DID THE RIGHT MAKE AMERICA A LAWSUIT NATION?

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I. INTRODUCTION

Many books and writers have documented the problems caused by the tremendous expansion of liability in the last half century.[1] In response, several writers on the political left have written defenses of unfettered liability or indictments of the tort reform movement,[2] sometimes even rationalizing such infamous outliers as the McDonald's coffee case[3] as legitimate uses of the tort system.[4]

1. *E.g.*, PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM (2002); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) (hereinafter "DEATH OF COMMON SENSE"); PETER HUBER, LIABILITY (1988); MANHATTAN INSTITUTE, TRIAL LAWYERS INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA (2003); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991) (hereinafter "LITIGATION EXPLOSION"); WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW (2003); *see also* HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT (2006); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) (hereinafter "SIMPLE RULES"); MICHAEL S. GREVE, HARM-LESS LAWSUITS?: WHAT'S WRONG WITH CONSUMER CLASS ACTIONS (2005); WALTER K. OLSON, THE EXCUSE FACTORY (1997) (hereinafter "EXCUSE FACTORY"); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2004); STEPHEN B. PRESSER, HOW DID WE GET HERE? WHAT LITIGATION WAS, WHAT IT IS NOW, WHAT IT MIGHT BEEN, (2005), *available at* http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/php9H.pdf; Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359 (1994). *See generally* Point of Law, http://www.pointoflaw.com (last visited May 20, 2008) (weblog collecting discussions of tort system abuses); Overlawyered, http://www.overlawyered.com (last visited May 20, 2008) (weblog also discussing tort system abuse).

2. *E.g.*, CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2001); STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE (2006).

3. *Compare* Liebeck v. McDonald's Restaurants, P.T.S., Inc., CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994) (jury verdict of nearly $3 million for plaintiff who spilled coffee on herself), *with* McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 654 (7th Cir. 1998) (no liability as matter of law to plaintiff who spilled coffee on herself), *and* Bogle & Ors v McDonald's Restaurants, Ltd., [2002] EWHC (QB) 490 (same). *See also McMahon*, 150 F.3d at 654 (citing other cases that have reached the same holding). Contrary to the plaintiff's claim that McDonald's serving temperature of 170 degrees for coffee was 20 degrees above industry standards, the Specialty Coffee Association of America recommends that coffee be served up to 185 degrees in temperature and Starbucks serves its coffee at 175 to 185 degrees Fahrenheit. Matt Fleischer-Black, *One Lump or Two?*, THE AMERICAN LAWYER, June 2004, at 15, 17.

4. *E.g.*, WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 183–226 (2004); MENCIMER, *supra* note 2, at 18–22; RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 266–68 (1996); GERRY SPENCE, BLOODTHIRSTY BITCHES AND PIOUS PIMPS OF POWER: THE RISE AND RISKS OF THE NEW CONSERVATIVE

The latest arrival in this genre comes from much-celebrated [5] labor lawyer and author Thomas Geoghegan: *See You in Court: How the Right Made America a Lawsuit Nation.*[6] Unlike many on his political side of the aisle, Geoghegan acknowledges that the litigation explosion has harmed America, but blames it on right-wing policies. Deregulation, deunionization, and the right's putative dismantling of the legal system and Rule of Law, Geoghegan argues, have driven Americans to the courts by cutting off alternative routes to social justice. Geoghegan effectively demonstrates that the left should view skeptically the claims of the litigation lobby, a skepticism sadly disappearing from the political discourse as the Democratic Party more and more reflexively adopts the positions of trial-lawyer benefactors at the expense of its other constituents.[7] But Geoghegan's

HATE CULTURE 176–78 (St. Martin's Griffin 2007). *But see* Anthony J. Sebok, *Dispatches from the Tort Wars: A Review Essay*, 85 TEX. L. REV. 1465, 1509–10 (2007) (critiquing Haltom & McCann's perspective on the Liebeck case).

5. *E.g.*, John Edward Connelly, *Which Side Are You On? Trying To Be For Labor When It's Flat On Its Back*, 90 MICH. L. REV. 1819, 1830 (1992) ("[Geoghegan's] *Which Side Are You On?* is a triumph of the imagination within the mind of the practicing lawyer."); David L. Gregory, *Working for a Living*, 58 BROOK. L. REV. 1355, 1367 (1993) ("Geoghegan confesses that he is no saint, no paragon of virtue. But, I think he is close enough, especially for a lawyer."); Paul Berman, *A Union Man From Harvard*, N.Y. TIMES, Aug. 11, 1991, § 7, at 7 (calling Geoghegan's *Which Side Are You On?* "brilliant" and stating "What this country needs is more people like Thomas Geoghegan"); Jonathan Kirsch, *A Trying Time*, WASH. POST, Sept. 8, 2002, at T15 (stating that Geoghegan has "a passion for justice that is found in precious few attorneys in America today"); David Kusnet, *A Romance With America's Labor Unions*, WASH. POST, Jul. 21, 1991, at X1 (calling Geoghegan "a natural talent," "a gifted raconteur," and a "remarkable lawyer"); Lawrence Joseph, *As Unions Fall, Lawsuits Rise*, In These Times, May 2008 ("Geoghegan is the most important writer of our time in one of the left's most important—if not the most important—social traditions."); Adam Liptak, *Books of the Times: If There's Too Much Litigation, Blame Class Divisions, Not Class Actions*, N.Y. TIMES, Nov. 24, 2007, at B13 (calling *See You in Court* a "charming leftist examination of the litigation culture"); Stephanie Mencimer, *Objection, Your Honor*, WASH. MONTHLY, Sept. 2007, at 66 (*See You in Court* "successfully mixes wry observations about the political system with anecdotes from the frontlines of his own practice"); Emily Mitchell, *An Affair to Remember*, TIME, Aug. 5, 1991 (calling Geoghegan "unswervingly honest" and a "modern-day Don Quixote of the legal profession").

6. THOMAS GEOGHEGAN, SEE YOU IN COURT: HOW THE RIGHT MADE AMERICA A LAWSUIT NATION (2007).

7. Ted Frank, *Should Trial Lawyers Make Terror Policy?*, LIABILITY OUTLOOK , Sept. 2007; Grover Norquist, *Tribune of the Trial Lawyers*, THE AMERICAN ENTERPRISE, Sept. 2004 ("John Kerry's selection of North Carolina senator John Edwards as his running mate signaled a formal power transfer of a different kind: the handover of the Democratic Party from Organized Labor to Trial Lawyers"); Adam Nossiter, *In Mississippi, Democrat Runs in G.O.P. Lane,* N.Y. TIMES, Oct. 10, 2007, at A1 (describing Democratic trial-lawyer candidate for governor in Mississippi as anti-gay rights and anti-legalized-abortion and supporting prayer in school); Walter Olson, *The Lawsuit Lobby*, AMERICAN SPECTATOR, March–April 2003; Walter Olson, *The Next Sandra Day*, WALL ST. J., July 7, 2005, at A12 (reporting that then-Senator Minority Leader Harry Reid expresses willingness to confirm anti-*Roe* Supreme Court justice, so long as justice is member of plaintiffs' bar);

attempt to blame conservatives for the increased role of litigation in society suffers from *non sequiturs*, self-contradictory arguments, and a general failure to engage his opponents' arguments fairly.

Section I of this review examines Geoghegan's thesis. It finds that Geoghegan defines and applies his core values—the Rule of Law; valuing democracy over decision-making by elites; recognizing the value of contracts—inconsistently and without providing any framework for determining when these principles should yield to other concerns. It further finds that Geoghegan provides no evidence for his claim that deunionization and deregulation caused the problems he describes in the legal system.

Section II describes and analyzes Geoghegan's most costly economic and factual errors. Many of his arguments are based on false premises or faulty economic reasoning. In particular, Geoghegan's lengthy indictment of the Federalist Society is central to his attack on the right but is riddled with mistakes and unfair rhetoric.

Section III explores Geoghegan's more thoughtful critique of the role of litigation in American society. Though Geoghegan makes some inconsistent claims on this subject as well, he effectively critiques the left's support of litigation as a means of achieving social change.

II. EASILY DISCARDED PRINCIPLES

Geoghegan prefaces the book with the tale of a Red Mass in Chicago (marred by the inclusion of his describing with glee the sight of "Scalia on his knees" at the Washington Red Mass) during which a bishop warned that the Rule of Law was dangerously in retreat in the United States.[8] Geoghegan, too, speaks out in favor of the principle of the Rule of Law and of the need for the law to reflect the consent of the governed. These are fundamentally conservative principles: the Rule of Law principle is enshrined in the charter of Geoghegan's bugaboo, the Federalist Society;[9] much of the argument for originalism

Robert Young, *Reflections of a Survivor of State Judicial Election Warfare*, 2 CIV. JUST. REP. 1, 7–8 (2001).

8. GEOGHEGAN, *supra* note 6, at 1–4.

9. Federalist Society, http://www.fed-soc.org/aboutus/ (last visited May 20, 2008) (explaining the Federalist Society's purpose).

rests on the principle of democratic consent to the governing constitution of the country.[10] But Geoghegan does not seem to mean what other writers do when they refer to these principles: he espouses positions that clearly violate them, but he fails to either develop a framework to explain when or why the Rule of Law or democratic consent should yield to other values or to redefine these previously well-defined principles in a way that harmonizes his apparent inconsistencies.

Thus, even when Geoghegan is right, it is for the wrong reasons. He complains that "more and more, people experience the law as arbitrary" and "unpredictable,"[11] a frequent complaint of conservatives and reformers.[12] But in Geoghegan's mind, the complaint is tied to an incoherent critique that "contract law is being deregulated," and that "[t]he more we 'rationalize' law to get out of the way of the market, the more irrational and arbitrary it seems to be,"[13] a sentiment not weighed down by any explanation or analysis.

A. *For the Rule of Law Except When He Is Against It*

Geoghegan's stated reasons for opposition to the Class Action Fairness Act of 2005 (CAFA)[14] is one of the best examples of his

10. *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 374–75 (1992); JOHN ARTHUR, WORDS THAT BIND: JUDICIAL REVIEW AND THE GROUNDS OF MODERN CONSTITUTIONAL THEORY 154 (1995); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 856 (1995).

11. GEOGHEGAN, *supra* note 6, at 5.

12. *See, e.g.*, SIMPLE RULES, *supra* note 1, at 239–44 (randomness and arbitrariness of modern product liability law has made it worthless as a deterrent); Ted Frank, *Zombie Litigation: Revivers and Retroactive Lawsuits Are Bad Ideas*, LIABILITY OUTLOOK, April 2008, at 2, 4–6 (discussing importance of legal certainty and predictability); DEATH OF COMMON SENSE, *supra* note 1 (criticizing arbitrariness of modern civil litigation system); LITIGATION EXPLOSION, *supra* note 1 (same); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name."). *See also* William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 230 (1995) ("[S]trict tort liability arises irrespective of conduct. . . . Decision making is random, and conduct is judged ex post rather than ex ante. As a result of its philosophical failure, the doctrine lacks the moral foundation and predictability necessary to command either respect or obedience.").

13. GEOGHEGAN, *supra* note 6, at 6.

14. Pub. L. No. 109-2, 119 Stat. 4 (2005).

inconstant fidelity to the Rule of Law.[15] Geoghegan claims that the reduction in class actions has led to an expansion of litigation.[16] This is a stunningly counterintuitive premise that is unsupported by any evidence, given that the modern-day class action did not exist before the 1966 amendments to Rule 23,[17] that class actions were at a high-water mark in 2005 (if not now), and that critics have persuasively identified such class actions as exemplars of the very arbitrariness that Geoghegan bemoans.[18]

Indeed, the forum-shopping that CAFA has reduced is a stunning example of the violation of the principle of the Rule of Law. In the pre-CAFA era, plaintiffs would search out the individual state courts most likely to grant illegitimate nationwide class certifications and those jurisdictions would become "magnet jurisdictions"[19] that then, in an upside-down perversion of federalism, regulated the national economy.[20] Such certifications, by creating aggregate litigation in which individualized issues predominated, prevented defendants from adequately defending themselves, and created settlement

15. GEOGHEGAN, *supra* note 6, at 81–92.

16. *Id.* at 6.

17. *See generally* Richard A. Epstein, *Class Actions: Aggregation, Amplification,* and *Distortion*, 2003 U. CHI. LEGAL F. 475, 475–76 (2003) (arguing that the surge of class action litigation resulted from adoption of the 1966 class action rules); John P. Hooper, *The Class Action Fairness Act: Tort Reform Worth the Wait*, 5 MEALEY'S LITIG. REP. CLASS ACTIONS 22, 23 (2005) ("The class action crisis is rooted in the enactment of the 1966 amendment to Federal Rule of Civil Procedure 23.").

18. *See, e.g.*, Epstein, *supra* note 17, at 477–78 (criticizing "the real and persistent danger of distortion through aggregation"); Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427, 439 (2006) ("[S]ome judges let the tail wag the dog; class actions are regularly certified when the individualized issues predominate, simply by structuring a trial plan in which the individualized issues are not tried at all."); Hooper, *supra* note 17, at 23 (arguing that the Class Action Fairness Act "is a fair and measured response to the current arbitrary, and in some cases unjust, tort system"); Mark Moller, *Controlling Unconstitutional Class Actions: A Blueprint for Future Lawsuit Reform*, POL'Y ANALYSIS, June 27, 2005, at 2, *available at* http://www.cato.org/pub_display.php?pub_id=3827 ("[A] second look at the class action procedure underscores that judges who manage those actions often change the law, arbitrarily, for the benefit of plaintiffs.").

19. Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1715 (2000) (prevailing sense among some practitioners is that in Gulf states "judges are more than willing to certify almost anything that walks through the courtroom doors"); John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, CIV. JUST. REP., July 2002, *available at* www.manhattan-institute.org/pdf/cjr_05.pdf (documenting status of Madison County, Illinois, as a magnet jurisdiction for class actions).

20. Ted Frank, *The Class Action Fairness Act Two Years Later*, LIABILITY OUTLOOK, March 2007, at 1, *available at* http://www.aei.org/docLib/20070327_Liability.pdf.

pressure on defendants where none would otherwise exist.[21] Rogue Illinois trial courts issued illegitimate multi-billion dollar judgments against State Farm[22] and Philip Morris[23] before the Illinois Supreme Court stepped in. But Geoghegan breezes over all of this.

Geoghegan's respect for the Rule of Law also yields when it leads to individual case results he does not like. He offers an extensive anecdote involving a Workers Adjustment and Retraining Notification Act[24] (WARN Act) claim against a meat-packing factory that was effectively shut down by the United States Department of Agriculture (USDA).[25] As Geoghegan tells it, he represented union workers who did not get sixty days'

21. *Id. See In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015–16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."); West v. Prudential Securities, Inc., 282 F.3d 935, 937 (7th Cir. 2002) (discussing "[t]he effect of a class certification in inducing settlement to curtail the risk of large awards"); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2001) (holding that class certification may induce a substantial settlement even if the customer's position is weak); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995) (noting extensive settlement pressure placed on defendants by class actions); Epstein, *supra* note 17 (discussing problem of coercive settlement pressure from aggregation); Frank, *supra* note 18 at 440 (criticizing "the too-real possibility of abuse of the conjunction of the consumer fraud laws and the class-action mechanism to blackmail a defendant into settling a case rather than risk the small chance of a bankrupting judgment"); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 119–20 (1973) ("[T]he possible consequences of a judgment [in a class action case] to a defendant are so horrendous that these actions are almost always settled."). S*ee also* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8 (1971) (defendants faced with massive [class action] litigation will invariably choose to settle rather than litigate); *id.* at 9 ("Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail."); Ted Frank, *Arbitrary and Unfair*, Wall St. J., May 31, 2007, at A14 (noting ability of plaintiffs' attorneys to profit mightily from erroneous class certification by offering to settle for pennies on the dollar of a gigantic claim); Ted Frank, *Enron: Extortion, Interrupted*, N.Y. Sun, Jan. 23, 2008 ("Even a defendant who believes it has a 90% chance of prevailing in a trial over complex financial instruments is hard-pressed to refuse the opportunity to escape the 'gallows.'. . . [T]he expense of litigation and the risk to a defendant of a mistaken legal judgment means that even a meritless suit has settlement value."); George L. Priest, *Class Warfare*, WALL ST. J., May 5, 2003, at A14 ("[I]f a class can be certified that is massive enough, even defendants with a strong case can be bludgeoned into a huge payout.").

22. Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005) (vacating $1.05 billion judgment).

23. Price v. Philip Morris Inc., 848 N.E.2d 1 (Ill. 2005) (vacating $10.1 billion judgment).

24. 29 U.S.C. §§ 2101–09 (2006).

25. GEOGHEGAN, *supra* note 6, at 63–66.

notice of the plant closing against a plant owner who claimed that the closing was unforeseeable.[26]

The defendant won at the trial level on a summary judgment motion, though Geoghegan was able to reverse it on appeal.[27] Geoghegan concludes that conservatives (and Clinton) have undone the Rule of Law through deregulation to the point that a defendant could make such a claim.[28]

Geoghegan appears to be referring to *Pena v. American Meat Packing Corp.*,[29] but his account is a caricature of the facts and the defendant's argument. The USDA halted production and ordered expensive destruction of meat that it had previously approved; it did not shut down the plant.[30] Between October 31 and November 15 of 2001, the plant operator made extensive efforts to improve sanitation at the plant.[31] The plant was indirectly shut down once negotiations with the USDA revealed that the amelioration to meet USDA standards was financially infeasible; before that date, the defendant claimed, it had reasonably expected that it could negotiate a resolution with the USDA that would permit it to keep the plant open.[32] WARN Act regulations explicitly contemplated that "[a] government ordered closing of an employment site . . . may be an unforeseeable business circumstance" qualifying for an exemption from strict WARN Act requirements[33] and that "depending on the length of the notice given, a claim that [indirect government] closings qualify for reduced notice under the unforeseeable business circumstances exception may be available."[34] Thus, Geoghegan's clients could not win when they moved for summary judgment.

Perhaps Geoghegan wishes to argue that the WARN Act should not have such a fact-bound exception to the sixty-day

26. *Id.* at 64 ("He had an argument: 'I'm in the business, and they never enforce the law.' Never. That was his claim.").

27. *Id.* at 64–65.

28. *Id.* at 64.

29. 258 F. Supp. 2d 864 (N.D. Ill. 2003), *rev'd*, 362 F.3d 418 (7th Cir. 2004).

30. *Id.* at 868.

31. *Id.* at 868–69.

32. *Id.* at 869.

33. 20 C.F.R. § 639.9(b)(1) (2004).

34. Pena v. Am. Meat Packing Corp., 362 F.3d 418, 421 (7th Cir. 2004) (quoting 54 Fed. Reg. 16,042, 16,053–54 (April 20, 1989)).

notice provision.[35] But that is a public policy argument about what legislation Congress should pass, rather than an argument about the application of the Rule of Law. The Rule of Law requires courts to allow defendants to rely upon a legal defense provided for in the regulations and to let juries decide these issues rather than summarily ruling for Geoghegan's client. (If Geoghegan is arguing that the Rule of Law violation comes because the regulations contradicted the statute, he never says so in the book.) And contrary to Geoghegan's claims that businesses are increasingly unregulated,[36] this meatpacking plant was shut down because of new rules regarding sanitation requirements for meat and poultry establishments issued in January 2000.[37]

Geoghegan laments the unanimous decision in *Marquette National Bank v. First of Omaha Services Corp.*[38]—"Oh, Justice Brennan! How could he do this?"—without providing any legal (as opposed to policy) argument for a contrary decision.[39] Similarly, Geoghegan is unhappy with courts that refused to expand the law of product liability or public nuisance to cover misuse of handguns in response to suits he and others brought to regulate handguns.[40] Never mind that to do otherwise would

35. Of course, better still would be to have no WARN Act at all. John C. Alexander & Michael F. Spivey, *The Impact of the WARN Act on Firm Value*, 37 Q. REV. ECON. & FIN. 905 (1997); James J. Kilpatrick, *Plant-Closing Bill is a Bad Idea*, ST. PETERSBURG TIMES, July 13, 1988 at 17A; *Text of Reagan's Statement: Plant Closing Bill Enacted without President's Signature*, 46 CONG. Q. WKLY. REP. 2226, 2226 (1988) ("Federal law, unlike negotiations between labor and management, cannot anticipate the variety of individual circumstances faced by workers and firms. Federal laws like this one are counterproductive."). Recent proposals in the Senate are going in the opposite direction. FOREWARN Act of 2007, S. 1792, 110th Cong. (2007) (expanding notice requirement to 90 days and requiring double back pay for violations). Geoghegan's fondness for tort actions under the WARN Act is ironic, given his complaint elsewhere in the book that tort has replaced contract and contractual negotiations between labor and management. *See infra* Section I.C.

36. GEOGHEGAN, *supra* note 6, at 58–70.

37. *Pena*, 362 F.3d at 422.

38. 439 U.S. 299, 301 (1978) (holding that under the National Bank Act, a national bank may charge interest at the rate allowed by the laws of the State where the bank is chartered).

39. GEOGHEGAN, *supra* note 6, at 120–22.

40. GEOGHEGAN, *supra* note 6, at 76–78. Geoghegan's suit was *Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004) (unanimously rejecting public nuisance claims against handgun makers), which was decided on the same day as *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (same). *Accord* People v. Sturm, Ruger & Co., 309 A.D.2d 91 (N.Y. App. Div. 2003).

be lawless;[41] Geoghegan wants his preferred policy results, to the point of bemoaning juries that "don't want to bash the rich."[42] Simply following the law is not good enough.

Geoghegan calls for following the consensus of other republican nations on questions such as the death penalty. (Whether Geoghegan would be willing to surrender American exceptionalism for, say, abortion rights[43] is left unanswered.) But the application of foreign law again violates Geoghegan's own principles of democracy and the Rule of Law: on what constitutional grounds can American judges effectively write and adopt a unilateral treaty with a foreign nation governing American law when neither the Senate nor the President has ratified it?[44] At least there is one point in the book where Geoghegan honestly acknowledges that the judicial activism of a "living constitution" absent from the text of the document violates the concept of the Rule of Law—but even there, he shrugs his shoulders and is willing to let the Rule of Law slide.[45]

B. *A Shifting Definition of Consent*

Geoghegan conspicuously opposes a Fareed Zakaria book[46] that he characterizes (perhaps unfairly) as calling for more decision-making by elites, rather than democracy.[47] Geoghegan thinks that the problem is the opposite: "*lack* of democracy undermines . . . the Rule of Law."[48] But Geoghegan's faith in the value of democratic institutions over elites is exhausted well before the end of the book. We have already seen Geoghegan seek to regulate handguns through litigation rather than

41. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 555–57 (2006); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984).

42. GEOGHEGAN, *supra* note 6, at 138.

43. *Cf.* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM & MARY L. REV. 743, 751 (2005) ("[T]he United States is one of only six countries worldwide that allows 'abortion on demand until the point of viability.'") (quoting Roper v. Simmons, 543 U.S. 551 (2005)).

44. Calabresi & Zimdahl, *supra* note 43; Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 229–30 (2006).

45. GEOGHEGAN, *supra* note 6, at 165–68.

46. FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD (2003).

47. GEOGHEGAN, *supra* note 6, at 9.

48. *Id.* at 11.

through democratic lawmaking,[49] and his frustration that courts will not impose results that the democratic process has rejected is never tempered by his supposed respect for democracy.

By Chapter 5, he is celebrating judges who legislate the use of the public fisc[50] and criticizing conservatives who had suggested that this was beyond the scope of the judicial power.[51] Democracy on such matters as taxation for local education should be surrendered to a mandatory equalization of schools decided by the Supreme Court.[52] Per Geoghegan, government institutions (or unions) should make paternalistic choices for people about their employment, contractual, banking, and consumer relationships[53]—and Geoghegan never makes it clear why he is willing to trust the masses with democratic decision-making when he feels it necessary to dictate what voluntary day-to-day economic decisions individuals can or cannot make for themselves.

Geoghegan worries about civic disengagement,[54] though evidence is scant that Americans are less engaged than they used to be,[55] and Geoghegan is forced to resort to the unlikely complaint that twelve million undocumented workers and a number of ex-felons are not allowed to vote.[56] He also complains that material possessions in the middle class—"more iPods, video games, and TV"—have created political apathy,[57] a

49. *Id.* at 76–78. *See supra* text accompanying notes 40–42.

50. *Id.* at 73.

51. *Id.* at 75. *See, e.g.*, MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS AND HOW IT COULD HAPPEN 76–86, 119–32 (1999); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000); Michael S. Greve, *Terminating School Desegregation Lawsuits*, 7 HARV. J.L. & PUB. POL'Y 303 (1984). Of course it was not just conservatives who found the judicial abuse of injunctions and consent decrees problematic. *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

52. GEOGHEGAN, *supra* note 6, at 176–77. *Compare, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding that the Equal Protection Clause does not require strict scrutiny of local funding decisions within a state), *with* Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50 (N.Y. 2006) (interpreting state constitution to require judicial intervention to increase funding for education).

53. GEOGHEGAN, *supra* note 6, at 68–70 (payday loans); *id.* at 120–22 (credit card rate caps); *id.* 226–27 (employment law).

54. *Id.* at 16–17, 139–41.

55. EVERETT CARLL LADD, THE LADD REPORT 54–60 (1999) (group participation has not declined); *id.* at 63–65 (volunteering and social service activities have increased); *id.* at 102–05 (politics participation has increased or remained unchanged).

56. GEOGHEGAN, *supra* note 6, at 17, 220–22.

57. *Id.* at 184 (describing material possessions as "distractions" that make it harder for people to figure out what is in their interests).

contradiction to his earlier claim that we are materially less well off than previous generations[58] and a revealing admission of Geoghegan's indifference to individuals' personal preferences.[59] Geoghegan is especially surprising with a claim right out of *Slouching Towards Gomorrah*[60] that "hip-hop and rap" from "rage against civic life" by the convicted has caused civic disengagement in "the dorm rooms of Harvard and Yale,"[61] but Geoghegan perhaps avoids trouble for himself by never following up on this throwaway jeremiad.

Geoghegan delves questionably into larger questions about constitutional structure. Others deal far better with the political questions presented by the two-senators-per-state violation of the one-person-one-vote principle; the *de facto* supermajority requirement of the filibuster; the Electoral College; and gerrymandering.[62] These topics are far afield of Geoghegan's thesis and will thus remain outside this review. But it is curious that Geoghegan thinks these basic questions of constitutional and political structure are really issues about which the right gets its way over objections from left-wing majorities. After all, while Republicans have certainly engaged in gerrymandering,[63] Congressional Democrats—working with labor unions—helped to block California Governor Arnold Schwarzenegger's antigerrymandering referendum to protect their safe seats.[64]

58. GEOGHEGAN, *supra* note 6, at 16 ("American GDP soars, productivity soars, yet income goes down."). *See id.* at 222 ("It's hard to say whether immigration has driven down the 'market' wage, or depressed wages in a purely economic sense."); *see infra* Section II.A.

