

PUBLIC CHOICE THEORY, INTEREST GROUPS, AND TORT REFORM

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The scope of the civil justice system has generated significant interest in recent U.S. history, in large part through the debate surrounding “tort reform.” Most of the relevant political and academic discussion thus far has focused on whether the tort system should be comparatively large or small. Advocates for tort reform argue that it should be small, because a large system is too costly for consumers and abusive to defendants. This Note seeks to add to the discussion by evaluating, not whether one group’s position on tort law is better, but whether one group’s influence on tort law is stronger.

The academic literature evaluating interest groups through the lens of economic theory suggests that when private factions have a direct pecuniary interest in shaping the law through litigation and the political process, the effort they expend to do so will be relative to their ability to overcome problems inherent in collective action. Further, the extent to which their efforts are rewarded will depend on how strategically positioned they are to influence courts and policy makers. This Note builds on the public choice literature analyzing those groups with a direct financial interest in expanding or reducing the scope of tort law. Much of the existing scholarship concludes that groups with an interest in expansion have an advantage in their ability to overcome collective action problems and thus are in a superior strategic position to influence tort law. This Note argues that such conclusions are based on faulty assumptions. If anything, public choice and interest group theory suggest that groups with an interest in reducing the scope of the tort system through tort reform have an advantage over their opponents.

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I. INTRODUCTION

The U.S. tort system has far-reaching effects on the global economy and the lives of individuals all over the world. In its simplest form, negligence tort law¹ shifts the financial risk of accidents by redistributing wealth from those who cause accidents to those who suffer from them. This shift changes the incentives of individual persons and corporations who operate in accident-prone industries.² When individuals must pay for the harm they cause, they are deterred from engaging in activity that might result in liability for another's injuries.³ Thus, tort law affects the world in two ways: it redistributes wealth between certain classes of individuals, and it deters certain types of behavior.⁴ The typical justification for redistribution is that blameworthy tortfeasors ought to give compensation for the injuries they impose on blameless victims. Deterrence is justified on the grounds that forcing individuals who can most easily avoid injuries to internalize the cost of those injuries stops such injuries from occurring in the first place.⁵

While both justifications for the tort system are generally accepted in theory, the system's tangible effects are still subject to controversy.⁶ It is easy to say that a tortfeasor should compensate his victim for her injury, at least in proportion to his culpability. But what constitutes fair compensation for an injury, especially when it causes lasting nonpecuniary harm, and how much of that can fairly be taken from a tortfeasor who was merely negligent? Should these determinations be made by a jury on a case-by-case basis, or should they be standardized in some way? How easy should it be to get before a jury? Is it worse to avoid compensating deserving victims by closing the courthouse doors too tightly, or to force innocent defendants to suffer through long and costly litigation by opening the doors too widely? It is easy to say that harmful behavior should be deterred. But it is just as easy to conclude that beneficial behavior should be encouraged. What is to be done about behavior that is beneficial but inherently risky? Can doctors be forced to take proper care without also being pushed toward "defensive medicine" techniques that are not always in patients' best interests? What rules will discourage pharmaceutical companies from creating dangerous products while encouraging them to innovate? How can the tort system be structured so that the baby is not thrown out with the bath water?

Controversy over the nuances and effects of tort law has culminated in the local and national debates surrounding "tort reform." Simply put, the proponents of tort reform seek to reduce the scope of the tort system,

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1. For the purposes of this Note, "tort law" and "the tort system" refer to negligence tort law.
 2. See JANE STAPLETON, *PRODUCT LIABILITY* 100-07 (1994).
 3. See generally *id.*
 4. See generally *id.* at 100-107, 214, 271.
 5. See generally *id.* at 100-107.
 6. See *id.* at 107.

while the opponents of tort reform seek to maintain or increase the system's current scope. Many justifications are given on both sides. Those favoring a reduced scope through tort reform generally maintain that the current tort system is too large, arguing that it deters too much desirable behavior and rewards plaintiffs' lawyers for bringing frivolous lawsuits against corporations guilty of nothing more than having "deep pockets."⁷ Many of those favoring an expanded scope counter that the system is too small, arguing that it underdeters socially harmful behavior and does not provide enough access to the justice system for victims with valid claims.⁸

These disagreements are difficult to overcome through resort to objective criteria or shared values. Ultimately, policy makers must resolve several difficult normative problems: how to properly balance the values of compensation, allocation of risk, and deterrence. This task is difficult enough. But normative discussions cannot even truly begin until the relevant facts are known and agreed upon. A difficulty in the current debate over tort reform is that large disagreement exists over the extent to which deserving victims go without compensation, innocent defendants expend needless resources, and tort law deters both harmful and beneficial behavior.⁹ The tort system is a public tool used to further societal goals.¹⁰ Policy makers cannot know what problem to fix until they know what goals the system fails to accomplish, and they cannot fix those problems without a deep understanding of how the system works in practice. For policy makers to begin shaping a fair and efficient tort system, they must be well informed.

Unfortunately, the tort system's ultimate effect on individuals and the economy is a product of many interrelated factors, all of which must be considered. Policy makers have limited resources, and most parties with an incentive to supply information and analysis regarding the cur-

7. See John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Losses*, 21 J. LEGAL STUD. 371, 371–73 (1992); Todd J. Zywicki, *Public Choice and Tort Reform* 1–2 (George Mason Univ. Sch. of Law, Working Paper No. 00-36, 2000), http://www.law.gmu.edu/assets/files/publications/working_papers/00-36.pdf; see also Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1760–61 (1994) (arguing that if the tort system does not in fact efficiently deter harmful behavior and compensate wrongfully injured claimants, it merely operates to "penalize 'innocent human beings from whom wealth is [being] transferred through the tortuous paths of liability and insurance'" (alteration in original) (quoting Alfred F. Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 SAN DIEGO L. REV. 283, 284 (1993))).

8. See Richard L. Abel, *Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 TEX. L. REV. 1547, 1549 (2002) ("Insurers and well-organized defendants abuse their economic power to delay legal redress, forcing vulnerable victims facing unemployment and mounting medical expenses to accept inadequate settlements."); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987) [hereinafter *The Real Tort Crisis*] (arguing that there "is a crisis of underclaiming rather than overclaiming" tort lawsuits); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 643–47, 668–69 (2006).

9. See Zywicki, *supra* note 7, at 12.

10. *The Real Tort Crisis*, *supra* note 8, at 443–44, 447.

rent state of the tort system have a significant, and narrow, financial stake in the outcome.¹¹ A cursory look at the organizations involved in the tort debate shows that the faction supporting tort reform is in large part comprised of repeat tort defendants with a pecuniary interest in reducing tort wealth transfers, while the faction opposing tort reform is comprised mainly of plaintiffs' lawyers with a pecuniary interest in increasing tort wealth transfers.¹² Neither side has a direct incentive to share society's interest in balancing the risks of under deterrence with the risks of over deterrence. On the contrary, each has an almost unlimited financial incentive to increase or decrease the scope of the tort system to the extent possible.

