

Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation



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ABSTRACT

During the last four decades the United States has witnessed first the emergence and then the disappearance of civil litigation as a topic of partisan debate in national politics. Following two centuries in which neither party thought the topic worth mentioning, in the last decades of the twentieth and the first decade of the twenty-first century, both parties made it part of their agendas. Republican candidates and presidents denounced litigation as a blight; Democratic candidates and presidents embraced it as a panacea. This Essay traces the emergence of this issue, the apparent oddness of the two parties' stances toward it, and the ways in which both parties chose to ignore salient characteristics of modern civil litigation—the unspoken truths of my title. Finally, I tentatively suggest some reasons for the disappearance of this issue—at least temporarily—from the political scene.

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INTRODUCTION

In the middle of the twentieth century, the novelist C.P. Snow used the phrase “two cultures”¹ to describe the gulf between the world as scientists saw it and the world as humanists saw it. I am borrowing the phrase to describe divergent attitudes toward civil litigation in the United States. Some view civil litigation as the vindicator of rights, a way of speaking truth to power, and a guarantor of democratic values and freedoms. Others see civil litigation as a deadweight loss, a stick in the wheels of commerce, and a source of national shame.

In recent decades these two views have become attached to the major political parties: Republicans deploring litigation, Democrats defending it. That circumstance itself bears noting. The 2012 presidential campaign was the first in decades in which neither party’s platform mentioned civil litigation as a partisan issue. This Essay seeks to account for the appearance and recent disappearance of civil litigation as a salient topic of political and popular culture. Beyond marking and accounting for the strange political career of civil litigation, I want to emphasize two circumstances.

First, the debate displays an apparently odd misalignment of political forces: In the litigation wars, the Democratic and Republican parties take stances that conflict with their core views of government. The same political party that in other contexts deplores governmental meddling and recommends privatization as a remedy recoils in horror from this instance of privatization. Conversely, the political party that, in general, cheers on new regulatory regimes and distrusts markets, here celebrates private entrepreneurship in the form of the plaintiffs’ bar.

Second, the debate reveals striking blind spots: Both sides of the debate ignore salient characteristics of contemporary civil litigation—the “unspoken truths” of my title. The actual litigation system consists mostly of cases essential to the smooth functioning of business, and it would thus be an act of self-destructive madness if the Republican Party really wanted to cut back on all civil litigation. The unspoken truth is that the Republicans have only a small segment of civil litigation in their sights—a segment they hesitate to describe clearly. The Democratic rhetoric equally fails to touch on the uncomfortable truth that litigation has itself become a remarkably successful business, one embedded within and parasitic on the larger business community. How this came to be and why neither side wants to describe the fight in accurate terms provides the second theme of this Essay.

1. C.P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION* 1 (1959).

I. THE OBVIOUS EXPLANATION—AND WHY IT DOESN'T WORK

Before beginning this exploration, I want to put to one side an apparently obvious and straightforward explanation for the present state of play. One might suppose that to the extent that Republicans are the party of business, they would naturally resist any policies—including litigation—that thwart business. Similarly, one might believe that the Democrats would favor policies, including litigation, that help important Democratic constituencies—consumers,² civil rights groups, and the environmental movement. Were this the whole story, there would be nothing to explain, for we would be seeing a natural alignment of interests. But this seemingly straightforward explanation ignores as much as it explains. It fails to explain why the Republicans, who typically celebrate the role of small business as an engine of economic growth, so dislike the successful business developed by the plaintiffs' bar. And it fails to explain why the Democrats champion a business model whose success consists of attacking other businesses—businesses that employ the great majority of the Democratic constituency.

II. WHAT HAPPENED?

For the first 185 years of the Republic, civil litigation was not a topic of political discussion: Presidential candidates were for and against wars, national banks, social welfare programs and more—but had no position on civil litigation.³ Then, at the end of the 1970s, civil litigation became a topic of political controversy, a controversy that continued for several decades until—with equal suddenness—silence concerning this topic descended once more in the 2012 presidential campaign.

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2. We are all, of course, consumers in the literal sense of that word; I use it here in a more specific sense, to reference the set of values and interests growing out of the consumer movement, itself a brainchild of Ralph Nader, who has a complicated relationship with the Democratic Party. See David Bollier, *Citizen Action and Other Big Ideas by David Bollier—Chapter One: The Beginnings*, NADER PAGE (Jan. 9, 2004), <http://nader.org/2004/01/09/citizen-action-and-other-big-ideas-by-david-bollier-chapter-one-the-beginnings>.
 3. One can be confident in this broad assertion because of the excellent work of the American Presidency Project, based at the University of California, Santa Barbara. The Project puts online—in a searchable format—every paper, speech, press conference, convention address, and election document of both sitting presidents and those who campaigned against them. See John T. Woolley & Gerhard Peters, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu> (last visited July 18, 2013).

A. The Sounds of Silence: 1789–1970

Before we examine the terms of engagement and alignment of the parties, contemplate the odd circumstance that civil litigation became a political issue at all. For almost the first two centuries of the nation's history, civil litigation did not figure in political discourse. Unsurprisingly, George Washington had nothing to say about litigation or lawsuits. Andrew Jackson did, but only because he was moved to protest a vote of censure by the Senate,⁴ and what he said was directed only to his own situation. Similarly, while deploring the *Dredd Scott* case, Abraham Lincoln had nothing to say about civil litigation in general.⁵

Closer to our time one finds Lyndon Johnson, signing the Voting Rights Act, noting that “lawsuits can open the doors to the polling places and open the doors to the wondrous rewards which await the wise use of the ballot.”⁶ Richard Nixon, seeking to establish an independent Legal Services Corporation in order to insulate it from political pressure, declared:

The Nation has learned many lessons in these six short years. This program has not been without travail. Much of the litigation initiated by legal services has placed it in direct conflict with local and State governments. The program is concerned with social issues and is thus subject to unusually strong political pressures.⁷

These statements of Presidents Lincoln, Johnson, and Nixon, like their predecessors, referred to specific instances of civil litigation, not to civil litigation itself, as topics of national and political concern.⁸ American politicians simply did not

4. See President Andrew Jackson, Message to the Senate Protesting Censure Resolution (Apr. 15, 1834), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=67039>. Jackson contrasted his inability to present his case to the U.S. Senate with the right of an impartial trial that existed “even in the most trivial litigations.” *Id.*

5. See President Abraham Lincoln, Inaugural Address (Mar. 4, 1861), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25818>. While recognizing the U.S. Supreme Court's duty to decide “some . . . constitutional questions,” Lincoln went on to note that “the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions[,] the people will have ceased to be their own rulers.” *Id.*

6. President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), available at <http://www.presidency.ucsb.edu/ws/?pid=27140>.

7. President Richard Nixon, Special Message to the Cong. Proposing Establishment of a Legal Servs. Corp. (May 5, 1971), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2998>.

8. When searching the American Presidency Project database, see Woolley & Peters, *supra* note 3, if one uses “lawsuit” and “litigation” as keywords, only scattered references appear before 1970. All refer to particular pieces of litigation or to the need to reorganize the federal judiciary or reform procedures as a result of the growth of litigation. None describes civil litigation itself as an issue of political import.

have a generalized position on civil litigation. Until recent decades, it was not a salient political issue. In the decades, indeed the centuries, before 1970 one can search largely in vain for political references to civil litigation. Then, toward the end of the 1970s, warfare broke out.

B. The Terms of Engagement

Ronald Reagan started the snowball rolling downhill. Early in his presidency he gave a speech that sounded the general theme:

I would suggest the time has come to look reality in the face. American society is mired in excessive litigation. Our courts today are loaded with suits and motions of every conceivable type. Yet, as our system of justice has become weighed down with lawsuits of every nature and description, as the courts have become the arbiters of all kinds of disputes they were never intended to handle, our legal system has failed to carry out its most important function—the protection of the innocent and the punishment of the guilty.⁹

By the time Reagan had reached his second term, the idea had both ripened and changed. No longer was the complaint that courts were being distracted from their central task by silly lawsuits; the threat had become deeper and wider, affecting the entire economy:

We must stop draining off resources from our economy through product liability judgments that have gotten out of hand. We will propose legislative measures to reduce the costly product liability insurance spiral affecting the production costs of U.S. goods while still providing the necessary protections for consumer health and safety.¹⁰

Reagan's vice president, George H.W. Bush, took up the theme wholeheartedly. The Republican Party Platform of 1988, when Bush was the Republican presidential candidate, sought to "return the fault-based standard to the civil justice system," because without it "[j]obs are being lost . . . and sometimes lifesaving products are being discontinued, and America's ability to compete is being adversely affected."¹¹ In the 1992 campaign against Bill Clinton, President Bush

9. President Ronald Reagan, Remarks in New Orleans, La., at the Annual Meeting of the Int'l Ass'n of Chiefs of Police (Sept. 28, 1981), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=44300&st=chiefs&st1>.

10. President Ronald Reagan, Message to the Cong. on "A Quest for Excellence," (Jan. 27, 1987), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=34441&st=liability&st1>.

11. Republican Party Platform of 1988 (Aug. 16, 1988), *available at* <http://www.presidency.ucsb.edu/ws/?pid=25846>.

took up the theme with special relish, and repeatedly cited a statement made by an Arkansas lawyer who headed the plaintiffs' bar in that state:

These trial lawyers are backing Governor Clinton right up to the hilt. The lead trial lawyer in Arkansas said, "Don't worry. Bill [Clinton] won't go against us on tort reform." Look, we've got Little League coaches that are afraid to coach; we've got doctors that are afraid to bring babies into the world because of a lawsuit; we've got people that are afraid to help people along the highway because they're afraid to be sued. We've got to put an end to these crazy lawsuits. And we're going to do it. Whatever your politics, you should have an interest in that one. And we've got to sue each other less and care for each other more in this country.¹²

My opponent doesn't think this is a problem. Listen to the president of the Arkansas Trial Lawyers Association, and I quote, "I can never remember an occasion where Governor Clinton failed to do the right thing where we trial lawyers were concerned." While Governor Clinton's in the corner sponging the trial lawyer's brow, I want to get in the ring and strike a blow against all those crazy lawsuits.¹³

Bob Dole, who challenged President Clinton in 1996, took up the same theme, promising to reform the legal system so that it would "help all Americans rather than just a few trial lawyers."¹⁴ One standard Dole campaign speech riffed on an incident in which he fell off a platform that lacked a railing:

You know, I fell off a platform out in California, Chico, a while back. Before I hit the ground, my cell phone rang and this trial lawyer said, I think we've got a case here. (Laughter).¹⁵

Undaunted by the outcome of the 1992 and 1996 elections, Republican candidates continued the theme. In the 2004 presidential election, the Republican platform and standard stump speech of George W. Bush, the candidate and later president, featured statements like the following:

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12. President George H.W. Bush, Remarks to the Cmty. in Auburn Hills, Mich. (Nov. 1, 1992), *available at* <http://www.presidency.ucsb.edu/ws/?pid=21724>.
 13. President George H.W. Bush, Remarks at a Welcome Rally in Anaheim, Cal. (Sept. 13, 1992), *available at* <http://www.gpo.gov/fdsys/pkg/PPP-1992-book2/pdf/PPP-1992-book2-doc-pg1548-2.pdf>.
 14. Senator Robert Dole, Remarks at Arrival Ceremony for the Republican Nat'l Convention in San Diego (Aug. 11, 1996), *available at* <http://www.presidency.ucsb.edu/ws/?pid=85170>.
 15. Senator Robert Dole, Remarks at the Second Clinton-Dole Presidential Debate (Oct. 16, 1996), *available at* <http://www.debates.org/index.php?page=october-16-1996-debate-transcript>. Dole told a variation on the same anecdote in the first debate. *See* Senator Robert Dole, Remarks at the First Clinton-Dole Presidential Debate (Oct. 6, 1996), *available at* <http://www.debates.org/index.php?page=october-6-1996-debate-transcript>.

