

# DETECTING GOOD PUBLIC POLICY RATIONALES FOR THE AMERICAN RULE: A RESPONSE TO THE ILL-CONCEIVED CALLS FOR “LOSER PAYS” RULES

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## ABSTRACT

*Several critiques have been leveled at the American Rule—that is, the rule that each party to a lawsuit should pay for its attorneys. Some claim that there were no principled justifications offered by the nineteenth-century jurists who authored the opinions marking the rule’s origins. Instead, these jurists only cited their states’ “taxable costs” statutes. Others claim that the American Rule—as well as its close relative, the contingency-fee contract—contributed to a “liability explosion” in that century. This Article offers a comprehensive examination of the origins of, rationales given for, and impact of the American Rule; then it evaluates instances in which the rule has faced legislative, judicial, and academic opposition.*

## INTRODUCTION

This Article aims to familiarize readers with the American Rule, providing both much-needed historical context for the development of the notion that each party to a lawsuit should pay its own costs as well as a discussion of the Rule’s contemporary reconsideration by certain scholars and in certain jurisdictions. The Article has four Parts. It opens with a historical analysis of the various American breaks with English common law rules regarding attorneys in the nineteenth century, including the principled creation of the American Rule. In the second Part, the Article examines the relationship between the creation of conservative think tanks, which sought to discourage what some perceived as frivolous litigation, and the resulting attacks on both the contingency fee and the American Rule—two means to accomplishing

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that goal. Third, it evaluates how Texas's reintroduction of the English Rule—in which the losing party pays for both sides—has affected Texas since the legislature passed, and the Texas Supreme Court approved, Rule 91a. Additionally, this Part examines how the English Rule galvanized Delaware's legislature to reinstitute the American Rule following a recent decision of that state's supreme court authorizing fee-shifting “loser pays” arrangements in corporate bylaws. Finally, this Article closes with a general critique of some arguments advanced by scholars calling for the replacement of the American Rule with the English one.

## I. ORIGINS AND PRECEDENTS FOR THE ENGLISH AND AMERICAN RULES

### A. *Nineteenth-Century American Deviations from English Statutory and Common Law Attorney-Payment Rules*

During the late eighteenth and early nineteenth centuries, American courts began deviating from English statutory and common law attorney-payment rules. Such deviations were first seen in state-court decisions about whether the English judicial standard that suits by advocates for payments by their clients were acceptable.<sup>1</sup> By the early modern era, payments for their efforts to their recommending solicitor counterparts in the Westminster courts were mere gratuities, and such advocates would disgrace themselves by suing for their fees.<sup>2</sup>

In 1819, the Pennsylvania Supreme Court held that no action could be “supported by a gentleman of the bar, against his client, for advice and services in the trial of a cause, over and above the attorney's fees allowed by act of assembly.”<sup>3</sup> It also said that “without a doubt no such action lies at common law. The connection between counsel and client, in contemplation of law, is honorable indeed. The counsellor renders his best services, and trusts to the gratitude of his client for reward.”<sup>4</sup> Chief Justice Tilghman then cited Blackstone and two English cases (*Moor v. Row*<sup>5</sup> and Lord Hardwicke's view in *Thornhill*

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1. *Mooney v. Lloyd*, 5 Serg. & Rawle 412, 415 (Pa. 1819); see *infra* notes 7, 13.

2. See J.H. Baker, *Counsellors and Barristers: An Historical Study*, 27 CAMBRIDGE L.J. 205, 224–28 (1969) (describing the *honorarium* doctrine for legal fees and noting particularly, “[I]n 1742 Lord Hardwicke refused to allow a barrister to recover his fees . . . because they were *quiddam honorarium*.” (citing *Thornhill v. Evans* (1742) 26 Eng. Rep. 601, 602)).

3. *Mooney*, 5 Serg. & Rawle at 415.

4. *Id.*

5. *Moor v. Row* (1630) 21 Eng. Rep. 501.

*v. Evans*<sup>6</sup>) for the proposition that “the Court would not suffer [that is, allow] a gentleman of the bar” to sue his client for fees.<sup>7</sup> Tilghman concluded that “this then is the law which our ancestors brought with them when they emigrated from England, nor did they or their successors think proper to alter it.”<sup>8</sup>

Two years later, a decision by a divided D.C. Circuit Court in 1817 held that a “fee as counsellor could not be recovered at law,” but “a legal attorney’s fee could be recovered in *assumpsit*.”<sup>9</sup> Afterward, American jurists insisted that such a rule ignored the differences between the English hierarchic class structure and America’s more republican structure. Attorneys—like physicians and other professionals—were now entitled to bargain for specific fees or receive *quantum meruit* compensation.

The first judgment that used this method constituted a “one step at a time” progression. Justice Gantt’s opinion observed that “the name of [the attorney] . . . added weight and importance to the claim,” and that he had devoted “[y]ears of diligence” to “these cases before they could be placed in a proper train for trial.”<sup>10</sup> And, what was more, he had been “engaged in making preparations, nay, devoting the last moments of his existence in the service of his client.”<sup>11</sup> The court held that the attorney’s estate was entitled to recover from the client the jury’s judgment of what his labors had been worth (*quantum meruit*), to what remained to be paid, a total of \$1500.<sup>12</sup>

The same Pennsylvania high court took a more explicit step toward sanctioning attorney’s suits for wages in 1835, in contrast with the English Rule barring counsellor suits for wages that it had followed

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6. *Thornhill*, 26 Eng. Rep. at 602.

7. *Mooney*, 5 Serg. & Rawle at 415.

8. *Id.* at 415–16.

9. *Law v. Ewell*, 2 D.C. (2 Cranch) 144, 145 (D.C. Cir. 1817). In *Ewell*, attorney Roger Brooke Taney told the court that a counsel “of this court” could not support an action at law against his client for his fee, although he might prove an express promise to pay it, because “by the common law of England, in force in Maryland . . . the fees of counsel were merely honorary, like those of a physician,” and that “this [was] expressly stated by Blackstone . . . [who] says that the fees of counsel are given . . . as a mere gratuity which a counsellor cannot demand without doing harm to his reputation.” *Id.* at 144 (citations omitted); *see also* *Scott v. Elmendorf*, 12 Johns. 315, 316 (N.Y. 1815) (“[W]hen, as in this case, nothing is said, there cannot be a doubt that no other costs are recoverable, as between attorney and client, than such as the fee bill directs, when the recovery is under 250 dollars.”).

10. *Duncan v. Briethaupt*, 12 S.C.L. (1 McCord) 100, 102 (1824).

11. *Id.*

12. *Id.* at 104.

since 1819. An attorney who secured a judgment against the Stoystown & Greensburgh Turnpike Road Company sued his client in *quantum meruit* for 5 percent of the client's judicial recovery, which amounted to \$800 and was "the fee usually allowed to attorneys for collecting money."<sup>13</sup> His claim was based on the client's promise to "well and truly pay . . . so much money as he reasonably should deserve to have for his services . . . in commencing and prosecuting said suits [once decided] and the money recovered . . . duly paid to the plaintiff."<sup>14</sup> Chief Justice John Bannister Gibson began his opinion by confessing that he should have dissented from the *Mooney v. Lloyd*<sup>15</sup> judgment, having been "dissatisfied . . . on principle and for its consequences."<sup>16</sup> He responded by authoring a sound critique of this English practice:

Its principle, if it can be said to have one, had its origin in the Roman law, when the practice of forensic oratory was so elevated as to be fancifully thought to be incapable of stooping to mercenary considerations without debasement. And the dignity of the robe, instead of any principle of policy, furnishes all the . . . support of it at the present day . . . for services in a profession which is now as purely a calling as any mechanical art.<sup>17</sup>

Chief Justice Gibson proceeded to note the English distinction between advocates and solicitors, observed that such a distinction did not apply to the American experience, and he remanded the case to correct the deficiency in the attorney's compensation.<sup>18</sup>

In 1841, New York's Court for the Correction of Errors similarly abandoned the English practice.<sup>19</sup> Its Chancellor noted the disgrace such an advocate would have experienced in the Roman Empire, as

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13. *Foster v. Jack*, 4 Watts 334, 335 (Pa. 1835).

14. *Id.* at 334.

15. *Mooney v. Lloyd*, 5 Serg. & Rawle 412, 415 (Pa. 1819).

16. *Foster*, 4 Watts at 337.

17. *Id.*; see also *Seeley v. Crane*, 15 N.J.L. 35, 36-37 (1835) (discussing fee recovery and concluding that the practice would debase the legal profession). *But see Newnan v. Washington*, 8 Tenn. (Mart. & Yer.) 79, 79-82 (1827) (offering numerous citations of similar findings in earlier Tennessee court holdings that the English "doctrine has not prevailed in this State"). But the *Newnan* opinion then critically observed in this regard, after having "spent as much money as would afford him the means of sustenance during life for the purpose of qualifying himself successfully to plead the cause . . . throughout a protracted controversy . . . and secure to his client an estate," the statutory recovery of the statutory tax fee constituted "the liberal compensation of two dollars and fifty cents" was intended by the legislature "as the sole reward of professional exertion." *Id.* at 82.

18. *Foster*, 4 Watts at 338, 340.

19. See *Adams v. Stevens & Cagger*, 26 Wend. 451, 455 (N.Y. Sup. Ct. 1841).

well as modern day England and France. But it noted that the practice did *not* exist in Scotland and that “[w]hatever may be the practice of other countries,” the principle that “the professions of physicians and counsellors are merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services” had “never . . . been adopted in this state.”<sup>20</sup> Hence, it would be inconsistent with “all our ideas of equality” to hold that the profession of counsellor “by which [he] earns the daily bread for his family” is “so much more honorable” than the business of others “as to prevent him” from “recovering a fair compensation for his services” merely because he had earned it as an advocate in court.<sup>21</sup>

Senator Verplank agreed: “[I]t is ridiculous to attempt to perpetuate a monstrous legal fiction, by which the hard working lawyers of our day, toiling till midnight in their offices, are to be regarded in the eyes of the law in the light of the patrician jurisconsults of ancient Rome . . . .”<sup>22</sup>

This process, then, was the *first* “English Rule” to be disposed of by American jurists. Although this initial rejection is interesting, American courts’ sanctioning of contingency-fee contracts in the nineteenth century is more relevant to the fee-shifting debate.