This does not mean that society's interests will be ignored. Even if private groups influencing tort law are only directly concerned with wealth transfers, they still benefit from persuading policy makers and the public that their respective positions are best for society.¹³ Neither side can ignore the public interest without the risk of losing its influence in the policy debate. So long as both factions have a similar degree of influence, policy makers should be supplied with enough information to make informed decisions regarding the proper scope of tort law.¹⁴

The danger for society lies in the possibility that one faction has significantly more influence than the other. Because much of the information and pressure driving change in tort law is supplied by rent-seeking groups, the efficiency of tort law is uniquely dependent on a roughly even balance of power between the two opposing factions.¹⁵ One of the tenets of public choice and interest group theory is that private interest groups will generally seek to shape laws in ways that further their own interests rather than the interests of the public.¹⁶ If an interest group is not effectively counterbalanced, the law will ordinarily evolve to favor the interests of that group, at the expense of society.¹⁷ Thus, if one of the factions influencing tort law has significantly greater power to achieve its goals, it is likely that the scope of the tort system has been expanded or reduced beyond the level that unbiased policy makers with the same resources would choose in furtherance of the public interest.

Although the subject has not been studied in great detail, public choice theorists analyzing tort law have for the most part argued that in-

11. See Zywicki, *supra* note 7, at 3–5.

12. *Id.*

13. *Id.* at 11–12.

14. Cf. Paul J. Stancil, *Assessing Interest Groups: A Playing Field Approach*, 29 CARDOZO L. REV. 1273, 1275 (2008) (arguing that interest groups will not be harmful to society when counterbalanced by opposing forces).

15. See *id.* at 1275–76.

16. Gary S. Becker, *Pressure Groups and Political Behavior*, in CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED 120, 141–42 (Richard D. Coe & Charles K. Wilber eds., 1985).

17. *Id.*; see also Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523, 527 (1996) (noting that when the common law becomes infected by rent-seeking litigation, it becomes less efficient).

terest groups opposing tort reform have a greater ability to exert pressure through the legal and political process¹⁸ and thus have greater influence over the scope of tort law than interest groups supporting tort reform.¹⁹ Therefore, the existing public choice literature largely concludes that tort law will be subject to undue expansionary pressures.²⁰

The purpose of this Note is to critically evaluate this literature by examining and evaluating each faction's ability to use the legal and political process to shape the tort system. This Note argues that the existing public choice literature is incomplete. Part II provides an overview of interest group theory and describes the political processes that interest groups use to influence the development of tort law. Part III builds on the current public choice scholarship and analyzes each faction's ability to organize its members effectively, as well as each faction's relative ability to manipulate the relevant legal and political processes. Part III argues that, contrary to most theorists' conclusions, supporters of tort reform have more influence than their opponents. Part IV recommends ways in which the literature can be further developed and explains why such development will be valuable. Part V concludes.

II. BACKGROUND

In order to analyze each faction's ability to shape the scope of the tort system, it is necessary to understand both the interest group dynamics that are involved and the forums in which tort law changes.²¹ Section A of this Part provides a brief overview of interest group theory and introduces the principal players: those interest groups with the largest stake in tort doctrine. Section B then describes the methods by which interest groups operate within the relevant legal forums to influence the development of tort law.

A. *The Players: Interest Group Factions and the Tort System*

Tort law has an indirect effect on all citizens, but several groups have a particularized economic interest in influencing the tort system. The faction fighting to expand the tort system is made up of groups that directly benefit from tort wealth transfers, while the faction fighting to reduce the system is made up of groups that are directly harmed by tort wealth transfers.²² This Section provides an overview of interest group theory and introduces the interest groups relevant to tort law.

18. See e.g., Zywicki, *supra* note 7, at 4, 6.

19. See *id.*

20. See *id.* at 6–7.

21. See Paul H. Rubin, *Public Choice and Tort Reform*, 124 PUB. CHOICE 223, 224 (2005).

22. See Zywicki, *supra* note 7, at 3, 5–6.

1. *Collective Action and Interest Group Theory*

Much of modern interest group theory stems from Mancur Olson's seminal work, *The Logic of Collective Action*,²³ in which Olson illustrates that groups have difficulty engaging in collective action even when all members share a common goal.²⁴ First, members have no incentive to work toward a goal unless they derive individual benefit sufficient to make the effort worthwhile.²⁵ Second, members are less likely to contribute if they can free ride off the efforts of others and still enjoy the benefits of success.²⁶ Third, members will not work together effectively unless the group can overcome the information and organization problems involved in coordination.²⁷

Interest group theory helps explain why, contrary to standard assumptions about majority rule, small groups are often more effective in generating legal change than large majority groups whose interests are more aligned with those of the general public.²⁸ When a law bestows concentrated benefits and dispersed costs, small groups with concentrated interests will have an advantage over large groups with more dispersed interests, especially if the smaller group already has an organizational structure in place.²⁹ Because interest groups are essentially competing for political influence, groups do not need to completely solve their collective action problems—they only need to do better than competing groups to have an advantage.³⁰

2. *Interest Groups Affecting Tort Law*

Tort law confers widely dispersed costs and benefits in the form of deterrence.³¹ By deterring certain types of behavior, tort law stops some socially harmful things from happening but also stops some socially valuable things from happening. Because these effects are relatively small for each individual, and because most individuals share the costs and benefits equally, no individual typically has enough of an interest in changing the law to exert significant effort on this basis. But tort law also

23. See generally MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971).

24. *Id. passim*.

25. *Id.* at 2.

26. *Id.* at 16.

27. *Id.* at 58.

28. See *id.* at 128; see also Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 385 (1983).

29. See OLSON, *supra* note 23, at 147–48; see also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 287 (“Under Olson’s theory, one would expect concentrated benefits and, especially, concentrated costs to stimulate more interest group formation, because the smaller and more focused groups will normally be better able to surmount the free rider problem.”).

30. Becker, *supra* note 28, at 380.

31. STAPLETON, *supra* note 2, at 100–07.

confers narrow costs and benefits, as it facilitates a wealth transfer from tort defendants to tort plaintiffs and their attorneys.³² The individuals that benefit or are harmed by this wealth transfer have a much greater interest in influencing the scope of tort law.

Several groups have clearly defined economic interests. Plaintiffs' lawyers have the greatest incentive to expand the tort system because their income consists of the proceeds of lawsuits they are able to win or successfully settle.³³ Almost any expansion of the tort system, be it a new form of liability, an increase in recognizable tort damages, or a procedural rule increasing access to the courts, is economically beneficial for the plaintiffs' bar. Likewise, almost any reduction of tort law is economically harmful for plaintiff's lawyers. Repeat tort defendants therefore have the opposite incentive. Manufacturers who repeatedly defend against products liability lawsuits, as well as hospitals and doctors who repeatedly defend against medical malpractice claims, are the hardest hit by the tort system and have a direct interest in reducing its scope.³⁴

Several other groups have an economic interest in the scope of tort law, albeit with incentives less clearly defined than those of plaintiffs' lawyers or repeat defendants. Insurers have a multifaceted interest in the tort system. While insurance companies incur costs from tort lawsuits, as most tort defendants are insured,³⁵ insurers also obtain revenue from the tort system as businesses only pay insurance premiums because the tort system generates liability risks.³⁶ Political entrepreneurs—

32. See *id.* at 100–07, 214, 271.

33. Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 808–09 (1994); see also Cross, *supra* note 17, at 533 (“The more torts available and the easier they are to claim and win, the better plaintiffs’ lawyers will do. Lawyers will have more business, and the best lawyers will have a broader selection of cases among which to choose.”); Zywicki, *supra* note 7, at 3 (“Tort lawyers, unlike the dispersed public, are in a position to directly capture a large portion of the gains created by expansions in tort liability and damages.”).

