervasive. One need look no further than the millions of dollars spent trying to block, and when that failed, to water down, the changes to financial markets and institutions that the Dodd-Frank legislation triggered.¹³¹

Additionally, judges are less likely than regulators and legislators to be “captured” by industries and other repeat players in the system.¹³² Public choice theory focuses on the power of well-organized and well-informed interest groups to win favorable legislation, which helps agency officials secure their personal preferences.¹³³ This manifests in problems with the “revolving door” between government service and lobbying firms, now moving faster than ever,¹³⁴ with wink-and-nod understandings that a light regulatory touch now can later yield a soft landing in industry.¹³⁵ Capture can also involve the significant

131. Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1296–1328 (2013); Pat Garofalo, *Wall Street Spending as Much to Undermine Dodd-Frank Regulations as it Spent Trying to Block Dodd-Frank*, THINK PROGRESS (Apr. 22, 2011), <http://thinkprogress.org/politics/2011/04/22/160524/banks-spending-2011/?mobile=nc> (millions of dollars that banks and others in the financial services industry spent in attempts to “water down” the Dodd-Frank Act while Congress was debating it). At the state level, the pro-business lobbying group Americans for American Legislative Exchange Council (ALEC) has had a major impact on state laws. See *supra* notes 78–80 and accompanying text.

132. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Agency Capture, and Inaction*, 101 GEO. L.J. 1337, 1342 (2013) (“The set of concerns related to the influence of well-organized special interests over regulatory decisions have come to be roughly grouped together under the rubric of ‘capture.’”); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 178 (1990) (capture “is the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or post regulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs”). The classic exposition of the phenomenon of regulatory capture is George Stigler’s article, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

133. Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS L. REV. 221, 225 (2012) (“Administrators, like legislators, are considered to be self-interested, [so] public choice analysis predicts they will adopt policies favored by business interests because they are in a better position than regulatory beneficiaries to assist agency officials in securing their personal preferences.”).

134. Holly Yeager, *In D.C., Government Experience Matters Most; Sunlight Offers Numerical Evidence*, WASH. POST, Jan. 26, 2014, at A15, available at http://www.washingtonpost.com/politics/in-dc-government-experience-matters-most-sunlight-offers-numerical-evidence/2014/01/26/927e1fb0-8451-11e3-9dd4-e7278db80d86_story.html (“There’s fresh evidence that the revolving door has been spinning faster than it used to, and that the people who travel through it are playing a bigger role on K Street than ever before.”).

135. Some regulators come from a regulated industry, while others may anticipate a cushy industry job after leaving government. Brett McDonnell, *Dampening Financial Regulatory Cycles*, 65 FLA. L. REV. 1597, 1610 (2013). The revolving door addresses the frequency in which people, especially within the federal government, move between the legislative branch, executive branch, industry, and trade groups, at several federal agencies in particular: the Food and Drug Administration and the Forest Service, David Zaring, *Against Being against the Revolving Door*, 2013 U. ILL. L. REV. 507, 523–24, as well as the Securities and Exchange Commission. Lawrence G. Baxter, *‘Capture’ in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL’Y 175, 183–86 (2011) (explaining that “cultural” and “social” capture arise when “the language of

informational advantages, or the “asymmetry” held by repeat players in the regulatory process over regulators.¹³⁶

Also problematic is the strategic disbursement of research dollars impacting the integrity of the science that government regulators necessarily rely upon to make important decisions.¹³⁷ As a result, deep pocket interests have the ability to influence important government decisions in both direct and indirect ways.¹³⁸ While these phenomena are well-known at the federal level, similar concerns are justified at the state level.¹³⁹

In contrast, institutional capture does not sit easily with the independent-minded streak of judges. Even when judges are elected and the influence of campaign donations acknowledged, professional norms as well as positive law make it highly unlikely that a supplicant would propose, let alone gain a quid-pro-quo for the handling of a case.¹⁴⁰ Despite having the resources to retain top lawyers and to spend

regulation is shaped by the common backgrounds, education, experience and intermingling of the more powerful players [in government and industry] in the policy formation process” and noting the impact of “the very visible revolving doors between the SEC and other financial regulators and industry”) (internal citations omitted).

136. Shapiro, *supra* note 133, at 234 (pointing out the “dominance of business interests in the presentation of information to an agency”). Indeed, by keeping damaging information secret and the applicable legal rules complex, or at least complex enough that less sophisticated parties lack the resources to invest in understanding them, regulated parties may effectively monopolize regulatory processes through “information capture.” Wendy Wagner, *When All Else Fails: Regulating Risky Products through Tort Litigation*, 95 GEO. L. J. 693, 708 (2007).

137. Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897 (2004) (detailing the efforts of risk-creating industries to shape science to benefit their interests and escape tort liability). One blatant example is the Advancement of Sound Science Coalition, funded by tobacco giant Phillip Morris and later ExxonMobil, discrediting science that recognized health hazards, while labeling industry-sponsored science as “sound science.” William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 ECOLOGY L.Q. 831, 846 (2012).

138. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 151 (2011) (finding that “at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counter pressure from the public interest”).

139. Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 562 (2001) (for a range of reasons, state regulatory agencies are more subject to industry capture than federal); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L. J. 81, 123 (2002) (“Simply put, the narrower and less-balanced array of interests active at the state and local levels means greater risk that state and local government agencies will be captured.”).

140. Abel, *supra* note 127, at 556 (“In practice, 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. Their relative electoral irresponsibility, paradoxically, protects them from capture by special interests.”). Add to this the fact that defense interests spend far more on campaign contributions intended to influence the judicial system than does the far less centralized plaintiffs’ bar. *Id.* at 536.

whatever is necessary in litigation¹⁴¹ the culture of judicial independence is so strong that there is no serious risk that a judge would decide a case in return for a private sector job.¹⁴²

In sum, unlike legislators and executive branch regulators, judges and juries manifest qualities that increase the chance of just resolution of civil disputes, and thus should be the primary shapers and appliers of the law to facts. The next Part discusses why state judges are in a better position to shape state law than federal judges.

4. Why State Judges

As previously mentioned, two bodies of federal constitutional law have increasingly intruded upon the ability of states to develop their own common law approaches to civil tort liability: Preemption and punitive damages.¹⁴³

Preemption has become an important aspect of modern products liability law.¹⁴⁴ As a result, federal courts are prohibiting state citizens from pursuing their state law claims in their state courts, despite the significant federalism concerns implicated.¹⁴⁵ Exacerbating this problem is the fact that federal statutes are often far from clear because of Congress's focus on regulation rather than upon private tort rights.¹⁴⁶ While nodding to the "presumption against preemption," federal courts are often guilty of treating cases as if they are simply exercises in statutory interpretation rather than federal nullification of state law.¹⁴⁷ A federal judicial determination of preemption means that a manufacturer is subject to direct regulation via often understaffed (and sometimes captured) bureaucrats, but not indirect regulation via the application of state tort law.¹⁴⁸ This outcome is especially egregious

141. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 195 (2001) (discussing the advantages of corporate defendants due to the ability to handle the cost of complex litigation).