59. A similar rant about iPods and "the kids out there in the fake Irish bars, in all the Starbucks" appears later in the book but placed in a fictional Justice Kennedy's mouth. GEOGHEGAN, *supra* note 6, at 219. One wonders if Geoghegan noticed that he holds the same crotchety get-off-my-lawn opinions as his Justice Kennedy caricature.

60 . ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 123–25 (1996).

61. GEOGHEGAN, *supra* note 6, at 18.

62. *Compare, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (arguing for greater scrutiny of undemocratic aspects of American constitutional structure), *with* Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971 (2007) (critiquing arguments for "democratizing" U.S. Constitution).

63. LULAC v. Perry, 548 U.S. 399 (2006).

64. *See* Christian Berthelsen, *Group Backing Remap Initiative Caught up in Donations Dispute*, S.F. CHRON., Oct. 7, 2005, at B3 (quoting Democratic Party Congressional leader Nancy Pelosi as saying "I am very committed to defeating Proposition 77, and I am raising money to defeat it"); David M. Drucker, *Reform Advocates Retain Hope; Losses Won't Stall Redistricting Push*, ROLL CALL, Nov. 8, 2005, *available at* http://www.rollcall.com/issues/51-48/politics/11153-1html (discussing role of unions

Geoghegan complains that filibusters squelched a number of left-wing proposals, but they have been used by the left as well to block judicial appointments,[65] antiabortion laws,[66] asbestos litigation reform,[67] medical malpractice reform,[68] and, for years, class action reform,[69] and many other conservative proposals.[70] Given Geoghegan's intermittent affinity for democracy and his failure to recognize the filibuster as a two-way street, it is unclear how principled his ideas for political reform are and how much they are intended to be instrumental to the questionable political goal of making America like "a European social democracy."[71] The discussion's dorm-room bull session ethos is exacerbated by Geoghegan's failure to acknowledge that Article V of the Constitution makes it effectively impossible to amend the document to deprive any state of its equal suffrage in the Senate.[72] He also amateurishly and incorrectly claims that in 1975 it only took "a simple majority" to pass a bill and it was the streamlining of the cloture rule "in 1976" that created the modern de facto supermajority requirements.[73]

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in defeating Proposition 77); John Wildermuth, *Incumbents Team Up to Oppose Schwarzenegger on Prop. 77*, S.F. CHRON., Aug. 26, 2005, at B1.

65. Melanie Kirkpatrick, *And the nominees are…*, WALL ST. J., Nov. 15, 2004, at A23; Byron York, Another Democratic Filibuster, NATIONAL REVIEW ONLINE, Mar. 28, 2003, http://www.nationalreview.com/york/york032803.asp; Byron York, *Why Estrada Quit*, NATIONAL REVIEW ONLINE, Sept. 4, 2003, http://www.nationalreview.com/york/york090403c.asp.

66. Carl Hulse, *Anti-Abortion Bill Stalls; Session Nears End*, N.Y. TIMES, Dec. 6, 2006, at A36.

67. Ted Frank, *Making the FAIR Act Fair*, LIABILITY OUTLOOK, March 2006, *available at* www.aei.org/docLib/20060303_060303LOFinal_g.pdf (bill fails on procedural vote despite support of 58 senators).

68. *Malpractice Legislation Remains Stuck in the Senate*, N.Y. TIMES, April 7, 2004, at A24; Sheryl Gay Stolberg, *Senate Refuses to Consider Cap on Medical Malpractice Awards*, N.Y. TIMES, July 9, 2003, at A20; Sheryl Gay Stolberg, *Senate Rejects Award Limits in Malpractice*, N.Y. TIMES, May 8, 2006, at A25.

69. *See* Sheryl Gay Stolberg, *Class-Action Legislation Fails in Senate*, N.Y. TIMES, Oct. 23, 2003, at A23 (documenting cloture vote that failed despite support from 59 senators).

70. *See, e.g.*, Felicity Barringer, *U.S. Reverses Accord and Opens 389,000 Acres in Alaska to Explore for Oil*, N.Y. TIMES, Jan. 13, 2006, at A16; Sheryl Gay Stolberg & Richard W. Stevenson, *Bush Wants New Effort on Bolton Vote in Senate*, N.Y. TIMES, June 22, 2005, at A8; Carl Hulse, *Senate Blocks Energy Bill; Backers Vow to Try Again*, N.Y. TIMES, Nov. 22, 2003, at A1.

71. GEOGHEGAN, *supra* note 6, at 194.

72. U.S. CONST. art. V ("[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate.").

73. GEOGHEGAN, *supra* note 6, at 191–92. Geoghegan is both incorrect about the history and his claim that the filibuster was used primarily by civil rights opponents. From 1806 to 1917, there was not even cloture, and Senators had the right of unlimited debate. Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means To Over Come The Filibuster*, 28 HARV. J.L. & PUB.

C. *Honoring Contracts*

Geoghegan claims that the old system of contract in employment law has been replaced by a system of tort.[74] Many would agree (and not just in employment law).[75] But Geoghegan then incoherently specifies that the "old" system of contract has been replaced by employment-at-will.[76] The blunder is obvious: employment-at-will is still a contractual relationship, just with different rights and obligations, albeit not those Geoghegan prefers.

Geoghegan's claim that the United States did not know "'employment-at-will' in anything like its current, universal, and highly arbitrary form" until the 1970s[77] is stunningly ignorant of American history.[78] Forty-nine of the fifty states have always had a common-law rule of employment-at-will, and the fiftieth, Montana, did not adopt a rule to the contrary until 1987.[79] The largest legal exception to at-will employment did not exist until

POL'Y 205, 215–17 (2004). Cloture was created by the adoption of Senate Rule 22 in 1917 in response to the Willful Eleven, led by Progressive Senator Robert La Follette, who had been systematically filibustering World War I financing. *Id.* at 217–19. The filibuster was used famously by Huey Long for populist (as well as patronage) reasons in the 1930s. *E.g.*, Scott Shane, *Henry Clay Hated It. So Does Bill Frist*, N.Y. Times, Nov. 21, 2004, § 4, at 5 (describing Long's 15-hour filibuster in 1935). Such filibusters inspired the climactic scene in Frank Capra's 1939 "little guy" film, MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939) ("Half of official Washington is here to see democracy's finest show, the filibuster. The right to talk your head off! The American privilege of free speech in its most dramatic form!"). In 1949, the Senate actually made filibusters easier by changing the cloture rule to require not merely two-thirds of Senators present, but two-thirds of the Senators "duly chosen and sworn." GOLD & GUPTA, *supra* note 73, at 229–30. The 1975 (not 1976, as Geoghegan has it) amendments to the cloture rules made it easier to obtain cloture and shut down filibusters, rather than more difficult. *Id.* at 252–60. Geoghegan's choice of 1975 as a high point of majoritarian Senate behavior is especially strange, and not one held contemporaneously. *Id.* at 252 n.307 (citing 94 CONG. REC. 1147 (1975) (statement of Sen. Kennedy) ("Half of all the cloture votes since 1917 have taken place in the past 5 years.")).

74. GEOGHEGAN, *supra* note 6, at 25–26.

75. *E.g.*, GRANT GILMORE, THE DEATH OF CONTRACT (1974) (bemoaning erosion of contract law).

76. GEOGHEGAN, *supra* note 6, at 27–29.

77. *Id.* at 27.

78. *See, e.g.*, Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 518–19 (1884) ("[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*."), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 544 (1915); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947–50 (1984) (discussing "retreat" of at-will employment principle). *Cf. also* UPTON SINCLAIR, THE JUNGLE (1906) (dramatizing plight of workers in early twentieth-century America).

79. MONT. CODE ANN. 39-2-904. Even Montana's law is riddled with exceptions that fall far short of Geoghegan's ideal. *See, e.g.*, MONT. CODE ANN. 39-2-912.

1978, when Congress passed a law eliminating at-will status for millions of federal civil service employees.[80] Even in Geoghegan's golden era of the 1960s, activist law professors were complaining of the prevalence of the employment-at-will rule.[81] In fact, the defense of employment-at-will has never been narrower in the United States than it has been today, both as courts over the last forty years have carved out substantial exceptions to employment-at-will common law doctrine[82] and as Congress and state legislatures have expanded the ability to sue over adverse employment actions.[83]

Geoghegan's apparent ignorance of basic economic concepts does further damage to his argument. Making it harder to fire workers is a nonpecuniary benefit to workers that raises costs to employers. Workers may well prefer income to job security, and those who are priced out of the market entirely because of the regulation are worse off still. This dynamic raises unemployment rates in European nations where employers find it legally difficult to close plants or dismiss employees.[84] If over-expansion cannot be legally remedied, it is safer not to hire in the first place. The same has turned out true in the United States. There is an inverse relationship between wages and state adoption of exceptions to the common law doctrine of employment-at-will.[85]

80. 5 U.S.C. § 7513(a) (2006).

81. *E.g.*, Lawrence E. Blades, *Employment-at-will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). *See also* Epstein, *supra* note 78, at 948–49 n.4 (citing articles).

82. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L. J. 653, 654 (2000); Epstein, *supra* note 78, at 947–50; Richard Edwards, *Using the Market to Find Common Ground*, REGULATION: THE REV. OF BUS. & GOV'T (Fall 1993), *available at* http://www.cato.org/pubs/regulation/reg16n4f.html.

83. EPSTEIN, SIMPLE RULES, *supra* note 1, at 151–93. *See generally*, EPSTEIN, FORBIDDEN GROUNDS, *supra* note 1 (discussing expansion of causes of action for employment litigation); OLSON, EXCUSE FACTORY, *supra* note 1 (same).

84. *See* Bureau of Labor Statistics, Unemployment Rates in Ten Countries, Civilian Labor Force Basis, Approximating U.S. Concepts, Seasonally Adjusted, 1995–2007, ftp://ftp.bls.gov/pub/special.requests/ForeignLabor/flsjec.txt (last visited May 20, 2008) (recording unemployment rates in France and Germany approximately twice those in United States).

85. Timothy M. Shaughnessy, *How State Exceptions to Employment-at-Will Affect Wages*, 24 J. LABOR RESEARCH 447 (2003). *See also* JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY, 35–45 (1992), *available at* http://www.rand.org/pubs/reports/2007/R3989.pdf (finding that a decline in employment resulting from indirect costs of wrongful termination suits is roughly equivalent to the effect of a 10% wage increase); U. S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 50 (1994) ("[A]s the firm's employment law expenses grow, less resources are available to provide wage [sic] and benefits to workers.").

Similar results apply to statutory restrictions on employment-at-will: evidence indicates that the Americans with Disabilities Act, in the name of creating employment rights for the disabled, made it less likely for employers to hire the disabled because the increased litigation risk priced numerous disabled workers out of the market.[86]

Geoghegan objects to other voluntary transactions, such as the liberalization of credit after *Marquette National Bank*,[87] legal releases,[88] and payday loans, the last with an aggressive comparison of the practice to selling heroin.[89] For payday loans, Geoghegan again complains about deregulation, when in fact regulation has been increasing,[90] with questionable welfare effects on the consumers supposedly protected.[91] Geoghegan

86. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001); Thomas DeLeire, *The Americans with Disabilities Act and the Employment of People with Disabilities*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds., 2003); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693 (2000); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 273–76 (2000). *But see* Samuel R. Bagenstos, *Has the Americans With Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 529 (2004) (defending ADA but saying "I find it hard to disagree with the claim that the statute (at least initially) imposed some negative pressure on employers' decisions to hire some people with disabilities"). *Cf. also* Shaughnessy, *supra* note 85; DERTOUZOS AND KAROLY, *supra* note 85; Jonathan Klick, et al., *The Effect of Contract Regulation: The Case of Franchising* (George Mason Law & Economics Research Paper No. 07-03), *available at* http://ssrn.com/abstract=951464 (finding that employment in franchise industries is significantly reduced when states enact restrictions on franchisor termination rights and the effect is larger when states limit the ability to contract around these restrictions).

87. GEOGHEGAN, *supra* note 6, at 121–26. For an alternate reading on the impact of Marquette, see Todd Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79 (2000).

88. GEOGHEGAN, *supra* note 6, at 104–08.

89. *Id.* at 68–70.

90. *E.g.*, FDIC, Payday Lending Programs: Revised Examination Guidance 2005, http://www.fdic.gov/news/news/financial/2005/fil1405.pdf (last visited May 20, 2008) (restricting number of payday loans a borrower may obtain in a year).