34. Such groups are organized nationally through organizations such as the American Tort Reform Association, which seeks to contract the tort system through tort reform legislation. See AM. TORT REFORM ASS’N, <http://www.atra.org> (last visited Aug. 15, 2012). Many groups have also organized together to form powerful state organizations, which can have a powerful voice in state legislative bodies. See, e.g., CIVIL JUSTICE ASS’N CAL., <http://www.cjac.org> (last visited Aug. 15, 2012); COLO. CIVIL JUSTICE LEAGUE, <http://www.ccjl.org> (last visited Aug. 15, 2012); FLA. JUSTICE REFORM INST., <http://www.fljustice.org> (last visited Aug. 15, 2012); ILL. CIVIL JUSTICE LEAGUE, <http://www.icjl.org> (last visited Aug. 15, 2012); MISSISSIPPIANS FOR ECON. PROGRESS, <http://www.mfep.org> (last visited Aug. 15, 2012); N.J. LAWSUIT REFORM ALLIANCE, <http://www.njlra.org> (last visited Aug. 15, 2012); OR. LIABILITY REFORM COAL., <http://www.orlrc.org> (last visited Aug. 15, 2012); TEXANS FOR LAWSUIT REFORM, <http://www.tortreform.com> (last visited Aug. 15, 2012); WASH. LIAB. REFORM COAL., <http://www.walrc.org> (last visited Aug. 15, 2012); WIS. CIVIL JUSTICE COUNCIL, <http://www.wisciviljusticecouncil.org> (last visited Aug. 15, 2012).

35. Some have gone so far as to argue that liability insurance is, in practice, a de facto element of tort liability as plaintiffs’ lawyers will usually only sue a defendant that is insured. Tom Baker, *Liability Insurance As Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 4 (2005) (“The legal elements of tort liability are well known. . . . For a lawyer considering whether to take a particular case . . . these legal elements are only a starting point. Liability by itself is not enough. The defendant must have the ability to pay.”).

36. See Zywicki, *supra* note 7, at 7 (“Insurance companies earn a normal return on insuring an amortized amount of risk.”).

elected officials who ‘independently’ execute policy agendas—have an interest in either attacking or supporting tort reform, depending on their respective positions.³⁷ Finally, defense lawyers have conflicting interests regarding the tort system. While defense lawyers have as much to gain from a robust legal market as plaintiffs’ lawyers do, their clients have an interest in limiting tort law.³⁸ No defense lawyer can afford to alienate regular clients by championing a cause contrary to these clients’ economic interests.

Together, plaintiffs’ lawyers, repeat defendants, insurers, political entrepreneurs, and defense lawyers are the primary groups with an interest in and influence over the development of the tort system.

B. The Game: Influencing Tort Law Through the Legal and Political Process

Interest groups seeking to influence tort law can proceed in three major forums. The first is on the campaign trail, where both tort reformers and their opponents seek to elect members of the judicial, legislative, and executive branches who will share their respective ideology regarding tort law. The second is in the court system, where both factions engage in strategic litigation geared toward influencing the common law. The third is in the legislature, where both factions attempt to enact favorable statutes and block unfavorable ones. If and when legislation is passed, opponents can go back to the courts and ask judges to invalidate the statute or to interpret it narrowly.

1. Influencing Elections

Many of the most important policy makers with influence over the scope of the tort system are elected officials. Factions involved with shaping tort law are active in the electoral cycle, seeking to elect public officials with parallel agendas and influence incumbents with promises of campaign funding and support.³⁹ Key decision makers include those in executive positions, such as the President or a governor, who can appoint judges, influence the direction of legislation, and veto specific bills.⁴⁰

37. Wendy J. Schiller, *Senators As Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. POL. SCI. 186, 187, 190 (1995) (noting that given the receptiveness of the political environment, bill sponsorship can contribute to electoral success).

38. See Cross, *supra* note 17, at 557–58.

39. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 37–41 (1982) (arguing that there is a “public-policy ‘market’” and that private groups reward electoral candidates for supporting their particular cause; candidates seeking election are pressured to respond to this market, no matter their personal beliefs).

40. See *id.* at 41–43 (arguing that it is “naive” to assume that the President’s or a governor’s incentives are to thwart private interests and that the power to introduce and veto bills may in many cases lead to a growth of “public-sector programs yielding private benefits”); W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555, 555 (1979) (analyzing the executive veto power).

Elected judges are also important, as they have the power to make and modify common-law rules, interpret statutes, and even invalidate legislation as unconstitutional.⁴¹ Finally, legislative support is needed to pass or block legislation, and certain special committee members are especially critical for legislative success, as they hold disproportionate power over the fate of proposed bills.⁴²

2. *Strategic Litigation*

Lawyers are able to influence the common law by choosing the nature of cases that they bring, as well as where and when to file them.⁴³ Specifically, plaintiffs' lawyers can "shop" for precedent by filing lawsuits involving novel legal issues in plaintiff-friendly forums, where pro-plaintiff rules are most likely to be adopted.⁴⁴ Because judges have relatively little control over their docket and are constrained by the nature of disputes before them, lawyers can influence the law simply through the timing and nature of the legal issues that they bring to courts.⁴⁵ Defendants can counter by moving litigation to a more favorable location and by selectively settling claims involving the risk of bad precedent.⁴⁶ Beyond these measures, factions can attempt to influence precedent by filing amicus briefs and occasionally attempting to "depublish" opinions containing unfavorable precedent.⁴⁷

41. See Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 848–53; see also Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393, 421–22 (2005) ("[A]s long as judges are elected, those who support candidates with particular points of view must play an active role in judicial races."); Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 SMU L. REV. 263, 263 (2000) (arguing that although "there is no method of selecting and retaining judges that is worth a damn," the most flawed method, "one where judges qualify for their jobs by raising very large sums of money from lawyers, litigants, and special interest groups, and retain their offices only by continuing to raise such funds," impermissibly allows interest groups to exercise undue influence over the judicial system (internal citations omitted)). Even if campaign contributions do not influence judges to favor their benefactors, putting ideologically aligned judges on state supreme courts can have the same beneficial effect for an interest group as capturing a judge through campaign contributions. *Id.* at 267.

42. See, e.g., Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 85 (1987); see also Aranson et al., *supra* note 39, at 43 (asserting that members of Congress are "the primary agents responsible for generating and perpetuating the collective production of private benefits").

43. See Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. ECON. PERSP., Spring 2004, at 183, 188.

44. *Id.*

45. See Cross, *supra* note 17, at 570 (noting that if judicial decisions are even somewhat "random" or arbitrary, strategic litigation can be effective); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 77–79 (1991).

46. Frank B. Cross, *The Judiciary and the Public Choice*, 50 HASTINGS L.J. 355, 366–67 (1999).

47. *Id.* at 360, 367.