To make sure that jobs exist here in America so people can find work, we've got to protect our small-business owners and workers from the junk lawsuits that threaten jobs across America. I don't think you can be pro-homebuilder, pro-small-business, pro-entrepreneur, and pro-trial-lawyer at the same time. I think you have to choose. My opponent made a choice. He put a trial lawyer on the ticket. I made my choice. I'm for legal reform to make sure this economy continues forward.¹⁶

President Bush's administration was as good as its word, advocating bills that would restrict state-based class actions,¹⁷ cap noneconomic and punitive damages in medical malpractice lawsuits,¹⁸ and limit asbestos litigation.¹⁹ Walking in the same footsteps, Senator John McCain, the 2008 Republican presidential nominee, promised tort reform, a term he used to describe limits on civil lawsuits in various areas (medical malpractice and product liability among them).²⁰

By contrast, the preceding Clinton administration sought to expand the list of recognized civil claims, advocating a Patients' Bill of Rights, which would have created a new federal cause of action against health maintenance organizations for denial of treatment—a claim otherwise barred by the Employment Retirement Income Security Act.²¹ A characteristic Clinton statement on the topic ran along the following lines:

A real Patients' Bill of Rights holds health care plans accountable for the harm patients face if they are denied critical care. . . . Let me ask you this: How would you react if I gave a speech tomorrow that said, "My fellow Americans, I love the Bill of Rights. I love the freedom of speech, the freedom of assembly, the freedom of religion, the right to travel. I love all those Bill of Rights. But I don't like all these lawsuits. We got too many of them in America. Therefore, I have proposed to amend the Constitution so that no one can ever sue to enforce the right

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16. George W. Bush, Remarks to the Nat'l Ass'n of Homebuilders in Columbus, Ohio (Oct. 2, 2004), available at <http://www.gpo.gov/fdsys/pkg/PPP-2004-book3/pdf/PPP-2004-book3-doc-pg2323.pdf>. The reference to the trial lawyer running mate was to John Edwards, John Kerry's vice presidential candidate.
 17. See, e.g., Elisabeth Bumiller & Stephen Labaton, *Bush Holds Event to Back Curbs on Class-Action Lawsuits*, N.Y. TIMES, Feb. 10, 2005, at A20.
 18. See, e.g., David Rogers, *Leading the News: House Passes Medical-Malpractice Litigation Bill*, WALL ST. J., Mar. 14, 2003, at A3.
 19. See, e.g., Stephen Labaton, *Bush Calls for Change in Handling Asbestos Lawsuits*, N.Y. TIMES, Jan. 8, 2005, at A12.
 20. See, e.g., Senator John McCain, Address at the Presidency IV Forum in Orlando, Fla. (Oct. 20, 2007), available at <http://www.presidency.ucsb.edu/ws/?pid=77132> ("My plan [on the health care system] . . . takes up the challenge of tort reform to stop frivolous lawsuits that enrich trial lawyers while raising health costs for everyone else.").
 21. Employment Retirement Income Security Act of 1974, §§ 4, 514, 29 U.S.C. §§ 1003, 1144 (2006).

to free speech, free assembly, free practice of religion, or any other of the rights that have kept our country strong for 220 years.”²²

In connecting the Democratic Party with the plaintiffs’ bar, both Robert Dole and the two Presidents Bush were right descriptively, whatever one thinks about their proposed policies. As one writer noted, “The connections between plaintiff groups and the Democratic party have gone relatively unexplored in the academic literature, which concentrates on the politics of bar associations.”²³ That connection comes out with special force when legislation proposes to limit or eliminate various claims. Consider, for example, hearings in the 103rd U.S. Congress on legislation eventually adopted as the Private Securities Litigation Reform Act. Senator Howard Metzenbaum, Democrat of Ohio, testifying in opposition to the portion of the legislation that would have blocked aiding and abetting liability in securities fraud cases, captured much of the argument:

Let me spell out the damage that the Supreme Court’s bizarre legal reasoning will cause.

It gives clearly, clearly, I’m not talking about arguable, I’m talking about clearly fraudulent behavior the green light. It says you can’t be sued, you can’t be held accountable. It immunizes those who have clearly helped others to commit securities fraud.

It says to those who assisted savings and loan executives, . . . who have caused innocent investors to lose hundreds of millions of dollars, go home. You’re protected from liability. Sorry to have bothered you. Feel free to do this again.²⁴

Another piece of legislation that would have made plaintiffs responsible for the attorneys’ fees of prevailing defendants drew this assessment from Congressman Edward Markey, Democrat of Massachusetts:

By tilting the scales of justice sharply in favor of powerful, well-heeled corporate interests, H.R. 10 threatens to erode the rights of the individual to obtain equal justice under law. . . . This is a debate over whether individuals within our society will have any rights against large corporations if they have been harmed by those corporations.

22. President William J. Clinton, Remarks on the Patients’ Bill of Rights in Louisville, Ky. (Aug. 10, 1998), available at <http://www.gpo.gov/fdsys/pkg/PPP-1998-book2/pdf/PPP-1998-book2-doc-pg1416.pdf>.

23. THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 186 (2002).

24. *Abandonment of the Private Right of Action for Aiding and Abetting Sec. Fraud: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 8 (1994) (statement of Sen. Howard Metzenbaum).

Let's make no mistake about it: H.R. 10 is dangerous to both the financial and physical health and well-being of ordinary Americans.

. . . Apparently the same ideology that offers up bleak orphanages for poor children views [Charles] Dickens' *Bleak House* as an appropriate model for reforming our judicial system.²⁵

The debate over the predecessors of the bill that ultimately became the Class Action Fairness Act of 2005 brought forth equally spirited defenses of civil litigation in general and the class action in particular. Senator Richard Durbin, Democrat of Illinois, opposed an early version of that bill:

The plaintiffs [in a suit against Texaco] knew they were facing systematic and inexcusable discrimination in the workplace. They wanted to sue, but for months they went from door to door to local attorneys and were turned down. No one was willing to take on their case. Finally a firm down here in the District of Columbia took the case on a flat contingency fee basis. After 4 years—4 years of hard work and after absorbing all the cost of bringing the lawsuit, the plaintiffs' attorneys settled the case for \$176 million. The plaintiffs' attorneys were awarded 11 percent of the common fund for their work and for accepting the case. The Texaco case is a perfect example of why we need to carefully maintain the class action system.²⁶

Senator Robert Toricelli, Democrat of New Jersey, extolled the virtues of the class action in tobacco-related litigation:

Class action lawsuits have been an indispensable tool in recent efforts to hold the tobacco industry accountable.

. . . .

In general, the tobacco industry prefers to litigate in federal court and this bill corresponds perfectly with their strategy.²⁷

25. *Common Sense Legal Reform Act: Hearing on H.R. 10 Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Commerce*, 104th Cong. 6 (1995) (statement of Rep. Edward Markey, Member, H. Comm. on Commerce). The reference to orphanages came from an unrelated Republican proposal to enable mothers on welfare to join the work force by placing their children in group homes. See, e.g., Richard O'Mara, *Are Orphanages Better for Kids Than Welfare*, BALT. SUN, Nov. 27, 1994, http://articles.baltimoresun.com/1994-11-27/news/1994331010_1_orphanages-newt Gingrich-illegitimacy (explaining that a provision of the Republicans' Personal Responsibility Act would place the children of unmarried mothers cut off welfare in group homes).

26. *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 5 (1997) (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary).

27. *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 36 (1999) (statement of Sen. Robert Toricelli, Member, S. Comm. on the Judiciary).

Two years later Representative John Conyers, Democrat of Michigan, personalized the same theme:

Our citizens need more protection against being swindled, not less. But if I understand this measure, and that is what we are here to do, this is the direction that we are being taken, into less corporate responsibility. I have got maybe 13,000 investors from the Baptist Foundation of Arizona who would say amen to that, who would have been barred from the courthouse from any civil judicial relief had the measure that we are examining today been the law of the land as is being proposed at this hearing.²⁸

Looking beyond rhetorical sallies and particular programs, one finds substantive evidence of the linkage of pro- and anti-civil litigation stances with the two parties. A study of all the votes taken in the House of Representatives during 1995, a year in which the Republicans controlled Congress for the first time in forty years and introduced a number of anti-litigation bills suggested the lay of the land:

Even with pure party-line votes excluded, party affiliation had an enormous impact on voting. Democrats voted for the pro-litigation side on an average of 67 percent of the votes, Republicans 17 percent. . . . Litigious policies, then, were supported or opposed mainly on the ends they served, and the battle over them in the 104th Congress was overwhelmingly a partisan struggle.²⁹

And the two parties had allies in their respective views. The anti-litigation camp found echoes in the press and in public relations campaigns. In one example, the villains are plaintiffs' lawyers and the misguided (Democratic) senators who sponsor legislation that fosters litigation:

The Jones case played out in Washington in textbook trial-lawyer style. In recent years one of the tort bar's top priorities has been getting rid of mandatory arbitration clauses in employment contracts. Those clauses require employees to settle disputes with employers in front of a neutral arbiter. Plaintiffs' attorneys hate the efficiency and fairness of this system, since it denies them a chance to clog up courts and win giant punitive damages.³⁰

In another instance, negligent examiners in the Patent Office conspire with renegade federal judges to wreak havoc with intellectual property:

28. *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary*, 107th Cong. 3 (2002) (statement of Rep. John Conyers, Member, H. Comm. on the Judiciary).

29. BURKE, *supra* note 23, at 188.

30. Kimberley A. Strassel, *The Senate's Lawsuit Factory*, WALL ST. J., July 22, 2011, at A13.

But that's the rationale used to justify all litigation ginned up by contingency-fee lawyers. The issue isn't whether intellectual property rights should be enforced, it's whether we have a reliable process for working out who really supplied the intellect. We don't. A system that issues and upholds junk patents will devalue intellectual property much faster than one that scrutinizes patents more carefully and enforces only the good ones.³¹

Echoing the same theme, the website of the U.S. Chamber of Commerce describes the importance of legal reform:

The U.S. Chamber of Commerce works to end lawsuit abuse and ensure that businesses receive the fair, efficient, and consistent justice system they deserve.