142. That is not to say that judges are never perceived as having economic factors create an appearance of impropriety. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (judge's refusal to recuse himself from a case in which one of the parties had spent over \$3 million on behalf of the judge's electoral campaign created "a significant and disproportionate influence on the electoral outcome" and violated due process of law).

143. See *supra* notes 35–39, 46–56 and accompanying text.

144. See DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 938 (2008) ("No issue in modern products liability law is more important, or more inscrutable, than the doctrine of federal preemption.").

145. State courts are less likely to preempt state law than federal courts, likely because protecting citizens from injury matters more than federal supremacy. *Id.* at 941.

146. DOBBS' LAW OF TORTS, *supra* note 11, at § 146.

147. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 742 (2008).

148. DOBBS' LAW OF TORTS, *supra* note 2, at § 146. See also Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L. J. 2023, 2080–83 (2008) (federal agencies may be better than

because tort law is at the heart of state police power over safety.¹⁴⁹

We have also seen federal courts reject long-standing state common law rules that allowed juries to award punitive damages to a plaintiff harmed by a defendant's malicious conduct.¹⁵⁰ Like legislative damage caps, federal judicial constraints on punitive damages harm the deterrent effect of tort law and undercut the ability of states, and especially state courts, to monitor and adjust the civil justice system. In sum, state courts, likely to be more sensitive to the needs of the home state, are the preferable locus for shaping tort doctrine.¹⁵¹

IV. CONTROLLING JURIES FROM THE INSIDE OUT (RATHER THAN OUTSIDE IN)

The primary focus of tort reformers has been control of juries.¹⁵² The remainder of this Article considers tools that can serve that same goal without gutting key aspects of the civil justice system.

A. *Move from Standards to Rules*

One way to restrain jury influence is to move from a tort system dominated by standards to a greater reliance upon rules. This suggestion is consistent with a civil justice system that always has reflected a blend of approaches, with tort law especially using standards rather than rules,¹⁵³ characterized by judges adopting open-ended legal principles that are in the first instance applied by juries. The classic example is the core concept of negligence: Asking the jury whether the defendant acted

the federal courts at preserving a meaningful state regulatory role); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L. J. 2125, 2127–28 (2009) (federal agencies, and not Congress, are “the best possible protectors of state regulatory interests”).

149. This presumption should be most powerful when federal courts bar state governments from regulating in core state areas of concern, like public safety. *See, e.g., Hillsborough Co. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1985); Richard E. Levy & Robert L. Glicksman, *Access to Courts and Preemption of State Remedies in Collective Action Perspective*, 59 CASE W. RES. L. REV. 919, 950 (2009) (“[Courts should apply] a presumption against preemption, emphasizing the traditional role of states' police powers to protect the health and safety of their citizens.”).

150. OWEN, *supra* note 144, at 1286 (“[The Constitution] should not require that people be deprived of what may be their most effective protection against the abuses of megalithic enterprises, which may trample, sometimes flagrantly, and always in the pursuit of profit, the safety and other interests of private individuals.”).

151. *See* Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L. J. 435, 489 (2012) (“[T]he development of state law is incremental. State judicial decisions employ a common law methodology that maintains consistence and stability while providing the flexibility for courts to adapt legal rules to new developments.”).

152. *See supra* notes 1–13 and accompanying text.

153. A rule provides specific content to the law before an actor acts. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 1992 DUKE L.J. 557, 559–60. For a list of only a few of the many discussions of the rules vs. standards debates, *see id.* at n.1.

with “reasonable care in the circumstances.”¹⁵⁴ The plasticity of such an approach has allowed the common law to adjust to changes in society, sometimes expanding liability, other times constricting it, in a complex, organic way.¹⁵⁵

While there have long been pockets of tort law where legislative rules supplanted judge-made law—statutes of limitation and workers compensations schemes are the most pervasive examples—tort law has been primarily a common law system characterized by judge-made law.¹⁵⁶ For example, all of the law contained in the first American treatise on tort law, as well as all in the first torts casebook, was judge-made law.¹⁵⁷ A corollary to this is that our tort system has traditionally been characterized by the use of standards rather than rules: Most tort issues are resolved *ex post* by the applications of relatively generalized standards to a unique set of facts, rather than *ex ante*, as with rules.¹⁵⁸

154. WILLIAM L. PROSSER, *THE LAW OF TORTS* 145 (4th ed. 1971) (“[I]t is seldom possible to reduce negligence to any definite rules . . .”). *But see* Rabin, *supra* note 12, at 431 (noting that historically common law included a range of specific rules, like sovereign immunity, the privity requirement for products liability, and the rules favoring landowners in premises liability actions, that yielded predictability but have been modified by modern judges more concerned with corrective justice and the deterrence of unreasonable conduct).

155. *See* Gregory C. Keating, *Recovering Rylands: An Essay for Robert Rabin*, 61 *DEPAUL L. REV.* 543, 586 (2012) (lauding the common law process that makes, and then remakes tort law). This process unfolds not just within jurisdictions, but across the entirety of tort law, as judges in one state consider not just their own legal doctrine, but that adopted in other states. *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 *N.Y.U. L. REV.* 962, 1027–28 (2002):

[O]nce a society had adopted the common law, its judges were authorized to interpret that law in all the cases to which it applied, employing the uniquely legal form of “artificial reasoning” by which judges molded the principles of the common law to fit the exigencies of the day. . . . [I]t was the judges’ special task to determine how the common law resolved particular cases. In so doing, the judges were participating in a collective project of shaping a general body of legal principles that was shared with judges everywhere the common law system had been received.

156. DOBBS, *supra* note 2, at 1 (“Tort law is predominantly common law. That is, judges rather than legislatures usually define what counts as a tort and how compensation is to be measured.”); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Legislation*, 125 *HARV. L. REV.* 1757 (2012) (“[Tort law reflects] a common law, nonlegislative, and incremental approach to the articulation of legal wrongs that . . . expose a defendant to liability, just as we have always delegated the job of selecting damages to a jury.”).

157. Michael D. Green, *The Road Less Travelled (and Seen): Contemporary Lawmaking in Products Liability*, 49 *DEPAUL L. REV.* 377, 379 (1999).

