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THE RISE AND FALL OF EFFICIENCY IN THE COMMON LAW: A SUPPLY-SIDE ANALYSIS

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I. INTRODUCTION

From its inception, an animating insight of the economic analysis of law has been the observation that the common law process appears to have a strong tendency to produce efficiency-enhancing legal rules.[1] But many recent commentators have also concluded that recent decades have seen an evolution away from this traditional principle, as the common law appears to increasingly reflect interest-group pressures that have attenuated this traditional evolutionary tendency toward efficiency.[2] This duality has deep-

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[1] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 2.2, at 25–27 (5th ed. 1998).

[2] The literature on the economic inefficiency of modern American tort law, for instance, is now quite extensive. *See, e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991); David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999); George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5(3) J. ECON. PERSPECTIVES 31 (1991). Other scholars have challenged these conclusions. *See* James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in*

ened the dilemma confronting scholars, requiring an explanation of not only the factors that traditionally drove the common law toward the production of efficient rules but also requiring an explanation of why the evolution in recent years has differed so dramatically from prior eras.[3] It was traditionally thought that the common law process had built into its structure a self-correcting evolution mechanism that led Lord Mansfield to conclude that over time the common law "works itself pure."[4] Some leading scholars continue to adhere to Mansfield's optimism about the self-correcting nature of the common law.[5] In recent years, however, this process of self-correction seems to have gone awry, leading to increased concerns about inefficiency in many areas of the common law and heightened calls for legislative tort reform and restoration of freedom of contract.[6]

Traditional models of the rise and fall of efficiency in the common law, such as those proposed by Paul Rubin and George Priest, have stressed the "demand" side of the production of common law legal rules.[7] They have argued that the driving force in the evolution of the common law is the actions of private litigants that generate a "demand" for the production of legal rules. Rubin and Priest have argued that these litigation efforts by private parties can explain both the common law's historic tendency to produce efficient rules as well as its more recent evolution away from efficiency in favor of wealth redistribution.

This Article revisits the debate over the rise and fall of efficiency in the common law by examining the supply-side conditions of the production of common law legal rules. This Article does not directly challenge the tradi-

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Products Liability: An Empirical Study of Legal Change, 37 UCLA L. REV. 479 (1990). *But see* ARTHUR HAVENNER, NOT QUITE A REVOLUTION IN PRODUCTS LIABILITY (Manhattan Institute Judicial Studies Program White Paper, 1991) (challenging Henderson and Eisenberg's conclusions). There have been similar criticisms of tendencies in contract law to principles such as unconscionability to restrict freedom of contract and the enforceability of contracts. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEG. STUD. 253 (1980); Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223 (1978).

[3] Indeed, several of those who have criticized the recent developments in common law doctrine are the same scholars who developed the earlier models explaining the tendency of the common law toward efficiency. *See infra* notes 24–27, 30–32 and accompanying text.

[4] Omichund v. Barker, 1 Atk. 21, 33 (K.B. 1744).

[5] *See* Mark F. Grady, *Legal Evolution and Precedent*, 3 ANN. REV. L. & ETHICS 147 (1995).

[6] *See* TODD J. ZYWICKI, PUBLIC CHOICE AND TORT REFORM (George Mason University School of Law, Working Paper No. 00-36, 2000), *available at* http://www.law.gmu.edu/faculty/papers/authors.html#z.

[7] The discussion here will focus on Priest and Rubin's models as representative of the class of models. Numerous related and refined models also exist. A full discussion of this body of literature is outside of the scope of this Article. An excellent summary of the various models that have been offered, as well as a general survey of early developments in the efficiency thesis of law and economics, is presented in Peter H. Aranson, *Economic Efficiency and the Common Law: A Critical Survey*, *in* LAW AND ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION 51 (J.-Matthias Graf von der Schulenburg & Goran Skogh eds., 1986).

tional "demand-side" model, but it proposes to supplement the model with a "supply-side" model of the evolution of the common law that examines the institutional incentives and constraints of common law judges over time. It argues that the traditional efficiency of the common law arose in the context of a particular historical institutional setting and that changes in that institutional framework have made the common law more susceptible to rent-seeking pressures, which have undermined the common law's pro-efficiency orientation. Moreover, it is argued that understanding the supply side constraints and incentives confronting judges is a *necessary condition* for understanding litigant-driven demand-side models. Whether one seeks to understand efficiency or inefficiency in the common law, it is essential to understand the institutional structure confronting judges and the incentives they are provided to produce efficient law. The market for law, like other markets, requires an understanding of both supply and demand conditions in order to identify the resulting equilibrium.