The Facts

- America's civil justice system is the world's most expensive, with a direct cost in 2010 of \$264.6 billion, or 1.82% of the U.S. GDP.
- The tort cost per person was \$857 in 2010, a sevenfold increase from 1950 when adjusted for inflation.
- Lawsuits cost small businesses \$105.4 billion in 2008—money that could be invested in more jobs, higher wages, or better benefits.
- 70% of senior executives and litigators at America's largest employers believe that the litigation environment in a state is likely to impact important business decisions at their companies, including whether to grow jobs or do business in a state. That is a 13% increase from 2007.³²

The pro-litigation camp followers could dish it out just as well. In this narrative, civil litigation vindicates rights of the downtrodden and speaks truth to power. In the process, civil litigation fills the shoes of sclerotic public regulators who fail to enforce the law:

When private corporations and the government fail to keep the public safe from food poisoning, the civil justice system can step in. Lawsuits can provide an additional layer of accountability and help shed light on issues and information that private companies and the government are

31. Peter Huber, *Digital Innovators vs. the Patent Trolls*, WALL ST. J., Apr. 18, 2011, at A15.

32. *Legal Reform*, U.S. CHAMBER OF COM., <http://www.uschamber.com/legalreform> (last visited July 18, 2013).

complicit in hiding from the public. Lawsuits have also allowed the public to gain information integral to public safety that consumers can then use to make informed market decisions. In addition, they provide much needed compensation to the injured.³³

In still another iteration of the pro-litigation theme, civil litigation protects us all against malevolent economic powers as well as sleepy or co-opted regulators:

From autos and appliances to toys and tampons, civil lawsuits save lives by holding manufacturers accountable for dangerous defects ignored in the name of profits.

Consumers may think they are adequately protected from dangerous products by benevolent corporations that will go out of their way to prevent injuring or killing their consumers.

Or they may think they are adequately protected by government regulations designed to keep unsafe products off the market.

If only those things were enough to guarantee safety. Fortunately, consumers have another line of defense: the civil justice system.

Our civil courts do more than compensate injured consumers and hold corporations accountable for the harm caused by their wares. The courts also force manufacturers to remove dangerous goods from the marketplace and make changes that create safe products, even when government regulations and corporate goodwill have been unable or unwilling to do so.³⁴

As the reader will infer from the hyperbole employed by both sides, we see not a respectful dialogue over issues of public concern but an exchange of artillery fire by two camps, both entrenched in their opposing positions and each convinced of the rectitude of its views. In this piece, I do not intend to step into the line of fire or to make peace between the warring parties. I want rather to observe the configuration of the trenches, to explain how the opposing parties chose the allies with whom they entered the battle, and to describe some aspects of the quarrel that neither side wants to mention. As with many real wars, there is both destiny and contingency in the alliances formed, and some facts about the roots of the conflict that both sides would rather conceal or ignore.

33. JOCELYN BOGDAN, OUR FATAL FOOD ATTRACTION: REGULATORY FAILURES AND THE CIVIL JUSTICE SYSTEM 1–2 (2012). Bogdan's report appeared on the web site of the Center for Justice and Democracy, a nonprofit organization based at New York Law School, which describes itself as "[f]ighting for civil justice [and] stopping so-called 'tort reform.'" CENTER FOR JUST. & DEMOCRACY, <http://www.centerjd.org> (last visited July 18, 2013).

34. *Product Safety*, CONSUMER ATTORNEYS CAL., <http://www.caoc.org/index.cfm?pg=productSafety> (last visited July 18, 2013).

III. WHY DID IT HAPPEN?

If I have convinced the reader that there is something striking about the emergence of civil litigation as a political issue, the next logical question is how this came about—followed by speculation about why it stopped. Why did civil litigation emerge as a partisan issue in the latter part of the twentieth century, persisting into the opening decade of the twenty-first?

Both from a distant and from a close historical perspective, one would imagine that civil litigation was an uncontroversial part of the landscape. The colonial inheritors of the Glorious Revolution of 1688 tended to see the institutions of the common law as essential protectors of their liberties.³⁵ This tendency reveals itself both in political pamphlets and in the provisions of the U.S. Constitution, particularly those of the Bill of Rights, several of which enshrine liberties that had been part of the common law tradition. Other constitutional features, such as the creation of diversity jurisdiction in the federal courts, improve on the common law—providing extra insurance against biased local fora.

If we leap forward from the founding to the eve of the litigation wars, one might have imagined that no such conflict would ever take place. By the middle of the 1970s, the U.S. legal system had dismantled and rejected the doctrines reflecting the view that civil litigation was a social evil: barratry, champerty, and maintenance.³⁶ In a series of decisions between 1963 and 1977, the Supreme Court effectively constitutionally protected these activities.³⁷ In one such case, *Bates v. State Bar of Arizona*,³⁸ the Court likened lawsuits to political activity:

Decided cases reinforce this view [that advertisements for lawyers were constitutionally protected]. The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of

35. J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30 (1987).

36. Barratry involved the stirring up of litigation by informing others that they had a meritorious cause of action—as happens in every advertisement urging those who have taken a drug or bought a product to contact a lawyer. Champerty involved dividing the proceeds of a lawsuit with a person not a party to that suit—as happens with every contingent fee arrangement. Maintenance involved paying for another to maintain a lawsuit—as happens with numerous nonprofits founded to finance and conduct litigation in some area of interest to the membership.

37. See, e.g., Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 *VAND. L. REV.* 1975, 1985–91 (2004).

38. 433 U.S. 350 (1977).

effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.³⁹

That language constitutes both a firm rejection of medieval hostility toward litigation and an endorsement of civil litigation as a political right. Both the rejection and the endorsement gain strength from the factual context.⁴⁰ Before the Court in *Bates* was a homely newspaper advertisement in which a pair of lawyers had advertised their prices for handling an uncontested divorce, adoption, personal bankruptcy, or name change.⁴¹ In the understated language of judicial opinion writing, *Bates* also expresses what I term the pro-litigation stance. Shortly after *Bates*, the litigation wars broke out, and the firing since then has been steady and occasionally intense. Why did the controversy, which one might have thought the Supreme Court's decisions laid to rest, flare up again?

I posit two reasons. As I argue in Part VI—which focuses on the end of the litigation wars—complaining about or extolling the virtues of civil litigation was for both parties politically more feasible than doing something about real problems. Those real problems included the decline of the traditional manufacturing economy in the United States and the nation's inability to establish a modern, comprehensive health care system. For different reasons, neither party was able or willing to do very much about these large-scale problems in the closing years of the twentieth century. For the Republicans, it became politically convenient to blame the lawyers for the declining manufacturing sector and for the rise of health care costs. For their part, the Democrats proposed lawyers and litigation as the solution to health care and for the sclerosis of a regulatory apparatus unable to cope with workplace safety and financial fraud. For the Democrats, political action was unnecessary because litigation would take care of the problem.

Even if these stances bore only glancing relations to reality, they needed to be plausible to be politically effective. But for either of those positions to be plausible,

39. *Id.* at 376–77 n.32 (citations omitted). The status of the common law crimes was not formally at stake in these cases. See Van O'Steen, *Bates v. State Bar of Arizona: The Personal Account of a Party and the Consumer Benefits of Lawyer Advertising*, 37 ARIZ. ST. L.J. 245, 246–48 (2005). All observers agree, however, that their net effect was to cast these offenses into a dark constitutional shadow.

40. One can find an occasional case indicating that not all courts or lawyers have read *Bates* so broadly. See, e.g., *Del Webb Cmty., Inc. v. Partington*, No. 2:08-CV-00571, 2009 U.S. Dist. LEXIS 85616 (D. Nev. Sept. 18, 2009) (granting summary judgment to plaintiff on a champerty claim against a house inspection firm whose contracts contained a clause requiring homeowners to split with the firm any recoveries resulting from the defects identified and remarking that Nevada has not repealed its champerty and maintenance statutes). More characteristic are cases like *Saladini v. Rigbellis*, 687 N.E.2d 1224 (Mass. 1997) (abolishing as outmoded the common law actions of barratry, champerty, and maintenance).

41. *Bates*, 433 U.S. at 354.

the plaintiffs' bar needed to be either a formidable enemy (for the Republicans) or a reliable and heroic champion (for the Democrats). In 1950, either role for the plaintiffs' bar would have been laughable. Several related developments made these lawyers far more formidable than they were at the close of World War II: the reorganization of the plaintiffs' bar, changes in substantive law, and the class action. Much has been written separately about each of these developments; the sketch that follows serves only to explain how they shed light on our current battles over civil litigation.

A. The Bar

At the start of the twentieth century, what we now call the plaintiffs' bar was a pitiful spectacle: Operating out of fly-specked storefronts, these undercapitalized and sometimes marginally educated lawyers often lacked the resources to represent their economically marginal clients adequately. Paul Newman's 1982 film *The Verdict* anachronistically but concisely captures the essentials: The alcoholic Newman, a failing solo practitioner, lurches from a funeral home where he trolls for clients to a bar where he drinks himself into a stupor while ignoring his one existing client, a patient reduced to a vegetative state by incompetent obstetrical care.⁴² When the defendant, represented by a score of clever but unscrupulous defense lawyers, spirits away the expert on whose testimony Newman is depending, Newman lacks the funds to hire another of suitable credentials and must rely on the testimony of an unimpressive generalist.⁴³ Newman's character nevertheless succeeds against all odds; in real life in the first half of the twentieth century the story often came out otherwise.⁴⁴

In describing *The Verdict*, I characterized it as anachronistic. By the time of the film's release in 1982, the plaintiffs' bar no longer resembled Paul Newman's character. It was smarter, richer, and better organized. In the years after World War II, the plaintiffs' bar began to organize, first as a group calling itself the National Association of Claimants' Compensation Attorneys, a reference to the workers' compensation practice that provided a steady income to its members, then renaming itself the Association of Trial Lawyers of America (ATLA), and today

42. THE VERDICT (Twentieth Century Fox Film Corporation 1982).

43. *Id.*

44. For a similar although slightly less dramatic account by a successful practitioner looking back on his predecessors, see STUART M. SPEISER, LAWYERS AND THE AMERICAN DREAM 185–86 (1993), stating that, “They would start the lawsuit by typing up a very short standardized form of complaint, and would then attempt to settle the case If no settlement was forthcoming, they would drop the case, even if it had merit.”

the American Association for Justice (AAJ).⁴⁵ Besides throwing rather elaborate conventions, the group has two principal functions: education (broadly speaking) and lobbying. It does both very well.

The association and its state analogues run a number of professional seminars sharing information about how best to pursue various claims.⁴⁶ These meetings serve several purposes. First and obviously, they offer members a chance to network and to develop skills and gather information about emerging topics in civil litigation. They do so at a level unimaginable to those inhabiting Paul Newman's world. Conversations with practitioners who typically represent defendants suggest that the plaintiffs' lawyers were often more at ease with case-presentation technology than their defense counterparts, who tended to rely, occasionally to their detriment, on their information technology departments.⁴⁷ Less obviously but perhaps even more importantly, these meetings serve to create a robust network of referrals. By giving a seminar in, say, employment law or insurance bad faith, a lawyer not only educates her colleagues; she also advertises that she knows a lot about this area—and may welcome referrals from others who have clients with such claims. Once upon a time, ethical constraints discouraged lawyers from referring claims by banning referral fees. Without the ability to profit by handing the case to a specialist, the original lawyer might try to muddle through, often to the detriment of his client. Today, in most jurisdictions, referral fees are either explicitly permitted or achieved through cocounsel relationships, or the ban is ill-enforced.⁴⁸ As a result, a lawyer who gets a case that seems outside his capabilities has a strong incentive to get it into hands able to maximize its potential.