### B. *Sanctioning Contingency-Fee Contracts*

The American courts’ acceptance of contingency-fee contracts has been addressed extensively by other scholarship, but this Section will briefly recount that history.<sup>23</sup> By the sixteenth century, England’s landed aristocracy and gentry had experienced men bargaining with other men who did not have adequate resources to finance a lawsuit. These strangers to lawsuits, and their attorneys, would conduct their claims by “receiving, if successful, a part of the proceeds or subject sought to be recovered.”<sup>24</sup> Parliament made this behavior criminal

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20. *Id.* at 455.

21. *Id.*

22. *Id.* at 466.

23. See generally PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA 191–201 (1997) [hereinafter KARSTEN, HEART VERSUS HEAD] (describing the growth of the American trend toward creating contingency-fee contracts in the nineteenth century); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998) [hereinafter Karsten, *Enabling the Poor*] (offering an expanded account of that phenomenon).

24. Karsten, *Enabling the Poor*, *supra* note 23, at 232 n.3 (quoting BLACK’S LAW DICTIONARY 292 (4th ed. 1968)).

under the term “champerty,” and it imposed penalties of three years’ imprisonment and fines for these attorneys.<sup>25</sup> Consequently, by the seventeenth century, Englishmen with virtuous claims but modest means were unable to finance suits to secure their rights. As pamphleteer John Warr put it in 1649: “[T]he inhabitants [of England] are lost in the law, such and so many are the references, orders and appeals, that it were better for us to sit down by the loss than to seek for relief. . . . [T]he price of right is too high for a poor man.”<sup>26</sup>

By 1853, the dilemma was still quite evident. A government inspector of coal mines reported that mine-disaster victims “have no one to plead their cause . . . . The colliers, the [propertied] jury, the means of legal redress . . . and the difficulty of obtaining a solicitor who will undertake the odium and the risk, unite in forming an insuperable bar to the claim due . . . .”<sup>27</sup> During the next year, these reports convinced the Secretary of State to pay for the costs of one widow’s wrongful-death suit and its unsuccessful appeal.<sup>28</sup> Note here the two dilemmas faced by such suitors: the absence of available contingency-fee attorneys and the potential for a nongovernment plaintiff to experience the English “loser pays” rule regarding litigant costs.

In the early nineteenth century, several state courts pledged to adhere to the English Rule by voiding champertous contracts, which were defined by jurists of the period as the emerging practice of “parties not monied” to “stipulate for something out of what was

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25. *Id.* at 232 (quoting CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 150 (2d ed. London, G.G.H. & Charles Viner 1793)); *see also* 28 Edw. 1 c. 11 (outlawing practice of champerty during the reign of King Edward I); 32 Hen. 8 c. 9, § 8 (similar statute under King Henry VIII); 18 Eliz. c. 5, § 6 (similar statute under Queen Elizabeth).

26. John Warr, *The Corruption and Deficiency of the Laws of England*, in *A SPARK IN THE ASHES: THE PAMPHLETS OF JOHN WARR* 89, 102 (Stephen Sedley & Lawrence Kaplan eds., 1992).

27. P.W.J. BARTRIP & S.B. BURMAN, *THE WOUNDED SOLDIERS OF INDUSTRY: INDUSTRIAL COMPENSATION POLICY 1833–1897*, at 116–17 (John C. Boal et al. eds., 1983) (quoting *REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE DUBLIN TURNPIKES, 1854–55*, HC 1-XIX, at 696–97 (UK)).

28. *See* *REPORTS OF INSPECTORS OF COAL MINES, 1854–55*, HC XV, at 32–34 (UK); *REPORT OF THE INSPECTION OF COAL MINES IN THE LANCASHIRE, CHESHIRE, AND NORTH WALES DISTRICT, FOR THE YEAR ENDED 31ST DECEMBER 1855, 1856*, HC XVIII, at 18–19 (UK). The Government’s costs were £187.13s.11d and one inspector noted that the relatively new wrongful-death statute was “comparatively inoperative as regards collieries, owing to the poverty of the suitor.” BARTRIP & BURMAN, *supra* note 27, at 111, 115 (quoting *REPORT OF INSPECTOR MORTON, 1854–55*, HC 1-XIX, at 741 (UK)); B.R. MITCHELL, *BRITISH HISTORICAL STATISTICS* 702 (1988).

recoverable” with attorneys in “what are called contingent fees.”<sup>29</sup> However, beginning with New York in 1824,<sup>30</sup> the courts of eighteen states and, in 1898, the U.S. Supreme Court had sanctioned such arrangements.<sup>31</sup>

Most of the authors of these opinions offered similar “principled” public policy rationales, quoting the language of previous state-court opinions and stating that this was the only way for poor men or women to have their day in court. In 1836, Tennessee’s Justice Reece proclaimed: “[To] redress the wrongs of the indigent and the injured is no quixotism, but [rather] a grave and highly honorable duty of the profession.”<sup>32</sup> In 1840, Delaware’s Justice Harrington observed that “the *poor* suitor may not have the present means of payment, and this [English common law policy] may deprive him of counsel . . . . His rights are nothing unless he can have the means of enforcing them.”<sup>33</sup> Similarly, in 1876, Missouri’s Judge Bakewell noted, “[M]any a poor man with a just claim would find himself unable to prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of the suit.”<sup>34</sup> He added, “[I]f [such contracts] are immoral or illegal, there are perhaps few attorneys in active practice amongst us who have not been habitual violators of the law.”<sup>35</sup>

These jurists emphasized the suitor’s plight, but the authors of the Virginia and Illinois decisions offered more utilitarian rationales. They reasoned that these contracts “constituted a better guaranty for fidelity, energy and proper zeal [from one’s attorney], than the fee certain.”<sup>36</sup> In other words, both the client and the court’s time and resources were better served by attorneys who would not take cases

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29. HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES*, at xx (Arno Press Inc., 1814); see *Rust v. Larue*, 14 Ky. (4 Litt.) 411, 418 (1823); *Livingston v. Cornell*, 2 Mart. (O.S.) 281, 284 (La. 1812); *Thurston v. Percival*, 36 Mass. (1 Pick.) 415, 416 (1823); *Key v. Vattier*, 1 Ohio 58, 67–68 (1823); *BLACK’S LAW DICTIONARY* 869 (4th ed. 1968).

30. *Thalhimer v. Brinkerhoff*, 3 Cow. 623, 648 (N.Y. 1824).

31. *Taylor v. Bemiss*, 110 U.S. 42, 46 (1884); see Karsten, *Enabling the Poor*, *supra* note 23, at 239 nn.64–66 (collecting sources). These states were Pennsylvania, Connecticut, Missouri, Delaware, Louisiana, Tennessee, Arkansas, California, Georgia, Illinois, Iowa, Texas, Virginia, Wisconsin, Michigan, New Jersey, and Utah. *Id.*

32. *Moore v. Trs. of Campbell Acad.*, 17 Tenn. (9 Yerg.), 114, 118 (1836).

33. *Bayard v. McLane*, 3 Del. (1 Harr.) 139, 219–20 (1840). (This suitor’s opponent was the wealthy Philadelphia merchant, Stephen Girard). *Id.* at 31.

34. *Duke v. Harper*, 2 Mo. App. 1, 10 (1876).

35. *Id.* at 10–11.

36. *Major’s Ex’r v. Gibson*, 1 Pat. & H. 48, 82 (Va. 1855); see *Newkirk v. Cone*, 18 Ill. 449, 453 (1857).

with little prospect of securing anything for their clients than by those working “for a fee certain,” not to mention those working on a “billable hours” agreement.

From here, this Article examines the third rejection of an English Rule regarding the attorney’s (and client’s) plight in the courtroom: the “loser pays” rule.

*C. The English Rule and the Emergence of Judicial Justifications for the American Rule*

The emergence of the “loser pays,” or English, rule may have begun in 1278 with the Parliamentary Statute of Gloucester,<sup>37</sup> which directed defendants to pay costs to successful plaintiffs.<sup>38</sup> Statutes from 1515 that limited the amount of writs<sup>39</sup> and 1606 that expanded the rule to all civil actions gave defendants costs in all cases in which the plaintiff would have had them if he had been successful, essentially creating a situation wherein losers paid the prevailing parties’ expenses.<sup>40</sup> These statutes gave discretion to the high courts in Order 55 of the 1875 Rules of Court. In most cases, “the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court” to this day.<sup>41</sup>

37. Statute of Gloucester 1278, 6 Edw., c. 1.

38. “Costs” in England have always referred to the expenses (or most of them) incurred in bringing a dispute to court. Hence the term “fee-shifting” here means “cost-shifting” there.

39. Statutes Made at Westminster 1515, 7 Hen. 8, c. 1.

40. 1606, 4 Jac., c. 3.

41. Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 854 (1929) (quoting Supreme Court of Judicature Act 1875, 38 & 39 Vict. § 47, sch. 1.); see Warren Watson, *A Rationale of the Law of Costs*, 16 CENT. L.J. 306, 306–08 (1883). Patrick Atiyah demonstrated in 1987 that England of the 1970s experienced fewer per capita tort lawsuits than the United States, and he speculated that two of the possible causes for this difference were the sanctioning of contingency-fee contracts and the “American Rule” limiting fee-shifting. These two trends, contingency-fee contracts and the “English Rule,” were also present in colonial India, which resulted in the subcontinent having virtually no lawsuits filed by railway-accident victims from the late 1880s to the early 1930s. See Patrick S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1007–09, 1016–17, 1025, 1042–43; Peter Karsten, *Before Bhopal: Explaining the Infrequency of Railway Accident Victim Compensation, 1889–1931: Kharmic Fatalism or Colonial Law and Policy?*, 55 AM. J. LEGAL HIST. 433, 433–64 (2015) [hereinafter Karsten, *Before Bhopal*]. Some have compared Canada’s use of the English Rule with the use of the American Rule in the United States. See, e.g., Matthew B. Wills & Neil Gold, *Attorneys’ Fees in Litigation: Time to Discard the American Rule?*, 4 LITIGATION 31, 31–34, 59–60 (1978) (partially answered in the positive); H. Patrick Glenn, *Costs and Fees in Common Law Canada and Quebec* 11 (unpublished manuscript), [www.personal.umich.edu/~purzel/national\\_reports/Canada.pdf](http://www.personal.umich.edu/~purzel/national_reports/Canada.pdf) [https://perma.cc/A83W-SERJ] (concluding that the English Rule is “the chief cause for very significant declines in litigation rates in Canada”); Tracey Tyler, *Legal System’s Losers*, TORONTO STAR