This Article also demonstrates a more general point. In discussing the tendency of institutions to produce efficiency-enhancing rules, it is necessary to consider two factors. The first factor has been well-recognized by previous scholars, namely the features of the institution that are relevant to the production of efficient rules, such as the ability to make use of decentralized information and provide useful feedback to decision-makers. But a second, equally important feature has been largely ignored by previous scholars: the degree to which the institution is resistant to rent-seeking pressures by private parties seeking to manipulate it so as to redistribute wealth to themselves at the expense of overall efficiency. As this Article will demonstrate, it is necessary to consider *both* of these factors to understand the tendencies of an institution. Even if an institution is designed to maximize efficiency in theory, its attempt to do so will be thwarted if the institution is susceptible to rent-seeking pressures by private litigants. Efficiency-enhancing institutions, therefore, must be incentive-compatible to those using the institution and those affected by its outputs. In other words, the institution must not only be capable of collecting and using all of the information necessary to render a sound decision, but the individual actors within the institution must have the correct individual incentives to use this information to produce efficient rules, rather than to reward rent-seeking pressures.

This Article does not seek to reopen the debate over the empirical validity of whether the common law has traditionally tended toward efficiency or whether modern developments have tended away from efficiency. For the sake of argument, this Article will simply take as a given the assumption that although the traditional common law tended toward efficiency, this tendency has been attenuated and even reversed in some areas in recent decades leading to growing inefficiency in the common law.[8]

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[8] Making this threshold assumption should not be interpreted as denying the importance of those questions or to ignore the fact that a lively debate on those questions continues to rage. Reasonable ar-

The Article first describes the traditional demand-side explanation for the rise and fall of efficiency in the common law. It then describes and distinguishes a supply-side model of efficiency in the common law, examining the historical institutional framework that generated the common law. Prior explanations have generally ignored the supply side of the model, in large part because most scholars have made the anachronistic assumption that the institutional structure of the modern common law is fundamentally identical to that of the traditional common law. This Article will show that this assumption is incorrect, and that the modern institutional framework of the common law differs in several important ways from the institutional framework that characterized the common law throughout its early evolution. Certain historical institutional developments, such as a weak doctrine of precedent and a competitive legal order, provided a framework for the common law to evolve largely insulated from rent-seeking pressures and in favor of efficiency-enhancing rules. These institutional features were coupled with doctrinal tendencies in the law, namely freedom of contract and reliance on custom, both of which further tended to improve efficiency and to prevent rent-seeking pressures. The Article then explains how changes in this institutional framework have generated a decline in the efficiency of the common law and a rise in rent-seeking pressures.

II. DEMAND-SIDE MODELS OF LEGAL EVOLUTION

A. A General Model of Legal Evolution

The process of legal evolution can be usefully envisioned as a "market for law." For instance, it has been argued that the outcome of the legislative process results from competing efforts by various interest groups who "bid" for favorable pieces of legislation and those who bid to prevent legislation harmful to their interests.[9] In this interest-group model, favorable legislation is given to the party that "bids" the most for the legislation.[10] This bid-

guments could be made, and in fact have been made, on both sides of the question. This Article, however, is concerned with a somewhat different inquiry of exploring the evolutionary and institutional mechanisms at work that might explain these tendencies, assuming that they in fact exist. As a result, this paper simply assumes for the sake of argument that such trends do in fact exist, and seeks to explain them.

[9] For a summary of these models, see Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999) [hereinafter Zywicki, *Environmental Externalities*]. *See also* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON 875 (1975). The constitutional amendment process may similarly be conceived of as a market, as parties bid for desired constitutional amendments. *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994) [hereinafter Zywicki, *Senators and Special Interests*]; Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993).