The association also maintains a vigorous lobby, principally in Washington. One study chronicled its effectiveness:

ATLA's strategy [of focusing its efforts on "insider" lobbying] was undeniably successful in blocking federal tort reform legislation. Until

45. See *Mission & History*, AM. ASS'N FOR JUST., <http://www.justice.org/cps/rde/justice/hs.xsl/418.htm> (last visited July 18, 2013). The most recent name change occurred because the litigation controversy had turned "trial lawyer" into a term of opprobrium. See *infra* note 107 and accompanying text.

46. A recent flyer from the Consumer Attorneys Association of Los Angeles advertises a Las Vegas meeting offering panels on prelitigation client preparation, mediation, government torts, damages, technology, jury selection, complex cases, evidence, legal ethics, experts, employment litigation, depositions, liens, advanced trial skills, auto cases, effective proof of medical damages, workplace injuries, pretrial motions, and insurance bad faith litigation. See Flyer, Consumer Attorneys Ass'n of L.A., CAALA Vegas 1983–2012: 30th Anniversary Las Vegas Convention (on file with author and the UCLA Law Review).

47. Conversation with Mark Herrman, Partner, Jones Day, Kansas City, Mo. (Apr. 7, 2006).

48. See Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 957–58 (2004).

the fall of 1994 the association could credibly claim that it had never been beaten in Congress. Reader's Digest hyperbolically acclaimed ATLA as "America's Most Powerful Lobby." Even today [in 2002] there are only minor blemishes on ATLA's record in Congress. The downside of ATLA's strategy, however, was that the lawyers seemed to be losing the battle of public opinion, and with it the hearts and minds of juries and judges.⁴⁹

Lobbying in Washington notoriously costs a lot, and, again, Paul Newman's fictional cohort could not have imagined mounting such an effort, much less succeeding at it. In real life, the new plaintiffs' bar—at least its elites—are wealthy enough to have such an impact. They got to that point in several ways.

First, they collaborated with other lawyers. At the start of the twentieth century, most lawyers of all sorts were solo practitioners. At the start of the twenty-first, most were not—including members of the plaintiffs' bar. Even a firm of five or ten lawyers both creates economies of scale and enables complementary areas of expertise: I do workers' compensation work that reliably pays the rent; you do high-damage personal injury cases; she does product liability cases. These new practice groupings increased the likelihood that the plaintiffs' bar would perceive commonalities of interests (hence ATLA and AAJ). It also encouraged deeper investment both in expertise and in technology: If my practice will end with my retirement, I may be warier about investing than if I foresee the firm continuing indefinitely. Second, as the hypothetical narrative above suggests, these firms became better capitalized.⁵⁰ Unlike Newman's character, they could afford to hire the best experts in the United States; indeed they may have a stable of such persons from whom to choose, with scores more eagerly awaiting a phone call. One way of characterizing the change—a characterization to which I return in Part V—is to say that the plaintiffs' bar had achieved a sustainable business model.

Expertise, recapitalization, and reorganization rendered the plaintiffs' bar an adversary far more formidable than Paul Newman's character might suggest. Two other developments substantially increased the impact of the lawsuits brought by this new generation of plaintiffs' lawyers.

B. The Substantive Law

The years between 1945 and 1980 saw substantial changes in three areas of substantive law: comparative negligence, joint and several liability, and products

49. BURKE, *supra* note 23, at 49 (footnote omitted).

50. *Cf.* Yeazell, *supra* note 48, at 957 n.37.

liability.⁵¹ Comparative negligence reduced the number of defense verdicts in negligence cases and increased the number of cases in which a plaintiff could recover something.⁵² And, if plaintiffs could recover all the damages from a secondary defendant—often an entity whose assets would suffice to satisfy any imaginable judgment—then comparative negligence had an even deeper reach and bite. To take a generic scenario, suppose an auto accident occurred in which both the plaintiff's and the defendant's negligence contributed to the injuries—but so did the actions of the plaintiff's automaker and the physicians who treated the plaintiff's injuries. If the plaintiff's injuries were sufficiently serious, the judgment might exceed the defendant's insurance coverage, in which case the additional liability of the automaker and the physician would prove critical to the eventual recovery.

The liability of the automaker also became more likely because of other developments. In a series of decisions, judges and legislators developed doctrines that held manufacturers liable for harms inflicted by products whose design was “unreasonably dangerous.”⁵³ The plaintiff harmed by such a product did not need to demonstrate that the product was defectively manufactured, only that the manufacturer could have, with existing knowledge and at a reasonable cost, designed the product in such a way as to avoid the injury now complained of.⁵⁴ This development opened the way for substantial recoveries by those injured by a wide variety of modern products: vehicles, home appliances, too-hot cups of coffee, and a wide list of others. Sometimes the defect might be inadequate warnings about foreseeable hazards, a theory of liability leading to such familiar phenomena as the now-ubiquitous statements such as, “Objects may be closer than they appear” or “Caution: This beverage is hot.”

51. See, e.g., Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 190–93 (2001) (chronicling the expansion of products liability and “the substitution of comparative [negligence] for the regime of contributory negligence”).

52. I put to one side the contention that some juries had for many years applied a homemade form of comparative negligence, rendering plaintiffs' verdicts in the face of evidence suggesting that the defendant had a good contributory negligence defense. Whatever the number of such cases, a jury instruction explicitly permitting a partial plaintiff's verdict, even if he was partially responsible for the injury, must have increased the number of plaintiffs' verdicts.

53. See, e.g., David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 974–77 (2007) (discussing strict product liability and the publication of *Restatement (Second) of Torts* § 402(a) (1965), which adopted the “unreasonably dangerous” standard).

54. See *id.*

C. The Class Action

In 1966, the Supreme Court, acting under authority of a congressional delegation of power, revised Rule 23 of the Federal Rules of Civil Procedure, which provided for class actions.⁵⁵ The commentary provided by the committee that drafted the new rule noted that it recast “in more practical terms the occasions for maintaining class actions.”⁵⁶ Most states followed suit.⁵⁷ The revised rule created a small industry in class actions, an industry that continues to flourish, though now under significant constraints. The revised Rule allows an enterprising plaintiff’s lawyer to identify a harm that would not by itself be large enough to justify a lawsuit and bring suit on behalf of a large group of similarly situated people. From the defendant’s standpoint, the class action turns a \$1.28 overcharge of a million customers into a potential multimillion-dollar liability. The virtues of class actions have been widely and sometimes hyperbolically debated, described both as “one of the most socially useful remedies in history”⁵⁸ and as “legalized blackmail.”⁵⁹

The merits of the class action debate need not detain us. Our concern lies instead with how these developments affected prospective defendants. Combined with the shift to comparative negligence, a new law of product liability, and the rise of a more powerful plaintiffs’ bar, the class action produced litigation that could threaten the wellbeing even of a well-established defendant. Asbestos litigation bankrupted an entire industry, and some thought that tobacco litigation might have done so had the defendants not settled for many billions of dollars. On the public and nonprofit side of things, class actions forced substantial—and expensive—changes in schools, prisons, and other institutions. Lawsuits became a threat to the stability and even the continued existence of a number of potential defendants. Unsurprisingly, defendants fought back, not only by vigorously defending lawsuits but also by launching broad political and public relations efforts. One result of those efforts was the new salience of civil litigation as a political issue.

Put another way, changes in substantive and procedural law combined with the reorganization of the plaintiffs’ bar to make civil litigation a much more

55. FED. R. CIV. P. 23.

56. FED. R. CIV. P. 23 advisory committee’s note (1966).

57. Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences From—and Lessons for?—Federal Rule 23*, 35 W. ST. U. L. REV. 147, 147 (2007) (“[A] considerable majority of American states track Federal Rule 23, at least in its 1966 version . . .”).

58. Abraham L. Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1259 (1970).

59. Milton Handler, *The Shift From Substantive to Procedural Innovations in Anti-trust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

formidable threat to major economic and social entities. When such shifts happen, the gored oxen look for help. One place they look is to government, which has the power to change the terms of engagement. State legislatures could—and some did—restrict the availability of joint and several liability.⁶⁰ State legislatures could—and some did—cap damages for certain kinds of injuries.⁶¹ State and federal legislatures could—and did—forbid publicly funded lawyers from engaging in certain forms of representation.⁶² Congress might offer protection from class actions by changing the standards for such lawsuits or by making it more difficult for state courts to pursue large classes whose members mostly came from out of the state. Or Congress might preempt state law, for example, by setting uniform national standards for product liability suits, either across the board or in specific areas. Or Congress might make it more difficult to initiate some kinds of suits—by raising pleading standards. In the years after 1980, political forces aligned with defendants proposed each of these changes with varying degrees of success.

The plaintiffs' bar fought back with remarkable success given the interests aligned on the other side. True, the structure of both state and federal governments makes it easier to oppose than to enact legislation, and from 1980 onwards, the plaintiffs were opposing rather than seeking change. Nevertheless, the stickiness of the status quo seems remarkable. In 2013, we have no national medical malpractice regime, in spite of several administrations that sought one. Nor do we have a national products liability regime. After great congressional effort, we have a changed pleading standard for private securities litigation,⁶³ but that change is remarkable for having been directed primarily at the activities of one notoriously⁶⁴ successful plaintiffs' firm. The effort needed to thwart the activity of a

60. 3 JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 19:18 (2013) (reporting that in the wake of comparative negligence “thirty-seven jurisdictions have adopted some alterations to the common-law rule of joint and several liability” and that the “modifications, apart from total abolition, come in all sizes”).

61. DAN B. DOBBS ET AL., *DOBBS' LAW OF TORTS* § 486 (2013) (surveying jurisdictions that have capped damages and reporting that “well over half the states have enacted some kind of cap on damages recoverable”).

62. *See, e.g.*, 45 C.F.R. § 1617.1 (2012) (forbidding agencies funded by the Legal Services Corporation from participating in class actions).

63. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C. (2006)).

64. The activities were notorious and unlawful. One of the firm's principal partners pleaded guilty to a scheme in which he paid an “on-call plaintiff” holding small numbers of many securities; this device enabled the firm to be the first to file a securities law class action for virtually any widely traded stock. Under the then-existing law, the lawyers of a first-to-file plaintiff had an advantage in being appointed “lead counsel” and thus in line for a lion's share of resulting legal fees. *See* Ann Woolner, *Convicted King of Class Actions Bill Lerach Builds Aviary, Regrets Nothing*, BLOOMBERG

single law firm testifies as much to the strength of the plaintiffs' bar as to those opposing it. In a similar vein, a decade after the securities law legislation came modest changes in the availability of state-based class actions,⁶⁵ but the widely predicted demise of the class action seems to have been greatly exaggerated.⁶⁶

Having viewed the emergence of civil litigation as a topic of controversy, let us now turn in the following two Parts to observe some of its oddities, including the facts omitted from the competing narratives.