158. Kathleen Sullivan explains the rules/standards distinction:

A legal directive is “rule”-like when it binds a decision maker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective choices to be worked out elsewhere. . . . A legal directive is “standard”-like when it tends to collapse decision making back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decision maker more discretion than do rules. Standards allow the decision maker to take into account all relevant factors or the totality of the circumstances.

Legislative tort reform flies in the face of both of these important traditions.

Admittedly, the line between rules and standards can be “fuzzy at the edges,”¹⁵⁹ just as there are degrees of “rule-ness,”¹⁶⁰ but the benefits of standards for the tort system are many. Perhaps most importantly, in a system built to dispense corrective justice, standards tend to be more fair: More open-ended than rules, standards are flexible and thus more easily tailored to provide individuated consideration by the decision maker.¹⁶¹ Similarly, because they are implemented *ex post* via decisions that are generally more fact-specific, outcomes can be more precisely tailored to the circumstances.¹⁶² Given the almost infinite contexts in which tort principles are applied—whether *this* actor was reasonable in *this* circumstance, whether *this* defendant’s misconduct caused *this* plaintiff’s injury, and how seriously *this* plaintiff was injured—it should be no surprise that standards have long been the preferable approach.¹⁶³

Rules inevitably risk both under-and-over inclusiveness, and that danger increases when a rule, like a cap on damages, is applied to a broad range of situations. Like mandating one shoe size for both men and women, rules may provide too much to some and too little to

Kathleen M. Sullivan, *The Justices of Rules and of Standards*, 106 HARV. L. REV. 22, 58–59 (1992).

159. WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 164 (2004).

160. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 959 (1995) (“Whether a legal provision is a rule, a presumption, a principle, a standard, a guideline, a set of factors—or something else—cannot be decided in the abstract.”)

161. Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 510 (1988) (defining formalism as “the way in which rules achieve their ‘ruleness’ [by] . . . screening off from a decision maker factors that a sensitive decision maker would otherwise take into account”).

162. Francesco Parisi, *Rules Versus Standards*, in *ENCYCLOPEDIA OF PUBLIC CHOICE* 510 (Charles K. Rowley & Friedrich Schneider eds., 2004).

163. 1 MARILYN MINZER ET AL., *DAMAGES IN TORT ACTIONS* § 3.01 (2010) (“The general purpose of compensatory damages in tort actions is to give the injured party a sum of money which will restore him, as nearly as possible, to the position he would have been in if the wrong had not been committed; in other words, to make the plaintiff whole.”); Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L. J. 659, 660–61 (2003) (stating that “a dominant theme” among legal academics and practitioners is that tort law is designed to return a plaintiff to the status quo ante).

There are a host of doctrines deeply imbedded in our common law of torts that reflect the understanding that no two negligence cases are identical and that are committed to individuated damages, like the doctrine of the “eggshell plaintiff.” *See, e.g.*, DOBBS, *supra* note 2, at 465 (“[O]nce defendant [is negligent and puts someone at risk] the thin skill rule provides that he is liable for all the personal injuries actually caused, although they may be greater than those that would be suffered by a normal person.”). Similar concern with nuance is reflected in the bedrock notion of cause in fact. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 28 cmt. b (2010) provides:

The difficulty that courts confront is that the line between reasonable inference and prohibited speculation is one of the more indistinct lines that exists in law and also is one on which reasonable minds can and do differ. Different courts draw those lines at different points at different times; comparison of cases is very difficult because modest differences in the evidence can substantially affect the power of an inference.

others.¹⁶⁴ Perhaps the greatest proponent of tort rules was Oliver Wendell Holmes, Jr. In his classic work *The Common Law*, he wrote: "It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances."¹⁶⁵

When Holmes was on the Supreme Court of the United States late in his career, he was able to implement his preference for rulemaking by common law judges. In *B&O Railroad v. Goodman*,¹⁶⁶ Holmes, for a unanimous Court, held that a driver who was injured at a railroad crossing could recover damages only if he had stopped his vehicle before crossing, regardless of the other facts presented. Only seven years later, with Holmes retired, the Court reconsidered the wisdom of imposing such a rule in another railroad crossing case, *Pokora v. Wabash Ry. Co.*¹⁶⁷ This time, the Court, led by another giant of the common law, Benjamin Cardozo, recognized the myriad variations of track location, amount of traffic, nature and speed of the plaintiff's vehicle, time of day, etc., and reverted to the time-tested case-by-case use of a standard. As Cardozo's unanimous opinion aptly observed, "[There must be] caution in framing standards of behavior that amount to rules of law."¹⁶⁸

A common justification for preferring rules made by government officials to standards applied by a lay jury is that rules are the result of careful deliberation. While this may characterize the work of appellate judges, it is often not the case with legislators.¹⁶⁹ Even well-intending legislatures, especially at the state level (where most tort reform originates), are chronically understaffed, increasing the risk that a law

164. ENCYCLOPEDIA, *supra* note 162, at 2.

165. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 89 (Mark D. Howe ed., Harv. Univ. Press 1963) (1st ed. 1881).

166. 275 U.S. 66 (1927).

167. 292 U.S. 98 (1934).

168. *Id.* at 105. While Justice Holmes had a huge influence on the law generally, his foray into tort rule-making failed. See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989) (Easterbrook, J.) ("Justice Holmes believed that courts would (at least, should) slowly reduce all of tort law to objective, readily applied rules. This is not viewed today as one of his more astute predictions.") (internal citation omitted). See also Robert L. Rabin, *Reflections on Tort and the Administrative State*, 61 DEPAUL L. REV. 239, 260, n.80 (2012) (pointing out the tension between Holmes' preference for the predictability of rules with his full-throated advocacy of a system built on such a context-sensitive concept as negligence).

169. See Hanah Metchis Volokoh, *A Read-the-Bill-Rule for Congress*, 76 MO. L. REV. 135 (2011) (discussing the many circumstances in which members of Congress do not have the time to read bills before voting).

will fail to reflect a careful balancing of all considerations.¹⁷⁰

Also relevant is the power of special interest money in the legislative process, which may make robust debate and optimal outcomes less likely.¹⁷¹ The chance that a fair law will result from the legislative process is lessened because of the powerful impact of lobbying by interest groups.¹⁷² Specifically, in the civil justice context the Chamber of Commerce, the National Association of Manufacturers, the Pharmaceutical Manufacturers of America, and the American Medical Association, have poured millions of dollars into legislative advocacy.¹⁷³

Regulation via rules also risks obsolescence. A rule freezes the law in place, ignoring newly available information or changing values.¹⁷⁴ Even a well-crafted rule may become out-of-step with changed exogenous realities, and there is no guarantee that a legislature will update a rule due to the press of other legislative business or rent-seeking behavior.¹⁷⁵ Similarly, while standards undoubtedly can impose higher administrative costs due to case-by-case ex post adjudication, rules also have a process cost: They may not be rewritten to keep up with changes in society.¹⁷⁶

Rules also may be nullified when the party is asked to apply what is perceived as an unfair rule.¹⁷⁷ One example of this has already been observed in the context of damage caps, as there are reports that jurors who want to award an amount above a legislative cap on non-economic damages respond by increasing the amount of the compensatory

170. K. Nicholas Portz, *Education Reform Litigation in Nevada: Is the Nevada Legislature Neglecting its Constitutional Duties?*, 11 NEV. L. J. 849, 875 (2011) (many state legislatures are underpaid, understaffed, and part-time; the lack of valuable resources compromises the legislature's ability to create meaningful legislation).