[10] This is oversimplified. Often it will be the case that the legislative bargain that is struck is the result of a multi-lateral bargain between several interest groups rather than a bilateral bargain where one

ding takes many forms but can generally be understood as making financial and in-kind investments designed to help a politician be re-elected or to directly enrich the politician. Those interest groups that can contribute the greatest resources to a candidate are likely to secure favorable legislation; those that are unable or unwilling to contribute resources are likely to be disfavored in the process. Politicians traditionally have been modeled as largely passive "brokers" of these wealth transfers, simply responding to the demands of special interests.[11] This process of special interests trying to influence the law to transfer wealth from the public to themselves and to thereby increase their wealth above what they would receive in a competitive market (*i.e.*, to earn "economic rents") is referred to as "rent-seeking."[12]

In general, parties will be willing to invest resources up to the amount to be transferred in seeking favorable legislation. Consider, for instance, an import quota that, if enacted, would enrich the American steel industry by a total present value of $100 million over the expected life of the legislation (say 10 years), as compared with expected profits without the quota. In such an example, the steel industry would be willing to invest up to $100 million in the form of campaign contributions, media advertising, in-kind campaign help, and the like to pass the quota.[13] Of course, some of the benefit—and thus some of the cost—will also flow to the employees of firms in the steel industry.[14] So the "industry" that benefits includes all relevant actors, such as shareholders, employees, management, etc. In contrast, the costs of the quota will be diffuse and borne by the many consumers of steel and steel products, who will now be forced to pay slightly higher prices for raw steel and goods manufactured with steel. The exact division of the $100 million surplus among these groups is unimportant for current purposes; what matters is the recognition that legal changes can en-

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group wins and another loses. *See* Zywicki, *Environmental Externalities*, *supra* note 9, at 848–56. Rather, it will generally be the case that *relatively* well-organized groups will generally be able to take advantage of relatively unorganized groups to transfer wealth to themselves. The question of how the wins and losses are to be allocated as a distributional matter is a second-order question.

[11] This is particularly the case with respect to the Chicago School of political economy. *See* CHICAGO STUDIES IN POLITICAL ECONOMY (George Stigler ed., 1988). Politicians do play an active role in some models. *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 7–13 (1997). The Virginia School of political economy also has paid greater attention to the role of politicians and political entrepreneurship in the special-interest theory of government. For a useful overview and comparison of these various intellectual schools (including the Rochester School as well), see MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY xvii–xxvi (1997).

[12] *See* Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 294 n.50 (2002) ("Rent-seeking refers to the lobbying process by which special interest groups attempt to procure legislation that transfers wealth (economic 'rents') in excess of what the members of such groups could earn in the competitive marketplace to themselves from the public at large."); *see also* MCCHESNEY, *supra* note 11, at 7–13 (describing rent-seeking).

[13] *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228 (1967).

[14] *See* Zywicki, *Environmental Externalities*, *supra* note 9, at 866–68.

rich some groups at the expense of others and that rational parties will invest resources so as to bring about legal changes in order to capture these gains, if the benefited parties are sufficiently able to organize to mount an effective lobbying effort.

The demand curve for legal change, therefore, is a function of two variables: (1) the expected total amount of wealth to be transferred by the law in question (V), and (2) the durability of the favorable piece of legislation, defined as the length of time the law will effectively generate wealth (L).[15]

$D = (VL)$,

Where

D = demand for a particular legal rule,

V = the annual value of the amounts to be transferred, and

L = the expected longevity of the law and the number of periods over which wealth will be transferred.

The demand, D, for a particular legal rule will be a function of the present value of the expected stream of economic rents that will be generated by a particular legal rule. Parties will be willing to invest greater amounts to secure legal rules that generate greater benefits to them. Thus, the steel industry would be willing to make much larger investments to secure a very strict import quota rather than a mild import quota, because a strict quota will increase industry wealth much more than a mild quota. So as the expected value of V increases for a particular law, parties will be willing to invest greater sums to secure that law's passage. The converse is also true: as parties invest greater sums, then, at the margin, it is more likely that they will secure favorable legislation, so a greater investment of resources will generally increase the value of any legislation obtained.