IV. MISALIGNED POSITIONS AND THEIR CAUSES

History has a way of distorting theoretical purity, and one can see this process at work in the way the political parties took their respective stances toward civil litigation. From a distant perspective, they appear to have things backwards.

A. An Extraterrestrial Perspective

If a Martian visited the United States and were told that one political party generally favored regulation by markets and the other by political bureaucracies, and further that one of those parties generally favored litigation and the other opposed it, our Martian would likely reach the wrong conclusion about the alignment of interests with current political parties. Moreover, the alignment our Martian would imagine would create for both parties a cleaner, more coherent stance toward the respective roles of markets and politics.

Roughly speaking, the Republican Party celebrates markets and entrepreneurs, seeks to decentralize control of social and economic life, and deplores bureaucratic regulation. Equally roughly speaking, the Democratic Party shows more enthusiasm for regulatory and centralized solutions to national problems and substantial wariness of market forces. In a conceptually tidy universe, the view that celebrates litigation might see it as the market alternative to centralized control and government regulation. In that universe, litigation enthusiasts would align themselves with the Republican Party and celebrate its decentralizing and privatizing virtues. In the same tidy universe, the view that abhors litigation

(Oct. 11, 2011, 9:00 PM), <http://www.bloomberg.com/news/2011-10-12/convicted-king-of-class-actions-bill-lerach-builds-aviary-regrets-nothing.html>.

65. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2006)).

66. More carefully put, the Class Action Fairness Act has not had the effect its sponsors hoped for and its opponents feared. Subsequent cases, for example, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), may prove to be more important restrictions on the class action.

might see central regulation administered by wise, rational, and democratically accountable civil servants as a substitute for the messiness, inefficiency, and uncertainty of litigation. In that universe the anti-litigation party would be the Democrats. That is not our universe.

In our Martian's world, the Democrats could describe themselves as supporters of the rational regulatory state, with expert civil servants implementing sensible policies set by the political branches. In such a polity, efficient levels of regulation would supplant the inefficiency and inconsistency of litigation in creating incentives for producers and manufacturers to bring optimally safe products to markets. Social insurance would supplant tort's role in compensating the injured. Such a policy would move the United States toward a social democracy resembling a number of European nations. A number of scholars and policy makers have recommended such a vision.⁶⁷ And, for a brief moment, a Democrat—an uncharacteristic Democrat—did propose such an idea. In 1978, Jimmy Carter chose a speech before the Los Angeles County Bar Association to launch an attack on litigation and lawyers:

We have the heaviest concentration of lawyers on Earth—1 for every 500 Americans; three times as many as are in England, four times as many as are in West Germany, twenty-one times as many as there are in Japan. We have more litigation, but I am not sure that we have more justice. No resources of talent and training in our own society, even including the medical care, is more wastefully or unfairly distributed than legal skills.

Ninety percent of our lawyers serve 10 percent of our people. We are over-lawyered and under-represented.⁶⁸

Carter's proposed alternative to litigation was alternative dispute resolution, no-fault auto insurance and divorce regimes—all rational, government-sponsored alternatives that might have warmed the heart of a New Deal Democrat.⁶⁹ Noth-

67. See, e.g., ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 7–9 (2001) (criticizing the tendency in the United States to turn policy problems into litigation); see also CHARLES FRIED & DAVID ROSENBERG, *MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT* (2003) (recommending rational regulation supplemented by first-party insurance).

68. President Jimmy Carter, Remarks at the 100th Anniversary Luncheon of the L.A. Cnty. Bar Ass'n (May 4, 1978), available at <http://www.presidency.ucsb.edu/ws/?pid=30750>.

69. President Carter remarked,

We must eliminate from our judicial system cases which can be resolved in other ways. No-fault automobile insurance systems, adopted by many States, are a step in the right direction. National standards for no-fault will have a much greater impact. We support no-fault divorce laws, like those passed when I was Governor of Georgia and the ones passed here in California, that can reduce litigation that's

ing happened, and no subsequent Democrat has taken up that banner, but Carter's statement nicely captures a might-have-been alignment of interests.

Our Martian's Republicans could offer a contrasting but equally coherent and attractive vision. In this vision, bureaucratic regulation would wither. Instead, civil litigation would put in the hands of juries questions of economic regulation. The answers emerging from thousands of lawsuits would represent a summation of localized wisdom of hundreds of thousands of ordinary citizens, adapting and applying law to numerous, ever-changing circumstances. The litigation market, not bureaucrats, would give society the level of precaution and risk its citizens had chosen, and the suppliers of goods and services would take into account the cost of verdicts past and future and adjust their processes accordingly. This vision was beautifully captured in remarks made by a plaintiff's lawyer who identified himself as "a member of a pretty small group . . . a politically conservative trial lawyer":⁷⁰

I'd like to take about two minutes and explain why [being a politically conservative trial lawyer is] not an oxymoron. The basic premise underlying what most conservatives believe about government is that government doesn't work very well. The less we have of it, as Jefferson said, the better off we are. . . . But conservatives also share with most Americans the view that . . . [e]very citizen, regardless of his station in life, has access to justice, to equal treatment at the hands of the law . . .

. . . .

We require in this country by our social contract to address this imbalance [between individual citizens and large corporations] in some way, and there are two ways to do it. . . . The first way . . . we make government bigger, more regulations, more red tape, more bureaucrats, more oversight from Washington. Now, this idea is repugnant to conservatives. . . .

. . . Is there an alternative? Yes. There's one alternative that's grown up that doesn't require a clumsy ham fisted hand of big government. It's the judicial system. It's been around for two-hundred years with a

unnecessary and also the bitterness that litigation brings. We must look for ways to reduce the tremendous burden of medical malpractice costs.

. . . .

We are reviewing suggestions for reducing litigation, including more arbitration, greater reliance on small claims courts, and experiments with alternative systems for resolving disputes such as the experimental arbitration systems now in existence in San Francisco, in Philadelphia, and in other parts of our country. *Id.*

70. *Tobacco Lawyers' Roundtable: A Report From the Front Lines*, 51 DEPAUL L. REV. 543, 549 (2001).

body of common law that protects the major corporations and the little guys just a like [sic].⁷¹

Like social democracy, this vision has both strong attractions and learned proponents,⁷² and it could be the mantra of the Republican Party.

But it is not. We do not live in the tidy universe envisioned by our Martian. Instead, Democrats favor both regulation and litigation. By contrast, Republicans favor neither regulation nor litigation. Why? Surely part of the answer lies in accident and path dependency. The old Association of Claimants' Compensation Attorneys—the grandparent of today's organized plaintiffs' bar—had strong labor roots: Workers' compensation was the Progressive Era's response to workers' injuries, and the Democrats were the party of organized labor.⁷³ Accordingly, when the leaders of the nascent organization thought of contacting an officeholder to influence legislation, it was natural to call on—and then to contribute to—a Democrat. Once one starts down that path, future contacts and future contributions seem natural.

Yet even this first contact might have gone otherwise in a parallel universe. Workers' compensation (workmen's compensation, it would then have been called) grew out of hostility to courts and litigation, a hostility shared by the workers, who had too often suffered defeat in efforts to gain compensation for workplace injuries, and their employers, who sought predictable and inexpensive administrative decisions in place of unpredictable and occasionally large jury verdicts. For their part, the Republicans might have welcomed an alliance with the plaintiffs' bar as an attractive, small-government answer to the proliferation of administrative regulation under the New Deal. So in a slightly different frame of mind, the Republicans and the plaintiffs' bar might have become allies. That they did not may have had something to do with the civil rights revolution that was occurring at same time the plaintiffs' bar was taking on its modern configuration.

B. Civil Rights and the Political Alignment of the Plaintiffs' Bar

In 1954, litigation organized by the Legal Defense & Education Fund of the National Association for the Advancement of Colored People (NAACP) persuaded the U.S. Supreme Court to overrule *Plessy v. Ferguson*⁷⁴ and to hold unconstitutional laws mandating the segregation of public education. The story

71. *Id.* at 549–50 (second alteration in original).

72. For an influential example of this tradition, see generally FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

73. See *Mission & History*, *supra* note 45.

74. 163 U.S. 537 (1896).

of the litigation campaign leading to *Brown v. Board of Education*⁷⁵ has been told well and often. For our purposes, *Brown's* importance lies not in its status as a landmark case but in its effect on the image of the lawyer, in particular the plaintiffs' lawyer. The plaintiffs' bar, maligned, with some justice, as marginally competent ambulance chasers, badly needed an image remake.⁷⁶ Thurgood Marshall and his colleagues provided a heroic image for the plaintiffs' bar: Travelling into sometimes-dangerous venues, litigating against an entrenched establishment, operating on a shoestring budget, and seeking social justice, these lawyers could do for civil plaintiffs' lawyers what Clarence Darrow had done for criminal defense lawyers.⁷⁷ They provided a splendid public face for lawyers as vindicators of rights, champions of the oppressed, and doers of justice.

But the plaintiff's bar's nominal alliance with the Democrats was a significant obstacle to embracing the heroic mantle of the civil rights litigators. The South had turned its back on Lincoln's Republican Party after Reconstruction, and those who created and maintained the regime of segregation were all Democratic officeholders. For a century after the Civil War, to the very limited extent that either party could be described as favoring civil rights, it was the Republicans. The adversaries of the NAACP litigators were all southern Democrats. It would have been both awkward and ineffective to bask in the heroic glow of the NAACP litigators and simultaneously to send checks to the party whose entrenched senatorial cadres were vigorously resisting implementation of the rights won by those litigators.

Fortunately, Lyndon Johnson came to the rescue—of the plaintiffs' bar, though not of the southern Democrats. By making civil rights legislation the hallmark of his presidency, Johnson may, as he himself remarked, have “delivered the South to the Republican Party for a long time to come.”⁷⁸ At the same time, he coincidentally removed a barrier to the plaintiffs' bar's wholehearted association with the Democrats. The bar could now continue its connection with the Democrats and simultaneously lay claim to the heroic image of the civil rights litigators. They were not only allying themselves with old friends but they were also allying themselves with the party that had rooted its national policy in implementing the rights heroically won by this small band of lawyers.

75. 347 U.S. 483 (1954).

76. See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 45–50 (1976) (describing efforts in the early twentieth century to reform the plaintiffs' bar, driven by the perception among the legal elite that “ambulance chasing” and contingency fee arrangements had attracted “undesirable persons” to the profession).