3. *Passing and Blocking Legislation*

All groups with an economic interest in the tort system can lobby for favorable legislation by writing reports and hiring experts, promising support and funding for campaigns, and utilizing the expertise of lobbyists and political strategists.⁴⁸ Also significant to enacting change is amassing popular support for the law, to put pressure on lawmakers and ensure that tort law is part of the legislative agenda.⁴⁹ Finally, factions seeking to enact state or federal legislation must usually secure the support of the relevant executive branch, because a governor or the President can significantly influence the agenda of the legislature.⁵⁰

Because legislation must pass through multiple checkpoints before becoming law, legislation is ordinarily easier to block than to enact.⁵¹ First, bills must pass through the various “veto gates” controlled by members of special committees, who often have unilateral authority to block, or at least delay, legislation.⁵² On the other hand, groups attempting to enact legislation must secure all veto gates and convince all critical committee members.⁵³ Groups attempting to block legislation only need to secure the support of enough members to keep the legislation from a vote.⁵⁴ Even if a bill survives committee, it may do so only in a compromised form. Second, legislation must avoid an executive veto; otherwise, it must secure a supermajority legislative coalition.⁵⁵ If the executive is generally opposed to a bill, proponents might be required to water the bill down to avoid or survive a veto.⁵⁶ Finally, even assuming a faction is successful in enacting a statute, opposing groups may ask the courts to strike it down as unconstitutional⁵⁷ or blunt its impact through a narrow

48. See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 342–43, 361–62 (1988); see generally Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 STAN. L. & POL’Y REV. 23 (2008) (describing the function of lobbyists and defending lobbying as a profession).

49. See, e.g., Behrens & Silverman, *supra* note 41, at 417–18 (using the 2001–2004 tort reform success in Mississippi to show that “strong, local grassroots efforts are key to change”); see also Zywicki, *supra* note 7, at 29 (noting that “a pivotal moment in the Texas tort reform battle” was a segment on *60 Minutes* ridiculing the currently plaintiff-friendly Texas tort system, which apparently “resonated with voters who were then willing to endorse reform”).

50. See, e.g., Behrens & Silverman, *supra* note 41, at 418–19.

51. Zywicki, *supra* note 7, at 25.

52. See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 217 (1984) (noting that influential members of pertinent committees are the most important individuals to interest groups).

53. *Id.*

54. MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 255–56 (2009).

55. See Bruff, *supra* note 52, at 220.

56. *Id.* (noting that the threat of the executive veto has a substantial effect on whether legislation moves forward in the legislature and can have a significant influence on the ultimate substance of enacted legislation).

57. The supreme court of a state has the power to invalidate a piece of legislation by declaring it unconstitutional. This power has been exercised often in the past, making it much more than an idle threat. The following is a sample of cases in which state supreme courts across the United States invalidated tort reform laws: *Turner Constr. Co. v. Scales*, 752 P.2d 467 (Alaska 1988); *Barrio v. San Ma-*

construction.⁵⁸ A like-minded state supreme court may be all that a group needs to successfully oppose unfavorable legislation.⁵⁹

As this Part has illustrated, there are a number of groups with an economic interest in the tort system and a number of forums within which they can exert pressure. The next Part builds on the public choice literature analyzing the relevant interest groups and the relative influence they have in each forum.

III. ANALYSIS

Because the development of legal doctrine is significantly affected by the ability of interest groups to influence the legal and political process, the scope of the tort system depends in many respects on the relative ability of proponents and opponents of tort reform to advance their goals through litigation and legislation.⁶⁰ Much of the public choice literature that is focused on tort reform, consisting largely of articles by Professors Richard A. Epstein,⁶¹ Martin J. Bailey,⁶² Paul H. Rubin,⁶³ and Todd J. Zywicki,⁶⁴ has concluded that the opponents of tort reform have

nuel Div. Hosp., Magma Copper Co., 692 P.2d 280 (Ariz. 1984); Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); Denton v. Con-Way S. Express, Inc., 402 S.E.2d 269 (Ga. 1991); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999); Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998); Bourgeois v. A.P. Green Indus., Inc., 783 So. 2d 1251 (La. 2001); Taylor v. Gate Pharm., 639 N.W.2d 45 (Mich. Ct. App. 2001); Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (en banc); Brewer v. Ski-Lift, Inc., 762 P.2d 226 (Mont. 1988); State Farm Fire & Cas. Co. v. All Elec., Inc., 660 P.2d 995 (Nev. 1983); Trovato v. DeVeau, 736 A.2d 1212 (N.H. 1999); Jiron v. Mahlab, 659 P.2d 311 (N.M. 1983); Anderson v. Assimos, 553 S.E.2d 63 (N.C. Ct. App. 2001); Dickie v. Farmers Union Oil Co. of LaMoure, 611 N.W.2d 168 (N.D. 2000); State *ex. rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); Crowe v. Owens Corning Fiberglas, 718 N.E.2d 923 (Ohio 1999); Reynolds v. Porter, 760 P.2d 816 (Okla. 1988); Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999); Heller v. Frankston, 475 A.2d 1291 (Pa. 1984); DeWeese v. Weaver, 880 A.2d 54 (Pa. Commw. Ct. 2005), *preliminary objections overruled*, 824 A.2d 364 (Pa. Commw. Ct. 2003); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984); Knowles v. United States, 544 N.W.2d 183 (S.D. 1996); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); DeYoung v. Providence Med. Ctr., 960 P.2d 919 (Wash. 1998) (en banc); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (en banc); Morris v. Crown Equip. Corp., 633 S.E.2d 292 (W. Va. 2006); Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005); Hoem v. Wyoming, 756 P.2d 780 (Wyo. 1988).

58. Courts have the power to interpret statutes and thus potentially impose their own meaning. Although it is unlikely that courts would attempt to thwart the intent of the legislature outright, some scholars have suggested that judges will "read statutes in such a fashion as to maximize their policy preferences within the limits set by outside political constraints; for example, to avoid triggering a congressional override." Lee Epstein et al., *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL'Y 305, 305 (2003).

59. See Behrens & Silverman, *supra* note 41, at 419 (decrying the practice of some judges behaving as a "super-legislature" and arguing that such judges often nullify legislative policy decisions simply because they disagree with such policies).

60. See Paul H. Rubin et al., *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUB. CHOICE 295, 307-08 (2001).

61. Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. (PAPERS & PROC.) 311, 314 (1988).

62. See generally Rubin & Bailey, *supra* note 33.

63. See generally *id.*; see also Rubin, *supra* note 21.

64. See generally Zywicki, *supra* note 7.

a significant advantage. While this literature has been challenged,⁶⁵ there have been no significant attempts to revise or develop it. This Part critically evaluates the literature and attempts to build on it, first by analyzing each faction's ability to overcome collective action problems, and second by analyzing each faction's relative ability to influence the relevant legal forums.

Section A analyzes the degree to which each interest group has an incentive to exert effort in expanding or reducing the scope of the tort system. This analysis suggests that supporters of tort reform have fewer collective action problems than the literature has assumed—and opponents have more. Section B then evaluates whether either faction has a strategic advantage in any of the three legal forums, concluding that contrary to traditional assumptions, opponents of tort reform have no strategic advantage. This Note argues that, if anything, groups supporting tort reform appear to have an advantage over their opponents in shaping the law.