The value, V, of a favorable legal rule will also be a function of the ability of detrimentally affected parties to avoid paying the costs of a law. Consider, for example, a minimum wage law. An essential element of a minimum wage law is that parties cannot contract around the law by agreeing to pay less than the statutory minimum. For example, imposing a minimum wage on labor increases wages for those who are employed, but it also causes unemployment for other workers and effects a wealth transfer from shareholders to those laborers benefited by the law. If those injured by the law could escape its reach, such as by contracting for other terms, then no one would provide a wealth transfer to the beneficiaries. Making a

[15] Stating the point in the form of an equation is not intended to present a formal model of legal change but is intended only to serve an expository purpose in identifying the relevant considerations.

law such as the minimum wage policy a default rule that the parties could freely alter, therefore, would frustrate the entire purpose of having such a law. Thus, if detrimentally affected parties cannot escape the reach of a law, then wealth can be transferred from them to the benefited groups under that law. By contrast, if escape from the reach of a law by detrimentally affected parties is easy, then the amount of wealth that can be transferred from those groups to beneficiaries is limited.

Parties will also be willing to invest greater amounts to secure laws that generate longer-lasting benefits. Most favorable legislation does not generate benefits in the short-term. Rather, most legislation generates modest benefits over a long period of time. For instance, occupational licensing of attorneys has the effect of increasing the earnings of lawyers over the span of a 40-year career, rather than generating a one-time lump-sum benefit upon graduation.[16] Thus, as longevity, L, increases, meaning that the expected longevity is likely to go up, parties will be willing to invest more in order to secure favorable legislation. For instance, a law that will generate benefits of $1 million per year for 20 years if enacted will be much more valuable to the interest group it favors than will a law that will generate $1 million, but only for one year. Parties will be willing to invest more to secure the enactment of a law of longer duration because this increases the present value of the benefits to be generated over the life of the wealth-transferring law.

B. Application of the Model to Common Law Evolution

Although originally designed to explain the production of legislation, Paul Rubin has argued that change in the common law can be analyzed by applying this general model.[17] We can think of the demand side of the market as private litigants, bringing actions before courts and requesting that the courts produce legal rulings and legal opinions designed to resolve the dispute. Judges can be thought of as providing the supply side of the market, because they produce the service of dispute resolution and because the

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[16] Of course, these economic rents are to some extent dissipated by investments to join the profession. Thus, for instance, law schools can charge higher tuition to students and students will be willing to pay higher tuition, because a law degree is required to practice law. Thus, law schools are part of the "industry" that benefits from restrictive licensing of lawyers.

[17] *See* Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977) [hereinafter Rubin, *Why is the Common Law Efficient?*]; *see also* Paul H. Rubin et al., *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUB. CHOICE 295 (2001); Martin J. Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, 14 INT'L REV. L. & ECON. 467, 476 (1994) [hereinafter Bailey & Rubin, *Positive Theory*]; Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEG. STUD. 807 (1994); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEG. STUD. 205 (1982) [hereinafter Rubin, *Common Law and Statute Law*]. Gordon Tullock described a similar model, but less concretely than Rubin. *See* GORDON TULLOCK, TRIALS ON TRIAL: A PURE THEORY OF LEGAL PROCEDURE 197–206 (1980); *see also* George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980) (suggesting a similar model).

reasoned legal opinions and precedents they provide are often designed to offer guidance to future litigants.