77. See SPEISER, *supra* note 44, at 42–43.

78. Bill Moyers, *Second Thoughts: Reflections on the Great Society*, *NEW PERSP. Q.*, Winter 1987, at 40, 41.

The plaintiffs' bar was not alone in seizing on the image of the heroic litigator. The public interest bar as we know it today was born of this image, and the many affinity groups that inhabit the nonprofit landscape also draw on this model, in which litigation is simultaneously their reason for existence and a fundraising mechanism. They raise funds to litigate, and litigation draws attention that raises more funds (this is at any rate the hope and the business model). That model came to seem both heroic and omnipotent; as Aryeh Neier, the former litigation director of the American Civil Liberties Union, wrote, reflecting on the era: "In the 1960s . . . litigation seemed the way to deal with every question."⁷⁹

C. Litigation or Regulation, Litigation and Regulation: Tensions in the New Alliance

This newfound faith in litigation as a tool of social and economic policy created, however, a potential tension between the plaintiffs' bar and the Democratic Party. The preceding political generation had seen litigation as an alternative—an unattractive alternative—to administrative regulation.⁸⁰ We all know that the Democratic Party was the party of the New Deal. It is less commonly remembered that the architects of the New Deal had resolutely rejected litigation as a source of social change.⁸¹ Indeed, the administrative state came into being in response to judicial decisions that thwarted a number of early efforts at social reform. Litigation was the tool of those who opposed the administrative regulations of the Progressive Era and the New Deal. James Landis, the former dean of Harvard Law School, put the point concisely in his Storrs Lectures in 1938, later published as *The Administrative Process*: "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes."⁸² In 1954 that was still the legacy of the Democratic Party—the architects of the administrative state, a state that defined itself as a rational and efficient alternative to the sloppy and politically retrograde inconsistency of litigation.

How the Democrats became disenchanted with the administrative process is too complex a story to be told here. For present purposes, it is enough to note that the tension between litigation and administration within the Democratic Party—which a preceding generation would have understood—has not surfaced

79. ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 213 (1982).

80. Or, at best, the preceding political generation had seen litigation as a supplement to administrative action. See, e.g., Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) (depicting class actions as a way of extending the enforcement efforts of administrative agencies).

81. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

82. *Id.* at 46.

in recent decades. With the momentary exception of Jimmy Carter, there is not an anti-litigation, proregulation wing of the Democratic Party.⁸³ And the Republicans seem quite uninterested in wooing the votes and money of the plaintiffs' bar, instead savaging both regulation and litigation, without asking that the Democrats choose one position or the other. Why? Two answers suggest themselves, one from the perspective of the plaintiffs' bar, another from that of the two political parties.

From the perspective of the plaintiffs' bar, regulation and litigation can stand in a symbiotic relationship. A long-established example is Rule 10b-5 of the Securities Exchange Act of 1934.⁸⁴ That regulation famously prohibits fraud in the purchase or sale of public securities. From that regulation, the Supreme Court has implied a private right of action for those who have suffered losses from such fraud.⁸⁵ Securities fraud claims, particularly class actions claiming securities fraud, have become a major litigation specialty—and have inspired at least two pieces of federal legislation to limit them.⁸⁶ Other private rights of action have been found in a number of areas.⁸⁷ To the extent the plaintiffs' bar could rely on courts to imply such causes of action, they would welcome administrative regulations, because such regulations hold the potential to create new claims.

From the anti-litigation perspective, this symbiotic relation between litigation and regulation poses a difficult choice between evils. From the defendants' standpoint, regulation has two important advantages over litigation: It is slower (the process for producing a formal regulation is notoriously long) and it is more subject to political influence. That means that a regulated entity has advance notice of a proposed regulation, opportunity to influence it in both the regulatory and political arenas, and lots of warning that a new regulation is coming into effect. Regulation thus offers predictability, and large entities like predictability: It gives them time to plan and adapt. By comparison, litigation is faster and less predictable: Those responsible for planning at an entity have a good idea how

83. President Carter's unsuccessful effort to curb litigation and replace it with alternative procedures might have created such a splinter movement, but his crushing electoral defeat likely doomed such a development. *See supra* note 68 and accompanying text.

84. 17 C.F.R. § 240.10b-5 (2013).

85. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (extending private cause of action to securities not sold on an exchange); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (affirming existence of private cause of action).

86. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C. (2006)); Securities Litigation Uniform Standards Act of 1998, § 101, 15 U.S.C. § 77p(b) (2006).

87. *See, e.g.,* Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429, 429 n.2 (1976) (listing private rights of action previously implied under eight federal statutes).

long the Food and Drug Administration or the Department of Education will take to promulgate a new regulation and what it might say, but who knows what an Idaho jury may do next week? So, in principle, one might imagine that both profit-making and nonprofit institutions would systematically prefer regulation to litigation. But if regulation carries the risk of creating rather than supplanting litigation, the odds may change. In light of that possibility, the potentially regulated entity may oppose both, since it has little control over whether the regulation will replace litigation or produce it.

For the two political parties a different calculus presents itself. Democrats seeking to supplant litigation with regulation would have to increase enforcement to a large, expensive, and likely unpopular extent. It is one thing to promulgate regulations in Washington (or a state capital), and another to start knocking on the doors and inspecting the books and premises of businesses and institutions to enforce those regulations. And Republicans, were they to start dismantling the regulatory apparatus and replacing it with a more robust litigation regime, would encounter fierce resistance from both sides of the political spectrum. Bureaucrats and government employees, some of them unionized, would strongly resist the loss of their jobs. Business constituencies, many of which have established and comfortable relationships with their regulators, would display outrage at having to face a well-financed, opportunistic, and nimble plaintiffs' bar instead of an underfinanced and unenthusiastic regulatory bureaucracy.

D. Third-Party Litigation Finance

These fault lines and contradictions come into sharp relief in the light shed by a finance mechanism that has emerged just in the last decade: untraditional, nonbank third-party financiers. According to one account, by early 2010 at least nine firms, two of them publicly traded, offered to advance sums ranging from \$100,000 to \$25,000,000 to finance the prosecution of individual lawsuits.⁸⁸ These financiers do not expect to collect interest, and the advances are not structured as loans.⁸⁹ Instead the financiers seek a stake in any eventual recovery, with the understanding that if there is no recovery they will not recoup their investment.⁹⁰ These financiers are, in other words, the nightmare zombies of the anti-civil litigation world: They have securitized champerty. Moreover, they seem to be doing quite well at it. In 2011, one such firm reported an internal rate of return of

88. See STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 13–16 (2010).

89. *Id.* at 13.

90. *Id.*

78 percent on a portion of its portfolio;⁹¹ another noted a 96.5 percent growth in profits in the same year.⁹² Perhaps just as significantly, major players in the financial field are investing in these entities: A principal investor in one litigation finance firm is itself a constituent of the Standard & Poor's 500⁹³ with hundreds of billions of dollars under management.⁹⁴ Significant financial powers see litigation investment as a new, profitable market, as a business in which they seek to invest.

A recent news report captured some of the delicious ironies arising from the parties' odd alignment. The U.S. Chamber of Commerce retained John Beisner, a partner at Skadden, Arps, Slate, Meagher & Flom (Skadden), to testify before Congress against third-party litigation finance on the grounds that it could encourage frivolous lawsuits.⁹⁵ In an interview with the *New York Times* following his testimony, Beisner said of litigation finance: "The whole theory is to take the legal system and turn it into a stock market."⁹⁶

Aficionados of irony will enjoy contemplating a lawyer from Skadden, a firm long identified with Wall Street and the financial markets,⁹⁷ attacking third-party litigation financiers on the grounds that they make litigation too much like

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91. See Press Release, Juridica Invs. Ltd., Audited Final Results for the Year Ended 31 December 2011 (Apr. 19, 2012), <http://www.juridicainvestments.com/~media/Files/J/Juridica/pdfs/20120419-FY11.pdf>.
92. See BURFORD CAPITAL, ANNUAL REPORT 2011, at 1 (2012), http://www.burfordcapital.com/wp-content/uploads/2012/10/burford_ar11.pdf.
93. See *S&P 500 Index*, CNN MONEY, <http://money.cnn.com/data/markets/sandp/?page=17> (last visited July 18, 2013).
94. See Press Release, Invesco Ltd., Invesco Ltd. Announces June 30, 2012 Assets Under Management (July 11, 2012), http://www.invesco.com/site/global/pdf/invest/media/press_releases/2012_07_11.pdf (announcing \$651.2 billion of average assets under management for the quarter).
95. See, e.g., William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, N.Y. TIMES, Apr. 30, 2012, <http://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-lawsuits-firms-invest-in-them/>.
96. *Id.* (internal quotation marks omitted).
97. The firm's web site lists as noteworthy milestones: "defend[ing] the management of General Fireproofing and American Hardware" in 1962; its focus "shift[ing] from proxy fights to tender offers" in 1965 and listing examples; "help[ing] Mead Corp. fend off Occidental Petroleum" in 1978; being "involved in many of the largest megadeals of the decade" in the 1980s; "represent[ing] the special committee of RJR Nabisco, Inc. in the largest corporate transaction in history at the time" in 1989; "represent[ing] Occidental Petroleum Corporation and American Express Company in their issuances of common stock—the year's two largest public offerings" in 1990; "represent[ing] Warner-Lambert in the largest pharmaceutical deal in history" in 2000; "advis[ing] lead underwriters in MetLife Inc.'s initial public offering" in 2000; being listed as the "top-ranked firm in two . . . surveys: 'Who Defends Corporate America' and 'Who Defends Financial America'" in 2001; "hand[ing] numerous high-profile restructurings" in 2002; and ranking "first for worldwide announced transactions based on value" in 2007. *History*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, <http://www.skadden.com/the-firm/history> (last visited July 18, 2013).

the stock market! The irony is deepened by the circumstance that some prominent members of the Chamber of Commerce, which hired Beisner to conduct this attack, may well be using third-party litigation finance to offload part of the risk of high stakes litigation in which they are engaged.⁹⁸ Beyond the irony, lies another confounding circumstance: In attacking the financiers for making litigation like the stock market, Beisner is implicitly endorsing a model of litigation rather like that in the public statements of the plaintiffs' bar—as something that is or should be about right and wrong, rather than about estimates of likely outcomes, the model most of his firm's clients use in making their litigation decisions.

V. THE UNSPOKEN TRUTHS

The political contortions underlying the alignments of interest produce another distortion: Both sides misdescribe the nature of civil litigation, omitting truths that would challenge their competing narratives. To those unspoken truths we now turn. Those seeking change in civil litigation speak of “trial lawyers,” “junk and frivolous lawsuits,” and of “tort reform.” Those defending civil litigation speak of “justice,” “holding wrongdoers accountable,” and “taking on the most powerful interests.” All these terms merit some probing, for none of them reveals the underlying dynamics, and none describes civil litigation as it actually exists in the twenty-first century. Even more pertinent to our present inquiry, all these terms avoid speaking a truth the speaker would rather not express.

The reference to “trial lawyers” would have been difficult for a lawyer in 1900 to understand. That lawyer would think that trial is a setting in which disputes that do not settle get resolved and would also assume that almost all lawyers go to trial at some point. In the late nineteenth century “trial lawyer” would have been a redundant term, like “lawyer lawyer.” That characterization was emphatically not true a century later. By 2000, only a small minority of practicing

98. For obvious reasons the finance firms do not disclose the identities of the clients who use them to finance litigation. But generic descriptions support the surmise. Consider the comments of the CEO of Burford Financial, in an interview published by one of the arms of *The American Lawyer*:

“Q: What do Burford's typical clients look like?”