171. The negative influence of money in politics is well-established, and is likely to become an even more serious problem given decisions of the Supreme Court of the United States that provide constitutional protection to special interest campaign spending. See e.g., *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 335–36 (2010) (first amendment precludes federal regulation of independent campaign expenditures by corporations and labor unions). See also C.M.A. McCauliff, *Didn't Your Mother Teach You to Share? Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. REV. 383, 429 (2010) (“If taking a more representative set of voices into political account does not occur, as some expect the effect of *Citizens United* to be, lobbying will only continue to become a more and more disabling problem for democratic government.”).

172. ENCYCLOPEDIA, *supra* note 162, at 5.

173. See Hubbard, *supra* note 91, at 475 (detailing the massive industry resources available to lobby in state capitals); Dawn House, *Tort Reform: What about the Little Guy?*, 39 LOY. L.A. L. REV. 819 (2006) (detailing power of industry to influence federal regulatory law).

174. Kaplow, *supra* note 153, at 616.

175. ENCYCLOPEDIA, *supra* note 162, at 4. See also Gilles, *supra* note 18, at 693 (California cap on medical malpractice damages, set at \$250,000 in 1975, is now effectively less than \$100,000 due to inflation).

176. FARNSWORTH, *supra* note 159, at 168.

177. *Id.* at 166.

damages, which typically are not subject to a cap.¹⁷⁸

Finally, standards applied by a lay jury have the virtue of increasing citizen involvement, engaging citizens in moral deliberation as well as the operation of government, thus serving democratic values.¹⁷⁹ Rather than having rote application of a rule by a government bureaucrat or even by a judge, the traditional tort system is an immersive experience for a juror, asking a layperson to evaluate the behavior of another citizen, the severity of harm to an injured fellow citizen, and whether a particular act caused the plaintiff's injury.¹⁸⁰

In sum, powerful reasons of both historical practice and current public policy cut against the usurpation of the common law by the imposition of legislative rules. Because juries apply rather than make law, the other virtues of jury decision-making should make the default approach laypeople and judges collaborating to make law manifest.¹⁸¹

Despite the wisdom and prevalence of standards in tort law, a common law court concerned with the erratic behavior of juries has the inherent power to adopt a rule, placing more power in the hands of judges. There are many examples: the requirement of privity barred juries from determining whether the manufacturer of a product was negligent; the limited duties owed to licensees and trespassers in the premises liability context meant that juries could not award damages due to a landowner's lack of reasonable care; and the "fellow servant rule" that barred an employee from recovery for workplace injuries in most circumstances.¹⁸² More recently, courts have shielded property owners from liability for crime on their premises without a prior similar assault, limited the ability of spectators to recover for injuries while attending a sporting event,¹⁸³ and adopted a new no-duty rule that that makes it

178. Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance about Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361 (2005) (discussing impact of juror behavior in the context of damage caps). Another example is the long-recognized tendency of juries to bypass the harshness of contributory negligence by reaching compromise verdicts. See Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695, 711 (2011).

179. See Sharkey, *supra* note 178, at 711.

180. *Id.*

181. See Michael L. Wells, *Scott v. Harris and the Role of the Jury in Constitutional Litigation*, 29 REV. LITG. 65, 93 (2009) ("The rules-versus standards issue differs slightly from the judge-jury problem, as standards may be applied by either a judge or a jury. Nonetheless, the two are closely related. Since juries cannot make rules, choosing rules over standards necessarily entails a greater role for judges.").

182. See Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 467-70 (1999) ("From all around the nation there were many cases . . . that cast aside old 'no duty' rules. . . . The practical result of the elimination of many of these old rules (seen most clearly in the occupier liability area) was to transfer much power from judges to juries.").

183. See Ronald Steiner, *Policy Oscillation in California's Law of Premises Liability*, 39

harder for plaintiffs to prevail when asbestos brought home from the workplace injures family members.¹⁸⁴ Indeed, “[w]e have lots of new rules and judicial decision-making in cases that, in prior years would have gone to juries with vague instructions about fault attached.”¹⁸⁵

B. Invigorate Summary Judgment

A liability regime can be tipped away from broad jury power without fundamentally altering the substantive law. This tactic has been identified in the line of cases in which the Supreme Court of the United States facilitated the use of summary judgment to remove cases from the jury. In *Celotex Corp. v. Catrett*,¹⁸⁶ *Anderson v. Liberty Lobby, Inc.*,¹⁸⁷ and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹⁸⁸ the Court provided federal trial judges greater latitude to resolve the merits of a case without a full presentation of the facts to a jury.¹⁸⁹ This generous availability of summary judgment—which is overwhelmingly to the advantage of defendants in tort litigation¹⁹⁰—has been accelerated by more recent decisions that have eroded the long-standing practice of allowing a plaintiff to take advantage of notice pleading, and then use the discovery process to develop evidence.¹⁹¹

There is also another noteworthy example of incremental tort reform at the federal level: the Supreme Court of the United States, in a string

McGEORGE L. REV. 131 (2008) (discussing how California courts moved from a standard to a rule in cases involving crime on the premises). See also *Davidoff v. Metro. Baseball Club*, 463 N.E.2d 1219 (N.Y. 1984) (adopting a limited duty rule rather than a negligence-based standard).

184. Meghan E. Flinn, Note, *Continuing War with Asbestos: The Stalemate among State Courts on Liability for Take-home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707, 713 (2014).

185. Sugarman, *supra* note 182, at 487. See also Lawrence M. Friedman, *The Day before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 698 (2004) (“Power and discretion have shifted away from the jury and more and more now is in the hands of the judge. To put it another way, the long-term historical development is to shift decision making from amateurs to professionals.”).

186. 477 U.S. 317 (1986).

187. 477 U.S. 242 (1986).

188. 475 U.S. 574 (1986).

189. See Bert I. Huang, *Trial By Preview*, 113 COLUM. L. REV. 1323, 1325 n.6 (2013). See also Cecil, et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 866 (2007) (“the three opinions, taken together . . . urged greater openness and receptivity to summary judgment”).