Rubin's model rests on the relative stakes between the two parties to a given dispute, arguing that as the amount of money at stake in a particular case increases, the willingness of parties to invest resources in order to effectuate legal change increases as well. The stakes in a given dispute will be a function not only of the amount at stake in that particular case, but also of the potential long term value of the precedent generated by that case, which will affect the results of *future* cases. In many situations, this latter variable will be much larger than the former. For instance, if a party—say steel manufacturers—can obtain a legal precedent that makes it difficult for consumers or employees to sue or one that limits the damages that that party can recover, then such a precedent is an extremely valuable economic asset. Although avoiding liability in a particular case saves the steel manufacturer damages in that case, a legal rule that makes it more difficult for plaintiffs to recover in future cases promises an ongoing *stream* of future benefits. If a party has the ability and opportunity to influence the evolution of the law in a manner favorable to it, then it will be willing to invest resources in order to garner legal change. Common law rules, therefore, can be thought of as generated by a process similar to legislative statutes, where interest groups "bid" on particular rules and where the legal rules that are passed are those preferred by the highest bidder. In turn, the highest bidder will be the one who has the largest stakes in the case, either the most to win or lose, from proposed legal change.

Rubin's model, therefore, turns on the same two factors as the model of legislative change: the amount of money at issue in the particular case (V) and the period of time over which parties can capture the benefits of a change in the law (L).[18] But there is a fundamental difference between legislative change and common law change. For legislative change, one legislature has no ability to bind the hands of a subsequent legislature. Thus, in theory at least, all legislative bargains can be undone as governing coalitions in the legislature change.[19] For the common law, however, the modern doctrine of *stare decisis* means that, in theory at least, all court decisions will be binding on all subsequent courts. Thus, there is an inherent stability in the common law process that the legislative process lacks. As a result, even if the value of a favorable legal rule is relatively small in any given case, that benefit may be multiplied over many cases over many years and may give rise to a relatively large bounty in present value terms for any group that can capture it. For similar reasons, a constitutional rule pro-

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[18] *See* Rubin, *Common Law and Statute Law*, *supra* note 17, at 207.

[19] *See* Zywicki, *Senators and Special Interests*, *supra* note 9, at 1028–29. In practice, of course, there are a large number of constitutional and other internal procedural rules that limit the ability of one legislature to overturn the work of prior legislatures. *See id.*; *see also* Landes & Posner, *supra* note 9, at 878.

tected by supermajoritarian amendment procedures will be more durable than a mere legislative rule, because the constitutional rule will be more difficult to reverse at a later date.[20] In theory, at least, the doctrine of *stare decisis* suggests that common law rules might be more durable than legislative rules. As will be discussed below, however, this does not necessarily mean that common law rules will be able to redistribute greater amounts of wealth than legislative rules, because other factors may also reduce the amount of wealth that can be transferred.

Because of the long-term nature of the economic rents generated by certain economic rules, Rubin observes that repeat players in litigation will be the parties with the greatest incentives to bring litigation designed to generate new precedents. Groups that are better able to organize will also be able to invest greater resources in legal change. Of course, if the stakes in a given case are sufficiently high that parties will be willing to invest large amounts solely on the outcome of the case without concern for the future value of the precedent generated by the case, then there is no reason to engage in collective action to change the law. If both parties to a dispute have equal and sufficiently high stakes, then their investments will tend to cancel out and the law will tend toward efficiency. If both parties have equal but low stakes, such as in small-claims court, then one would expect largely random drift in the doctrinal evolution of the law. If one party has a greater stake in the dispute and is able to solve any relevant collective action problems, however, then Rubin predicts that the law will evolve in a direction favorable to that party.[21]

Rubin argues that this model generally describes the evolution of the common law as a historical matter, both in its early tendency to promote efficiency as well as more recent developments that depart from efficiency. Rubin postulates that, in the nineteenth century (and presumably before), rule making (both common law and statutory) was dominated by individual actors acting independently, rather than by organized special interests acting collectively.[22] This was the case for several reasons. First, most disputes that arose were between two individuals or between an individual and a very small business. Thus, there was little benefit to be captured by a party from strategic litigation because neither party was a frequent litigant. Moreover, each individual usually stood in a reciprocal relationship with all

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[20] *See* W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165, 168–69 (1979); Landes & Posner, *supra* note 9, at 892.