“A: They fall into two buckets. One contains large financially liquid companies that want litigation financing as a financing technique. Their motivation may be budgetary, it may be accounting management, it may be liquidity, but they could easily pay cash for their legal services if they wanted to. That's probably the largest pool of users of our capital.”

Brian Zabcik, *Burford CEO Christopher Bogart: Litigation Financing Loses Its Mystery*, LITIG. DAILY (Feb. 1, 2013), http://www.americanlawyer.com/digestTAL.jsp?id=1202586775024&Burford_CEO_Christopher_Bogart_Litigation_Financing_Loses_Its_Mystery&slreturn=20130509023313.

lawyers would in the course of their careers conduct even part of a civil trial. The reasons for the change are many and debated,⁹⁹ but the result is clear. One professional organization unusually draws its membership from both defense and plaintiff bar: the American Board of Trial Advocates (ABOTA). To become an advocate, a lawyer must have taken fifty civil jury verdicts.¹⁰⁰ A recurrent discussion among ABOTA members is the desirability of reducing these requirements lest they result in the death of the organization—because the number of lawyers in the United States who can meet such a requirement is inexorably declining.¹⁰¹

So why should the anti-litigation camp attack this vanishing species, “trial lawyers,” as opposed, say to “litigators,” or “plaintiffs’ lawyers”? One might think that the least expensive and most effective strategy would be to let the species gradually become extinct. The answer lies in the role of the civil jury: Only in a trial will a jury enter the picture. The civil jury is an almost uniquely U.S. institution. England, which had widely used civil juries for eight hundred years, essentially eliminated them in the early twentieth century.¹⁰² But the U.S. civil jury sits embedded in the Seventh Amendment to the U.S. Constitution and in numerous state constitutions and statutes. According to most historical accounts, the institution of civil jury trials reflected distrust of judges and lawyers; and at the time the U.S. Constitution was framed, it reflected a more specific antipathy toward the coastal, urban creditor classes who used the courts to collect their debts from farmers and small tradespeople.¹⁰³ The jury, it was thought, might stand between such debtors and their creditors.¹⁰⁴

Changes in legal procedure have made that particular scenario less likely today, but the civil jury often stands behind substantial verdicts, verdicts that can threaten defendants’ enterprises and can be difficult to predict. Those verdicts stir the defendants’ blood, open their pocketbooks, and mobilize the attacks on

99. See, e.g., Yeazell, *supra* note 48, at 945 (hypothesizing that the present state of civil trials results from a convergence of procedural reform, changes in the legal profession, and an evolution in the economic organization of the bar).

100. Alternatively, a lawyer could take twenty-five verdicts and accumulate a certain number of “points” for related litigation activity. See AM. BD. OF TRIAL ADVOCATES, CONSTITUTION AND BYLAWS OF THE AMERICAN BOARD OF TRIAL ADVOCATES 2–3 (1996), <https://www.abota.org/index.cfm?&pg=Bylaws>.

101. Conversation with Steven Glickman, Member, Cal. Bar & L.A. Chapter of ABOTA (Dec. 2011).

102. English parties have a right to jury trial in only a few exotic cases: fraud, libel, slander, malicious prosecution, and false imprisonment. See Supreme Court Act, 1981, c. 54, § 69 (Eng.).

103. See, e.g., Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667–705 (1973).

104. See *id.*

civil litigation.¹⁰⁵ Yet only a reckless or desperate political candidate would attack the jury as an institution, for jurors are, after all, us.¹⁰⁶ Most of us disagree with occasional individual verdicts, far fewer with the system of jury adjudication as a whole. By contrast, most of us hold no special affection for lawyers as a group.¹⁰⁷ So in these political narratives “trial lawyer” becomes a proxy for the unspoken target: the jury trial.

Just as it is easier for the anti-litigation camp to attack “trial lawyers” than juries, so it was apparently easier for the real trial lawyers to call themselves something different. The former Association of Trial Lawyers of America is now the American Association for Justice.¹⁰⁸ In part that name change reflects a success of the anti-litigation campaign. Some polling data suggests that in recent decades Americans have taken a dimmer view of “trial lawyers.”¹⁰⁹ In part the name change also reflects a realignment of the debate. To describe oneself as a trial lawyer is to accept an identity within a subset of a relatively unesteemed profession. To describe oneself as a champion of justice is not only nobler but also comports with the chosen stance of the plaintiffs’ bar: In their eyes, or at least in their public utterances, plaintiffs’ lawyers vindicate rights, insist on redress for the injured, and hold powerful entities publicly accountable. Who wouldn’t rather describe oneself in such terms? As the Association’s website puts it:

Justice belongs to us all. That’s why we work hard to make sure any person who is injured by the misconduct and negligence of others can get justice in the courtroom, even when taking on the most powerful interests. The Fight for Justice Campaign is AAJ’s winning campaign to make our case to the public and tell the real story about the civil justice system—that trial attorneys’ unwavering commitment to justice

105. One might add that some defendants are stirred by the prospect of large-ticket settlements, settlements produced by even the slight chance of an enormous verdict. This is a particularly salient feature of class action settlements, as many have noted.

106. This observation holds increased truth in the wake of the jury reforms of the 1970s, in which both state and federal governments abolished what were at one time broad categorical exemptions that allowed great swaths of the population to avoid service. *See, e.g.*, 28 U.S.C. § 1861 (2006).

107. *See, e.g.*, AM. BAR ASS’N, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 4 (2002) (“Americans say that lawyers are greedy, manipulative, and corrupt. . . . Americans also believe that lawyers do a poor job of policing themselves.”).

108. *See Mission & History*, *supra* note 45.

109. *See, e.g.*, Ross Ramsey, *Poll: Texas Voters Just Don’t Like Trial Lawyers*, TEX. TRIB. (Sept. 27, 2010), <http://www.texastribune.org/texas-special-interest-groups/interest-groups/poll-texas-voters-just-dont-like-trial-lawyers> (“72 percent [of those polled] said they’d be less likely to vote for a candidate who accepted campaign contributions from personal injury trial lawyers.”).

ensures that every person is on a level playing field in the courtroom and able to hold wrongdoers accountable.¹¹⁰

This noble statement understandably omits references to large changes in the business model of the plaintiffs' bar. These lawyers now manage much better the business side of their practices. They are far better capitalized than their predecessors. Consequently, the best study of the comparative incomes of contingent fee lawyers found that their effective hourly rates just slightly *exceeded* that of the insurance defense lawyers who most frequently represented their adversaries.¹¹¹ As with its opponents, the plaintiffs' bar rather selectively describes the nature of its professional activities. And, as with its opponents, the selectivity has its roots in circumstances that the plaintiffs' bar would prefer not be part of its public image or the public debate.

Like "trial lawyers," "junk and frivolous lawsuits" refers to safe targets of political attack. Some claims of course lack merit, and no one in principle favors meritless claims. The press understandably delights in bringing us examples of claims running the gamut from the barely tenable to the outrageous.¹¹² In the real world, of course, almost no such suits succeed, and no lawyer working on a contingent fee wants to bring such a suit. Moreover, the legislative proposals recommended by those attacking "frivolous litigation" would do nothing to hasten the demise of truly frivolous claims, since the proposals aim at far bigger game. The changes typically recommended by those speaking of "junk lawsuits" raise interesting and serious questions, all of which deal with meritorious lawsuits. These proposals involve capping some or all noneconomic recoveries, reducing the

110. *AAF: Fighting for Justice*, AM. ASS'N FOR JUST., <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/16.htm> (last visited July 18, 2013).

111. See HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 186-90* (2004).

112. *The Week*, a magazine that digests news reports from around the world, contains an "Only in America" sidebar, which regularly notes some silly lawsuit, actual or threatened. A scan of a randomly selected two-month series of this section of the magazine yielded reports of a California candidate for political office defending his claim to be allowed the ballot designation of "astronaut," The Week Staff, *An Astronaut by Any Other Name*, WEEK, Mar. 30, 2012, <http://theweek.com/article/flipbook/226205/an-astronaut-by-any-other-name>, a moviegoer bringing a class action against a theater to force it to lower its popcorn prices, The Week Staff, *Popcorn, Thy Name is Cruelty!*, WEEK, Mar. 15, 2012, <http://theweek.com/article/flipbook/225599/popcorn-thy-name-is-cruelty>, a law student suing her undergraduate college (where she did not complete her degree requirements) for allowing her to enroll in law school, The Week Staff, *The Lawful Truth*, WEEK, Feb. 24, 2012, <http://theweek.com/article/flipbook/224786/the-lawful-truth>, a man hit by a car after playing "beer pong" for three hours suing the bar, The Week Staff, *Beer Pong Blame Game*, WEEK, Feb. 20, 2012, <http://theweek.com/article/flipbook/224464/beer-pong-blame-game>, and a college student suing his fraternity alleging he fell off a deck "when a drunken frat brother fired a bottle rocket out of his own anus," The Week Staff, *The Bottom Rocket*, WEEK, Feb. 14, 2012, <http://theweek.com/article/flipbook/224191/the-bottom-rocket>.

extent of joint and several liability, eliminating or reducing punitive damages, changing the allocation of attorneys' fees, and substituting arbitration for jury trial. Each of these proposals has something serious to be said for it, as well as some equally serious opposing arguments.¹¹³ Referring instead to junk lawsuits eliminates the need to engage those arguments, by substituting a reference to whatever silliness dominates the week's news.

For its part, the plaintiffs' bar displays a similarly revealing ambivalence in defending against the junk lawsuit charge. On one hand, no one wants to favor frivolous litigation. But the business model developed by the new plaintiffs' bar involves what one might call litigation entrepreneurship, lawsuits that test the viability of claims at the edge—or just beyond the edge—of existing law. A well-managed investment portfolio relies primarily on the Standard & Poor's 500 or similarly diversified holdings, but it also contains some highly speculative high-risk, high-return investments. So the plaintiffs' bar regularly puts part of its investment in claims that test the boundaries of civil liability. These are its version of high-risk, high-return investments. And, just as one person's speculative investment is another's junk stock, so one's edge-testing claim is another's junk lawsuit. The plaintiffs' bar does not want to defend itself in those terms because to do so would be to acknowledge its dual identity: not only as selfless defenders of rights but also as entrepreneurial business people. "Hey we're entrepreneurs too!" does not have the same ring as "holding wrongdoers accountable."

For its part, the anti-litigation camp does not want to acknowledge that in attacking civil litigation it is waging war on a successful group of small businesses. To put the attack in such terms would entail acknowledging a quite different characterization of the conflict: It is not entrepreneurial job creators of America confronting the jackals of predation; instead it is one business model pitted against another.