91. Donald P. Morgan & Michael Strain, Payday Holiday: How Households Fare After Payday Credit Bans (Federal Reserve Bank of N.Y., Working Paper No. 309, 2008), *available at* http://www.newyorkfed.org/research/staff_reports/sr309.pdf (finding that Georgia's 2004 and North Carolina's 2005 abolition of payday loans increased Chapter 7 bankruptcy declarations in those two states); Adair Morse, Payday Lenders: Heroes or Villains? (February 2007) (unpublished manuscript, *available at* http://ssrn.com/abstract=999408). The solution of capping interest rates proposed by Democrats in Congress and by Geoghegan, *supra* note 6, at 232–33, would effectively abolish payday lending. Paige Skiba & Jeremy Tobacman, The Profitability of Payday Loans (Dec. 10, 2007) (unpublished manuscript, *available at* http://www.economics.ox.ac.uk/members/jeremy.tobacman/papers/profitability.pdf) ("Despite charging effective annualized rates of many thousand percent, we find lenders' firm-level returns differ little from typical financial returns. The data are consistent with an interpretation that payday lenders face high per-loan and per-store fixed costs in a competitive market."); Lee Davidson, *Payday Lenders Tells Military 'No'*, DESERET MORNING

surprisingly suggests a quasi-market solution: charter a state-run bank to offer capped-interest loans "to people of good character."[92] What politically appointed bank officer doling out taxpayer money is going to risk telling someone they are not of good character is never made clear. Nor does Geoghegan explain why, if such banks undercharging payday lenders are financially viable, a George Soros or Warren Buffett could not float the funds to create one or, if they are not financially viable, why taxpayers should subsidize such loans.

D. *Geoghegan's Panacea*

Geoghegan recognizes that unions contract around the employment-at-will default rule,[93] but he wrongly concludes that the declining unionization led to the employment litigation explosion.[94] The *post hoc, ergo propter hoc* reasoning falls to scrutiny. For one thing, the alternative hypothesis for the correlation—that the change in the default floor of employment laws to permit litigation over employment decisions reduced the appeal of unions to workers—is at least as plausible, and is supported by an extensive academic literature.[95]

Economic theory supports the alternative contention that greater default legal protections make unions unnecessary for workers. Workers deciding whether to unionize have to make a decision whether the marginal benefits of unionization outweigh the costs of union dues and having to interact with union officials. When labor and employment laws raise the floor of working conditions and remedies for termination,

NEWS (Salt Lake City), Oct. 2, 2007, at A1 ("'At 36 percent annual percent rate, the total fees we could charge are $1.38 per $100 for a two-week loan. That is less than 10 cents a day,' [Utah Consumer Lending Association spokesman Cort] Walker said. 'Payroll advance lenders could not even meet employee payroll at that rate, let alone cover other fixed expenses and make a profit.'… 'This law will force the members of the military to choose between more expensive alternatives like bounced checks or overdraft protections and even unregulated and more risky alternatives, like offshore Internet lending.'").

92. GEOGHEGAN, *supra* note 6, at 233.

93. *Id.* at 26.

94. *Id.* at 15, 27.

95. Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 491 & n.6 (2001). *See also* OLSON, EXCUSE FACTORY, *supra* note 1 at 236–37 ("[M]any union leaders uneasily sense that each new right-to-sue law strengthens the tendency for the private bar to compete with them in providing the service of extracting concessions from management . . . .").

unionization loses its comparative advantage. But Geoghegan does not address this possibility.

It is quite clear that Geoghegan's idea that the growth in employment law remedies comes from the decline in unionization is not supported by the evidence. The one sector where unionization has resisted the trend seen throughout the rest of the United States is the same sector where the power to litigate over employment disputes is at its highest. While public-sector unionization rates have remained stable between 1974 and 2000,[96] public-sector employees also have the greatest ability to use the litigation system in response to adverse employment actions, with the ability to file not just run-of-the-mill discrimination claims but also civil-service-specific causes of action[97] and constitutional claims under the First Amendment[98] or Due Process Clauses.[99]

The dramatic increase in employment litigation cases between 1990 and 2000[100] is much better explained by a legislative expansion of civil causes of action through the Civil Rights Act of 1991[101] and the Americans with Disabilities Act[102] than by the decline of unions between 1953 and 1990.[103] The presence of

96. *See* Gerald Friedman, Labor Unions in the United States, http://eh.net/encyclopedia/article/friedman.unions.us (last visited May 20, 2008) (listing 1974's public-employment unionization rate at 38% and 2000's at 37.5% in Table 4).

97. *E.g.*, Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended in 29 U.S.C.), (prohibiting, *inter alia*, federal executive branch employment discrimination against people with disabilities). *Cf.* Prewitt v. U.S. Postal Serv., 662 F.2d 292, 301–04 (5th Cir. 1981) (discussing in detail the 1978 amendments to the Rehabilitation Act creating private right of action).

98. *E.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (creating private right of action under First Amendment for government employees against retaliation for speech in some circumstances).

99. *E.g.*, Skelly v. State Personnel Bd., 539 P.2d 774 (Cal. 1975) (holding that the California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment that is protected by due process).

100. Federal employment and accommodations civil rights civil case filings increased from 8,637 to 22,316 between 1990 and 2000. U. S. Courts, Table 4.4: U. S. District Courts. Civil Cases Filed by Nature of Suit, http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf (last visited May 20, 2008).

101. 42 U.S.C. § 1981 (2006).

102. 42 U.S.C. § 12101 (2006).

103. Geoghegan acknowledges the Civil Rights Act of 1991 but also claims without evidence that the "corporate downsizing of the 1990s" is also to blame. GEOGHEGAN, *supra* note 6, at 30. In fact, unemployment rates decreased substantially between 1990 and 2000, from 5.6% to 4.0%. Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, www.bls.gov/cps/prev_yrs.htm (last

collective-bargaining remedies has not acted as a substitute for the attractive jackpot awards these statutes promise. Notwithstanding Geoghegan's claims that employment litigation arises from the discontent caused by lack of unionization, union members are regularly plaintiffs in cases alleging disabilities discrimination,[104] race discrimination,[105] sex discrimination,[106] age discrimination,[107] sexual harassment,[108] and racial harassment.[109] (Indeed, there is a long history of unions and union members actively participating in racial and sexual discrimination and harassment.)[110] Geoghegan is well aware of this: he and his law firm have represented union-member plaintiffs who have sued under Title VII or state anti-discrimination laws.[111] Moreover, different industries and different states have wildly different rates of unionization without similarly different litigation rates; Europe has also faced substantial declines in unionization rates without a litigation

visited May 20, 2008). Note that the number of federal employment civil rights civil case filings decreased between 2000 and today, even as unionization rates have continued to decline, but, as Geoghegan notes, such declines can be deceptive because the number of plaintiffs in an individual civil-case filing is not tracked. GEOGHEGAN, *supra* note 6 at 30. Indeed, plaintiffs' lawyers have made a tactical decision to bring fewer individual employment cases and more class actions. Roger Parloff, *The War Over Unconscious Bias*, FORTUNE, Oct. 15, 2007, at 90. This strategy has been rewarded by dubious class certifications countenanced by the Ninth Circuit Court of Appeals. Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1244–49 (9th Cir. 2007) (Kleinfeld, J., dissenting); Frank, *supra* note 20 (criticizing class certification in *Dukes*); Steven Malanga, *The Tort Plague Hits Wal-Mart*, CITY J., June 24, 2004, http://www.city-journal.org/html/14_3_sndgs08.html (same); Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, REG: THE REV. OF BUS. & GOV'T., Summer 2007 at 50, *available at* http://www.cato.org/pubs/regulation/regv30n2/v30n2-6.pdf (same).

104. *E.g.*, Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 72 (1998); Fenny v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 710 (8th Cir. 2003).

105. *E.g.*, Despres v. City of San Antonio, No. 05–51611, 2006 WL 3697207, at *1 (5th Cir. Dec. 15, 2006).

106. *E.g.*, Robinson v. Healthtex, Inc., No. 99–2023, 2000 WL 691053, at *1 (4th Cir. May 30, 2000).

107. *E.g.*, Carson v. Giant Food, Inc., 175 F.3d 325, 327 (4th Cir. 1999).

108. *E.g.*, Reynolds v. USX Corp., No. 01-3941, 2003 WL 146367, at *1 (3rd Cir. Jan. 15, 2003).

109. *E.g.*, Woods v. Graphic Comm'ns, 925 F.2d 1195, 1197–98 (9th Cir. 1991).

110. *E.g.*, Conley v. Gibson 355 U.S. 41, 42 (1957) (racial); Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73 (1st Cir. 2007) (gender); Reynolds, 2003 WL 146367, at *1 (gender); Woods, 925 F.2d at 1197–98 (racial); Wilson v. Myers, 823 F.2d 253 (8th Cir. 1987) (racial); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001).

111. *E.g.*, Ill. J. Livingston Co. v. Ill. Human Rights Comm'n, 704 N.E.2d 797 (Ill. App. 1 Dist. 1998); Jones v. GES Exposition Servs., Inc., No. 02 C 6243, 2004 WL 1151588 (N.D. Ill. Apr. 16, 2004).

explosion.[112] To blame the employment litigation explosion on the Taft-Hartley Act seems to be wishful thinking by a critic of the latter.

Making unionization more common (against the will of workers through such measures as card-check in the mislabeled Employee Free Choice Act)[113] will not resolve the problem of workers using both unionization and inefficient litigation. And Geoghegan does not suggest solutions for how to move from the status quo world of the employment tort litigation explosion to one where disputes are resolved more easily and cheaply by unions and arbitration. But conservatives have done so: in 2000, Eugene Scalia proposed that it was a simple matter for the federal government to incentivize employers to recognize unions by exempting unionized companies from certain labor laws and permitting unions to negotiate their own safety and antidiscrimination rules with employers.[114] An employer could thus choose whether to accept federal regulation or union regulation, and might find it preferable to accept a union; workers may prefer the wage/conditions package the local union negotiated to the standards imposed by bureaucrats or legislators in Washington; both could avoid the expense of litigation by establishing alternative dispute resolution procedures to address these issues and share the savings. Both management and labor would be better off. For simply floating this trial balloon, Eugene Scalia faced rampant criticism at his confirmation hearing for the Department of Labor Solicitor and had his nomination blocked, requiring President Bush to use a recess appointment.[115]

Geoghegan blames employer disregard for labor laws for the decline of unionization but only in an *ipse dixit* way.[116] The lack

112. Thomas Fuller, *Power Ebbs at Europe's Unions*, INT'L HERALD TRIBUNE, Jan. 10, 2005, at 1 ("[T]he percentage of unionized workers has declined, especially among young people, in nearly every European country in recent years.").

113. H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007); Lawrence B. Lindsey, *Abrogating Workers' Rights*, WALL ST. J., Feb. 2, 2007, at A19.

114. Scalia, *supra* note 95.

115. Leigh Strope, *Democrats Line Up Against Bush Pick for Labor Post*, PHILADELPHIA INQUIRER, Oct. 3, 2001, at A6; Jim Burns, *Unions, Democrats Win One, Eugene Scalia Bows Out*, CNSNEWS, Jan. 8, 2003, http://www.cnsnews.com/Nation/archive/200301/archive.asp (follow "Unions, Democrats Win One, Eugene Scalia Bows Out" hyperlink).

116. GEOGHEGAN, *supra* note 6, at 13–15.

of support for his assertions makes it difficult to give the theory much weight.[117]

The deunionization argument is part of a larger argument made (if not especially developed) by Geoghegan,[118] and others, that regulation and litigation are invariable substitutes.[119] In other words, society must have a certain amount of intrusion into the affairs of others, and that can be accomplished by regulation (as in Europe) or litigation (as in the United States).[120] Certainly, regulation can occupy the field and formally preempt litigation, as in the case of workmen's compensation or the Federal Drug Administration's attempts to preempt failure-to-warn litigation that would otherwise interfere with the Administration's policy choices.[121] But nothing about that is

117. Indeed, many authors have persuasively rebutted the claim, but Geoghegan ignores the evidence. *E.g.*, Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991) (rebutting claims that employer illegality is substantially to blame for declines in unionization); *id.* at 954 n.7 (collecting studies attributing decline in unionization rates to "social and economic developments that are largely beyond the short-term control of particular unions or firms"); *id.* at 1006 (concluding "[T]he contention that increased employer lawlessness has been a major factor in American deunionization lacks adequate support. Moreover, there is no basis for concluding that the importance of such lawlessness for deunionization comes close to that of structural changes in the U.S. economy."); Leo Troy, *Market Forces And Union Decline: A Response To Paul Weiler*, 59 U. CHI. L. REV. 681 (1992) (identifying market forces and employee opposition for decline in unionization); *id.* at 682 ("[E]mployer opposition is at best marginal to the explanation of union decline."). For the contrary view, see PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

118. GEOGHEGAN, *supra* note 6, at 58–70.

119. *E.g.*, THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS (2002) (asserting that America's "litigious policies" promote the use of litigation in place of regulation and government programs in resolving disputes and implementing public policy); Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 385 (2007) ("Ex post accountability is the prerequisite for ex ante liberalization.").

120. *E.g.*, Matthew Yglesias, *Out of Control Lawsuits*, Mar. 23, 2007, http://www.matthewyglesias.com/archives/2007/03/out_of_control_lawsuits/ (last visited May 20, 2008) ("You can regulate or you can litigate; the less we have of the former, the more we need of the latter.").

121. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933–34 (Jan. 24, 2006). *See also* Brief for United States as Amicus Curiae, Motus v. Pfizer, Inc., 358 F.3d 659 (9th Cir. 2004) (Nos. 02-55372, 02-55498), 2002 WL 32303084 (Bush Administration's Federal Drug Administration arguing for preemption); RICHARD EPSTEIN, OVERDOSE: HOW EXCESSIVE GOVERNMENT REGULATION STIFLES PHARMACEUTICAL INNOVATION 201 (2006) (arguing that the Federal Drug Administration preemption is preferable to product liability litigation); Richard Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. TORT LAW art. 5 (2006) (arguing for increased deregulation, as well as arguing that federal preemption is preferable to state tort litigation).

ineluctable: it is certainly possible for legislation to increase regulation at the same time that it is expanding litigation.[122] And it is hardly the case that the litigation explosion is a response to deregulation. The litigation explosion between 1960 and today came at the same time that the amount of federal regulation ballooned;[123] notwithstanding Geoghegan's complaints about deregulation, the federal regulatory budget continues to grow.[124]

III. A COMEDY OF ERRORS

In one sense, the idea that it is the right that is responsible for the litigation explosion is absurd. Some quick inspection of the litigation industry reveals that the trial lawyer lobby devotes its money to political institutions on the left ranging from Public Citizen to the American Constitution Society to the Democratic Party.[125] If Geoghegan were correct that it is the right's devotion to limited government and free markets that has created the boom in litigation, then trial lawyers would be acting dramatically against their economic self-interest by failing to recognize where its bread is buttered and supporting the Federalist Society and the Republicans. But Geoghegan never addresses this paradox when making his counterintuitive claim.