[21] *See* Rubin, *Common Law and Statute Law*, *supra* note 17, at 206 ("[F]or efficiency to result from these models parties to particular disputes must represent symmetrically all future interests in such disputes. If this condition is not satisfied, the models indicate that the law will not be driven toward efficiency. Rather, the law will come to favor those parties which do have future interests in cases of the sort under consideration, whether or not it is efficient for such parties to be victorious."); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

[22] Rubin, *Common Law and Statute Law*, *supra* note 17, at 211–14.

other individuals; thus an individual or small business who is a plaintiff today was equally likely to be a defendant tomorrow, reducing the incentive to litigate for one-sided rules and favoring advocacy in favor of stable and efficient rules. Finally, Rubin argues, the structure of litigation and high costs of communication made it very difficult for groups to solve collective action problems in order to aggregate their interests into a coherent and effective litigation strategy. Thus, for much of the common law's evolution, most litigation was between two individual parties, both with substantially equal stakes in the outcome. The result was that the common law tended toward efficiency.[23]

Subsequent innovations changed this dynamic in some particulars. The "equal stakes" model still describes many areas governed by the common law, which explains the persistent efficiency in many of these areas. Nonetheless, Rubin argues that his model can explain some episodes of dramatic legal change over very short time periods. He provides two examples to illustrate his point: the adoption of liability-restricting rules for manufacturing firms in nineteenth century England and the adoption of liability-expanding rules in twentieth century America.

First, the industrial revolution brought about the innovation of large-scale manufacturing enterprises. Unlike private parties, these new firms had a strong interest in the path of legal change—especially in areas such as nuisance law and tort law. Rubin argues that this gave them unequal stakes and may have been sufficient to cause them to invest in legal changes to narrow the scope of liability for pollution and workplace accidents.[24]

In recent decades, a more modern and more potent form of strategic legal change has been occasioned by the Association of Trial Lawyers of America (ATLA), the leading trade group of America's tort plaintiff's lawyers. Among its activities, ATLA organizes plaintiff's lawyers into a coherent interest group that effectively lobbies on issues of legal change, and Rubin and Bailey argue that, through these interest group activities, ATLA has created a class of residual claimants for legal change in the tort law. Thus, even though individual tort plaintiffs are not repeat players, tort *lawyers* as a group are. Moreover, tort lawyers benefit from changing the law so as to increase liability, increase litigation, and increase the damages available from tort lawsuits. Thus, they have high stakes in the generation of legal precedents. This combination of high stakes and strong organization has made ATLA an effective litigant for liability-expanding tort law rules.

Rubin suggests that it is unnecessary to consider the supply side of the market for legal change in order for his model to accurately describe real-

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[23] As Rubin notes, this same dynamic meant that statute law also tended toward efficiency during this era. *Id.*

[24] He leaves open the question of whether this change was efficiency-enhancing or not. *See id.* at 216–17.

ity.[25] Nonetheless, he leaves open the possibility that changes in the supply side of the market, such as changes in the proclivity or ability of judges to supply certain types of legal rules, can supplement his model of legal change.[26] Thus, in understanding the evolution of the common law, it is not necessary to force an either-or choice between demand-side and supply-side theories. In fact, most markets are best understood by examining both sides.[27] The point of this Article is not to offer a supply-side theory as an alternative to demand-side models. Rather, it is to offer a supply-side story as a *supplement* to demand-side stories. As the subsequent discussion will show, there were crucial historical changes in the supply side of the common law "market" that were necessary for Rubin's model of rent-seeking litigation to be feasible. The argument thus builds upon Rubin's demand-side model, especially as it relates to the stake of litigation and the ability to manipulate the path of legal precedent. As this Article will show, Rubin's argument rests on important assumptions about the nature of legal precedent, the ability of parties to manipulate the path of legal evolution, and the ability of successful litigants to involuntarily bind parties to inefficient legal rules by making exit costly. There are, thus, certain institutional arrangements that are necessary for a rent-seeking model of the common law to be feasible and there are certain institutional arrangements that are more resistant to rent-seeking pressures than other institutional frameworks.