190. See Cecil, et al., *supra* note 189, at 886–89 (noting that summary judgment motions in federal cases are far more common, and far more likely to be granted to defendants, than summary judgment motions filed by plaintiffs).

191. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court called into question what seemed to be settled law regarding the level of factual detail needed in a complaint, adopting a more rigorous “factual plausibility” regime. Joshua A. Douglas, *Election Law Pleading*, 81 GEO. WASH. L. REV. 1966, 1967–68 (2013). See also Mark Moller, *Procedure's Ambiguity*, 86 IND. L. J. 645 (2011) (drawing comparisons between *Twombly* and *Iqbal* and the summary judgment trilogy).

of decisions over two decades, reshaped the law of defamation, resulting in a reduced risk that defendants will face significant civil judgments imposed by a jury.¹⁹² These changes were the product of a series of gradual adjustments over time, much like the case-by-case approach familiar to the common law.¹⁹³

A similar trend has been identified at the state level. In a careful empirical study of decisions of the Texas Supreme Court, David Anderson concluded that defendants won 87% of the cases decided with an opinion.¹⁹⁴ This tilt to favor defendants was accomplished without alteration of the substantive law of torts. The court did so by relying on statutory interpretation, close construction of pleadings, the strict application of procedural rules, and a painstaking review of the evidence that would usually have been left to a jury.¹⁹⁵

Judges clearly have the capacity to adjust the civil justice system if it tilts too far in one direction (or another), and such an approach avoids the pitfalls of ill-informed legislators and executive officers trying to find the right balance from outside of the system.¹⁹⁶

C. Tighten the Rules of Evidence

Another procedural reform that could provide greater control of juries is to tighten the rules of evidence. Beginning with the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*,¹⁹⁷ federal courts, and since then an increasing number of state courts, have made it harder for plaintiffs in tort cases to get to a jury by rejecting the plaintiff's proffer of expert testimony.

This is especially true in products liability, medical malpractice, and toxic tort claims, which often require expert testimony.¹⁹⁸ For example, it may be difficult for a plaintiff in a products liability action to trace her

192. See David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Defamation Litigation*, 87 VA. L. REV. 503 (2001) (detailing how changes to defamation law resulted in many fewer examples of large verdicts punishing unpopular defendants).

193. Unlike the changes to pleading requirements discussed in the previous paragraph, *New York Times v. Sullivan* and its progeny construed the Constitution, but in both contexts the changes resulted from case-by-case deliberation over a period of years.

194. Anderson, *supra* note 5, at 11. Professor Anderson also concluded that in twelve cases in which Wal-Mart was a tort defendant, the corporate defendant always won, while in other states the company's success rate was 56%. *Id.*

195. *Id.* at 18. The most frequent tool was an unprecedented willingness to hold that there was "no evidence" to support the plaintiff's claim. *Id.* at 23.

196. See Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 677-83 (2008) (describing the "revolution and counter-revolution in tort law").

197. 509 U.S. 579 (1993).

198. See Christopher R.J. Pace, *Admitting And Excluding General Causation Expert Testimony: The Eleventh Circuit Construct*, 37 AM. J. TRIAL ADVOC. 47, 47-48 (2013).

injury or condition to a defective product when it is also associated with background risk.¹⁹⁹ Similarly, a plaintiff injured by defendant's product may have to introduce expert testimony to prove that there was a safer alternative design for the product than the one adopted by the defendant, and if one does not already exist, suggest how it could be developed,²⁰⁰ or that the defendant's design did not comply with the "state of the art."²⁰¹ In medical malpractice cases, a plaintiff may need an expert to prove causation and almost always must support the allegation of negligence by an expert's testimony on how the defendant diverged from medical custom.²⁰² Similar evidentiary hurdles face plaintiffs attempting to prove toxic torts.²⁰³

While *Daubert* construed the Federal Rules of Evidence, its approach to expert testimony has been followed in many states.²⁰⁴ In general, this more restrictive approach to expert testimony favors defendants and results in closer control over juries.²⁰⁵

D. Improve Jury Performance

This Article has analyzed how a move from standards to rules may cure the concern with jury unpredictability when determining whether a defendant is liable for the injury caused to the plaintiff.²⁰⁶ This Part examines a similar inconsistency problem caused by the amorphous nature of damages rules in tort actions.²⁰⁷ Indeed, tort reformers have focused much of their effort on constricting the jury's ability to award

199. See Joseph Sanders, *The Controversial Comment C: Factual Causation in Toxic-Substance and Disease Cases*, 44 WAKE FOREST L. REV. 1029, 1034 (2009) (pattern of exclusion of plaintiff's causation expert followed by summary judgment for defendant is "quite familiar").

200. Richard L. Cupp, Jr., *Believing in Products Liability: Reflections on Daubert, Doctrinal Evolution, and David Owen's Products Liability Law*, 40 U.C. DAVIS L. REV. 511, 518–19 (2006).

201. OWEN, *supra* note 144, § 10.4, at 706.

202. Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51, 51–52 (2007).

203. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 335–36 (1999) (evidentiary rulings involve "the social allocation of risk and who should bear the burden of scientific uncertainty or controversy—injured people or manufacturers . . ."); Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 VAND. L. REV. 1011, 1017–23 (2001).

204. Indeed, when the federal evidentiary rule is different from the state rule, plaintiffs prefer litigating in state court. Arthur Hellman, *Another Voice for the "Dialogue": Federal Courts as a Litigation Course*, 53 ST. LOUIS U. L. J. 761, 766–67 (2009).

205. Andrew Jurs, *Gatekeeper With A Gavel: A Survey Evaluating Judicial Management of Challenges to Expert Reliability and their Relationship to Summary Judgment*, 83 MISS. L. J. 325, 346 (2014). Not surprisingly, this difference manifested itself in a greater frequency of motions to exclude expert testimony. *Id.* at 365.