A. Step One: Analyzing the Factions' Relative Ability to Overcome Collective Action Problems

In order to coordinate its members and prevent free riding, a faction must solve its collective action problems.⁶⁶ Without significant support from members, factions cannot summon the resources necessary to influence legal development.⁶⁷ As noted, the amount of support that factions can expect from their members is dependent upon at least three factors: First, the degree to which individual members derive economic benefit from legal change; if members do not derive enough benefit from change, they will simply not care enough to act.⁶⁸ Second, the degree to which factions can “capture” the benefits of success for participating members; if members are able to free ride successfully, they will not have an incentive to participate themselves.⁶⁹ Third, the degree to which organizational structures already exist within the group; if existing structures are not in place, the information and organization costs of coordination will be higher.⁷⁰ For various reasons, the public choice literature concludes that supporters of tort reform are at a severe collective action disadvantage.⁷¹ The following Subsections evaluate this conclusion by

65. See generally Cross, *supra* note 17, at 528, 578 (challenging the assumption that plaintiffs' lawyers will be able to systematically influence the law through litigation).

66. See *supra* Part II.A.1.

67. See Eskridge, *supra* note 29, at 291 (suggesting how bills with weak, dispersed support fail to surmount procedural hurdles).

68. See *supra* Part II.A.1.

69. See *supra* Part II.A.1.

70. See *supra* Part II.A.1.

71. See, e.g., Epstein, *supra* note 61, at 315 (arguing that tort reformers' collective action problems present “structural obstacles to [tort] reform [that] seem a constant in our political process”).

analyzing the degree to which each relevant interest group has an incentive to influence tort law through litigation or legislation.

1. *Repeat Defendants*

Epstein and Zywicki both argue that repeat defendants face large collective action problems.⁷² Although repeat defendants collectively have an enormous economic incentive to reduce the scope of the tort system, members of this group may have significant problems coordinating because they each have distinct goals that often fail to overlap with the goals of other members.⁷³ Epstein notes that defendants in different industries have different needs and thus wish to reduce the scope of tort law in different ways.⁷⁴ For example, manufacturers might have an interest in supporting products liability tort reform, while doctors might have greater reason to support medical malpractice reform. Although Epstein concludes from this that “[c]oordinated action across industry groups is not feasible,”⁷⁵ Rubin correctly notes that certain reforms confer benefits across several industries.⁷⁶ Nevertheless, some tort reforms are industry specific.

Zywicki, in his working paper *Public Choice and Tort Reform*, argues that even within industries, members of this rather amorphous group have different and often divergent economic goals that can raise the costs of coordination.⁷⁷ In industries where small businesses are insured against liability, those businesses will have little incentive to combat the tort system because the only benefit to them will be the uncertain possibility of slightly lower premiums.⁷⁸ Additionally, larger businesses may have some economic interest in maintaining a harsh tort system in industries where small businesses suffer relatively more harm from tort liability.⁷⁹ On the one hand, a larger tort system means greater liability, but on the other hand, it means less competition from smaller rivals.⁸⁰ Zywicki further argues that individual defendants with a national presence may gain relatively little from changing a single state’s tort system.⁸¹ So long as plaintiff-friendly states exist, plaintiffs’ lawyers will have the ability to forum shop. Zywicki concludes that all these factors put repeat

72. *Id.* at 314–15; Zywicki, *supra* note 7, at 8–9.

73. Rubin, *supra* note 21, at 230; *see also* Zywicki, *supra* note 7, at 6–9.

74. Epstein, *supra* note 61, at 314–15 (noting that manufacturers have trouble organizing themselves as a unified whole around any particular piece of legislative reform that would benefit them all).

75. *Id.* at 315.

76. Rubin, *supra* note 21, at 230 (“There are some issues of interest to all businesses.”).

77. Zywicki, *supra* note 7, at 8–9.

78. *Id.*

79. *Id.*

80. *Id.* at 9.

81. *See id.* at 30 (noting that certain claims can be brought in several states, allowing plaintiffs’ lawyers to bring claims in states that have not enacted substantial tort reform).

defendants at “a comparative disadvantage in fighting for [tort] reform.”⁸²

Although Epstein and Zywicki accurately point out collective action problems for repeat defendants,⁸³ defendants’ hurdles are by no means insurmountable. Even if specific industries must advocate for narrow legislation without help from others, narrow legislation means more concentrated interests, and therefore fewer free rider problems. The fact that different industries can capture benefits for themselves means they will find it easier to galvanize support from members. Also, even if small businesses are somewhat insulated from tort liability through insurance, the hassle of civil lawsuits and the pain of increased premiums can still be a significant incentive to support reform; some of the most vocal supporters of medical malpractice tort reform have been local doctors and hospitals worried about the expense of medical malpractice insurance.⁸⁴ While Zywicki does point out that large corporations may in some instances have reason to avoid support in order to crush competition,⁸⁵ it is unlikely that there are many industries where small businesses are hurt more by tort law than large ones, both because large corporations are the most attractive targets, and because small businesses are insured. Finally, the largest businesses do not have to focus on all fifty states to obtain the benefits of tort reform. Most claims against national corporations can only be brought in a limited number of states.⁸⁶ If a repeat defendant engages in significant tortious activity in one state, enacting substantial tort reform in that state can still significantly reduce its liability costs.

2. *Insurers*

Zywicki argues that insurers have little interest in reducing the scope of the tort system because their long-term rate of return is largely determined by the amount of risk that exists in the field to be insured.⁸⁷ Zywicki acknowledges that insurers may derive short-term benefits from tort reform during the lag time between lowered liability and lowered premiums, but assumes that the long-term loss will be greater.⁸⁸ He also acknowledges that insurance companies will derive diminishing marginal returns from increased liability, because clients will become unwilling to

82. *Id.* at 8.

83. Epstein, *supra* note 61, at 315; Zywicki, *supra* note 7, at 8–9.

84. *See, e.g.*, Thomas Horenkamp, Comment, *The New Florida Medical Malpractice Legislation and Its Likely Constitutional Challenges*, 58 U. MIAMI L. REV. 1285, 1289 (describing tort reform lobbying by doctors in Florida).

85. Zywicki, *supra* note 7, at 9.

86. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011) (stating that a corporation can typically only be sued where the harm occurred, where the corporation was incorporated, or where the corporation had its principal place of business).

87. Zywicki, *supra* note, at 7.

88. *See id.*; *see also* David Schap & Andrew Feeley, *The Collateral Source Rule: Statutory Reform and Special Interests*, 28 CATO J. 83, 92 (2008).

pay for premiums, but he assumes that the demand for liability insurance is too inelastic to make much of a difference.⁸⁹ Zywicki concludes that “insurance companies will be at best indifferent to rules and reforms designed to limit tort liability” and “may actually [have] an economic interest in maximizing tort liability.”⁹⁰ Rubin and Bailey agree that insurers’ economic interests “are at best mixed,” but note that some forms of tort reform can benefit insurance companies by increasing the predictability of tort damages.⁹¹

The observation that insurers only benefit from certain types of tort reform illustrates the difference between insurers and repeat defendants. While self-insured defendants have an economic interest in reducing liability risk, insurers have an interest in reducing volatility. Risk itself can be predicted with some precision; insurers earn their profits by accurately assessing risk.⁹² But volatility reduces insurers’ ability to forecast costs and price policies so as to maximize profitability.⁹³ Therefore, decreasing volatility may increase profits in areas that are currently insured. In addition, decreasing volatility in some extremely unstable areas might allow insurers to offer policies that were previously deemed too unpredictable. For example, in a jurisdiction where punitive damages are unconstrained, insurers might not find it profitable to offer policies protecting against punitive damages awards.⁹⁴ A legal rule limiting or otherwise clarifying the scope of punitive damages could make it profitable to provide insurance against punitive damages and thus open a new stream of income for insurers.