George Priest has offered a similar model of the evolution of the common law.[28] Like Rubin, Priest emphasizes the demand-side of the market for common law evolution, grounding his models in the actions of private litigants. Priest argues that inefficient rules will tend to lead to more societal conflict and will thereby be the subject of more litigation over time. Assuming judges randomly reverse a certain percentage of precedents each time the precedents are tested in litigation, Priest argues that the tendency for inefficient precedents to be litigated more often will also cause them to be reversed more often then efficient rules. Over time this will cause a pronounced tendency in the law toward the production and maintenance of efficient legal rules. As with Rubin, Priest's model can be understood as a demand-side model, wherein judges passively respond to the actions of private litigants.

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[25] Rubin and Bailey stress the point that a strength of their model is that it can explain the evolution of the common law without accounting for changes in judicial preferences. *See* Bailey & Rubin, *Positive Theory*, *supra* note 17, at 476. This does not rule out the possibility that legal change may occur as a result of a change in the incentives and constraints facing judges, however, which is the argument advanced in this paper. For an argument of legal evolution rooted in changes in judges' ideological preferences, see Alfred L. Brophy, *Reason & Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (book review).

[26] *See* Bailey & Rubin, *Positive Theory*, *supra* note 17, at 475–76.

[27] *See* Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

[28] *See* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEG. STUD. 65 (1977).

Scholars have offered a variety of criticisms of Priest's model.[29] For current purposes, however, the crucial point to recognize is that, although Priest may be able to provide an explanation for why the common law might evolve toward efficiency, his model provides no explanation of why the common law might evolve *away* from efficiency.[30] This omission is telling in that it is evident that Priest believes that the common law has departed from the efficiency norm in recent years.[31] In explaining these recent trends, Priest has abandoned his demand-side model of common law evolution, instead turning to a supply-side model grounded in an intellectual and ideological revolution among common law judges. This ideological revolution has caused judges to deviate from sound economics in favor of using tort law as an instrument of social justice and insurance. Priest also implicitly concludes that existing institutional constraints are inadequate to constrain judges from reading their personal ideological preferences into the law.[32] As this Article will show, the ability of judges to indulge their ideological preferences is dependent on certain institutional arrangements that make it possible for judges to bind private-decisionmakers and to thereby impose their ideological preferences.

III. A SUPPLY-SIDE MODEL OF COMMON LAW EFFICIENCY

Supply-side models of common law efficiency have been rare, as demand-side explanations have dominated scholarship. The only prior supply-side model of efficiency was offered by Judge Richard Posner, who argued that common law judges will have a preference or "taste" for efficiency.[33] According to Posner, judges have a "taste" or "preference" for efficient rules that guide their decision-making. Because of limited external constraints on judges, they can indulge their preferences, whatever those preferences may be. According to Posner, the common law system—at least at the appellate level, where most legal rules are formulated—is highly impersonal, meaning that the judge has little ability or inclination to try to

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[29] For a summary of several of those criticisms, see POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 1, § 21.5, at 614.

[30] For the common law evolutionary process to trend away from efficiency in Priest's model, it would be necessary for efficient rules to cause more social conflict and therefore to be litigated more often than inefficient rules, which is expressly denied by the assumptions of the model. Thus, Priest's model is a one-way model that can explain the evolution toward efficient rules but not an evolution *away* from efficiency.

[31] *See* Priest, *supra* note 2; *see also* George L. Priest, *Products Liability, Law and the Accident Rate*, *in* LIABILITY: PERSPECTIVES AND POLICIES 184 (Robert E. Litan & Clifford Winston eds., 1988).

[32] *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) (arguing that modern tort law is the result of judges reading their philosophical ideas into the law); George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987) (same); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

[33] *See* POSNER, *supra* note 1, § 19.2, at 569.