A second reason for the defendants' reference to junk lawsuits involves the actual target. The big game hunted under the name of the junk lawsuit is not the frivolous suit but the *meritorious* lawsuit with very high damages. Fewer than 10 percent of civil judgments award amounts in excess of \$1 million,¹¹⁴ and even within this rarefied group an even smaller proportion of cases make the headlines. One careful study of every jury verdict in California during two sample years found a very high concentration of damage awards in a very small number of cases. In one year more than 60 percent of the damages were awarded in 5 percent of the cas-

113. See Yeazell, *supra* note 51, at 190–97.

114. LYNN LANGTON & THOMAS H. COHEN, U.S. DEPT OF JUSTICE, NCJ 223851, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 3 (2008), <http://bjs.gov/content/pub/pdf/cbjtsc05.pdf>.

es; in another 5 percent of the verdicts contributed almost 80 percent of the damages awarded.¹¹⁵ Just as the anti-litigation camp does not want to talk about the cases that are not junk, so the pro-litigation camp would prefer not to dwell on the cases that allow a few plaintiffs' lawyers to buy California vineyards and palatial spreads in Jackson Hole. "Holding wrongdoers accountable" by "taking on the most powerful interests"¹¹⁶ is surely a higher calling than hoping for a jury verdict at the far right-hand side of the curve of awards from a defendant with enough assets to satisfy the judgment.

"Tort reform," the third of the phrases used in the anti-litigation campaign, shares with the others the quality of revealing while concealing. From the rhetoric employed by both sides in the litigation debate, no one would guess that most civil litigation in the United States concerns contracts, not torts. The National Center for State Courts, the leading nonprofit, nonpartisan agency compiling litigation statistics, recently reported: "When tort and contract caseloads are examined side by side, contracts dominate in every jurisdiction[] [w]ith the overall and median proportion of contracts in the [sampled] states above 90 percent."¹¹⁷ Bluntly put, most civil litigation involves business disputes and debt collection.

That is not surprising in a market economy resting on credit, but, surprising or not, it is awkward for both sides in the rhetorical battle. It is awkward for the opponents of civil litigation because it reveals that only a very small portion of civil litigation could possibly involve the parade of horrors that supply grist for the anti-litigation mill. Moreover, it focuses unwelcome attention on the principal role of civil litigation—settling business disputes and collecting debts, often debts owed to those who otherwise sponsor the tort reform movement. The pro-litigation movement has its own reasons for remaining very quiet about the relatively small proportion of tort cases in the system. The plaintiffs' bar portrays itself as the champion of the little man, as the speaker of truth to power, and as the vindicator of rights of the otherwise oppressed. That stance becomes more difficult to maintain if the principal occupation of the civil courts (and of the lawyers who inhabit them) is settling disputes between businesses and collecting overdue loans. As a consequence, neither side in this duel wants to say how peripheral the "junk lawsuits," "trial lawyers," and even "torts" are to the civil litigation system.

115. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 36 (1996).

116. Both statements occur in *AAJ: Fighting for Justice*, *supra* note 110.

117. RICHARD Y. SCHAUFFLER ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 27 (2010).

Finally, we should contemplate some circumstances that both sides want to ignore, circumstances flowing from the emergence of the plaintiffs' bar as a successful small business model. Most regular defendants in the kind of suits that give rise to the debate will be large institutions, either governmental or private. In opposing the plaintiffs' bar, the Republicans are, in effect, championing large businesses over small businesses, which Republicans otherwise lionize in their political rhetoric. For the Democrats a different awkwardness arises: By associating themselves with the plaintiffs' bar, they are championing an almost entirely nonunion business, whose adversaries employ most of the remaining private and public sector union members in the United States. No one wants to tell that part of the story.

VI. WHY DID IT STOP?: ACCOUNTING FOR THE DISAPPEARANCE OF CIVIL LITIGATION FROM POLITICAL DISCOURSE

As suddenly as the shooting started, it ceased. The recently concluded 2012 presidential campaign was the first in decades in which the topic of civil litigation appeared neither in party platforms nor in the candidates' stump speeches. Why might that be? Some have suggested to me that the war stopped because the anti-litigation camp won. True, that side did pass the Private Securities Litigation Reform Act of 1995¹¹⁸ and the Class Action Fairness Act of 2005,¹¹⁹ and the Supreme Court has handed that side some victories: *State Farm Mutual Automobile Insurance Co. v. Campbell*¹²⁰ limited punitive damages; *Wal-Mart Stores, Inc. v. Dukes*¹²¹ and *AT&T Mobility LLC v. Concepcion*¹²² have limited the availability of some class actions. But the plaintiffs' bar seems as vigorous as ever.¹²³

Another plausible, and perhaps correct, answer is that a platform emphasizing civil litigation might seem trivial in light of the problems facing the country

118. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C. (2006)).

119. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2006)).

120. 538 U.S. 408 (2003).

121. 131 S. Ct. 2541 (2011).

122. 131 S. Ct. 1740 (2011).

123. The April 2013 issue of *Trial*, the magazine of the AAJ, has two articles suggesting the plaintiffs' bar is finding workarounds. See Joseph Jaramillo, *Strength in Numbers*, TRIAL, Apr. 2013, at 23, 23 ("[F]end off attempts to force employees into individual arbitration."); Cyrus Mehri & Michael D. Lieder, *Onward and Upward After Wal-Mart v. Dukes*, TRIAL, Apr. 2013, at 32, 32 ("[E]mployment discrimination class actions can survive—if you think small and target your case."); see also Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. L. REV. 511, 531–37 (2013) (reporting various indications of the continuing significance of class actions).

in 2012. Consider, however, a third possibility hinted at in the preceding account—that during its political career civil litigation served for both camps as a convenient proxy for other issues, which they lacked either the will or the capacity to address directly. Consequently, when the need for proxies disappeared, so did the controversy over civil litigation.

I think one can see two such issues lurking in the background of the litigation wars. One was the transformation of economic life. As tariff barriers fell and transportation improved, the old U.S. manufacturing-based economy began to wither, with metal-bending jobs drifting overseas and service industries and niche manufacturing coming into economic prominence. One branch of the litigation wars represented an indirect response to that phenomenon. The Republican Party traditionally favored lower tariff barriers and more trade. It would have been very difficult politically to reverse that course. Attacking product liability litigation as the root cause of the decline of U.S. manufacturing was a much easier strategy, and one with just enough plausibility to pass the laugh test. For their part, the Democrats were unable to muster the votes to create a more serious—and intrusive—regulatory regime for product and workplace safety and finance. Defending the plaintiffs' bar was a cheap second-best strategy, one that allowed Democrats to claim to be protecting consumers without doing anything very difficult politically.

The other proxy war involved health care. Since World War II, the United States has struggled over how to create a sustainable infrastructure for health care. Modern medicine has far greater ambitions than it once had, and many of those ambitions entail much expense. As health care costs and insurance premiums rose, both parties felt pressure to respond. The Republicans' traditional antipathy to large, national programs made it difficult for them to propose major change: Tinkering at the margins with prescription drug coverage was as much as they were prepared to do. Instead they could blame lawsuits for the increased cost and decreased access to health care; that became a major theme of the George H.W. Bush campaign as well as that of his son, George W. Bush. No one who has studied health care believes that malpractice litigation makes a major contribution to health costs, but there are a few specialties—obstetrics, anesthesia—where large verdicts made the claim superficially plausible.¹²⁴ On the Democratic side, the Clinton administration began by attacking health care straight on—with a comprehensive proposal that was just as comprehensively defeated. In the wake

124. Michelle M. Mello et al., *National Costs of the Medical Liability System*, 29 HEALTH AFF. 1569 (2010) (summarizing the literature and concluding that malpractice, including resulting “defensive medicine” amounts to 2.4 percent of total health care spending).

of that defeat, it became important for the Democrats to seem to do *something* about health care; their answer was to propose an expanded right to sue one's HMO for denial of care. Like the Republican malpractice story, this one surely fails as a realistic response, but like the malpractice story, it has enough searing anecdotes attached to it to create strong sound bites.

The strategies of these proxy wars were symmetrical. The Republicans were, in effect, saying "We didn't do it; the lawyers did"—and that if civil lawsuits were controlled, economic life and health care would thereby improve. The Democrats responded, "We don't have to do it; the lawyers will"—and that, left to their own devices, civil lawsuits would improve economic life and health care.

If this proxy war account coheres, it may help to explain why civil litigation, at least temporarily, has vanished from the political scene. We are in the midst of a grand, national debate about health care. The Democrats can at least temporarily declare that they have solved a persistent national problem; the Republicans can denounce "Obamacare" as the last nail in our socialist coffin. Next to these grand themes, the malpractice story is so peripheral to that conversation that the Democrats were willing to throw into the legislation a provision promising to study the role of malpractice litigation in health costs¹²⁵—a sign that no one was any longer seriously interested in the issue.

The same story can be told about the economy. We are having a large-scale conversation about the national economy: Is it broken, and, if so, how can it be fixed? But with worldwide recessions and trillion-dollar bailouts of financial and manufacturing firms in the news, not even the most hysterical commentator thinks that civil litigation caused—or can cure—our current economic challenges. We are accordingly not talking about the role of civil litigation in our economic life.

The current national conversations about economic life and health care may not be conducted intelligently, and our solutions may be flawed, but it is hard to dispute that we are better off talking about real problems than about whether civil litigation is a boon or bane. That has to represent progress: The nation can have a conversation about the real issues, and those responsible for the litigation system can address its ills, of which there are certainly enough, without pretending that we are thereby addressing major economic or health problems.

125. See David A. Hyman & William M. Sage, *Do Health Reform and Malpractice Reform Fit Together?* (Am. Enter. Inst. Policy Working Paper No. 2011-02, 2011), available at <http://www.aei.org/paper/100209> (reporting on the minor provisions of the Affordable Care Act that authorize grants to fund state demonstration projects that have the potential to lessen costs and inefficiencies attributable to malpractice litigation).

We should recognize, however, that none of the dynamics that produced this unedifying dispute have fundamentally altered. So, given the right mix of intractable political problems and a situation in which civil litigation could, with bare plausibility, be blamed for creating it or described as a possible solution—litigation wars could once more be coming our way.

CONCLUSION

At one level, this exploration seems to have demonstrated only the trite proposition that politics makes strange bedfellows. The news that people do not like to be sued and that they dislike those who sue them certainly does not rise to the man bites dog category, and it may not even be a case of dog biting dog. I hope, however, that I may have shown somewhat more. First, it is worth contemplating the oddity of these particular bedfellows. We are so used to the current pairing that we may gain something from noticing how counterintuitive their alignment is. Second, thinking about the process by which these bedfellows tucked themselves in together reminds us again how contingent the current alignments are: One can easily imagine a different configuration fifty or a hundred years hence. Third, I hope that contemplating the changes in the plaintiffs' bar over the past half century allows us to appreciate a paradox: The bar has evolved into a robust business, but it is a business with odd characteristics. It's one of the few successful, lawful businesses held in contempt by the editorial pages of *The Wall Street Journal*,¹²⁶ and it is one of the few successful businesses that does everything it can to conceal the fact that it *is* a business. Finally, we can see the tenuousness of the connection between the rhetoric of the warring camps and the realities of civil litigation. Precisely this tenuousness makes it possible—given a new set of problems that the political parties dare not approach directly—for them once more to claim that civil litigation is either the cause or the cure. Stay tuned.

126. See *supra* notes 30–31 and accompanying text.