Several factors caused the courts to limit fee-shifting. The American Rule has been said<sup>42</sup> to have first appeared in a 1796 opinion of the Supreme Court, *Arcambel v. Wiseman*,<sup>43</sup> in which the Court held that counsel fees of the prevailing party in the lower-court litigation cannot be awarded as damages.<sup>44</sup> But Justice Story's questioning of the holding of that case in *Boston Manufacturing Co. v. Fiske*<sup>45</sup> offers an indication that jurists of the time did not regard the case as standing for such a broad proposition of law.<sup>46</sup> Rather, Justice Story became convinced that the case involved admiralty law questions, which already possessed fee-shifting authority. He noted that the Supreme Court applied the same fee-shifting practices in U.S. admiralty cases.<sup>47</sup> Justice Story, speaking for the Court, said that the law permitted a jury to "allow the plaintiff as part of his 'actual damage,' any expenditures for counsel fees, or other charges, which were necessarily incurred to vindicate the rights derived under his patent."<sup>48</sup>

Adoption of the English Rule was not initially limited, however, to admiralty and patent-infringement issues. From 1805 to 1841, the rule was applied in four cases—in New York, Massachusetts, and Vermont—that involved a failed sale of title.<sup>49</sup>

A New Jersey case from 1816 was the first relevant case in which one can discern hints of the American Rule.<sup>50</sup> A man named Potts sued another named Imlay on two successive occasions for "small causes" in 1813 and 1814, requesting adjournment both times and failing to appear the first time. Imlay sued Potts, alleging "a malicious prosecution," and recovered a jury verdict and judgment for \$50, not a

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(Mar. 30, 2007), [www.thestar.com/news/2007/03/30/legal\\_systems\\_losers.html](http://www.thestar.com/news/2007/03/30/legal_systems_losers.html) [<https://perma.cc/D4RA-GJ3E>] (discussing shortcomings of the English Rule in Canada).

42. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 14, 15, 17, 23, 28 (1984).

43. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

44. *Id.* at 306.

45. *Boston Mfg. v. Fiske*, 3 F. Cas. 957 (C.C.D. Mass. 1820) (No. 1,681).

46. *Id.* at 958.

47. *Id.* at 957.

48. *Id.* at 958.

49. *Pitkin v. Leavitt*, 13 Vt. 379, 380, 383, 386 (Vt. 1841) (citing *Smith v. Compton* (1832) 110 Eng. Rep. 146; 23 Com. L. 106); *Williams v. Wetherbee*, 2 Aik. 329, 329 (Vt. 1827); *Sumner v. Williams*, 8 Mass. (7 Tyng) 162, 222 (1811); *Staats v. the Exec. of Ten Eyck*, 3 Cai. 111, 118 (N.Y. Sup. Ct. 1805).

50. *Potts v. Imlay*, 4 N.J.L. 330, 335–39 (1816). For a similar description of the American meaning of "costs," see *McDonald v. Page*, 1 Ohio 121, 121 (1832); *Henry v. Davis*, 123 Mass. 345, 346 (1877).

small sum in 1816.<sup>51</sup> Potts appealed, and both attorneys relied on English authorities. Chief Justice Kirkpatrick held that the English reports and treatises that he had consulted “limited” such damages to admiralty and patent-infringement cases, and they are “not to be carried beyond them.”<sup>52</sup> The costs of court “are the only penalty” the statute gave.<sup>53</sup> “The courts of law are open to every citizen,” to sue *toties quoties* (as often as the thing may happen) solely on the penalty of costs.<sup>54</sup> These costs “are considered as a sufficient compensation for the mere expenses of the defendant” and “he cannot rise up” in court “and say that the legislature have not given him enough.”<sup>55</sup> Besides, “if we go to the very equity of the thing,” to “what excesses would this lead us? [W]here would litigation end?”<sup>56</sup>

Kirkpatrick’s colleague, Justice Southard, concurred with the chief justice and added that permitting the defendant to recover his expenses by suit “where he can prove that the plaintiff maliciously sued him . . . would neither be lawful or expedient.”<sup>57</sup>

The views expressed here lacked the dimensions of the “good public policy” rationales detectable in the contingency-fee cases. So we examined other sources to determine whether John Leubsdorf, the leading author in the emergence of the American Rule, was correct. Leubsdorf claimed, “[O]ne of the most curious features of the American rule in the nineteenth century was its almost total absence of justification.”<sup>58</sup> He also said that the “[w]illingness to apply the American rule was not matched by a willingness to justify it.”<sup>59</sup> In a subsequent essay, he repeated the charge and claimed, “It was only later, in our own century, that commentators thought up the reasons

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51. *Potts*, 4 N.J.L. at 330.

52. *Id.* at 332.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 333. In support of his final proposition, Kirkpatrick relies on *Savile v. Roberts*, 91 Eng. Rep. 1147 (1698). *Potts*, 4 N.J.L. at 333.

57. *Potts*, 4 N.J.L. at 337 (Southard, J., concurring).

58. Leubsdorf, *supra* note 42, at 28.

59. *Id.* at 23. He also observed that nineteenth-century courts “gave little attention to justifying the low level of attorney fees included in court costs. Indeed, they apparently did not consider that it needed justification.” *Id.* at 14.

for low awards advanced today.”<sup>60</sup> Others have expressed similar opinions.<sup>61</sup>

This criticism of 19th century judicial commentaries on the American Rule was inaccurate and misleading. In fact, there was much support for the new rule that resembled the rule of the jurists who sanctioned contingency-fee contracts. This analysis proceeds essentially in chronological order, offering only opinions that did not borrow language from prior decisions.

The first example may be found in a Pennsylvania debt law decision from 1835, which involved issues related to sureties and the implied-contract doctrine.<sup>62</sup> The judgment included payment of the entire costs for the sureties.<sup>63</sup> Justice Rogers, writing for the court, said that the surety could recover the standard costs but noted “it would be going further than good policy requires” to recover counsel’s fees because “that would put it in the power of the surety” to “indulge an appetite for litigation at the principal’s ‘expense.’”<sup>64</sup> In such an event, there would no longer be a “difference between an implied contract and an express contract of indemnity.”<sup>65</sup>

Louisiana’s high court dealt with the issue in a runaway-slave case.<sup>66</sup> Justice Thomas Slidell<sup>67</sup> reviewed relevant precedent and the Louisiana Code about whether the \$100 attorney’s fee had been properly added to the successful litigant’s award. He disallowed it and

60. John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 447 (1986).

61. See Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 799 (1966). Ehrenzweig notes:

[After the adoption of the low level of taxable costs in the New York Field Code of 1848, the courts] gradually [forgot] the meaning of those [low] amounts. And it was this process of gradual forgetting rather than a deepseated moral argument that has apparently caused the abolition of the prevailing party’s right to the recovery of his counsel fees. Once we have recognized this irrefutable fact . . . as well as common sense [sic], that the present system denying counsel fees to the prevailing party is a serious threat to our administration of justice, the question of remedy becomes our main concern.

*Id.* For another perspective, see Comment, *Court Awarded Attorney’s Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 642–44 (1974) (arguing that the American Rule was adopted through most of the country because of “judicial preoccupation with *stare decisis*” without ever examining its public policy underpinnings).

62. *Wynn v. Brooke*, 5 Rawle 106, 106–08 (Pa. 1835).

63. *Id.* at 109.

64. *Id.*

65. *Id.*

66. *Stewart v. Sowles*, 3 La. Ann. 464, 464 (1848).

67. Yes, he was the brother of John Slidell, Confederate government emissary to Britain and France, captured in 1862 of the high seas by Union Commander Wilkes in The *Trent* Affair.

said that remote damages should be excluded because “the proximate cause of their expenditure was the refusal of the defendants to restore the price.”<sup>68</sup>

In 1848, Pennsylvania’s accomplished chief justice, John Bannister Gibson, addressed the issue. For a number of years, a plaintiff had enjoyed a watercourse for his mill. He charged that the defendant, “contriving and unjustly intending to injure the plaintiff,” obstructed it by constructing a dam “higher than the same was used or ought to be.”<sup>69</sup> The jury was instructed to provide “nominal damages” for the disruption of his mill, and the court said the jury “might in addition give damages sufficient to compensate the plaintiff for . . . the trouble and expense of establishing his right.”<sup>70</sup> The jury thereupon awarded the plaintiff “\$700, with six cents costs.”<sup>71</sup> Gibson would have none of it: “No lawsuit is prosecuted without trouble and expense[,] and were compensation for these recoverable, as an original ground of action by anticipation, the claim would be a standing dish.”<sup>72</sup> Besides, it would be a fallacy to suppose that every successful plaintiff had a right to be made whole by a verdict, “which is, at best, only an approximation to perfect justice.”<sup>73</sup> Such a principle of compensation would be “contrary to the genius of the common law, which does not give even costs.”<sup>74</sup>

Three years later Lemuel Shaw, the chief justice of the Massachusetts Supreme Judicial Court, was asked to rule on a jury award to the defendants, “[\$350] as counsel fees, in defending themselves in said suit.”<sup>75</sup> Shaw disallowed it because the expenses were “incurred by the party for his own satisfaction, and they var[ied] so much with the character and distinction of the counsel, that it would be dangerous to permit him to impose such a charge upon an opponent.”<sup>76</sup> In any event, the statute measured the expenses incurred in the management of a suit by the taxable costs.<sup>77</sup>

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68. *Stewart*, 3 La. Ann. at 466.

69. *Good v. Mylin*, 8 Pa. 51, 52 (1848).

70. *Id.* at 53.

71. *Id.*

72. *Id.* at 52.

73. *Id.* at 56.

74. *Id.*

75. *Reggio v. Braggiotti*, 61 Mass. (7 Cush.) 166, 168 (1851).

76. *Id.* at 170.

77. *Id.* at 166, 168, 170. Here Shaw is making a *general* statement. As Senator Bradbury’s remarks, recounted *infra* note 84, indicate, “costs” varied rather widely among the general states. And while Bradbury himself gives a few examples, there is no suggestion that Shaw, in using the term “costs,” was referring specifically to the Massachusetts statute.