206. See *supra* notes 153–185 and accompanying text.

207. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 VA. L. REV. 1401, 1407 (2004).

damages, with special attention to punitive and noneconomic damages.²⁰⁸

Monetizing injuries—selecting a damage figure for a plaintiff’s personal injury—is inherently difficult for a multitude of reasons.²⁰⁹ First, there is the problem of incommensurability, as we ask the jury to place a dollar figure on something that cannot be replaced.²¹⁰ Second, there is no agreed upon metric, especially with regard to non-pecuniary awards.²¹¹ Third, there is no market against which to evaluate appropriate awards.²¹² Finally, jurors are given little meaningful guidance.²¹³ As a result, there is a high risk of unprincipled differences in outcomes in similar cases.²¹⁴

Collecting relevant data about the value of a case is difficult because very few tort claims are litigated to a public conclusion. Indeed, many out-of-court settlements are subject to secrecy restrictions, meaning that there is only a snapshot of the system available to those who might want to draw conclusions, or even inferences, about how individual cases are resolved.²¹⁵

While there have been occasional calls for eliminating pain and suffering damages entirely,²¹⁶ which would certainly improve predictability, such an extreme remedy has been broadly rejected, and for good reason. Eliminating these damages would cause a core goal of the tort system to be unmet: “making the plaintiff whole.”²¹⁷ However,

208. Roederer, *supra* note 196, at 687.

209. Alexandra D. Lahav, *The Case for Trial by Formula*, 90 TEX. L. REV. 571, 580 (2012) (“The problem with this understanding of injury valuation is that the tort system does not approximate the actual damages suffered by the plaintiff. The tort system is an institution that is supposed to monetize injuries, yet injuries are not readily monetizable.”).

210. Joseph Sanders, *Reforming General Damages: A Good Tort Reform*, 13 ROGER WILLIAMS U.L. REV. 73, 142 (2008). See also Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L. J. 659 (2003).

211. Swedloff & Huang, *supra* note 97, at 589. See also Randall R. Bqvbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 938 (1989). Similar criticisms are levelled at punitive damages, but because they are awarded in a small percentage of cases, and in any event are subject to federal constitutional and state limitations, they will not be discussed here. See Lahav, *supra* note 209, at 582–83.

212. Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 S.M.U. L. REV. 163, 175 (2004).

213. *Id.*

214. Sanders, *supra* note 210, at 142.

215. Lahav, *supra* note 209, at 579.

216. Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM, 431, 444 (2009) (“Only a few of the most strident critics would abolish [noneconomic damages] altogether”).

217. See Rabin, *supra* note 12, at 441 (“In view of such an open-ended, indeterminate standard and the corresponding conceptual difficulties of monetizing intangible loss, some have argued that pain and suffering damages should be eliminated. . . . But these remonstrances have fallen on deaf ears; the

there have been less drastic proposals that attempt to improve jury decision-making, without fundamentally limiting the jury's important and time-tested role in the civil justice process.

One way to improve jury performance is to add to the tools juries can use to render decisions. Valerie Hans, among others, has advocated "active jury reforms," changes to litigation that "encourage jurors' vigorous participation in their decision making."²¹⁸ Some long-standing practices complicate the efforts of jurors to do their jobs in a competent and conscientious manner. For example, jurors have traditionally not been allowed to take notes, nor discuss the case with fellow jurors until closing arguments have been made and the judge has instructed on the applicable law. Similarly, jurors cannot ask questions of the witnesses or of the judge, until the jury is instructed and begins its deliberations.²¹⁹ While these procedural rules are not in themselves illogical, they have by and large outlived their usefulness.²²⁰

The American Bar Association (ABA) has recognized that such practices frustrate rather than improve jury performance. In its report, "Principles for Juries and Jury Trials," the ABA endorsed juror note taking, the use of notebooks to allow jurors to have exhibits with them after they are introduced, juror questioning, and lifting the ban on juror discussion of the case during presentation.²²¹ Some states have begun to experiment with changing these rules and this momentum should continue.²²²

Another way to improve jury predictability is to provide decision makers with more information, and there is already a model that has done so for over a century.²²³ Workers' compensation systems have used a schedule that pre-determines what award is associated with a specific injury, implemented by a government bureaucrat. Such systems

courts adhere to recognition of individualized pain and suffering recovery as a foundational principle of tort damages.").

218. Hans, *supra* note 2, at 40.

219. This ban makes sense in the criminal context, where fundamental liberties are at stake, but far less so in the civil context. Antoinette Plogstedt, *E-Jurors: A View from the Bench*, 61 CLEV. ST. L. REV. 597, 617–19 (2013).

220. VIDMAR & HANS, *supra* note 94, at 32–33.

221. AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 17 (2005), available at <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf>.

222. Hans, *supra* note 2, at 50–55.

223. While the following discussion focuses on providing juries information that could lead to do a better job assessing damages, there are also advocates for changing the rules of evidence so as to allow the jury to consider that the plaintiff in fact had some of her damages covered by a collateral sources; was not wearing a seatbelt or was under the influence of alcohol or drugs at the time of the accident; and that a finding of joint and several liability may lead to a single defendant paying for more than its fair share of the injury. See Steven B. Hantler, et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21 (2005).

have been criticized for, among other things, pervasively low awards,²²⁴ but there is nothing inherent in adopting such an approach to setting noneconomic damages that would dramatically undercompensate injured plaintiffs. Indeed, such a result would be patently unfair because a tort plaintiff, unlike a workers' compensation claimant, typically has to prove that the injury was the result of defendant misconduct.²²⁵

In a handful of other contexts, the traditional civil justice system has been supplanted in all or part by an administrative regime for handling injury claims, including providing redress in products liability claims (dalkon shield and vaccines) and in response to mass disasters (the 9/11 and BP Gulf Spill compensation regimes).²²⁶ While these alternatives have differing characteristics, they all remove judges and juries from the deliberative process and minimize the evaluation of the conduct of the parties. Additionally, they may substantially limit the chance for the full and fair compensation to a plaintiff who proves all of the elements of a civil claim.²²⁷

Distinguished scholars like Cass Sunstein have argued for an analogous approach to setting damages in all tort actions.²²⁸ Sunstein proposes that "specialists in the subject matter at hand" develop a schedule similar to that found in workers' compensation and other administrative payment schemes.²²⁹ The most dramatic version would be to set a specific dollar figure that binds the jury. Such an approach would streamline litigation and greatly limit, if not eliminate, the concerns with variability and fairness that the current practice risks by treating like cases differently.²³⁰ However, this approach is fatally

224. PETER M. LENCIS, *WORKERS COMPENSATION: A REFERENCE AND GUIDE* 1–2 (1998).

225. Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1449, 1571 (2010) (under workers' compensation, the fault of both employer and employee is immaterial and the amounts payable to the employee are determined by a schedule of benefits rather than by ad hoc jury awards).

226. Malika Kanodia, *The Fate of the Injured Patient in Wake of Reigel v. Medtronic: Should Congress Interject?*, 32 HAMLIN L. REV. 791, 833 (2009); Kenneth R. Feinberg, *Is the Glass Half-Empty or Half-Full?*, 44 LOY. U. CHI. L. J. 349, 351–53 (2012).

227. Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 833, 864–65 (2012).

228. CASS SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURORS DECIDE* 242 (2002) ("[S]erious consideration should be given to moving away from the jury and toward a system of civil fines, perhaps through a damages schedule of the sort that has been used in many areas of the law, including workers' compensation and environmental violations.").