Insurers therefore have an interest in limiting the scope of the tort system, at least in certain respects, and even if insurers choose not to be involved in legislative battles, they can influence the law in other ways. Because insurers are so often involved in litigation, they may find it in their interest to focus most of their efforts on precedent rather than legislation. Insurers are well positioned to use their litigation expertise to influence tort doctrine through the courts⁹⁵ and have an interest in using

89. Zywicki, *supra* note 7, at 7.

90. *Id.*

91. See Rubin & Bailey, *supra* note 33, at 812 (admitting that insurance companies have helped lobby for certain tort reforms, such as damage caps and statutes of limitations and repose).

92. *Id.* (noting that insurance companies are less concerned about the amount and level of damages generated by the tort system than by the predictability of those damages).

93. See Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 394–95 (2005) (“In the long run at least, medical malpractice insurance prices must bear a reasonable relationship to medical malpractice claim costs, or else insurers will not be able to pay claims as they become due.”). So long as insurance companies can predict risk, they can set premiums in order to gain a regular rate of return. When insurance companies are faced with a wide range of risk, however, they are more likely to err in predicting future costs and thus charge too little or too much on insurance premiums. *Id.* at 424.

94. This only applies in jurisdictions where punitive damages are legally insurable.

95. See Baker, *supra* note 35, at 3–4, 9 (noting insurance companies are sophisticated repeat players in tort lawsuits, “less focused on the fault of individual defendants and more focused on managing aggregate costs” by taking hard line positions against plaintiffs in order to create a “chilling effect” that disincentivizes plaintiffs from suing).

strategic litigation to pay as little as possible to tort plaintiffs.⁹⁶ This suggests that insurers are not as indifferent or neutral as is commonly assumed.

3. *Political Entrepreneurs*

The public choice tort literature has not analyzed the incentives of political entrepreneurs in any depth, although Zywicki notes that they can be invaluable to a faction's success in influencing the law.⁹⁷ Politicians will find it in their best interests to champion a certain agenda when it will contribute to their electoral success.⁹⁸ Therefore, politicians might tailor their agendas so as to appeal to the general public, meaning that political entrepreneurs supporting expansion of the tort system may be more likely to appear in generally liberal jurisdictions, while those supporting reduction of the tort system may be more likely to appear in conservative jurisdictions.⁹⁹ But at least some politicians might find it in their interest to tailor their agendas so as to maximize their ability to fundraise. Political entrepreneurs might gravitate toward supporting groups with the greatest ability to invest in legal agendas. This would mean the faction best able to deliver votes in electoral races would have an advantage in attracting political entrepreneurs.

4. *Trial Lawyers*

Because the economic interests of plaintiffs' lawyers and defense lawyers are related, they are best studied together. Epstein, Rubin, Bailey, and Zywicki note that all trial lawyers have a long-term economic interest in maintaining a large and complex legal system.¹⁰⁰ The legal market for trial services responds to the laws of supply and demand, and an expanded tort system drives up demand for both groups.¹⁰¹ More lawsuits by plaintiffs' lawyers mean more cases that can be won or successfully settled; it also means that more defense lawyers are needed to advocate for defendants.¹⁰² Higher potential verdicts and more complex

96. *Id.*

97. Zywicki, *supra* note 7, at 28 (noting that the successful passage of legislation will be "more plausible if a political entrepreneur picks up the opportunity to organize broad-based public support for reform").

98. *See, e.g., id.*

99. *Id.*

100. Epstein, *supra* note 61, at 313; Rubin, *supra* note 21, at 229; Rubin & Bailey, *supra* note 19, at 809; Zywicki, *supra* note 7, at 5; *see also* White, *supra* note 43, at 195 (noting that of the \$41 billion already paid in legal fees for asbestos litigation, \$20 billion had been paid to plaintiffs' lawyers, and \$21 billion had been paid to defense lawyers).

101. Zywicki, *supra* note 7, at 5 ("By increasing demand for and the income of plaintiffs' lawyers, this has the indirect effect of increasing the incomes of defense lawyers and eventually all other lawyers. The market for lawyers, like any other market, responds to relative prices. Thus, as the price for plaintiffs' lawyers are bid up, defendants will have to pay more for their lawyers to keep resources from flowing to the plaintiffs' side.").

102. *Id.*

rules raise the stakes of lawsuits and therefore increase the value of cases to both plaintiffs' and defense lawyers.¹⁰³ Zywicki and Epstein further note that all trial lawyers benefit from organizational structures like the plaintiffs' and defense bar, because such preexisting structures reduce organization costs.¹⁰⁴ Despite these similarities, defense and plaintiffs' lawyers ultimately face very different incentives.

a. Defense Lawyers

Defense lawyers may have a long-term economic interest in an expansive tort system, but they have a competing interest in vigorously defending those who do want to reduce tort law.¹⁰⁵ Defense lawyers have a legal and ethical duty of loyalty to their clients,¹⁰⁶ not to mention an economic interest in keeping them happy. The general consensus in the public choice literature is that this conflict gives defense lawyers an incentive to remain on the sidelines, at least in legislative battles.¹⁰⁷

This conclusion seems largely correct in the context of influencing legislation. Providing support for tort reform would run counter to defense lawyers' long-term economic interests, while opposing it would carry the risk of alienating clients. Remaining neutral is unlikely to alienate clients to the same degree and therefore appears to be the safest option. In the context of litigation, however, neutrality is not an option. Because defense lawyers act as the agents of defendant manufacturers, doctors,

103. *Id.* at 6 ("Although their clients may favor more limited liability and damages, less litigation, and less legal complexity, *defense lawyers* will share with plaintiffs' lawyers an economic interest favoring increased liability, more litigation, and more complexity. Put simply, the more cases that can be brought, the more business for defense lawyers. The greater the risk of being tagged with a large judgment, the greater the demand for defense lawyers.").

104. See Epstein, *supra* note 61, at 314; Zywicki, *supra* note 7, at 4. Professor Epstein argues that there are lower monitoring costs within the plaintiffs' bar because "it is easy for the lawyers to observe whether their lobbyists are complying with the general charge." Epstein, *supra* note 61, at 314.

105. See Rubin, *supra* note 21, at 229.

106. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2010) ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. . . . [A] lawyer may not allow related business interests to affect representation . . .").