Later that same year, the U.S. Supreme Court decided a property-damage case that included a counsel-fee issue.<sup>78</sup> Justice Grier noted that the right of the jury to “indemnify the plaintiff for counsel fees” has been altered by the various state legislative costs acts that have “much reduced attorney’s fee-bills” and will not “allow the honorarium paid to counsel to be exacted from the losing party,” even though “the legal taxed costs are far below the real expenses incurred by the litigant.”<sup>79</sup> But this was only proper, because the Court can permit the jury, “‘if they see fit,’ [to] allow counsel-fees and expenses as a part of the actual damages . . . and then the court add legal costs . . . the defendants may be truly said to be *in misericordia*; being at the mercy both of court and jury.”<sup>80</sup> This practice, the Court concluded, was not “such as to recommend it for general adoption either by courts or legislatures.”<sup>81</sup>

During a debate on the ensuing federal Fee Act of 1853, Senator James Bradbury of Maine differed from Justice Grier in one regard on this subject: he told his colleagues that the taxable costs mandated by statute were too high in many states and compelling the losing party to pay these court-official fees “ha[s] been a matter of serious complaint.”<sup>82</sup> In some cases they have “swelled to an amount exceedingly disproportionate to the . . . importance of the causes in which they are taxed,” and the labor that the court officials “bestowed.”<sup>83</sup> Hence, it is not surprising that courts would regard these taxed fees sufficient to compensate winning parties.<sup>84</sup>

In a slander case from 1852, a New York trial court judge told a jury that when assessing damages, it could consider that the plaintiff had to come to court to vindicate her character, an instruction the

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78. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 363 (1851).

79. *Id.* at 371–72.

80. *Id.* at 372.

81. *Id.* It is cited in *Flanders v. Tweed* as authority for the disallowance of counsel fees as allowances in cases. See *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450, 452–53 (1872) (stating that “the [American] rule is now well settled” and citing *Day* for the proposition “that neither the common law nor the statute law had invested the jury with” the power to allow attorney’s fees as damages).

82. Appendix to CONG. GLOBE, 32d Cong., 2d Sess. 207 (statement of Sen. Bradbury) (1853).

83. *Id.*

84. *Id.*; see John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1577 (1993). The Fee Act of 1853, codified at ch. 80, 10 Stat. 161, departed from the English Rule of offering the successful litigant with total reimbursement of his costs.

defendant argued was improper.<sup>85</sup> The appellate court said the evidence proved the slander to be “grossly malicious” and allowed “what have been called exemplary, vindictive or punitive damages.”<sup>86</sup> But the court denied attorneys’ fees and ordered a new trial. If the charge was to be sustained, it had to be upon the principle that the plaintiff was entitled to consequential, but not “vindictive,” damages that were “proximate, not remote, or depending on contingencies.”<sup>87</sup> If the court did not “stop at some point in the path of consequences,” it would get “involved in a labyrinth of difficulties, speculations and perplexities from which it will be difficult if not impossible [for the court] to extricate [itself].”<sup>88</sup>

An 1857 Connecticut property dispute led to the next judgment involving the American Rule. The court corrected the trial judge’s instruction to the jury.<sup>89</sup> The trial judge told the jury that “none but actual damages were to be assessed . . . [but it] proceeded to say that [the winning party’s legal] expenses might be allowed.”<sup>90</sup> The “actual loss or injury did not exceed \$10,” but the jury rendered a verdict for \$197.71.<sup>91</sup> Justice Ellsworth described the common law rule and defended it. One could not sue for “the expenses of litigation” as “damages” in “any case” where the action was brought “for the wrong itself.”<sup>92</sup> Not even if “the tort be wanton or malicious.”<sup>93</sup> These expenses were not the “natural and proximate consequence of the wrongful act.”<sup>94</sup> “[H]onest men” were “sometimes obliged to resort to courts to get their differences settled.”<sup>95</sup> And Ellsworth asked, rhetorically, “Who ever knew the plaintiff to prove his lawyer’s bills” or other such expenses related to the case in the court proceedings?<sup>96</sup>

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85. Hicks v. Foster, 13 Barb. 663, 664 (N.Y. App. Div. 1853).

86. *Id.*

87. *Id.*

88. *Id.*

89. St. Peter’s Church v. Beach, 26 Conn. 355, 365 (1857).

90. *Id.* That is, as Justice Ellsworth put it, no “penal sum or smart money.” *Id.*

91. *Id.* at 366.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 366–67; *see* Richards v. Whittle, 16 N.H. 259, 260 (1844) (“That the plaintiff has been subjected to the inconvenience and expense of a suit . . . can not be shown to increase his claim for damages.”).

In the same year, Louisiana's high court came to the same conclusion.<sup>97</sup> It reversed a lower-court verdict for \$150 for the defendant's expenses and time "in preparing his defense."<sup>98</sup> In language relevant to today's dispute over the effects of a "loser pays" rule on virtuous claimants, Chief Justice Merrick explained the public policy rationale for the American Rule:

It is desirable that courts of justice should be open to all men, and that suitors should not be deterred from pursuing their rights through fear that they should be compelled to pay for the loss of time of their adversary, nor from using, in good faith, the process of the court and the means of redress prescribed by law, through apprehensions that they should be mulct in vindictive damages, if from any unforeseen cause, they should fail in their action.<sup>99</sup>

In 1866, the Kansas Supreme Court heard an appeal involving the inclusion of attorney's fees of \$750 "as part of the costs and expenses in the cause."<sup>100</sup> Justice Bailey explained that it "cannot be difficult to determine" what was meant by "costs."<sup>101</sup> He then offered this law-and-economics reasoning: the "opposite theory involves" the proposition that the defendant's liability for the plaintiff's counsel fees "shall be larger" due to the "doubtfulness" of the plaintiff's case, "or, in other words, the more doubtful the plaintiff's right of recovery, the greater shall be the defendant's liability to the plaintiff's counsel for costs."<sup>102</sup> That was "not the policy of the law," because courts should not incentivize attorneys to take dubious cases in the hope of winning enormous and disproportionately undeserved awards.<sup>103</sup>

In 1872, the U.S. Supreme Court decided a case involving an award of counsel's fees.<sup>104</sup> An equity master's report allowed damages

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97. *Osborn v. Moore*, 12 La. Ann. 714, 714 (1857).

98. *Id.*

99. *Id.* For another rationale, see *Burruss v. Hines*, 26 S.E. 875, 878 (Va. 1897). The *Burruss* court stated:

Where parties in good faith differ as to their rights, and resort to law to settle their differences, the law has prescribed what costs shall be taxed, and what shall be therein included as the fee of the winning party. In such case no greater fee should be allowed to be proved or recovered. The litigants should be placed on equality.

*Id.*

100. *Swartzell v. Rogers*, 3 Kan. 380, 382 (1866).

101. *Id.* at 382.

102. *Id.* at 383.

103. *Id.*

104. *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872).

of \$1,500 in counsel's fees.<sup>105</sup> The Supreme Court disallowed the fee. Justice Swayne explained that—in debt, covenant, and assumpsit—damages can be recovered but counsel fees are never included.<sup>106</sup> Similarly, in equity cases, in which there is no injunction bond, only the taxable costs are to be allowed to the complainants.<sup>107</sup> The Court reasoned that, because some attorneys demanded higher fees than others, there was danger for abuse with attorneys charging higher fees than necessary.<sup>108</sup>

In 1874 Justice Young denied the grant of attorney's fees as part of a judgment because the expenses were “not the legitimate consequence of the tort or breach of contract complained of” and because it was too difficult to determine which expenses should count as punitive damages and which should not.<sup>109</sup>

This reluctance to sanction attorney-fee damages in cases in which punitive damages might have been sanctioned is illustrated in an 1895 Colorado decision.<sup>110</sup> After the appellant had a set fire to burn weeds in an irrigation ditch on his property, the fire spread to the appellee's property and destroyed some of his structures and 50 acres of his pasture land. He asked for damages and “attorney's fees, \$20.”<sup>111</sup> The jury verdict gave the appellee everything sought. The court denied the attorney's fee and critiqued the trial court's instruction to the jury permitting “reasonable exemplary damages” if “the defendant in relation to said fire showed a wanton and reckless disregard of the plaintiff's rights in the premises.”<sup>112</sup> President Judge Reed accentuated this conclusion by describing how the defendant did not try to stop the fire; instead, he abandoned the fire and went on a business trip to a town that was forty miles away.<sup>113</sup> Despite these facts, the Colorado court did not depart from the statutory guidelines for the American Rule.<sup>114</sup>

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105. *Id.* at 227.

106. *Id.* at 230–31.

107. *Id.* at 231.

108. *Id.*

109. *Kelly v. Rogers*, 21 Minn. 146, 152–53 (1874); *cf.* KARSTEN, HEART VERSUS HEAD, *supra* note 23, at 211–12 (describing the facts of the case); Peter Karsten, *Explaining the Fight over the Attractive Nuisance Doctrine: A Kinder, Gentler Instrumentalism in the “Age of Formalism,”* 10 LAW & HIST. REV. 45, 57–59 (1992).

110. *Spencer v. Murphy*, 41 P. 841, 841–42 (Colo. App. 1895).

111. *Id.* at 841.

112. *Id.* at 842.

113. *Id.*

114. *See id.* (reducing the damages to exclude \$21.15 awarded for “labor and attorney's fees”).



In 1878, Justice Thomas M. Cooley of the Michigan Supreme Court wrote the opinion in a case involving notes for relatively small sums with provisions for an “attorney’s fee of fifteen dollars upon each” in the event of any proceeding to collect it.<sup>115</sup> The state’s policy “limit[ed] such recovery to a very moderate sum in every case where it is permitted at all.”<sup>116</sup> This “fee” was “preposterous.”<sup>117</sup> A fee “supposes services,” and this “fee” was “nothing but a penalty.”<sup>118</sup> Moreover, the fee associated with the collection of these small notes was “opposed” to Michigan’s policy “concerning attorney’s fees” and was “susceptible of being made the instrument of the most grievous wrong and oppression.”<sup>119</sup>

An Arizona high-court decision from 1932 also defended the American Rule.<sup>120</sup> An individual had persistently sued another person as he declined to follow the trial judge’s advice to employ legal counsel and had lost on each occasion.<sup>121</sup> Eventually, the defendant in these cases sought damages for malicious prosecution, and a jury awarded him “\$500, being the attorneys’ fees which [he] alleged he had expended in defending [himself] against the malicious actions aforesaid,” waiving any other damages.<sup>122</sup> The trial judge thereupon issued “a permanent injunction against defendant bringing further actions of the nature of those found by the jury to be malicious.”<sup>123</sup> The plaintiff appealed this judgment—appearing unrepresented by counsel again—and offered “no intelligible statement in the brief from which we can determine just what particular rulings of the lower court he objects to.”<sup>124</sup>

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115. *Bullock v. Taylor*, 39 Mich. 137, 140 (1878).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 140–41; see *Stringfield v. Hirsch*, 29 S.W. 609, 613 (Tenn. 1895). The *Stringfield* court stated:

It is not sound public policy to place a penalty on the right to litigate; that the defeated party must pay the fees of counsel for his successful opponent in any case, and especially since it throws wide the doors of temptation for the opposing party and his counsel to swell the fees to undue proportions.