229. *Id.* at 252–54 (identifying various administrative schemes for determining compensation and/or penalties, including workers' compensation schedules, criminal sentencing guidelines, and social security disability determination grids, as precedents for his proposed "schedule of fines and penalties."). See also ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY II.C.8.IV n.30 (1991) (fixing damages via "a consortium of experienced judges, lawyers, insurers, doctors, and others, whose conclusions would then be adopted by the state legislature or the state supreme court").

230. Neal R. Fiegenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 281 (2003).

flawed because it eviscerates the various contributions that juries make to the civil justice system. Moreover, this approach is fundamentally inconsistent with the basic tort principle that each victim is entitled to an award tailored to his or her circumstances, set by a lay jury.²³¹

Recognizing this problem, Sunstein proposes alternatively that a fact finder be able to consider a range of possible awards, providing guidance (rather than limits) to a group that has never before been tasked with setting damages.²³² Other proposals from scholars²³³ and the ABA²³⁴ respond to the problems of unbounded scale for non-pecuniary awards, the absence of relevant anchors, and the presence of irrelevant ones, which may plague jury damage setting under traditional arrangements.²³⁵ Providing such yardsticks would also respond to complaints from jurors that they lack adequate information to set damages effectively.²³⁶

While this would improve predictability, such an approach would only be as good as the quality of the methodology for selecting which cases were factually similar enough to be included in the range. This is a significant challenge under the best of circumstances, but increasingly problematic when the vast majority of tort cases are settled and thus not part of any available public record.²³⁷ However, this problem can be

231. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (“[T]he law of torts attempts primarily to put an injured person as nearly as possible equivalent to *his position* prior to the tort.”) (emphasis added).

232. SUNSTEIN, *supra* note 228, at 248–49. See also Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn't Be (Just) about Pain and Suffering*, 37 J. LEGAL STUD. 195, 207–12 (2008) (proposing a three-step damage schedule prepared by a panel of laypeople enlisted to rank injuries “from worst to least bad,” with the legislature translating the rankings (presumably with the help of experts) into a series of maximum award categories, and finally having the jury decide which category applies to the case at bar); Ronald J. Allen et al., *An External Perspective on the Nature of Noneconomic Compensatory Damages and their Regulation*, 56 DEPAUL L. REV. 1249, 1257, 1275 (2007) (advocating legislative schedules, either exact amounts or ranges, which would be “modeled, in part, after sentencing guidelines used in the states”).

233. Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears?*, 55 DEPAUL L. REV. 489 (2006) (cataloging and critiquing various proposals that constrict jury authority to set damages).

234. SEE AM. BAR ASS'N, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 14 (1987) (recommending “tort award commissions” be “established to gather and report information on damage awards for incorporation into jury instructions, for use in damage additur and remittitur review, and for use in the settlement process.”).

235. Fiegenson, *supra* note 230, at 281.

236. Michael Dann, *Jurors and the Future of “Tort Reform,”* 78 CHI.-KENT L. REV. 1127, 1135–36 (2003).

237. David M. Studdert, *Rationalizing Noneconomic Damages: A Health-Utilities Approach*, 74 L. & CONTEMP. PROBLEMS 57, 69 (2011). See also Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 103 (2006) (“All of these solutions, however, are administratively complicated, and therefore possibly prohibitively costly. Who decides the schedules, matrices, scenarios, or guidelines? What criteria do they use? The more detailed the scenarios or guidelines are, the more costly it is to

viewed as only an administrative variation on a characteristic baked into the adversarial process: the quality of the lawyers representing the parties.²³⁸

E. *Overrule the Jury*

As a last resort, judges may control jury behavior by overruling the jury. The familiar tool of “judgment as a matter of law” allows the judge to reject a jury verdict. The focus here is on the jury’s determination of liability, and the judge uses the same standard as that used for a directed verdict motion and summary judgment: One party, usually the defendant, is entitled to a decision in its favor as a matter of law because there was insufficient proof of an essential element of the prima facie case.²³⁹ As discussed earlier, the power to screen out substantively weak cases is one that can expand or contract, depending upon a court’s judicial philosophy about the role of the jury.²⁴⁰

Because legislative tort reform has focused most often on preventing juries from assessing large damage awards, enhancing the role of the judge in reviewing the damage award is another way to limit, but not destroy, the role of the jury in providing remedies. Trial judges can exercise their power to grant a new trial if the evidence does not support the award.²⁴¹ In this context, the judge “sits as the 13th juror,” and can make the sort of credibility determinations that are generally off limits when ruling on other dispositive motions.²⁴² This power does not mean

design them.”).

238. See Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 722 (2008) (“The competent presentation of claims and defenses and the effective maneuvering through complex procedural rules rests fully on the advocates’ skills and resources. As equality between them declines, so too does the system’s ability to redeem the promises implicit in Lady Justice’s scales.”).

239. Pursuant to the Federal Rules of Civil Procedure (F.R. CIV. P.), a losing party may overturn a verdict when the court is convinced that no reasonable jury could have found the facts necessary to support the verdict. In other words, a JNOV is appropriate “only if the evidence, viewed from the perspective most favorable to the nonmovant, is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.” *Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir. 1994). Similar standards are used in state courts. David Hittner & Lynn Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1383 (2010).

240. See *supra* notes 153–205 and accompanying text. A given state’s approach may change over time, as well. See Aaron J. Hayes, *Should a Scintilla Be Enough? The Proper Standard for Summary Judgment in South Carolina*, 61 S.C. L. REV. 737 (2010) (describing evolving standards applied in South Carolina state courts).

241. DOBBS, *supra* note 2, at 358.

242. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF L. REV. 251, 261–62 (2003) (“[T]hrough the motion for a new trial, the trial judge has the opportunity to act almost as a thirteenth juror and to weigh the evidence to determine the validity of the jury’s judgment.”).

the trial judge is simply allowed to overrule the jury merely because of a difference of opinion; generally, the award must be “clearly excessive” to override the usual role of the jury to determine facts.²⁴³ There is also the related practice of remittitur,²⁴⁴ which conditions the grant of a new trial on the willingness of a plaintiff to accept a lower award identified by the trial judge.²⁴⁵

Using post-trial motions rather than legislative caps to control juries is an attractive alternative because trial judges, unlike legislators (and even appellate judges), have firsthand knowledge of all aspects of the trial, including important “soft information” that may not appear in the trial transcript on review,²⁴⁶ and appellate review of an award of a new trial is handled, appropriately, under a narrow “abuse of discretion” standard.²⁴⁷

Post-trial motions also provide the opportunity for close evaluation of jury awards of damages and are considerably more tailored and equitable than damage caps. Moreover, over time, this practice could prompt development of helpful comparative data to better identify excessive awards.²⁴⁸ Along the same lines, a trial judge could look at “comparability”—evaluating the reasonableness of a particular damage

243. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 677 (7th ed. 2011). Despite the right to a jury trial imbedded in the federal and many constitutions, the grant of a new trial is available because it merely allows another lay jury to consider the evidence. See Albert D. Brault & John A. Lynch, Jr., *The Motion for New Trial and its Constitutional Tension*, 28 U. BALT. L. REV. 1, 114 (1998) (“Until recently, most American jurisdictions viewed grant of a new trial as posing no threat to the right to trial by jury. This is because the grant of this motion was followed by another jury trial.”). See also Pamela J. Stevens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 KY. L. J. 81, 128 (1987) (providing history of new trial motions).