Geoghegan makes a number of basic legal errors in his arguments. He incorrectly claims that charities do not file tax returns.[126] He asserts that "only the tort system saves us from a

122. *E.g.*, CPSC Reform Act of 2007, S. 2045, 110th Cong., (2007) (expanding regulatory authority and power of Consumer Product Safety Commission while purporting to limit federal preemptive power); BUTLER & RIBSTEIN, *supra* note 1, at 37–93 (noting expanded regulatory and litigation burden of Sarbanes-Oxley).

123. EPSTEIN, SIMPLE RULES, *supra* note 1, at 6–7.

124. JERRY BRITO & MELINDA WARREN, GROWTH IN REGULATION SLOWS: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2007 AND 2008, at 8 (2007), *available at* http://www.mercatus.org/repository/docLib/20070619_2008_Regulators_Budget.pdf (noting a $13.2 billion increase in real spending on federal regulatory activity between 2000 and 2008).

125. Olson, *The Lawsuit Lobby*, *supra* note 7; American Constitution Society, http://acslaw.org/node/5203 (last visited May 20, 2008) (listing several plaintiffs' law firms as sponsors of 2007 National Convention); Walter Olson, Dept. of ill-timed announcements, http://www.overlawyered.com/2006/05/dept-of-illtimed-announcements.html (last visited May 20, 2008) (quoting May 9, 2006 press release from leftist Drum Major Institute about indicted plaintiffs' law firm's establishment of Milberg Weiss Legal Fellowship).

126. GEOGHEGAN, *supra* note 6, at 48. *But see* I.R.C. § 6033 (2006) (requiring every organization exempt from taxation under § 501(a) to file an annual return stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws); IRS Form 990, http://www.irs.gov/pub/irs-pdf/f990.pdf (last visited May 20, 2008) (requiring

Three Mile Island"[127] when in fact the nuclear industry is protected by one of the earliest federal tort-reform immunities.[128] Geoghegan argues that "a study by the General Accounting Office authorized by a Republican Congress decided in 2003 that no big rise in jury verdicts was to blame [for increased medical malpractice expenses.]"[129] In fact, the study said precisely the opposite.[130] Geoghegan surely could have benefited from a research assistant. The book is unfettered by a single footnote, and largely avoids citing its sources in the text as well. As one relatively sympathetic reviewer notes, "It's more rant than reporting, like something Geoghegan wrote at night in between briefs and a stiff drink."[131] But the problems in *See You in Court* go beyond mere glitches in the publication process or failures of proofreading.

nonprofit organizations to provide a copy of their exemption application and the previous three years' annual information returns to anyone requesting them in person or in writing). *See also* I.R.C. § 6104(a)(1)(A) (2006) (requiring § 501(c) returns to be publicly available).

127. GEOGHEGAN, *supra* note 6, at 66.

128. Anderson-Price Atomic Energy Damages Act, 71 Stat. 576 (1957), *codified at* 42 U.S.C. § 2210 (creating no-fault liability and partial immunity from liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants). *See also* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (upholding constitutionality of Anderson-Price Atomic Energy Damages Act); Harold P. Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 MICH. L. REV. 479, 493–98 (1973) (discussing liability under the Anderson-Price Atomic Energy Damages Act).

129. GEOGHEGAN, *supra* note 6, at 94.

130. U. S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 4 (2003), *available at* http://www.gao.gov/new.items/d03702.pdf ("We found that the increased losses appeared to be the greatest contributor to increased premium rates"); *id.* at 15 ("Inflation-adjusted incurred losses decreased by an average annual rate of 3.7 percent from 1988 to 1997 but increased by 18.7 percent from 1998 to 2001."). Geoghegan similarly elides the results of a *New England Journal of Medicine* study out of the Harvard School of Public Health. David M. Studdert, *et al.*, *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENGLAND J. MED. 2024 (2006). Geoghegan recites several specific statistics, and then concludes, "Where there was no 'serious medical injury' or no 'serious medical error,' a patient rarely got anything, even in settlement." GEOGHEGAN, *supra* note 6, at 98. One is hard-pressed to find a good-faith reason for Geoghegan to switch from the use of numbers to the adjective "rarely." The Harvard study in fact found that 28% of patients who suffered no medical error received compensation (as did 16% of patients who sued without any medical injury), and that only 60% of cases filed involved medical error. Studdert, *supra* note 130, at 2028.

131. Mencimer, *supra* note 5. *Accord* Liptak, *supra* note 5 ("His book has no index, no list of sources. And many of his anecdotes use pseudonyms, for reasons Mr. Geoghegan does not explain, which undercuts their credibility. But I guess you don't need footnotes for a rant.").

A. *The Myth of the Rational Author*

Notwithstanding the title of the book, an extensive portion of it is taken up with Geoghegan's faulty attacks on free-market economic policies. *See You in Court* is thus better understood with the aid of Bryan Caplan's recent *The Myth of the Rational Voter: Why Democracies Choose Bad Policies.*[132] In *Myth*, Caplan explores four economic fallacies that infect political debate. Geoghegan commits three of them.

Geoghegan criticizes corporations for profiting;[133] the unspoken premise is that there is a fixed pie, and every dollar going to capital is a dollar that cannot go to labor. That the pie would be smaller if there were fewer opportunities for profit is a possibility that never sees ink. His unreasoned criticism of profit demonstrates the antimarket bias Caplan describes.[134]

Geoghegan protests that corporations reduce the size of their workforce, bemoaning the impact of downsizing on the economy.[135] Again, he fails to consider the alternative scenario: a corporation with an inefficiently large workforce will be unable to compete, and will go entirely out of business. Nor is there any thought given to the distinction between ex ante and ex post effects.[136] If businesses are unable to replace workers at will, the expected expense to flexibility has to be accounted for when making the original decision to hire and pay the worker. Fewer workers will be hired, and wages will be lower. Caplan would identify Geoghegan's argument as make-work bias.[137]

Geoghegan also suffers from what Caplan calls pessimistic bias.[138] Geoghegan regularly claims that Americans are worse off than before,[139] and concludes that free-market policies have made them so. But the premise that "incomes are down" or even

132. BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007).

133. GEOGHEGAN, *supra* note 6, at 21.

134. CAPLAN, *supra* note 132 at 30–36. *See also id.* at 31 (quoting JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 234 (1954) (speaking of "the ineradicable prejudice that every action intended to serve the profit interest must be anti-social by this fact alone")).

135. GEOGHEGAN, *supra* note 6, at 26.

136. *Cf.* WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 3–11 (2007) (primer on ex ante and ex post legal reasoning); Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 11–12 (1984) (discussing importance of ex ante and ex post decisionmaking).

137. CAPLAN, *supra* note 132, at 40–43.

138. *Id.* at 43–47.

139. GEOGHEGAN, *supra* note 6, at 16, 22, 222.

stagnated is false. The median hourly wage has increased 28% in the last thirty years once benefits are included.[140] Two-thirds of Americans who were children in the late 1960s have higher family incomes than their parents,[141] even though single-parent households have increased. Even aside from wages, the standard of living has increased tremendously in the last half-century. As Nicholas Eberstadt wrote:

> A wealth of evidence shows that those who are counted as poor today have dramatically higher living standards than their counterparts in the 1960s.
>
> In the early 1960s, the poorest fifth of American families were forced to devote nearly 30 percent of their expenditures to buying food; by 2004, the proportion was down to one-sixth of spending. Undernourishment and hunger were common among the most vulnerable elements of society forty years ago; today, by contrast, obesity is the main nutritional problem facing adult Americans, rich and poor alike. …
>
> In 2001, only about 6 percent of the country's poor households lived in "crowded" dwellings (homes with more than one inhabitant per room), compared with more than 25 percent in 1970, according to the Census Bureau. Today's poor households are more likely to have telephone service and television sets than even non-poor households in 1970; they are much more likely to have central air conditioning than the typical American home of 1980 and almost as likely to have a dishwasher. Moreover, according to a Department of Energy survey in 2001, most poverty households have microwaves, VCRs or DVDs, and cable television—conveniences unavailable in even the most affluent homes at the time the poverty rate measure was first released.
>
> In 1973, a majority of the households in the bottom fifth of income earners did not own a car. By 2003, nearly three-fourths of all poverty households had a car, truck, or van, and a rising fraction owned two or more such vehicles.

140. Terry J. Fitzgerald, *Has Middle America Stagnated? A Closer Look at Hourly Wages*, THE REGION, Sept. 2007, at 14, 58 *available at* http://www.minneapolisfed.org/pubs/region/07-09/wages.cfm. Nor is it true that those at the bottom of the economy are worse off. Even leaving aside the question of income mobility, "Wage growth rates at the 10th and 20th percentiles were only slightly below the median growth rates, increasing by 17 percent and 18 percent, respectively." *Id.*

141. JULIE B. ISSACS, THE ECONOMIC MOBILITY OF FAMILIES ACROSS GENERATIONS 1–2 (2007), *available at* http://www.economicmobility.org/assets/pdfs/EMP_FamiliesAcrossGenerations_ChapterI.pdf.

> For the affluent and the disadvantaged alike, life expectancy in America has risen significantly since the nation's poverty measures were first developed. The CDC's National Center for Health Statistics has found a broad improvement in national health conditions over the past four decades. Since 1965, for example, the U.S. infant mortality rate (the risk of death in the year after birth) has dropped by more than 70 percent. And regardless of the availability of health insurance, access to medical treatment has risen markedly for poorer Americans: children in poor families are more likely today to have an annual medical visit or checkup with a doctor than even non-poor children did just twenty years ago.[142]

142. Nicholas Eberstadt, *Why Poverty Doesn't Rate*, AEI: ON THE ISSUES 2 (Sept. 2006). *See also* Daniel T. Slesnick, CONSUMPTION AND SOCIAL WELFARE 88–121 (2001) (arguing wealth over time should be measured in terms of consumption); W. Michael Cox & Richard Alm, *You Are What You Spend*, N.Y. TIMES, Feb. 10, 2008, at WK14 ("If we look at consumption per person, the difference between the richest and poorest households falls to just 2.1 to 1. The average person in the middle fifth consumes just 29 percent more than someone living in a bottom-fifth household."); Diana Furchtgott-Roth, *Making Sense of Income Inequality*, THE AMERICAN, Oct. 26, 2007, http://www.american.com/archive/2007/october-10-07/making-sense-of-income-inequality/ ("Even when using only cash-income measures, over the past 25 years, more families have moved to upper-income brackets. In 1980, fewer than 40 percent of American families made over $50,000 per year in 2005 dollars. A quarter century later, 46 percent of families did. On average, households in all income brackets had more spending power in 2005 than they did in 1985. Households in the lowest quintile spent 8 percent more in real terms per person, while households at the top spent 10 percent more and households in the middle spent 6 percent more.") James Pethokoukis, The Myth of Stagnant Wages, http://www.usnews.com/blogs/capital-commerce/2007/9/20/the-myth-of-stagnant-wages.html (last visited May 20, 2008) ("[W]ages, rather than being stagnant this decade, have actually risen by around 6 percent in real terms."); Robert Rector, *How "Poor" are America's Poor?*, BACKGROUNDER (Heritage Soc., Wash., D.C.), Sept. 21, 1990, *available at* http://www.heritage.org/Research/PoliticalPhilosophy/BG791.cfm (last visited May 20, 2008) (comparing "poor" Americans with "average" Western Europeans); Walter E. Williams, How Can It Be, http://www.cato.org/pub_display.php?pub_id=2506 (last visited May 20, 2008) (discussing how "poor" Americans are not poor by international standards, or even by historical standards of our own country); Walter E. Williams, *Income Mobility*, TOWNHALL.COM (Dec. 5, 2007), http://www.townhall.com/Columnists/WalterEWilliams/2007/12/05/income_mobility (last visited May 20, 2008) ("Controlling for inflation, in 1967, 8 percent of households had an annual income of $75,000 and up; in 2003, more than 26 percent did. In 1967, 17 percent of households had a $50,000 to $75,000 income; in 2003, it was 18 percent. In 1967, 22 percent of households were in the $35,000 to $50,000 income group; by 2003, it had fallen to 15 percent. During the same period, the $15,000 to $35,000 category fell from 31 percent to 25 percent, and the under $15,000 category fell from 21 percent to 16 percent. The only reasonable conclusion from this evidence is that if the middle class is disappearing, it's doing so by swelling the ranks of the upper classes."). Sometimes pessimists make a weaker claim that earnings volatility has increased dramatically. *E.g.*, GEOGHEGAN, *supra* note 6, at 23; JACOB HACKER, THE GREAT RISK SHIFT 12–16 (2006). But as a Congressional Budget Office study has shown, this is not true. Peter R Oszag, Congressional Budget Office Director, *Opening Letter to Senators Schumer and Webb* of CONGRESSIONAL BUDGET OFFICE, TRENDS IN EARNINGS VARIABILITY OVER THE PAST 20 YEARS 2 (2007), *available at* http://www.cbo.gov/ftpdocs/80xx/doc8007/04-17-

Geoghegan's own numbers bear this out: he protests that the top one percent of Americans has received a quarter of the increase in income, leaving "less and less" for everyone else.[143] There are two fallacies here: first, it assumes that there is only a single-sized pie, and that the pie cannot grow for everyone: it is not the case that every dollar Oprah Winfrey earns is a dollar Joe Lunchpail cannot earn. Second, it ignores income mobility. I have moved from decile to decile over the course of my life, and others have similar opportunities as they gain education and experience; moreover, that someone is in the top 1% of income today is no guarantee that they will be there next year.[144] Of course, leaving aside these two fallacies, Geoghegan's own number does not support his assertion: that the top one percent of Americans have received 25% of the increase in income means that the other 99% are not getting "less and less," but, rather, realizing an increase in income also, if not a proportionate increase. Only if the top earners are earning more than 100% of the increase in income is it the case that rich are getting richer while the rest of the country loses ground.