*Id.*

120. See *Ackerman v. Kaufman*, 41 Ariz. 110, 114 (1932).

121. *Id.* at 111.

122. *Id.*

123. *Id.*

124. *Id.* at 112.

Justice Lockwood addressed the issue with considerable detail. He referred to the two conflicting rules: “[T]he so-called English one and the American.”<sup>125</sup> As a matter of first impression, he noted that the court felt “free to determine which rule [was] most in harmony with justice and our public policy.”<sup>126</sup> After a thorough description of the historical roots of the English Rule, he reviewed Arizona’s costs statutes, “which apply to all actions malicious and *bona fide* alike,”<sup>127</sup> and observed,

[T]he law does not desire to throw around the right of a party to appeal to the courts such risks that a fear of the result might deter him from asserting a claim in which he has an honest belief. The damages which the defendant suffers in excess of the very meager costs allowed in a case of that kind are considered as one of the inevitable burdens which the individual must sustain in the interest of good government. Our public policy requires that the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he lose.<sup>128</sup>

But he also said that this public policy rationale “does not apply to the plaintiff who seeks to harass, damage and even ruin the honest citizen by maliciously invoking the aid of the courts in support of a claim which he knows to be unfounded.”<sup>129</sup> Justice Lockwood then reviewed the history of the eleven times that Kaufman had forced Ackerman to defend himself in court, all of them unsuccessful and said that “no normal man could honestly believe himself justified in bringing the repeated suits on the same state of facts.”<sup>130</sup> The Arizona high court

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125. *Id.* at 113.

126. *Id.*

127. *Id.*

128. *Id.* at 114.

129. *Id.* at 114. Here he cited nine decisions in the reports of other state courts involving “malicious” suits in which “smart” money was deemed warranted. *Id.* at 114–15. But only one of these, *Closson v. Staples*, 42 Vt. 209 (1869)—relying heavily upon citations to English cases—created a similar exception to the American rule with regard to attorney’s fees. *Id.* at 215, 220–21. In *Closson*, Justice Wilson said that the malicious behavior had to be proved to be explicit—as with an arrest or when witnesses testified of the wrongdoer’s explicit intention to compel the other party to seek counsel to defend himself against deliberately groundless charges. *Id.* at 220. In all other such cases, a defendant “has no legal ground to complain . . . because it is the ordinary and natural consequence of a uniform and well regulated system, to which all parties in civil actions are required to conform.” *Id.*

130. *Ackerman*, 41 Ariz. at 117.

thereupon affirmed the lower court's judgment and allowed attorney's fees to be awarded.<sup>131</sup>

Finally, consider two opinions from the Warren Court era, which are incorrectly referred to as the sources of the public policy rationale for the American Rule.<sup>132</sup> First, a 1964 wrongful-discharge case resulted in charging the losing plaintiff for the travel costs of the defendant's witnesses.<sup>133</sup> Concurring with the decision to deny this award, Justice Goldberg observed that

“[i]t has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means.”

....

Even the narrow decision of the Court today, in the words of Judge Clark, dissenting [from the decision below], “represents an approach to the English system, never accepted by us because of our conviction that it ‘favored the wealthy and unduly penalized the losing party.’”

Judge Learned Hand once properly observed: “After now some dozen years of experience I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death.”<sup>134</sup>

Justice Goldberg punctuated his analysis of the American Rule by expounding upon Learned Hand's remark: “I would not intensify that dread.”<sup>135</sup>

Second, in a 1967 patent-infringement case, Chief Justice Earl Warren, writing for the Court, said:

[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit [lest] the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel . . . [Moreover], the time, expense, and difficulties of proof

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131. *Id.* at 118.

132. Leubsdorf, *supra* note 42, at 10, 28.

133. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 237 (1964).

134. *Id.* at 237–39 (Goldberg, J., concurring) (citations omitted) (first quoting *Farmer v. Arabian Am. Oil Co.*, 324 F.2d 359, 365 (2d Cir. 1963) (Smith, J., dissenting); then quoting *Farmer*, 324 F.2d at 370 (Clark, J., dissenting); and then quoting Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1921)).

135. *Id.* at 239 (Goldberg J., concurring).

inherent in litigating the question of . . . reasonable attorney's fees would pose substantial burdens for judicial administration.<sup>136</sup>

In summary, each of these seventeen decisions offered rationales contrary to the arguments of scholars who have described the American Rule's historical roots as resting merely upon legislative "taxable costs" language. Several of these judgments relied upon the "proximate" or "remote" distinction, similar to *Palsgraf v. Long Island Railroad Co.*<sup>137</sup> This distinction mattered to nineteenth-century jurists.<sup>138</sup> If it had not been insisted upon, these jurists feared losing and winning litigants would both have to undergo a process something akin to the English one, in which a separate hearing is necessary before a taxing master on counsel's evidence as to what the loser must pay the winner.<sup>139</sup>

These jurists spoke as well of the need to ensure a measure of access for those whose grievances entitled them to a judicial hearing without those persons fearing potentially heavy financial penalties.<sup>140</sup> These two rationales, then undetected by previous scholars, were the nineteenth-century judiciary's good public policy justifications for the American Rule, and they are still cited by many contemporary legal scholars and jurists as such.<sup>141</sup>

## II. EXPLAINING THE ONSET OF THE "LOSER PAYS" ONSLAUGHT

In one sense, 1964 was a disaster for Republicans, with Barry Goldwater losing badly to Lyndon B. Johnson in the presidential election while barely winning his own state of Arizona and the five Deep South states—Alabama, Georgia, Louisiana, Mississippi, and South Carolina.<sup>142</sup> But in other ways it was the party's nadir, for it

136. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). In an exception to my assurance that all the opinions quoted were penned de novo, I allow that Warren does indeed refer to prior decisions upholding the rule. *Id.* at 717–18. He also notes in passing "some American commentators have urged adoption of the English practice in this country," and then offers up Albert Ehrenzweig's essay, *supra* note 61, as the first such example. *Id.* at 717.

137. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 346 (1928).

138. KARSTEN, HEART VERSUS HEAD, *supra* note 23, at 80, 101–07, 250.

139. Howard Greenberger, *The Cost of Justice: An American Problem, an English Solution*, 9 VILL. L. REV. 400, 402–03 (1964).

140. See *supra* note 136 and accompanying text.

141. See, e.g., Atiyah, *supra* note 41, at 1007–09, 1016–17, 1025, 1042–43; Karsten, *Before Bhopal*, *supra* note 41, at 433–64.

142. David Leip, *1964 Presidential General Election Results*, in ATLAS OF U.S. PRESIDENTIAL ELECTIONS (2012), <http://uselectionatlas.org/RESULTS/national.php?year=1964&f=0&off=0&elect=0> [https://perma.cc/6KfV-WUFL].

marked the beginning of a series of measures that fueled a Republican resurgence by the 1980s. These included reactions in the South and elsewhere to the enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Housing Rights Act of 1968, and the environmental statutes passed in the 1970s.<sup>143</sup> These acts were further empowered by those seeking to enforce them with limited financial resources—the Civil Rights Attorney’s Fees Awards Act of 1976<sup>144</sup> and the Equal Access to Justice Act.<sup>145</sup> These soon-to-be-called “private attorney general” statutes—which incentivized attorneys to sue to resolve these issues—did not represent the first one-way shifting of attorney’s fees acts in our past.<sup>146</sup> They were, however, in the first wave of such statutes in nearly 100 years. State legislatures began to offer their own versions of these measures and the process led to a massive spike in such fee-shifting statutes on the federal and state books.<sup>147</sup>

The Republican resurgence in the South, where the party had fared poorly since the end of Reconstruction, owed a great deal to legislative initiatives pursued by Democrats during the 1960s.<sup>148</sup> The

143. *Id.*; cf. RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 70–96 (2008); RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF AMERICAN CONSENSUS 364–486 *passim* (2009).

144. Pub. L. No. 94-559, § 1, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (2012)).

145. Pub. L. No. 96-481, 94 Stat. 2321 (1980) (codified as amended at 5 U.S.C. § 504(a)).

146. The first wave of such one-way plaintiff-favoring statutes involved railway companies violating state-rate-regulation statutes and unlawfully injuring or killing livestock. Most were upheld as constitutionally acceptable uses of state police powers. *See, e.g.*, *Dow v. Beidelman*, 49 Ark. 455, 456 (1887) (upholding a statute that imposed a fine and attorney’s fee as a proper exercise of the state’s police power to enforce a rate regulation for carriage of passengers on railroads); *Peoria Decatur & Evansville Ry. Co. v. Duggan*, 109 Ill. 537, 540 (1884) (holding the statute constitutional “as a police regulation . . . being in the nature of a penalty for non-compliance with the statutory duty of fencing . . . [and] the public welfare as well, as a measure for the safety of travel on railroads”).

A few state courts have held one-way plaintiff-favoring statutes regarding railway damage to cattle unconstitutional. *See, e.g.*, *S. & N. Ala. Ry. Co. v. Morris*, 65 Ala. 193, 200, 201 (1880) (holding that railroad corporations are persons entitled to the same rights as all others in the state under the terms of the Alabama Constitution of 1875, art. 1, and this statute is the imposition of an “arbitrary, unjust, and odious discrimination”); *see also* *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 49 Ark. 492 (1887) (“The [l]egislature has no power to . . . impose upon any one a penalty for exercising [the right to seek the aid of the courts to obtain relief from a wrong.]”); cf. James L. Hunt, *Private Law and Public Policy: Negligence Law & Political Change in 19th Century North Carolina*, 66 N.C. L. REV. 421, 440 (1988) (pointing out that the “Bourbon Democrat” court of the 1880s was decidedly pro-railroad in such tort suits).

147. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 342 graph 1 (1984).

148. *See generally* Ilyana Kuziemko & Ebonya Washington, *Why Did the Democrats Lose the South? Bringing New Data to an Old Debate* (Nat’l Bureau of Econ. Research, Working

passage of civil rights measures led to the steady decline of white Democratic voters in the South.<sup>149</sup> President Johnson proved prophetic when he commented to Ted Sorensen upon signing the Civil Rights Act of 1964, “I know the risks are great, and we might lose the South but those sorts of states may be lost anyway.”<sup>150</sup> Since then, Republicans in state and federal legislatures have tended to be more vociferous than Democrats in support of measures to cap attorney’s fees and pass “loser pays” statutes.<sup>151</sup>

Another reason for this Republican resurgence was the emergence of conservative organizations and well-funded think tanks,<sup>152</sup> including the American Enterprise Institute, the Manhattan Institute, the Heritage Foundation, the Hudson Institute, and the Cato Institute.<sup>153</sup> Some of these organizations have provided specific legislative proposals and accompanying “experts” to testify on behalf of legislative measures that would limit or repeal “private attorney general” statutes, the terms of contingency-fee contracts, and the American Rule regarding attorney’s fees.<sup>154</sup> The Manhattan Institute has been a key supporter of rollback on at least the last two of these issues.<sup>155</sup> The attack on the American Rule might have peaked in 1995

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Paper No. 21703, 2015), <http://economics.yale.edu/sites/default/files/files/Faculty/washington/south-dems.pdf> [<https://perma.cc/NPZ2-WP6S>] (using Gallup survey data to demonstrate that civil rights legislation triggered a mass exodus of Southern whites from the Democratic party).