107. Some scholars argue that defense lawyers will pay lip service to their clients while doing little in the way of substance. See Epstein, *supra* note 61, at 313–14 ("Given its economic interests, the defendants' bar attacks some of the excesses of the system, but acknowledges its basic soundness. Its posture, therefore, is to note that no manufacturer need fear liability if well represented at trial, and then to plead faintly on behalf some modest reform."); see also Ralph Winter, Luncheon Address, *Achieving Meaningful Civil Justice Reform: Is the Defense Bar a Problem?*, 41 N.Y.L. SCH. L. REV. 605, 608 (1997) ("Members of the defense bar may not always be vocal in opposing reform, but they are not likely to zealously support reform that may result in a reduced demand for their services."). Professor Winter further asserts that "the defense bar abstractly supports the need to find ways to reduce the large resources that go into civil discovery, but mounts ferocious and often unprincipled opposition to concrete measures that will actually reduce that cost." *Id.* at 609. Others argue that defense lawyers will advocate for one side or another but that their support will be muted. See Rubin, *supra* note 21, at 229 (arguing that defense lawyers may have an incentive to oppose reform while remaining "circumspect in their advocacy since their clients generally favor tort reform"); Zywicki, *supra* note 7, at 6 (arguing that while defense lawyers will not likely oppose tort reform, their support will likely be "somewhat half-hearted").

hospitals, and insurers, they are a necessary component in litigation. Even if it would be in the interests of all defense lawyers to engage in a universal strategy of half-hearted advocacy, individual attorneys would risk legal sanctions and poor reputations.¹⁰⁸ There is no reason to think that defense lawyers could overcome massive free-riding problems accompanying such a strategy.¹⁰⁹ While defense lawyers may remain neutral during legislative battles, they are unlikely to be anything but zealous advocates for their clients during litigation.

b. Plaintiffs' Lawyers

Because plaintiffs' lawyers have a considerable interest in expanding tort law, as well as a preexisting organizational structure through their bar, most public choice scholars argue that they will experience few collective action problems themselves.¹¹⁰ Inherent in this conclusion is the assumption that plaintiffs' lawyers will not suffer from significant free-rider problems.¹¹¹ While this may be largely true in the context of legislation, Professor Frank Cross has challenged the assumption in the context of litigation.¹¹²

Rubin and Bailey argue that plaintiffs' lawyers have an economic interest in strategically litigating to seek favorable precedents.¹¹³ Cross counters that plaintiffs' lawyers have a strong opposing economic interest in settling cases as early as possible rather than bringing them to trial in an attempt to obtain favorable precedent.¹¹⁴ Because precedent is shared among all plaintiffs' lawyers, while the proceeds of a settlement are restricted to the victorious lawyer, it will be in each individual lawyer's interest to settle his or her case and free ride off the efforts of others.¹¹⁵ Repeat defendants and insurers do not have the same free rider issue. A repeat defendant playing a long-term strategy will find it in his or her interest to settle bad cases and litigate good ones, while a plaintiffs' lawyer will usually want to settle both.

The plaintiffs' bar may be able to organize effectively for legislative battles, perhaps better than any single opposing group. But it is still only one interest group against many, and the supporters of tort reform do not suffer from as many collective action problems as has been assumed.

108. See Cross, *supra* note 17, at 557–58. Professor Cross notes that although defense lawyers appear to have an economic interest in an expansion of tort liability, they do not behave as such; when they are not merely staying on the sidelines, defense lawyers “actively oppose[] doctrinal expansion.” *Id.*

109. *Id.*

110. See Epstein, *supra* note 61, at 313–14; Rubin, *supra* note 21, at 229–30; Zywicki, *supra* note 7, at 4.

111. See Epstein, *supra* note 61, at 314 (“[T]he plaintiffs’ bar has an easy strategy to keep itself together: oppose all reforms. In general, it is hard to drive a wedge in that alliance.”).

112. See Cross, *supra* note 17, at 549–58.

113. Rubin & Bailey, *supra* note 33, at 828–31.

114. See Cross, *supra* note 17, at 543–44.

115. *Id.* at 549–58.

There is no reason to conclude that plaintiffs' lawyers will necessarily be able to exert more pressure on the legislature, especially in the context of broad tort reform measures that benefit insurers as well as many repeat defendants. In the context of litigation, moreover, plaintiffs' lawyers appear to be at a significant collective action disadvantage to repeat defendants and insurers.

B. Step Two: Analyzing the Factions' Relative Ability to Exert Pressure Through the Legal and Political Process

After gathering and organizing support from its membership, each faction can exert pressure in the court system, in the existing legislature, and on the campaign trail.¹¹⁶ Much of the public choice literature concludes that plaintiffs' lawyers are strategically positioned to exert pressure in a way that gives them an advantage over supporters of tort reform.¹¹⁷ Zywicki in particular argues that plaintiffs' lawyers have a relative advantage over nonlawyers in influencing the common law, which allows them to focus their legislative efforts on blocking tort reform bills.¹¹⁸ Because legislation is easier to block than to enact, plaintiffs' lawyers' strategic advantage in litigation leads to a strategic advantage in legislation.¹¹⁹ The following Subsections argue that plaintiffs' lawyers do not have an advantage in the courts, and that they therefore do not have a strategic advantage in legislative battles. Plaintiffs' lawyers have no advantage in influencing the outcome of elections and thus appear to have no strategic advantage whatsoever.

1. Litigating Strategically

Zywicki argues that plaintiffs' lawyers will have an advantage compared to manufacturers in influencing the courts, both because they have a relative advantage in overcoming collective action problems, and because they have greater control over the litigation process than their opponents.¹²⁰ But as the previous Section has noted, plaintiffs' lawyers actually appear to have greater collective action problems than their opponents in tort litigation.¹²¹ Plaintiffs' lawyers also appear to have less strategic control over their cases than their opponents.

In order to strategically litigate, factions must have control over the legal arguments they make and control over whether to settle or go to trial. Zywicki argues that repeat defendants will need to rely to some degree on their lawyers for making legal arguments and cannot mi-

116. See *supra* Part II.B.

117. See *supra* Part III.A.4.b.

118. See Zywicki, *supra* note 7, at 21–22.

119. See *id.*

120. *Id.* at 8.

121. See *supra* Part III.A and note 71.

cromanage without incurring monitoring costs.¹²² But large repeat defendants can hire legally sophisticated in-house counsel who can orchestrate an individual legal defense and a broader litigation agenda.¹²³ Smaller defendants are likely to be represented through an insurer, and insurers have the same incentive to become legally sophisticated repeat players. These powerful and legally sophisticated players will likely have significant control over their lawyers.¹²⁴ Additionally, defendants and insurers have the unilateral ability to offer a settlement or insist on a trial. Plaintiffs' lawyers cannot make a settlement offer or accept one without client approval.¹²⁵ While they might exert considerable informal control in the decision of whether to settle,¹²⁶ they do not share the direct control enjoyed by defendants and insurers. Once a trial has begun, supporters of tort reform have greater incentive and ability to litigate strategically for favorable precedent.

On the other hand, plaintiffs' lawyers do have a first-mover advantage and maintain some control over which defendants they choose to sue, where they choose to sue them, and when they bring their claims. They could theoretically use this ability to lay a precedential foundation for future lawsuits by suing defendants who are least likely to be concerned with legal precedent before moving on to more lucrative prey. But the first-mover advantage is limited. Lawyers are restricted to the facts of real cases and are constrained in where and when they are able to file suit. To use their first-mover advantage strategically, plaintiffs' lawyers would need to wait for the right facts to arise in the right place at the right time. As discussed, plaintiffs' lawyers suffer from significant free rider problems; it is unlikely that enough lawyers will be able to overcome these problems for this to be accomplished on a grand scale.