Geoghegan's nostalgia for the 1960s inspires other inaccurate reminiscences. While the percentage of people imprisoned in the 1960s was lower than today,[145] the number of people who were involuntarily institutionalized was much higher; the rate of incapacitation was thus about the same.[146] Geoghegan blames decreasing unionization and declining entry wages for the increase in the crime rate since the 1960s.[147] But unionization, Geoghegan's panacea for the nation's ills, dropped from 31% of the American labor force to 22% between 1960 and 1980[148]

EarningsVariability.pdf ("Since 1980, there has been little change in earnings variability for both men and women. There is some evidence that, between 1960 and 1980, earnings variability increased for men but was offset by a decrease for women.").

143. GEOGHEGAN, *supra* note 6, at 21.

144. DEP'T OF THE TREASURY, INCOME MOBILITY IN THE U.S. FROM 1996 TO 2005, at 7, 9 (2007) (noting that 57.6% of taxpayers in the lowest income quintile and 49.7% of taxpayers in the second quintile moved to a higher quintile in ten years); *id.* at 8 (finding that only 42.6% of those in the top 1% of income in 1996 were in the top 1% of income in 2005).

145. GEOGHEGAN, *supra* note 6, at 19.

146. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1755 (2006).

147. GEOGHEGAN, *supra* note 6, at 19–21.

148. Hoover Institute, Facts on Policy: Union Membership Rates, http://www.hoover.org/research/factsonpolicy/facts/5166532.html (last visited May 20, 2008).

without any adverse impact on income distribution.[149] Unionization dropped as the crime rate increased and dropped more as the crime rate decreased again. Scholars disagree about what caused the crime rate to decrease,[150] but the decline of unionization seems an unlikely culprit. Unionization only raises wage rates 15% or so,[151] at the expense of increasing unemployment,[152] especially among minorities;[153] nations with extensive unionization do not have substantially different pretax inequality than the United States.[154]

And it seems that the only reason that Geoghegan does not commit Caplan's fourth fallacy, antiforeigner bias,[155] is because he does not get the chance. Geoghegan's passing *ipse dixit* one-sentence criticism of globalization[156] suggests that he would have gladly flaunted his economic ignorance here, too, given the opportunity. On the other hand, Caplan criticizes antiforeigner bias by noting that complaining about trade between the United States and Mexico is like complaining about trade between California and Nevada.[157] Caplan uses this example as a *reductio ad absurdum* of the bias against trade, but Geoghegan takes the bait and complains about the nationalization of the economy as

149. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. ECON. 1, 35 (2005).

150. *Compare, e.g.*, Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, J. ECON. PERSPECTIVES, Winter 2004, at 163, *with* BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS (2005), *and* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1998).

151. H. GREGG LEWIS, UNION RELATIVE WAGE EFFECTS (1985).

152. Edward Montgomery, *Employment and Unemployment Effects of Unions*, 7 J. LAB. ECON. 170, 170 (1989).

153. BERNSTEIN, *supra* note 110.

154. Andrea Brandolini & Timothy M. Smeeding, *Inequality Patterns in Western-Type Democracies: Cross-Country Differences and Time Changes* 34, fig.4 (Ctr. for Household, Income, Labor, and Demographic Econs., Working Paper No. 08/2007, 2007) (showing similar pre-tax inequality between United States and highly unionized United Kingdom and Germany).

Geoghegan's claim that decreased unionization is responsible for the near-tripling of administrative law judges adjudicating Social Security Disability Insurance (SSDI) since the end of the Reagan era, GEOGHEGAN, *supra* note 6, at 127, is also implausible. That can be laid entirely at the feat of the 1984 liberalization of the standards for obtaining SSDI passed by Congress. David H. Autor & Mark G. Duggan, *The Rise in Disability Recipiency and the Decline in Unemployment*, 118 Q. J. ECON. 157, 160 (2003); David Stapleton et al., *Empirical Analyses of DI and SSI Application and Award Growth*, *in* GROWTH IN DISABILITY BENEFITS: EXPLANATIONS AND POLICY IMPLICATIONS 31–92 (Kalman Rupp& David Stapleton eds., 1998).

155. CAPLAN, *supra* note 132, at 36–39.

156. GEOGHEGAN, *supra* note 6, at 13.

157. CAPLAN, *supra* note 132, at 38.

industry moved from the North and Midwest to states in the South and West that respected the right to work.[158]

B. *The Federalist Society Bogeyman Strawman*

The Federalist Society was founded by law students in 1981 and 1982 to promote debate over conservative ideas.[159] A number on the left have aimed an extraordinary amount of vitriol at the Federalist Society in the last decade.[160] Geoghegan makes the standard exaggerated criticisms—and then goes off the rails entirely. Of course, given that Geoghegan considers Justice David Souter "moderate right" and the ABA "the bastion of the right,"[161] he is bound to be disappointed by the Federalist Society. But there is disappointment, and then there is irrational hatred.

Geoghegan fantasizes that the Federalist Society is the monolithic entity behind all particularly execrable Bush administration policies. In particular, Geoghegan accuses the Federalist Society of supporting "the right to torture"[162] and the

158. GEOGHEGAN, *supra* note 6, at 12–13. *Compare id.*, *with* MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN (1999) (discussing advantages of competitive federalism).

159. *See generally* George W. Hicks Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J.L. & PUB. POL'Y 623, 646–55 (2006) (detailing the founding of the Federalist Society). In the interest of full disclosure, I am a member and financial supporter of the Federalist Society and have sat on the Federalist Society's Litigation Practice Group Executive Committee since 2007.

160. *See, e.g.*, Amy Bach, *Movin' on Up with the Federalist Society: How the Right Rears Its Young Lawyers*, THE NATION, Oct. 1, 2001, at 11 (accusing Society of hiding its "true agenda"); Trevor Coleman, *Hold On To Your Rights: The Federalist Society is in Charge*, DETROIT FREE PRESS, March 26, 2001, at 10A ("After eight years of being the proverbial barbarians at the gate during the Clinton administration, the Federalist Society has finally broken through and taken control of the village."); Jerry Landay, *The Conservative Cabal That's Transforming American Law*, WASH. MONTHLY, Mar. 2000, at 19 (describing the society as a "cabal"); Abner Mikva, *ACS v. Federalists*, THE NATION, Apr. 17, 2006, at 6 (accusing Society of agenda of "hobbl[ing]" social justice and *Brown v. Board of Education*). The hyperbole has gotten to the point that Ted Olson regularly jokes in his (nationally broadcast) speeches about the hundreds of people at the "intimate, clandestine gathering of the secretive Federalist Society." *See* Jeff Jacoby, *A 'shadowy' Society*, BOST. GLOBE, Nov. 21, 2007, at A19; Kate O'Beirne, *High Society: Conservative Lawyers and Their Wonderful 'Cabal'*, NAT'L REV., Apr. 30, 2001, at 22 ("Illinois senator Richard Durbin labeled the Society 'far right,' with members who 'want to turn back the hands of the clock.'"). *See also id.* (rebutting and pointing out errors and inconsistencies in attacks on Federalist Society).

161. GEOGHEGAN, *supra* note 6, at 150. *But see* James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the US Courts of Appeals for Political Bias*, 17 J.L. & POL. 1 (2001) (finding evidence of liberal bias in ABA rankings of judicial nominees).

162. GEOGHEGAN, *supra* note 6, at 198.

Terri Schiavo legislation.[163] He fails to disclose that prominent Federalists—Ted Olson;[164] John Ashcroft;[165] Jack Goldsmith;[166] Patrick Philbin[167]—objected to torture and overbroad executive power in pursuing antiterror policy, even within the Bush administration.[168] No one would say that Richard Epstein was not a Federalist, and his criticism was vocal as well.[169] Geoghegan also ignores those Federalists (and other conservatives) who opposed the Schiavo legislation,[170] a product of political pandering to the Christian right, as unconstitutional. Geoghegan acknowledges that Republican-appointed judges unanimously rejected Terri's Law,[171] but refuses to acknowledge the implications for his theory. Conservatives, he insists, are relativistic and nihilistic, while liberals (like himself) have principles[172]—a proposition Geoghegan belies elsewhere in the book when he argues that judges and juries should have come to his preferred results notwithstanding the law.[173]

One passage illustrates the irrational venom of Geoghegan's views about the Federalist Society:

163. *Id.* at 161. Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

164. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A01.

165. Peter Baker & Susan Schmidt, *Ashcroft's Complex Tenure at Justice: On Some Issues, He Battled White House*, WASH. POST, May 20, 2007, at A01.

166. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH PRESIDENCY (2007).

167. *Id.* at 171; *Treatment of Detainees in the Global War Against Terror: Hearing Before the H. Permanent Select Comm. on Intelligence*, 108th Cong. (2004) (testimony of Patrick F. Philbin, Associate Deputy Att'y Gen.); Daniel Klaidman, Stuart Taylor Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34.

168. Another Federalist and bogeyman to the Left, Acting Assistant Attorney General for the Office of Legal Counsel Steven G. Bradbury, has spoken out against torture. Steven G. Bradbury, ASK THE WHITE HOUSE (Sept. 18, 2006), http://www.whitehouse.gov/ask/20060918.html ("The United States does not torture. The President has not authorized torture and has made clear that he will not do so. United States law already bans torture.").

169. Richard A. Epstein, *Federalism & Separation of Powers: Executive Powers in Wartime, Remarks Before, 2006 Federalist Society National Lawyers Convention*, (May 3, 2007) ENGAGE, May 2007, at 51–53; Richard A. Epstein, *Executive Power on Steroids*, WALL ST. J., Feb. 13, 2006, at A16. *See also* Charlie Savage, *Specialists Doubt Legality of Wiretaps*, BOSTON GLOBE, Feb. 2, 2006, at A1.

170. Charles Fried, *Federalism Has a Right to Life Too*, N.Y. TIMES, Mar. 23, 2005, at A17; Roger Pilon, Todd Gaziano & John Yoo, *The War on an Independent Judiciary*, CATO POLICY REPORT, 2005, at 8. See also Charles Krauthammer, *Between Travesty and Tragedy*, WASH. POST, March 23, 2005, at A15.

171. GEOGHEGAN, *supra* note 6, at 162.

172. *Id.* at 158.

173. *See supra* Part I.A.

> Like Scalia or Thomas or Alito, the young kids on the New Right don't want to go into business, they want to do public policy. They want to do what liberals do. So along comes Mr. Federalist to say, "Oh, You want to do public policy? I've got a nice foundation job for you." The next thing the kids know, they're at the Cato Institute.[174]

In early 2007, the Cato Institute had precisely two attorneys on staff under the age of thirty-five, one of them as an "Adjunct Scholar" while she was in a Ph.D. program, and both had come to the Institute from law-firm jobs where they almost certainly made much more money. The idea that the Federalist Society has tens of thousands of members because "young kids on the New Right" hope to join the Cato Institute is absurd. But it seems beyond Geoghegan's comprehension that law students might sincerely care about individual liberty and the rule of law.

Geoghegan's critique of the Federalist Society's role in the Harriet Miers nomination is similarly off-base: "When Bush nominated a Texas woman lawyer who was not in the club, the Federalists sneered at her and got Congress [sic] to withdraw her name."[175] This account of the rise and fall of the Miers nomination is fantasy;[176] in fact, Federalist Society Executive Vice President Leonard Leo, in the inner circle of Bush advisors, was one of Miers's most avid private and public supporters.[177]

Geoghegan similarly feverishly imagines a Justice Kennedy ready to declare gerrymandering unconstitutional in *LULAC v. Perry*,[178] but deciding against it because he was worried the Federalists would "scream" if he voted with the liberals in both *Perry* and *Hamdan*.[179] The point of this admittedly fictional tale is unclear. Why such a sinister cabal would save its powder for *Perry* and fail to exercise its underhanded authority in *Massachusetts v. EPA*,[180] *Roper v. Simmons*,[181] or *Kelo v. City of New London*[182] (much

174. GEOGHEGAN, *supra* note 6, at 158.

175. *Id.* at 198.

176. *Compare id.*, *with* JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

177. GREENBERG, *supra* note 177, at 253 (Leo proposes Miers's name in internal discussions with White House and offers to float her name to press); *id.* at 265 (Leo gives Miers nomination a green light); *id.* at 272 (Leo praises Miers publicly).

178. 548 U.S. 399 (2006).