149. *Id.*

150. NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA 61 (2005).

151. *See generally* MARIE GRYPHON, CTR. FOR LEGAL POLICY, MANHATTAN INST., GREATER JUSTICE, LOWER COST: HOW A “LOSER PAYS” RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM (2008), [http://www.manhattan-institute.org/pdf/cjr\\_11.pdf](http://www.manhattan-institute.org/pdf/cjr_11.pdf) [<https://perma.cc/9PRN-ZAVE>] (arguing for a loser-pays rule). Gryphon is a senior fellow at the conservative Manhattan Institute. *Id.* at 1. Conservative or libertarian-leaning think tanks such as the Cato Institute have produced other, similar publications. For a podcast featuring a detailed summary of these, see *The Benefits of Loser Pays*, CATO INST. (Mar. 24, 2009), <http://www.cato.org/multimedia/daily-podcast/benefits-loser-pays> [<http://perma.cc/ATX4-AKW7>].

152. *See* Jean Stefancic & Richard Delgado, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA 145 (1996). One of us (Karsten) can attest to the findings of the conservative perspective of *one* “think tank” he “sampled” for a semester in 1973, when he was on leave from his university. He was offered a position as “senior research fellow” at the Hudson Institute. (“I was clearly the ‘duty liberal.’”)

153. *Id.*; *see also* JANE MAYER, DARK MONEY 92–159 (2016) (covering similar ground, but updating this account). Stefancic, Delgado, and Mayer all demonstrate how conservatives have used private institutions, sometimes derisively referred to as think tanks, to reorient public opinion on many issues, particularly those related to the management of the country’s finances.

154. JASON STAHL, RIGHT MOVES 96–197 (2016).

155. For a similar observation, see Owen Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV., 21, 30 (1996).

when House Speaker Newt Gingrich’s “Contract with America” advocated implementing the English Rule.<sup>156</sup>

### III. THE EMERGENCE OF THE “TEXAS RULE” AND FEE-SHIFTING CORPORATE BYLAWS IN DELAWARE

Although the Contract with America was not realized in its entirety—and with regard to fee-shifting, not at all—attacks on the American Rule and one-way fee-shifting rules continued at the state level, in which the Republican Party has won significant victories throughout the past two decades.<sup>157</sup> Over the past forty years, many scholars have thought about the consequences that could ensue when jurisdictions shifted from the American Rule to the English one.<sup>158</sup> The two jurisdictions analyzed here took steps—fully in one case and hesitantly in the other—to test these theories. First, in 2011, Texas passed House Bill 274,<sup>159</sup> which ordered its supreme court to adopt a

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156. See, e.g., Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1164 (1996). Newt Gingrich’s “Contract with America” remains available at Newt Gingrich & Dick Arney, *Contract with America* (1994), <http://www.nationalcenter.org/ContractwithAmerica.html> [<https://perma.cc/W5ZK-WAGR>]. The proposed bill that addresses this subject is The Common Sense Legal Reforms Act, which blends loser pays laws, limits on punitive damages, and reform of product liability laws “to stem the endless tide of litigation.” *Id.* The first section of that proposed bill addresses the “award of attorney’s fees to prevailing parties in federal civil diversity litigation.” The Common Sense Legal Reforms Act, H.R. 10, 104th Cong. § 101 (1995).

157. For a general account, see Shannon Jenkins, Douglas D. Roscoe, John P. Frendreis & Alan R. Gitelson, *Ten Years After the Revolution: 1994 and Partisan Control of Government, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 357–58 (John C. Green, Daniel J. Coffey & David B. Cohen eds., 2007). See also Tim Storey, *GOP Makes Historic State Legislative Gains in 2010*, RASMUSSEN REPS. (2010), [http://www.rasmussenreports.com/public\\_content/political\\_commentary/commentary\\_by\\_tim\\_storey/gop\\_makes\\_historic\\_state\\_legislative\\_gains\\_in\\_2010](http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_tim_storey/gop_makes_historic_state_legislative_gains_in_2010) [<https://perma.cc/ZF7E-B8VH>]; Aman Batheja, *Republicans Extend Statewide Streak to 16 Years*, TEX. TRIB. (2014), <https://www.texastribune.org/2014/11/04/republicans-extend-statewide-streak-16-years> [<https://perma.cc/2FMC-LCPP>] (discussing specific GOP victories in the 2010 elections and in the state of Texas since 1998, respectively).

158. See, e.g., John J. Donohue, III, Commentary, *Opting for the British Rule, or if Posner and Shavell Can’t Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1099–1109 (1991); Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 427, 437–38 (1973); Thomas D. Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 140 (1984); Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2157 (1992).

159. H.R. 274, 82d Leg., 2011 Sess. (Tex. 2011).

“loser pays” rule.<sup>160</sup> Then, in 2014, Delaware’s<sup>161</sup> supreme court created a potentially destabilizing situation by letting corporate bylaws include fee-shifting arrangements.<sup>162</sup>

The two-way fee-shifting policy reform in Texas was lobbied for by the Texas Public Policy Foundation (TPPF), a private not-for-profit research institute funded by donations from libertarian and conservative backers such as Koch Industries, the Claude R. Lambe Foundation, and Texans for Lawsuit Reform.<sup>163</sup> Upon passage of H.B. 274, Ryan Brannan—a policy analyst for TPPF—announced that this legislation would “go a long way toward ensuring that our judicial system dispenses justice according to the merits of the case rather than the size of the wallet.”<sup>164</sup>

H.B. 274 resulted in the addition of Rule 91a to the Texas Code of Civil Procedure, which allowed for motions to dismiss groundless causes of action and award attorney’s fees to the prevailing party.<sup>165</sup> John Tothman, who owns a legal-fee management and litigation consulting firm, predicted that this new loser pays rule would jeopardize the chances of litigants bringing cases involving toxic-waste disposal, personal injury, products liability, and civil rights.<sup>166</sup> These parties, he reasoned, would be so worried about losing at the trial level via a Rule 91a motion, and paying the resulting fees, that they would never bother litigating their cases to the appeal stage.<sup>167</sup> Most of the famous cases have required “a party . . . to lose the first round or two before the basic principles are decided by a higher court,” although “the loser in a ‘loser pays’ scheme would generally have to post a bond

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160. TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West 2013).

161. With regard to the Delaware situation, the authors would like to thank Theodore N. Mirvis, partner at Wachtell, Lipton, Rosen & Katz, for apprising them of its significance in his comments on this Article.

162. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 560 (Del. 2014).

163. Forrest Wilder, *Revealed: The Corporations and Billionaires that Fund the Texas Public Policy Foundation*, TEX. OBSERVER (Aug. 24, 2012, 5:50 PM), <https://www.texasobserver.org/revealed-the-corporations-and-billionaires-that-fund-the-texas-public-policy-foundation> [<https://perma.cc/2WBG-QRDE>].

164. Patrick Gleason & Jason Russell, *Russell & Gleason: Perry’s ‘Loser Pays’ Is an Economic Winner*, WASH. TIMES (Sept. 1, 2011), <http://www.washingtontimes.com/news/2011/sep/1/perrys-loser-pays-is-an-economic-winner> [<https://perma.cc/G8E2-Q5ZE>].

165. TEX. R. CIV. P. 91a (2013).

166. John Tothman, *Texas Goes English by Jettisoning American Rule on Legal Fees*, CIVILIAN’S GUIDE TO LAWYERS (THE BLOG) (May 23, 2011), <http://blog.civiliansguide.tolawyers.com/2011/05/23/texas-goes-english-by-jettisoning-american-rule-on-legal-fees> [<https://perma.cc/7Q5H-W4BE>].

167. *Id.*



for the six, seven, or eight figure fees claimed by the defense to appeal in [that] situation.”<sup>168</sup> As a result, many important rights-expanding decisions would never have a chance to be made by higher courts.<sup>169</sup> “I don’t think [the plaintiffs in *Brown v. Board of Education*<sup>170</sup>] had that kind of scratch,” he joked in a blog entry.<sup>171</sup> He speculated that “crushing legal fees” would cause smaller firms “to forgo even the most meritorious litigation” whereas richer parties could “break the opponent who has limited resources.”<sup>172</sup> Furthermore, Tothman was not surprised that wealthy members of the plaintiff’s bar and conservative groups had agreed to support the adoption of loser pays: “There’s no one in this group representing civilians, small businesses, and so on” but instead merely a number of “trial lawyers [who deliver] the class to the defendants in exchange for some coupons and a large fee, to which the defendant agrees not to object.”<sup>173</sup>

Although several years have passed since Rule 91a’s adoption, no one has compiled precise data about its impact.<sup>174</sup> One is left to rely, then, solely on anecdotal evidence about the operation of this rule. David Chamberlain said in 2015 that “[f]requency of use has been the big surprise of HB 274,” given how “[w]e just didn’t think many defendants would risk having to pay fees, particularly when there is always a summary judgment motion available that doesn’t carry that fee-shifting risk.”<sup>175</sup> In terms of sheer media attention, the most notable Rule 91a motion to date was made by attorneys representing billionaire Dallas Cowboys owner Jerry Jones, who had been sued in civil court for sexual assault by Jana Weckerly.<sup>176</sup> Weckerly, who

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168. *Id.*

169. *Id.*

170. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

171. Tothman, *supra* note 166.

172. *Id.*

173. *Id.*

174. See, e.g., Yvette Ostolaza & Brandon Fuqua, *Rule 91a: Score One for the Defendants*, TEX. LAW. (Dec. 29, 2014), <http://www.texaslawyer.com/id=1202713413319/Rule-91a-Score-One-for-the-Defendants?slreturn=20160811075500> [<https://perma.cc/8WGX-2689>]. The authors—in the course of analyzing the still-evolving understanding of Rule 91a’s applicability—offer hope that a number of detailed “future appellate decisions” will interpret and clarify the rule, which in turn will “ease practitioners’ concerns about the tool’s novelty.” *Id.*

175. Angela Morris, *Tort Reform Bill Caused Flurry of New Motions to Dismiss*, TEX. LAWYER (Jan. 12, 2015), <http://www.texaslawyer.com/id=1202714459994/Tort-Reform-Bill-Caused-Flurry-of-New-Motions-to-Dismiss?slreturn=20160729213435> [<https://perma.cc/KP2Z-E753>].