2. *Passing and Blocking Legislation*

Zywicki asserts that because plaintiffs' lawyers have an advantage in influencing the law through the courts, they will enter legislative battles with the strategic upper hand.¹²⁷ This conclusion rests completely on the assumption that plaintiffs' lawyers have an advantage in the courts. As the previous Subsection illustrates, this assumption appears to be false. And apart from this, there is nothing to suggest that plaintiffs' lawyers have any special advantage in influencing legislation. Other things being equal, the group best able to overcome collective action problems and

122. Zywicki, *supra* note 7, at 8.

123. See Cross, *supra* note 17, at 563–64.

124. *Id.*

125. *Id.* at 562; see also MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

126. Cross, *supra* note 17, at 560–61.

127. See Zywicki, *supra* note 7, at 22.

exert pressure on the legislature will have an advantage.¹²⁸ Whether plaintiffs' lawyers actually have such an advantage is unclear.¹²⁹ Plaintiffs' lawyers will have a procedural advantage when blocking tort reform legislation,¹³⁰ but because they have no strategic advantage in influencing the common law, they cannot remain perpetually on the defensive in the legislature without slowly losing ground.

3. *Winning Elections*

To influence the law through the courts and the legislature, factions must influence the outcome of elections. Members of the legislative, executive, and judicial branches have direct influence over the law, and it is easier to persuade officials with similar agendas. Influencing elections is similar to influencing legislation in that groups who are better able to overcome collective action problems will have greater ability to organize efforts at fundraising and grassroots support than groups with more significant collective action problems.¹³¹ While a faction's success in a particular state will depend in part on the political climate, a collective action advantage will influence electoral success regardless of venue; for example, several states have seen a dramatic shift in the outcome of judicial races after tort reformers began organizing against the plaintiffs' bar.¹³²

There is reason to believe that repeat defendants will have an advantage over plaintiffs' lawyers in electing allies to positions of power.

128. See Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 537 (1999) (noting that tortfeasors generally have more resources and "better access to the expertise necessary to influence legislators").

129. See *supra* Part III.A.4.b. Because at least some repeat defendant supporters of tort reform have greater national influence than plaintiffs' lawyers, it is possible that they have a greater ability to organize tort reform efforts across the country. The Republican Party also appears to place a greater emphasis on enacting tort reform than the Democratic Party places on blocking it, which might result in an organizational advantage for tort reformers.

130. See Bruff, *supra* note 52, at 221 (using the "legislative veto" in the context of administrative law to show that it is far easier to block legislation than to enact it).

131. In recent years this has even become true of judicial races, which historically involved less campaign financing and fewer close races. See Carrington, *supra* note 41, at 267 ("It has become increasingly evident that whole judiciaries can be bought by those with money to spend."); see also Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1397-1403 (2001) (discussing the rise of hotly contested state supreme court elections, largely funded by special interests).

132. See Behrens & Silverman, *supra* note 41, at 420-22. Professors Behrens and Silverman explain how plaintiffs' lawyers in Mississippi were once dominant in influencing judicial elections but that, once organized, opponents of the tort system were able to outspend them and dramatically shift the ideology of the Mississippi Supreme Court. *Id.*; see also Anthony Champagne, *supra* note 131, at 1483-84. Professor Champagne recounts how a push by tort reformers to oust the Texas Supreme Court in 1988 resulted in record judicial campaign contributions of over \$10 million. The push was successful, and the new supreme court allowed opponents of the tort system to make Texas into a poster child for successful tort reforms through the following decades. *Id.* But see Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, 91 A.B.A. J. Feb. 2005, at 40, 44 (noting that several states have successfully reformed judicial campaigns and have reduced some of the ability of interest groups to influence judicial elections).

Plaintiffs' lawyers will only have an economic interest in supporting a candidate insofar as the candidate will fight to expand tort law and oppose tort reform. Repeat defendants, however, are large businesses with a multitude of interests. A generally probusiness candidate can offer a large corporation far more than tort reform. This means that repeat defendants will potentially have more reason to invest in their candidates than plaintiffs' lawyers will in theirs, which will lead the tort reform faction to expend greater pressure. Greater pressure means more like-minded public officials, giving supporters of tort reform an immediate advantage in influencing the courts and the legislature.

As this Part has shown, the public choice literature analyzing tort reform is incomplete and underdeveloped. While most public choice theorists conclude that opponents of tort reform will have an advantage in influencing the law, the assumptions underlying this conclusion are flawed. If anything, it appears as if supporters of tort reform have an advantage in shaping the scope of the tort system.

IV. RECOMMENDATION

The U.S. tort system serves both to deter behavior and to redistribute wealth. The social costs and benefits associated with deterrence, despite having enormous implications for public policy, are too widespread and tenuous for anyone to have an economic interest in influencing the law. The costs and benefits associated with wealth redistribution, however, are more narrowly distributed, meaning that groups favoring tort expansion and groups favoring tort reduction will work against each other to influence the law. Thus, even though most individuals have little incentive to explore the philosophical and economic ramifications of tort deterrence, groups that benefit from or are harmed by the tort system's wealth redistribution have some incentive to raise those issues to influence policy makers. But if these factions are not evenly matched, the law is less likely to move towards social progress and more likely to move towards satisfying the economic interests of the faction with the most influence.¹³³

Much of the public choice literature analyzing the interest group dynamics of tort law and reform has concluded that groups with an interest in expanding the scope of the tort system are more influential than groups with an interest in reducing the scope of the tort system. This Note has argued that the literature is flawed and that the available information supports the opposite conclusion. But this Note does no more than present an outline and scratch at the surface of the interest group dynamics at play in tort reform. A much more nuanced understanding of

133. See Cross, *supra* note 17, at 533 (noting the argument that unchecked rent-seeking behavior "produces a social evil and maldistribution of resources"); Rubin et al., *supra* note 60, at 295 (noting that law which is the product of rent seeking is inefficient).

the relevant groups and forums, ideally informed by empirical study of past tort reform battles, is necessary to fully develop this area of legal scholarship. Future development is certainly achievable and potentially invaluable.¹³⁴ A complete understanding of interest group dynamics will illuminate the ways in which policy formation is disconnected from the public interest, and may provide the basis for linking the two together.

V. CONCLUSION

The proper scope of the U.S. tort system is a subject of much discussion—and rightly so. Public choice theory can do much to inform this discussion. Interest group dynamics affect how the tort debate is presented to policy makers, and partially determines how the law is ultimately shaped. This Note has attempted to build on the current public choice scholarship to show how these dynamics might operate within the legal and political process. Contrary to much of the literature, this Note argues that interest groups fighting to reduce the scope of tort law have more influence than interest groups fighting to expand it. The author hopes that future scholarship will facilitate greater understanding of how these dynamics influence the shape of tort law, and ultimately help us make progress in improving the civil justice system.

134. See Rubin, *supra* note 21, at 232–33 (noting that there has been little academic research regarding the interest group dynamics and political processes of tort reform and that research into these areas could be extremely valuable).