179. GEOGHEGAN, *supra* note 6, at 217–20; Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

180. 127 S. Ct. 1438 (2007).

181. 543 U.S. 551, 555 (2005).

less *Hamdan*[183] itself) is left unexplained. Perhaps we are to believe that Kennedy has an arrangement where every term the Federalists get one, and only one, mulligan.

Geoghegan imagines another conversation with a hypothetical Federalist student at one point in the book that beggars belief: "If we bring up the Declaration of Independence, [the Federalists] say: 'Oh, these truths are self-evident? Well they aren't evident to us.'"[184] Perhaps Geoghegan expected his readers to forget Senator Joseph Biden's confirmation hearing interrogation of Clarence Thomas over natural law and the Declaration of Independence[185] and thus buy into Geoghegan's entirely fictional construct that it is the Federalists, rather than their opponents, who sneer at the Declaration of Independence and self-evident rights. One would call this argument *chutzpah*, and not in the positive sense.[186]

One might as well accuse the Federalist Society of supporting a return to slavery—and Geoghegan does this, too. In one particularly attenuated argument, Geoghegan notes that a four-Justice dissent in *U.S. Term Limits, Inc. v. Thornton,* written by Justice Clarence Thomas, endorsed the view that the Constitution was a compact between the states.[187] As others have noted, this view was notably expressed by John C. Calhoun a century ago,[188] though Thomas himself relied upon Madison's words in Federalist No. 39[189] and the structure of the Constitution, including the language of the Tenth

182. 545 U.S. 469, 490 (2005).

183. *Hamdan*, 126 S. Ct. at 2799.

184. GEOGHEGAN, *supra* note 6, at 151.

185. SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 36–55 (1999); Joseph R. Biden Jr., *Law and Natural Law: Questions for Judge Thomas*, WASH. POST, Sept. 8, 1991, at C1.

186. *Cf.* Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit,* 103 YALE L.J. 463 (1993) (discussing *chutzpah*).

187. 514 U.S. 779, 846–50 (1995) (Thomas, J., dissenting). The other dissenters were Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia. *Id.* at 845. Geoghegan's imagined Federalist cabal apparently did not have its pull with Justice Kennedy in this case.

188. Daniel A. Farber, *Judicial Review And Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 436 & n.106 (2003); Jeffrey Rosen, *Terminated*, NEW REPUBLIC, June 12, 1995, at 12.

189. *Thornton*, 514 U.S. at 846 (Thomas, J., dissenting) ("In Madison's words, the popular consent upon which the Constitution's authority rests was 'given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.'") (quoting THE FEDERALIST NO. 39, at 243 (C. Rossiter ed. 1961)).

Amendment.[190] Geoghegan concludes that one who agrees with Calhoun ("the Darth Vader of American history")[191] about something must agree with him about everything; thus the Federalist Society and Justice Thomas are supporters of John C. Calhoun.[192] Some members, he claims without evidence, call themselves "neo-Calhounian,"[193] which, he argues, is absurd because Calhoun "look[s] a little like Lucifer."[194] From the false premise that Federalist Society members call themselves neo-Calhounian in any significant number (and ignoring that even if they did so, a self-described neo-Calhounian is by definition distinguishing oneself from Calhoun), Geoghegan notes that Calhoun supported slavery, and thus, in a final leap of logic, Geoghegan suggests that Federalists secretly seek to re-impose slavery.[195] When the argument against the Federalist Society includes a hypothetical case in which "Justice Roberts and the Supreme Court decide that the Thirteenth Amendment is unconstitutional"[196] one has left the grounds of reasoned debate.

IV. CREDIT WHERE CREDIT IS DUE

Still, one must credit Geoghegan for admitting what so many of his fellow travelers do not: the civil justice system is broken in many important ways. "Even if they lose, even if they are acting pro se, people can sometimes force the employer to pay a

190. *Thornton*, 514 U.S. at 846–50.

191. GEOGHEGAN, *supra* note 6, at 153. There seems to be some disagreement on the left who is best characterized as the Darth Vader of American history. The characterization of Vice President Dick Cheney as "Darth Vader" is so frequent (including once by presidential candidate Hillary Clinton, Stephen F. Hayes, *Hillary's New Hope*, THE WEEKLY STANDARD, Sept. 20, 2007, http://www.weeklystandard.com/Content/Public/Articles/000/000/014/130pxdob.asp , that the Vice President's wife, Lynne Cheney, was moved to mock the comparison during her appearance on *The Daily Show* (Comedy Central television broadcast Oct. 10, 2007).

192. GEOGHEGAN, *supra* note 6, at 153–54. Hitler was a vegetarian. THOMAS FUCHS, A CONCISE BIOGRAPHY OF ADOLPH HITLER 77–82 (2000). One shudders to think what conclusions Geoghegan will thus draw about Gandhi and Paul McCartney if he were consistent in his logic.

193. GEOGHEGAN, *supra* note 6, at 154.

194. *Id.* A Google and Westlaw search for "neo-Calhounian" finds a single example of the phrase being used positively in modern discourse, and that is in liberal Alan Wolfe's description of rejected Clinton appointee Lani Guinier. ALAN WOLFE, RETURN TO GREATNESS: HOW AMERICA LOST ITS SENSE OF PURPOSE AND WHAT IT NEEDS TO DO TO RECOVER IT 117–24 (2005).

195. GEOGHEGAN, *supra* note 6, at 154.

196. *Id.*

staggering sum" in litigation expenses.[197] The trial bar is not solely to blame: corporate attorneys churning billable hours can waste small fortunes on pointless motions practice, a point illustrated by Geoghegan's tale of six New York law firms showing up in Illinois court to litigate an "emergency motion" over the validity of fax service of a motion to voluntarily dismiss a codefendant.[198]

The number of Chicago federal district court and magistrate judges, Geoghegan points out, jumped from 6 to 42 between 1962 and today,[199] far outstripping the approximate doubling of population around the same time. But he seems to have missed the preemption debates sweeping the legal and political world when he complains that the right wing "chose, on purpose, to govern the United States through judges, rather than with experts or specialists in the executive branch."[200] In fact, it is Democrats and the left who are asking to devolve more such cases to the courts[201] and complaining about Bush administration efforts to have regulatory agencies occupy the field and decide these issues.[202]

Geoghegan's criticism of juries and their mistakes[203] is more visceral than any mainstream American legal reformer on the right. At the end of the day, Geoghegan concedes the necessity of juries,[204] and has little in the way of solutions, though, like the

197. *Id.* at 29.

198. *Id.* at 100–02.

199. *Id.* at 205–06 (stating that the number of federal judges and magistrates in Chicago has multiplied by six or seven times since 1962 when the number was six).

200. *Id.* at 206.

201. *E.g.*, Consumer Product Safety Commission Reform Act of 2007, S. 2045 110th Cong. § 21 (2007) (creating new cause of action permitting state attorneys general to sue over violations of Consumer Product Safety Commission Reform Act of 2007).

202. *Compare supra* note 121, *with* Brief for Respondents, Warner-Lambert v. Kent, 128 S.Ct. 1168 (2008) (No. 06-1498) 2008 U.S. S.Ct. Briefs LEXIS 28 (arguing against FDA preemption), *and* Brief for Petitioners, Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008) (No. 06-179), 2007 U.S. S.Ct. Briefs LEXIS 1643 (same), *and* Brief for Center for Responsible Lending as Amici Curiae, Watters v. Wachovia Bank, 127 S.Ct. 1159 (2007) (No. 05-1342), 2006 U.S. S.Ct. Briefs LEXIS 802 (arguing against National Bank Act preemption), *and* Allison M. Zieve & Brian Wolfman, *The FDA's Argument for Eradicating State Tort Law: Why It Is Wrong and Warrants No Deference*, TOXICS LAW REP., May 25, 2006 (arguing against Bush administration efforts to have Food & Drug Administration be sole decision-maker on warning labels). *Cf.* Riegel v. Medtronic, 128 S.Ct. 999, 1008 (2008) ("[E]xcluding common-law duties from the scope of pre-emption would make little sense.").

203. GEOGHEGAN, *supra* note 6, at 132–43.

204. *Id.* at 143.

American Tort Reform Association,[205] Geoghegan calls for higher pay for jurors.[206]

Geoghegan also rightly recognizes the benefits of arbitration over litigation, a refreshing change of pace from the recent demonization of arbitration by water-carriers for the litigation lobby.[207] As Geoghegan notes, a case that would cost $6,000 to $15,000 to arbitrate would take "four or five years" and $150,000 to litigate.[208] Discovery, he also observes, is now "scorched-earth":

> In tort, the big thing is pretrial discovery; indeed, the cases never go to trial. And because there's no judge or kindly pipe-smoking arbitrator present, the questioning is meaner. The cases are meaner. In discovery, I can force you to tell me everything: what is in your secret heart, not to mention what's in your tax returns.
>
> … Everyone in the case has to strip themselves, in a sense, take off their clothes, far more now than was the case when I started out in law school. Look at what Paula Jones's lawyers did to Bill Clinton—and he was a sitting president! What makes the new "American-style" tort law so bitter, so cruel and unrestrained, is discovery, with no judge around and with each side on a rampage to swing at the other's head.
>
> Over what? Intent, motive. A "bad" state of mind. That gives a legal rationale to harass and destroy, in a litigation that is disconnected from whether the employee was treated fairly.[209]
>
> ….
>
> There's no judge around. There's no one to keep order. I can't even get the opposing lawyer to sit down. The other day a lawyer came over and stood right over the witness. What do I do? Tell him to sit down, or ask the client to stand? And there is not much limit to what the other side can ask. "We want to

205. American Tort Reform Association, *Jury Service Reform*, *available at,* http://www.atra.org/issues/index.php?issue=7490 (last visited May 20, 2008).

206. GEOGHEGAN, *supra* note 6, at 142–43.

207. *E.g.*, *Hearing on Mandatory Binding Arbitration Agreements: Are They Fair to Consumers? Hearing Before the H. Comm. On the Judiciary*, 110th Cong. (2007) (statement of F. Paul Bland, Staff Attorney, Public Justice), *available at,* http://judiciary.house.gov/media/pdfs/Bland070612.pdf; Richard Alderman, *The Future of Consumer Law in the United States—Hello Arbitration, Bye-Bye Courts, So–Long Consumer Protection* (U. of Houston Law Ctr., Working Paper No. 2008-A-09, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015517; Stephanie Mencimer, Suckers Wanted: How Car Dealers and Other Businesses are Taking Away Your Right to Sue, http://www.motherjones.com/washington_dispatch/2007/11/binding-mandatory-arbitration.html (last visited May 20, 2008); PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), *available at* http://www.citizen.org/documents/Final_wcover.pdf.

208. GEOGHEGAN, *supra* note 6, at 35–36.

209. *Id.* at 36.

> see your e-mails." "We want you to go into your hard drive." If you threw out a letter or deleted an e-mail two years ago, you start to think you may go to jail.[210]

Geoghegan does not acknowledge that conservative civil justice reformers made this point first.[211] But he makes the reformers' point on the problems of the status quo legal system: "[I]t's a kind of asymmetrical warfare. The little guy can force the company to settle just by not being knocked out."[212] It is this dynamic that the Roberts Court has recognized in its recent civil procedure jurisprudence.[213] Geoghegan's point about the superiority of peaceable arbitration to the violence of litigation[214] is similar to that made by Eugene Scalia, who writes of one case he litigated:

> [T]he plaintiff could not get along with her supervisor and was seeking a position in another division of the company. Shortly after her lawyers came on the scene, however, she quit her job, claimed she was forced out, and sued for constructive discharge. The constructive discharge claim was potentially more valuable to the lawyers than resolving the workplace dispute, but it proved insupportable and the plaintiff was left with a negligible settlement.[215]

The incentives of the attorneys mismatched with those of the client, and litigation tactics ended up making her worse off, a problem that would not have happened under arbitration. It is surprising, therefore, when Geoghegan suddenly complains about the use of arbitration by credit card companies to resolve collection disputes,[216] not withstanding his previous encomiums

210. *Id.* at 145.

211. *E.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"); Ted Frank, Where are the Privacy Advocates?, http://www.overlawyered.com/2006/02/where_are_the_privacy_advocate.html (last visited May 20, 2008) (noting intrusiveness of modern e-discovery).

212. GEOGHEGAN, *supra* note 6, at 38.

213. *See, e.g.,* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases."); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 ("Private securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."). *See generally* Ted Frank, *The Roberts Court and Liability Reform*, LIABILITY OUTLOOK, August 2007.

214. GEOGHEGAN, *supra* note 6, at 35–37.

215. Scalia, *supra* note 95, at 499–500.

216. GEOGHEGAN, *supra* note 6, at 109–15.

to arbitration and to the advantages of contract. But arbitration benefits consumers.[217] As Geoghegan acknowledges, the vast majority of arbitrations involve failure to pay.[218] Why shouldn't consumers be able to agree in advance to a cheaper method of dispute resolution in the case of a collection dispute? A rule that forbids mandatory arbitration in consumer agreements[219] benefits only deadbeats at the expense of the honest consumer[220]—but because it benefits attorneys as well, the litigation lobby promotes this anti-consumer legislation.[221] The question is why Geoghegan does also when he otherwise lauds arbitration.