176. See, e.g., Sports Xchange, *Jerry Jones, Cowboys Face Sexual Assault Suit*, CHI. TRIB., Sept. 9, 2014, <http://www.chicagotribune.com/sports/breaking/chi-jerry-jones-cowboys-civil-suit>

pursued her case against Jones vigorously in the local media but lost in the courtroom, was ordered by a Dallas County court to pay the defendant's costs and was thereafter barred from discussing the case with the media.<sup>177</sup>

Despite the lack of statistical evidence, conservative operatives believe the reforms have had a tremendous impact. “[W]ith the passage of loser pays,” wrote Patrick Gleason of Americans for Tax Reform, “[Governor] Perry has found a way . . . to make Texas an even more attractive place for employers to create jobs.”<sup>178</sup> Randy Wilson, a district judge who is a self-identified “conservative Republican,” approved of how the rule limited access to the courts. “Rule 91a is a useful tool to dismiss the occasional nut suits that we sometimes encounter,” he told the *Texas Advocate* in 2013.<sup>179</sup> Viewed in light of continued concerns about the relevance of the rule, as well as conservative boasts about its pro-business effects, John Tothman’s worries about the impact of the “loser pays” rule remain relevant.

Worries about the litigation-dampening implications of fee-shifting provisions also increased in 2014 after a controversial decision by the Delaware Supreme Court. In *ATP Tour, Inc. v. Deutscher Tennis Bund*,<sup>180</sup> which concerned a minor change in status to an ATP-sanctioned tennis tournament in Germany, the Delaware Supreme Court addressed whether a private company could amend its bylaws to make losers in shareholder-litigation cases pay the prevailing party’s fees.<sup>181</sup>

In an opinion by Justice Carolyn Berger, the court held, “[A] fee-shifting bylaw is not invalid *per se*, and the fact that it was adopted after

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20140909-story.html [https://perma.cc/CP3P-PS96]. The case remained front-page news in the Dallas-Fort Worth area for several weeks until Jones’ lawyers filed their Rule 91a motion. See Ostolaza & Fuqua, *supra* note 174 (“In October 2014, a broader audience learned the impact of this new rule when Jerry Jones, the owner of the Dallas Cowboys, successfully used it to achieve dismissal of allegations of civil sexual assault.”).

177. *Weckerly v. Jones*, No. DC-14-10061, at 1–2 (Tex. 134th Jud. Dist. Oct. 16, 2014), www.dallascounty.org/applications/english/record-search/rec-search\_intro.php [https://perma.cc/ZJ45-BH3L] (click under “Civil Records,” run search for “Weckerly,” click on “Documents,” click on icon next to “All Other Dispositions”) (granting Jones’ Amended Motion to Dismiss pursuant to TEX. R. CIV. P. 91a). For a discussion of media coverage, see *supra* note 176 and accompanying text.

178. Gleason & Russell, *supra* note 164.

179. Randy Wilson, *From My Side of the Bench: Motion to Dismiss*, 65 ADVOC. 80, 81 (2013).

180. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

181. *Id.* at 555.

entities became members will not affect its enforceability.”<sup>182</sup> Although the court did not determine whether the ATP fee-shifting provision was “adopted for a proper purpose or [was] enforceable in the circumstances presented,” this holding could alter the litigation landscape in the state.<sup>183</sup> With one million business entities incorporated in Delaware—including more than half of U.S. publicly traded companies and 64 percent of the Fortune 500 companies<sup>184</sup>—the ability of corporation directors to limit shareholder rights by adopting fee-shifting bylaws without a shareholder vote could have a significant chilling effect on corporate litigation. In a public memo, the law firm Wilson Sonsini Goodrich & Rosati said that “many boards of directors of private and public Delaware corporations should consider adopting fee-shifting bylaws of their own.”<sup>185</sup>

A little over a year later, after a number of large companies adopted “loser pays” litigation bylaws, the Delaware House of Representatives passed Senate Bill 75, prohibiting Delaware corporations from implementing these bylaws, at least as they apply to “intracorporate disputes.”<sup>186</sup> Professor John Coffee expressed concern that this limitation will not reach “federal antitrust, securities and related fraud actions (e.g., RICO),”<sup>187</sup> which could perhaps be curtailed by these fee-shifting bylaws.<sup>188</sup> Former SEC Commissioner Paul Atkins argued that Delaware’s passage of SB 75 may cost the state its

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182. *Id.* at 560. What is meant here, in other words, is that such bylaws can be adopted unilaterally at any time by the directors, and without a vote of stockholders or subsequent members of the corporation.

183. *Id.*

184. STATE OF DELAWARE DIVISION OF CORPORATIONS: ABOUT AGENCY, <http://www.corp.delaware.gov/aboutagency.shtml> [https://perma.cc/ZRA2-7Z9Y].

185. Steven Davidoff Solomon, *A Ruling’s Chilling Effect on Corporate Litigation*, N.Y. TIMES: DEALBOOK (May 23, 2014, 5:01 PM), <http://dealbook.nytimes.com/2014/05/23/a-rulings-chilling-effect-on-corporate-litigation> [https://perma.cc/TZ3H-6P8A] (quoting Wilson Sonsini Goodrich & Rosati, *Delaware Supreme Court Endorses “Fee-Shifting” Bylaw in Certified Question of Law*, WSGR ALERT (May 12, 2015), <https://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgalert-fee-shifting.htm> [https://perma.cc/34FD-64CK]).

186. S.B. 75, 148th Gen. Assemb. (Del. 2015) (codified at DEL. CODE ANN. tit. 8, § 109 (2015)). The bill also prevents corporations from adopting bylaws requiring disputes to be heard in non-Delaware courts (exclusive forum provisions requiring that cases be tried in Delaware courts, however, remain permissible). *Id.*

187. John C. Coffee, Jr., *Update on “Loser Pays” Fee Shifting*, CLS BLUE SKY BLOG (May 27, 2015), <http://clsbluesky.law.columbia.edu/2015/05/27/update-on-loser-pays-fee-shifting> [https://perma.cc/JAY2-VNGT].

188. *Id.*

preferred status as a corporate haven,<sup>189</sup> a fact confirmed several months later in a *Wall Street Journal* article that noted Delaware was losing ground to Nevada and other more lenient jurisdictions.<sup>190</sup> For example, in 2014, the Oklahoma legislature—hoping to gain ground on Delaware—preemptively passed a bill providing that in shareholder-initiated derivative actions, the court “shall require the non-prevailing party or parties to pay the prevailing party or parties the reasonable [litigation] expenses.”<sup>191</sup>

If nothing else, the dustups in Texas and Delaware underscore the significance of fee-shifting rules as a means of limiting litigants’ access to the courts precisely when it is most important: during long, complicated trials and appeals when deep-pocketed defendants have far less to lose than poorer plaintiffs seeking redress.<sup>192</sup> Delaware’s response offers evidence that legislators understood the dangers of private utilization of this kind of fee-shifting rule. Rule 91a, however, remains good law in the state of Texas where scholars continue to debate its impact.<sup>193</sup>

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189. Paul Atkins, *CA Has Hollywood, TX Has Oil, Delaware Corporations*, REAL CLEAR MKTS. (June 11, 2015), [http://www.realclearmarkets.com/articles/2015/06/11/ca\\_has\\_hollywood\\_tx\\_has\\_oil\\_delaware\\_corporations.html](http://www.realclearmarkets.com/articles/2015/06/11/ca_has_hollywood_tx_has_oil_delaware_corporations.html) [https://perma.cc/C8RM-WFZW].

190. Liz Hoffman, *Dole and Other Companies Sour on Delaware as a Corporate Haven*, WALL STREET J. (Aug. 2, 2015), <http://www.wsj.com/articles/dole-and-other-companies-sour-on-delaware-as-corporate-haven-1438569507> [https://perma.cc/4XNB-3AGY].

191. S.B. 1799, 54th Legis., 2d Reg. Sess. (Ok. 2014) (codified at OKLA. STAT. tit. 18, § 1126 (2014)). The Oklahoma legislation applies to any derivative action in the state, even if the company involved is not incorporated in Oklahoma. *Id.* This measure, along with Oklahoma’s corporate formation fee of \$50—which is the lowest in the country—was designed to attract business from states like Delaware. See Nellie Akalp, *The Many Variables to Consider When Choosing a State in Which to Incorporate*, ENTREPRENEUR (Feb. 2, 2015), <https://www.entrepreneur.com/article/241528> [https://perma.cc/L5JH-7T68]; J. Robert Brown Jr., *Fee Shifting in Derivative Suits and the Oklahoma Legislature*, RACE TO THE BOTTOM BLOG (Sept. 24, 2014, 6:00 AM), <http://www.theracetothetbottom.org/home/fee-shifting-in-derivative-suits-and-the-oklahoma-legislatur.html> [https://perma.cc/QC8C-V4CJ].

192. Some of the corporations that adopted these fee-shifting bylaws, such as Alibaba, are actually incorporated outside the US (in Alibaba’s case, the Cayman Islands). Alibaba Grp. Holding Ltd., Registration Statement (Form F-1) (May 6, 2014).