244. See, e.g., Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 775 (1995) (the A.B.A. Action Commission to Improve the Tort Liability System recommended increased use of remittitur to set aside verdicts “clearly disproportionate to community expectations”).

245. See RICHARD D. FREER, *CIVIL PROCEDURE* 499 (3d ed. 2012) (“This use of the conditional new trial through remittitur, obviously, is a way the court might play hardball with the plaintiff. The court tries to pressure the plaintiff to remit what the court believes is excessive damages.”). Because remittitur allows the trial judge to identify a lower award than that set by the jury, there are more substantial concerns about erosion of the jury’s role than with new trial motions generally. Brault & Lynch, *supra* note 243.

246. See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 448 (2004) (“[A]nyone who has absorbed a trial solely through its transcript knows that it can be a frustrating and incomplete experience.”). See also Noonan v. Cunard Steamship Co., 375 F.2d 69, 71 (2d Cir. 1967) (noting the trial judge’s “superior opportunity to get ‘the feel of the case.’”) (internal citation omitted).

247. *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (a district court’s review of a jury’s determination of damages “would be subject to appellate review under the standard the circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion.”).

248. See Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157 (2008) (recommending that courts safeguard the jury-trial right by increasing the trial judge’s discretion to grant a new trial on the weight of the evidence and by requiring a balanced appellate review of decisions granting and denying new trials).

award by comparing it to the amounts awarded in other similar cases in that court.²⁴⁹ This approach raises the same concerns about the ability to gather accurate data identified in the previous part,²⁵⁰ but would represent an improvement over legislatively imposed caps.

V. CONCLUSION

From the founding of our country, we trusted juries, supervised by judges, to fairly resolve civil disputes. That trust began to erode in the 1970s, and has since been replaced by an industry-created narrative that juries are irrational and incompetent, constantly handing down huge verdicts that threaten the existence of the corporations that have made our standard of living the envy of most of the world.

With that story line in place, corporate America successfully promoted its agenda, with the result being four decades of changes to a civil justice system that has served us well for more than two centuries, and almost always in the direction of making it harder for injured people to receive full compensation. The fundamental flaw in many of the reforms is that they fail to render justice in each specific case.²⁵¹ In contrast, we have deep experience with judges and juries evaluating and resolving a host of important issues—intent, fault, consent, causation, and damages²⁵²—and there is precious little evidence of persistent and significant error to justify usurping this tried and true combination of dispute resolution.

At first blush, it might seem puzzling that democratically elected legislators targeted the civil jury, one of our most democratic institutions, but this simply reflects the power wielded by pro-business interests to elect and then lobby friendly legislators and executive

249. See J. Patrick Elsevier, *Out-Of-Line: Federal Courts Using Comparability to Review Damage Awards*, 33 GA. L. REV. 243, 244–58 (1998). One noteworthy effort to use de novo appellate review of a jury verdict was proposed by one of the leading judges of the last century, Roger Traynor, the long-serving (and generally pro-plaintiff) Chief Justice of the California Supreme Court. In a dissent, he called for closer judicial scrutiny of pain and suffering awards than that provided under the prevailing “shocks the conscience” standard. In *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 346 (1971), Chief Justice Traynor, in his dissent, reviewed the reported California cases, and concluded that awards for pain and suffering were generally consistent with awards for pecuniary (economic) damages, and that injuries to legs and feet of the sort in the case under review uniformly resulted in total awards less than \$100,000. In sum, both sets of information justified a conclusion that the \$134,000 jury award was excessive, and Traynor would have reversed. *Seffert* is discussed in detail in Goldberg & Ziprusky, *supra* note 11, at 467.

250. See *supra* note 215, and accompanying text.

251. Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2413–14 (1990) (“If I am correct that the value of the tort system is in its quest for individual justice, then . . . fairness is an important aspiration for tort law and case-specific consensus decision-making is essential to achieving fair outcomes.”).

252. Goldberg & Ziprusky, *supra* note 11, at 483.

branch regulators. Similarly unsurprising is that these laws are enacted by legislatures containing fewer and fewer lawyers, in an atmosphere of misleading media coverage.

Even though numerous studies have concluded that juries generally do a good job of determining facts and applying the law to the facts, the system obviously needs checks on decision making by lay juries.²⁵³ Similarly, while judges are also imperfect, the judiciary, which is populated by professionals with the most information about what goes on in the civil justice system, is a far better institutional choice to provide the necessary reforms than legislatures.²⁵⁴

This Article identifies an array of options that judges can implement to yield better performance by the jury. This is no surprise; for all of our history, courts have adopted different blends of substance, procedure, and remedies in their molding of the common law, using states as laboratories.²⁵⁵ This time-tested approach recognizes that our civil justice system is a “peculiarly American jurisprudence, creative, decentralized, and thereby often messy. Certainly it is never stagnant.”²⁵⁶

Nor should it be.

253. Robertson, *supra* note 248, at 157 (“Empirical studies show that juries generally perform their job conscientiously and that the large majority of jury verdicts are accurate and fair. But some outliers remain, and even a small number of seemingly unjust jury verdicts can shake the public’s faith in the jury system as a whole.”).

254. See Jeb Barnes, *Rethinking The Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157, 164 (2007) (“Scholars have long recognized that judges can powerfully shape the adjudication process in the absence of legislation. Most prominently, judges were on the forefront of expanding the scope and potency of tort law. . . .”); Green, *supra* note 62, at 375 (“The adjustment of the difficulties of everyday life through the dual agency of the expert and the lay citizen—judge and jury—is the dominant idea of Anglo-American courthouse government.”).

255. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

256. Marshall S. Shapo, *Judges and Products Law: Provisional Truths and Designated Designers*, 49 DEPAUL L. REV. 405, 410 (1999). See also Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1512 (2009) (“courts have been ‘experimenting’ with tort law through the development of common law for well over a century”).