Geoghegan exhibits similar schizophrenia on the subject of medical malpractice lawsuits: he finds it "appalling" that "patients sue hospitals without restraint"[222] but focuses his criticism on the horrors of non-profit hospitals seeking to recover unpaid bills from patients.[223] One hospital Geoghegan

217. Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 KAN. J.L. & PUB. POL'Y. 578 (2000); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695; Peter B. Rutledge, *Whither Arbitration*, 6 GEO. J.L. & PUB. POL'Y (forthcoming 2008); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89. *Cf. also* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105 (2004); Ted Frank, Arbitration and the Free Market, http://www.overlawyered.com/2007/12/arbitration_and_the_free_marke.html (last visited May 20, 2008) ("If mandatory arbitration clauses weren't actually money-saving, then, again, the market provides plenty of incentive to cut costs by removing them from the contracts."). *Cf. generally* Overlawyered, http://www.overlawyered.com/arbitration (last visited May 20, 2008) (collecting posts on the political campaign against arbitration).

218. GEOGHEGAN, *supra* note 6, at 112–13. The fact that so many such arbitrations are uncontested default judgments is what leads to Geoghegan's misleading 99.6% figure for victories in arbitration proceedings by First USA. *Id.* at 110. Ware, *supra* note 218, at 99 n.4 (citing Matthew C. McDonald & Kirkland E. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 62 ALA. LAW. 56, 60 (2001) ("[V]irtually all of these cases were collection cases filed by the bank against customers more than six months behind on their credit cards bills. Unquestionably, the result in collections court would have been the same.")). *Cf.* Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990) (finding consumers prevailed in Small Claims and Conciliation Branch of the Superior Court of the District of Columbia only 4% of the time, with the vast majority of cases being default judgments).

219. *See, e.g.*, Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

220. *See, e.g.*, Amir Efrati, *The Court House: How One Family Fought Foreclosure*, WALL ST. J., Dec. 28, 2007, at A1 (reporting that Richard Davet "staved off foreclosure for eleven years" without paying a penny of his mortgage in that time); Frank, *Arbitration and the Free Market*, *supra* note 218 ("A mandatory arbitration clause is a way to make sure that dishonest consumers don't raise prices for the honest consumers.").

221. PUBLIC CITIZEN, *supra* note 208; *Party at Ralph's*, WALL ST. J., Nov. 7, 2007, at A22.

222. GEOGHEGAN, *supra* note 6, at 48.

223. *Id.* at 48–52.

complains about (in both the book and in court) dared to bring "fifty to sixty" collection actions a month against those who did not pay bills.[224] Again, Geoghegan suddenly loses his respect for the Rule of Law and contract, because hospitals are seeking to enforce contractual agreements to pay for services. Apparently, a hospital should simply give away health services—never mind whether it can afford to do so, much less whether it can afford to do so after word gets out that it provides valuable health care for free to those who do not pay its bills. As it is, a typical charitable hospital collects on only a third of its billings.[225] It would also be useful to know whether the defendant hospital in Geoghegan's case is waiving collections against other patients. Without this information, we cannot know whether Geoghegan is correct that his adversary was acting in a non-charitable fashion, or whether the defendants are a subset of patients who can actually pay.[226] (Contrary to Geoghegan's false dichotomy, there is nothing inconsistent between having a charitable purpose and standing on property rights: charitable shelters do not let the homeless walk away with the office equipment.)

Despite his early ambivalence towards malpractice litigation, by Chapter 7 Geoghegan has adopted fictional trial-lawyer talking points for his discussion.[227] Geoghegan worries that juries' (ostensible) failure to award gigantic damages in malpractice suits amounts to "tacitly encouraging medical error, or at least giving insufficient incentive for doctors to root it out."[228] But doctors in New Zealand *never* face damages for medical error, and there is no evidence that doctors there are

224. *Id.* at 49.

225. John Carreyrou, *As Medical Costs Soar, The Insured Face Huge Tab*, WALL ST. J., Nov. 29, 2007, at A1.

226. Nor does it help his case when Geoghegan trots out long-refuted talking-points statistics like Elizabeth Warren's claim that suits over medical bills are the largest reason for bankruptcy. David U. Himmelstein, Elizabeth Warren, Deborah Thorne, and Steffie Woolhandler, *Illness And Injury As Contributors To Bankruptcy*, W5 HEALTH AFFAIRS 74 (2005), *available at* http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.74v1. *But see* Todd Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U.L. REV. 1463, 1517 (2005) (refuting Warren's claim); Gail L. Heriot, Study Creates False Impressions, http://content.healthaffairs.og/cgi/eletters/hlthaff.w5.63.v1 (last visited May 20, 2008) (same); Todd J. Zywicki, Health Problems and Bankruptcy—Are 50% of Bankruptcies Health Related?, http://volokh.com/posts/1108558247.shtml (last visited May 20, 2008) (same).

227. GEOGHEGAN, *supra* note 6, at 94–99.

228. *Id.* at 98.

materially more careless than that of the United States.[229] Rather, the evidence indicates that American medical litigation is sufficiently random that it deters *practice*, rather than malpractice.[230] Thus doctor availability[231] and health outcomes[232] improve when sensible tort reforms are implemented.

Nonetheless Geoghegan makes a point that Democrats should carefully consider before endorsing the litigation-lobby agenda whole hog:

> But when I'm in court and the lawyers on the other side are charging $800 or more an hour . . . I realize that the money is going the other way. A tort case is now often a way of redistributing from the little people at the bottom to the big people at the top.
>
> . . . .
>
> And the more people sue, the richer they get. The more I bring suits, the richer I make them. When I read how lawyers make these sums, even breaking $1,000 an hour, I feel sorry for the businesses that pay them.
>
> But aren't I part of the problem? The more suits I bring, the more income in this country is redistributed to the top. The more we sue over looting of pension funds or just plain old-fashioned medical error, the more the money flows to people at the top—to law firms, to "experts," to the insurance companies.
>
> … The more we sue the rich, the richer the rich get. And the poor just end up "self-cannibalizing" themselves.[233]

229. Marie Bismark, et al., *Accountability sought by patients following adverse events from medical care: The New Zealand experience*, 175 CAN. MED. ASSOC. J. 889 (2006); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595 (2002).

230. Mello & Brennan, *supra* note 230; Dorothy L. Pennachio, *Why Dr. Kooyer had to move*, MED. ECON., Dec. 23, 2002, at 42. *Cf.* Atul Gawande, *A Lifesaving Checklist*, N.Y. TIMES, Dec. 30, 2007, § 4, at 8 (noting that fear of increased liability is among reasons hospitals have failed to impose Intensive Care Unit safety measures that would save hundreds of lives).

231. William Encinosa & Fred Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?* 24 HEALTH AFFAIRS 250–59 (2004); Daniel Kessler, William Sage & David Becker, *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005); Jonathan Klick & Thomas Stratmann, *Medical Malpractice Reform and Physicians in High Risk Specialties*, 38 J. LEG. STUD. (forthcoming 2008); Eric Helland & Mark H. Showalter, *The Impact of Liability on the Physician Labor Market* (RAND Inst. for Civ. Just., Working Paper No. WR-384-ICJ, 2006).

232. Jonathan Klick & Thomas Stratmann, Does Medical Malpractice Reform Help States Retain Physicians and Does it Matter? (unpublished manuscript, *available at* http://ssrn.com/abstract=870492) (finding relationship between some tort reforms and reduced levels of infant mortality).

233. GEOGHEGAN, *supra* note 6, at 103.

The problem is even worse than Geoghegan suggests. Litigation raises costs to the everyday consumer; Chrysler executives estimate that the cost of liability to domestic United States auto consumers today is about a thousand dollars a car.[234] The majority of expense in asbestos litigation goes to attorneys and administration, rather than to victims of asbestos-related disease,[235] and additional billions are siphoned off by uninjured plaintiffs bringing fraudulent claims[236] or from the dozens of bankruptcies and thousands of jobs lost.[237] It appears the largely meritless Vioxx litigation[238] will also result in more money going from investors to attorneys than to those who suffered heart attacks.[239]

As litigation expands, and bet-the-company suits threaten even Fortune 500 companies, recent law-school graduates earn over $200,000 per year in the defense bar,[240] and multi-millionaire plaintiffs' attorneys hold annual Kozlowski-esque Christmas parties costing more than three times that much.[241] There is nothing inherently wrong with conspicuous consumption *qua*

234. Ted Frank, More on the $500/car Figure, http://www.overlawyered.com/2006/12/more_on_the_500car_figure.html (last visited May 20, 2008). *See also* Murray Mackay, *Liability, Safety, and Innovation in the Automotive Industry*, *in* THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 191, 199 (Peter W. Huber & Robert E. Litan eds., 1991) (finding that domestic manufacturers face liability costs of up to $500 per car in 1990 dollars).

235. STEPHEN J. CARROLL, ET AL., ASBESTOS LITIGATION 104–05 (2005) (reporting that claimants' net compensation was only 42% of total costs of asbestos litigation).

236. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2004).

237. JONATHAN M. ORSZAG, PETER R. ORSZAG, & JOSEPH E. STIGLITZ, THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS (2002), *available at* http://www.asbestossolution.org/stiglitz_report.pdf.

238. Theodore H. Frank, *Riverboat Poker & Paradoxes: The Vioxx Mass Tort Settlement*, LEGAL BACKGROUNDER, Mar. 21, 2008, *available at* http://www/aei.org/publications/pubID.27701,filter.all/pub_detail.asp.

239. Merck has reported spending $1.2 billion on attorneys for Vioxx-related litigation as of Nov. 9, 2007, and it is estimated that 33% to 40% of the $4.85 billion settlement will be go to plaintiffs' attorneys, leaving only about $3 billion for those putatively injured by Vioxx. *Id.*

240. *E.g.*, David Lat, *May It Please the Court? Massive Law-Firm Bonuses, Not So Much*, N.Y. OBSERVER, Nov. 20, 2007, http://www.observer.com/2007/may-it-please-court-law-firm-bonuses-not-so-much (calculating that law school class of 2006 can receive $205,000 total compensation and senior associates only a few years out of law school can receive total compensation just shy of $400,000).

241. Jonathan D. Glater, *A Houston Holiday: Barbecue, Al Green and 5,000 Guests*, N.Y. TIMES, Dec. 13, 2003, at C1 (describing a Mark Lanier Christmas party). *Cf.* Jenn Abelson, *A Dark Diagnosis Reaffirms a Commitment*, BOSTON GLOBE, Nov. 15, 2007, at A1 (describing plaintiffs' attorney John Edwards' 28,000-square-foot-mansion on 102-acre property); Matt Leingang, *Chesleys Buy Big House*, CINCINNATI ENQUIRER, Sept. 13, 2004, at 2B (describing plaintiffs' attorney Stan Chesley's 27,000-square-foot mansion).

conspicuous consumption, but in this case it is a symptom of a larger problem. In terms of societal impact, at the margin, attorneys are rent-seekers or, at best, a transaction cost of navigating governmental regulation or performing the redistribution of wealth; Geoghegan will complain about CEO salaries,[242] but businesspeople and inventors are creating wealth through jobs and consumer surplus.[243] The extensive market demand for attorneys is entirely a creation of government rules created by legislatures and the courts.[244] When the best and brightest are encouraged to devote their lives to the game show that American civil litigation has become, the rest of us are deprived of the contributions they would have made as engineers, scientists or other innovators.[245]

To the extent the left is concerned about income inequities, litigation is an inefficient and counterproductive remedy:[246] a few plaintiffs benefit from windfalls but many more consumers and workers suffer the costs, and money flows from wealth-creating sectors of the economy to wealth-destroying attorneys. The pie is not only smaller, but it is not divided any more evenly. Tort reform and other pro-market reforms do not sacrifice "social justice" for efficiency.[247] Geoghegan recognizes the destructiveness of the litigation system and its perverse

242. GEOGHEGAN, *supra* note 6, at 150.

243. Robert Barro, *Bill Gates' Charitable Vistas*, WALL ST. J., Jun. 19, 2007, A17 (suggesting that Bill Gates has created value to society of close to a trillion dollars); Tyler Cowen, What's the social value of Microsoft?, http://www.marginalrevolution.com/marginalrevolution/2007/06/whats-the-socia.html (last visited May 20, 2008) (suggesting that Barro underestimates Gates's positive impact on consumer surplus). *Cf. also* Theodore H. Frank, *How Personal Wealth Shapes Policy*, N.Y. TIMES, Dec. 30, 2007, § 4, at 7; Robert B. Reich, *CEOs Deserve Their Pay*, WALL ST. J., Sept. 14, 2007, at A13.

244. On the role of the judiciary in expanding the demand for attorneys, see Dennis Jacobs, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855 (2007), and Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* (unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976478).

245. *Cf.* Amy Goldstein et al., *Roberts Resisted Women's Rights*, WASH. POST, Aug. 19, 2005, at A1 (reporting that Chief Justice John Roberts joked in a 1985 Reagan White House memo, "Some might question whether encouraging homemakers to become lawyers contributes to the common good, but I suppose that is for the judges to decide.").

246. David A. Weisbach, *Taxes and Torts in the Redistribution of Income* (U. Chi. Law & Econ., Olin Working Paper No. 148., 2002) *available at* http://ssrn.com/abstract=307007.

247. *Cf.* Alberto Alesina & Francesco Giavazzi, *Why the Left Should Learn to Love Liberalism*, VOX, Oct. 5, 2007, http:// www.voxeu.org/index.php?q=node/596 ("Pursuing pro-market reforms does not imply facing a trade-off between efficiency and social justice.").

redistributive effects, and he could have written a credible, left-leaning book that pointed these facts out. Instead, he chose to rant reflexively—and all too often ignorantly—against markets and conservatives that would improve the plight of workers and consumers.