193. See, e.g., Walter Olson, *‘Loser-Pays’ in Texas: A ‘Triumph of Packaging,’* CATO AT LIBERTY (Sept. 29, 2011, 8:34 AM), <http://www.cato.org/blog/loser-pays-texas-triumph-packaging> [https://perma.cc/57GZ-2HCE] (“Texas courts will apply the loser-pays principle only to a small fraction of unsuccessful actions.”). Olson, a leading libertarian legal scholar, believes that Rule 91a does not apply to enough cases. *Id.* Instead, per his earlier writings about the operation of “loser pays” in Europe, he argues that plaintiffs must always fear financial loss if they are to be discouraged from accessing the courts at the first opportunity. See Olson & Bernstein, *supra* note 156, at 1188 (stating that the fear of paying hefty legal fees upon losing a case hurts the middle class both when they sue and when they get sued); cf. Walter Olson, *Civil*

## IV. CRITICISMS OF THE AMERICAN RULE: A RESPONSE

This Article closes with two critiques. The first one deals with the oft-cited essays of Albert Ehrenzweig, who served as a judge in his native Austria before immigrating to the United States in 1939.<sup>194</sup> Several years later, he penned his first critique of the American Rule while holding the Walter Perry Johnson Chair at Boalt Hall.<sup>195</sup> In his second article critiquing the American Rule, he informed the reader that when he moved to his new American academic post, “an American moving firm had cheated us out of our last belongings.”<sup>196</sup> He “was, of course, directed to a fine lawyer,”<sup>197</sup> who told him he had “an airtight claim,”<sup>198</sup> but the lawyer astounded him by adding that he needed a \$100 retainer.<sup>199</sup> Ehrenzweig postulated that upon succeeding, the lawyer should get his fees “from the defendant, as he would anywhere else in the world.”<sup>200</sup>

Perhaps no one advised Ehrenzweig to approach a contingency-fee attorney in 1939. But his expressed attitude toward the “‘industries’ of the ‘plaintiffs’ bar’” fail to reflect any appreciation for what was offensive to this Austrian-trained lover of civil law.<sup>201</sup> The American Rule, he proclaimed in 1966, was “a pernicious historical relic—unknown in the rest of the world . . . a festering cancer in the body of our law without whose excision our society will not be great.”<sup>202</sup> And “the contingent fee . . . will have to remain with us as an incurable symptom of an uncured disease.”<sup>203</sup> In both essays, Ehrenzweig’s sole thesis is that the contingent fee and the American Rule are American

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*Suits*, REASON, June 1995, at 26, 28 (“Middle-class Americans who make a false move and get sued face those kinds of liability exposures every day . . .”).

194. A Google Scholar search for Albert Ehrenzweig at the time this Article was published reveals several thousand citations, among which hundreds refer to his work on this topic. See [https://scholar.google.com/scholar?q=albert+ehrenzweig&btnG=&hl=en&as\\_sdt=0%2C39](https://scholar.google.com/scholar?q=albert+ehrenzweig&btnG=&hl=en&as_sdt=0%2C39) [<https://perma.cc/YAT4-57LQ>].

195. See generally Albert A. Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CAL. ST. B.J. 107 (1951) (arguing that not awarding counsel fees to the prevailing party threatens the administration of justice).

196. Ehrenzweig, *supra* note 61, at 792. Ehrenzweig’s article was subsequently referred to as “a good analysis of . . . the American Rule.” Comment, *supra* note 61, at 638 n.6.

197. Ehrenzweig, *supra* note 61, at 792.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 794.

202. *Id.* at 793–94.

203. *Id.* at 794.

hybrids, foreign to the European Civil and English Common Law world (or, as he puts it, “the rest of the world”<sup>204</sup>), without indicating precisely why they were embraced here as a proper republican world innovation.

But perhaps the most prolific critic of the American Rule for the past several decades has been Walter Olson. Author of *The Litigation Explosion*<sup>205</sup> and numerous articles and blogs, Olson has made one misleading claim and another incorrect one.

In a blog called “Loser Pays” from May of 2004, Olson wrote:

The leading British scholar on torts and accident law, the distinguished Patrick Atiyah of Oxford, observes that “the reality is that the accident victim with a reasonable case should be able to find a lawyer with equal ease in England and America.”<sup>206</sup>

He then added that he “cited” this passage in his testimony before a House of Representatives committee in 1995 “when the issue came up . . . as part of the ‘Contract with America.’”<sup>207</sup> This passage misquotes Atiyah and misrepresents the contents of that essay. Atiyah wrote: “*These differences in fee practices may appear relatively unimportant, because the reality is that the accident victim with a reasonable case should be able to find a lawyer with equal ease in England and America.*”<sup>208</sup> He went on to write, “Nevertheless, the differences appear to be very considerable, though it is not easy to explain exactly why.”<sup>209</sup> He then said:

Perhaps the difference lies in the fact that personal injury litigation is actually highly profitable to [contingency-fee] lawyers in America . . . . In England, personal injury litigation is not generally regarded as highly profitable, and because of this many lawyers are uninterested in such work. If they do take on such cases, they may be prone either to recommend settlement or abandonment of the case long before an American attorney would take such a step. Possibly more important than the differences themselves is public knowledge of the respective arrangements. I believe the contingent fee is a well understood arrangement in America, and probably few Americans

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204. *Id.* at 793.

205. WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991).

206. Walter Olson, *Loser Pays*, POINT OF L. (May 21, 2004), <http://www.pointoflaw.com/loserpays/overview.php> [<https://perma.cc/33WP-F7EE>].

207. *Id.*

208. Atiyah, *supra* note 41, at 1017 (emphasis added).

209. *Id.*

are discouraged from applying to lawyers out of fear of the cost; in England, on the other hand, fear of legal costs does seem to be a factor that sometimes discourages accident victims from seeking legal assistance.<sup>210</sup>

Atiyah continued to tangle with Marc Galanter on recent data comparing the United States and the United Kingdom as well as on whether Americans were “litigious.” Olson has advanced this claim at length,<sup>211</sup> for which he has been criticized.<sup>212</sup>

Like other critics of the American Rule, Olson is comfortable with statutory language directing the judicial application of the English Rule when the plaintiff has brought a “frivolous” case, which calls to mind Tenth Circuit Judge Doyle’s observation: “If a case is to be considered frivolous based on the length of chancellor’s foot, so to speak, the results are going to be unfortunate.”<sup>213</sup>

On this score, this Part closes with some relevant findings that one of the authors detected from an earlier period. *Heart Versus Head* depicts median damage awards for personal injury suits that did not result in death. These cases were affirmed by American state supreme courts from 1823 to 1896, and they are organized by type of tort.<sup>214</sup>

During the second half of the nineteenth century, for-profit streetcars, stagecoaches, steamboats, and railroads proliferated

210. *Id.*; see also Donald Harris, *Claims for Damages: Negotiating, Settling or Abandoning*, in COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY, 45, 72 tbl.2.12 (Donald Harris et al. eds., 1984) (showing 11 percent of possible claimants deterred by fear of legal costs).

211. See generally OLSON, *supra* note 205 (arguing that America has experienced a socially wasteful litigation explosion in which Americans litigate against each other too much).

212. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1096–97 (1996); see also James D. Cox, *Making Securities Fraud Class Action Suits Virtuous*, 39 ARIZ. L. REV. 497, 499–508 (1997) (advancing this critique); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943 (2002) (“[W]e are hard pressed to find strong differences in behavioral patterns that can be tied to fee arrangements.”).

213. *Prochaska v. Marcoux*, 632 F.2d 848, 855 (10th Cir. 1980). This quote also serves as the introductory quotation in Glen Eugene Davis, Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U. L.Q. 75, 75 (1982). Selden’s passage explains:

Equity is a roguish thing; for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. ‘Tis all one as if they should make the standard for the measure we call a foot, a chancellor’s foot; what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot: ‘tis the same thing in the chancellor’s conscience.

JOHN SELDEN, TABLE TALK (1854), reprinted in SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 223, 223–24 (Michael Evans & R. Ian Jack eds., 1984).

214. KARSTEN, HEART VERSUS HEAD, *supra* note 23, at 274.

throughout the nation. They often generated suits due to corporate-agent negligence. The United States did, indeed, experience a “liability explosion,” but the rise in the size of negligence awards occurred as soon as such engines of transport and disaster appeared on the scene.<sup>215</sup> Ever since, their increase has not constituted a liability crisis, but a natural increase in award sizes. These awards are keyed to inflation increases and rises in the median household income levels. In the late nineteenth century, the nation’s median household income was about \$450, and the median tort award in these years was about \$3,800.<sup>216</sup> By 1991, the nation’s median household income was \$40,873 per year, and the median state-court jury award for torts was about \$30,000.<sup>217</sup> Do the math yourself: Which century experienced the “liability explosion,” the nineteenth or the twentieth? (A hint: It wasn’t the twentieth.)<sup>218</sup>

*Between Law and Custom*<sup>219</sup> compares approximately 850 median personal-injury and wrongful-death awards in the United States and four British imperial nations: England, Canada, Australia, and New Zealand. Awards were significantly higher in U.S. courts than those in England, Australia, New Zealand, and Canada,<sup>220</sup> to say nothing of the virtual absence of *any* awards resulting from Indian railway accidents between the late 1880s and late 1890s.<sup>221</sup>

215. Large jury awards were *often* by jurists. After all, they rode these coaches, steamboats, and rails as well. And the owner-operators of these behemoths had to be taught to protect their passengers. As Nevada’s Justice B. C. Whitman put it, in affirming such a substantial award: “[I]n these times, when traveling is so much a constituent part of living, it is perhaps practically well that [damages for bodily suffering in cases of mere negligence are allowed], for the pocket nerve is a very sensitive one and prospect of heavy damages will undoubtedly do much to prevent carelessness on the part of passenger carriers.” *Johnson v. Wells Fargo & Co.*, 6 Nev. 224, 239–40 (1870).

216. KARSTEN, HEART VERSUS HEAD, *supra* note 23, at 257–60, 440–42; Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901–1910*, 34 AM. J. LEGAL HIST. 295, 306 (1990).

217. Brian Ostrom, David Rottman & Roger Hanson, *What Are Tort Awards Really Like? The Untold Story from the State Courts*, 14 LAW & POL’Y 77, 84–85, 85 tbl.5 (1992).

218. *Id.*

219. PETER KARSTEN, BETWEEN LAW AND CUSTOM 475 tbl.2 (2003). For greater detail, see *id.* at 363–451, (discussing the different judicial responses to negligence claims by American courts and by the British colonies’ courts, and concluding victims in America had a better chance to recover damages for negligence than the victims in jurisdictions following British case law).

220. In the years from 1859 to 1900 the dollar to pound ratio averaged 5.5 to 1. MITCHELL, *supra* note 28, at 702.

221. See generally Karsten, *Before Bhopal*, *supra* note 41 (analyzing the lack of compensation for victims of railway accidents in India in the beginning of the 20th century).



## CONCLUSION

This Article has identified the nineteenth-century American state and federal judiciary's public policy justifications for the contingency-fee contract and for the American Rule. Critics of these doctrines have claimed these phenomena are important reasons why the United States has become "a litigious society." This ungenerous term can be countered by a fuller description of what these two American inventions have done for individuals with virtuous claims. Individuals elsewhere—in the British and European civil law world, to say nothing of those in countries without rule of law—lack the means these two tools provide plaintiffs in the United States: more reliable access to judicial hearings with less expense for poorer plaintiffs and the elimination of the fear of punishing loser pays costs. This should be something that Americans can feel *proud* of, rather than be told that they are out of step with a world of rules that cripple those seeking their day in court.