decide the case on the basis of which litigant is a "better" or more morally worthy person. Unlike trial judges, appellate judges generally are not intimately acquainted with the particular circumstances and characteristics of litigants and therefore lack the information and inclination to decide cases on subjective assessments of moral worthiness. Moreover, ethical rules usually require judges to recuse themselves from cases in which they have financial interests, rendering the outcome independent from the resulting financial consequences to the parties. As a result, judges will usually have an incentive to treat lawsuits as interactions between two competing economic activities, leading them "almost by default" to weigh the economic value of the two competing activities.[34] Moreover, judges have limited ability to redistribute wealth through common law rules, and Posner believes that judges recognize these limits. Thus, even if judges have preferences that they weigh more highly than efficiency, their institutional constraints will lead them to recognize that these other goals are unobtainable. Furthermore, even if judges have only a weak preference for efficiency, they will pursue this end by default because of their inability to accomplish other competing ends. Given this, Posner argues that judges will act as if they have a "taste" for efficiency that will lead them to seek efficiency in their decisions. But this preference is weak because it is merely by default, given that judges are constrained from pursuing other goals.

There are several problems with this argument. First, it is difficult to verify because we cannot read judges' minds to determine their preferences or the extent to which their preferences explain case outcomes. Second, Posner's assumption seems inconsistent with the observation that many judges are at least as concerned with redistributive goals as efficiency goals.[35] In fact, common experience indicates that many judges have strong tastes for distributional goals, and that they pursue these goals in their judicial role. Third, it fails to explain why the common law might evolve in an efficient manner at some times during history, but inefficiently at other times. Posner also has argued that nineteenth century judges were moral utilitarians, which led them to embrace the primacy of efficiency as a goal. But, of course, this merely restates the "preferences" theory without any further support, albeit with somewhat greater explanation. Fourth, it is questionable whether even the most well-intentioned judge possesses the expertise and knowledge to devise efficient legal rules where he or she desires to do so.[36]

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[34] *Id.*

[35] *See* ZYWICKI, *supra* note 6; *see also* James E. Krier, Book Review, 122 U. PA. L. REV. 1664 (1974) (reviewing POSNER, *supra* note 1). Judges may also be concerned with "justice," broadly defined. *See* Gerald P. O'Driscoll, Jr., *Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried*, 9 J. LEG. STUD. 355 (1980).

[36] *See* O'Driscoll, *supra* note 35; Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980); *see also* Edward Stringham, *Kaldor-Hicks Efficiency and the Problem of Central Planning*, 4 Q.J. AUSTRIAN ECON. 41 (2001); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

Thus, no prevailing positive theory of the supply-side incentives of judges to produce efficient rules exists.[37] Posner's argument turns on a postulated personal taste of judges for efficiency, institutional constraints that prevent them from pursuing other preferences, and on recognition by judges that it is in fact futile for them to try to accomplish other goals. Rather than postulating an assumption of judicial preferences for efficiency, this Article argues that the driving force in legal evolution on the supply side of the equation is not unprovable assumptions about judicial tastes but rather the incentives and constraints that judges face in carrying out their tasks. Moreover, this Article will offer a supply-side model that dovetails with the demand-side models of common law evolution previously described. In turn, this will force us to focus on the structure of incentives and constraints confronted by judges that encourage or discourage them from pursuing their personal preferences at the expense of litigants and society in general. This Article is an effort to fill this gap by postulating a supply-side model of efficiency in the common law that focuses on the incentives of judges to produce efficient common law rules.

This Part of the Article will show that there were particular institutional arrangements that characterized the common law in its formative period. These institutions made the common law resistant to rent-seeking litigation pressures and help to explain the common law's historic tendency toward the production of efficient rules. This Part also will argue that each of these factors has changed over time, thereby rendering the common law process more susceptible to problems of rent-seeking through litigation. Thus, the focus here is on the constraints that led common law judges to produce efficient rules even where their personal preferences did not incline them to do so. This Article will thus argue that Rubin and Priest's models rest on a previously unacknowledged change in the institutional constraints on judges. The effect of this change in institutional constraints was to increase the possibilities for litigants to transfer wealth through strategic litigation, both through an increasing incentive and opportunity to engage in rent-seeking litigation in terms of the Rubin model, as well as by creating greater agency costs for judges to indulge their ideological preferences in terms of the Priest model.

This Article will highlight several institutional features. First, it will show that Rubin's model rests on a particular understanding of the role of legal precedent and *stare decisis* in the common law. Although it is reasonable to assume the presence of *stare decisis* as a permanent element of the common law system, in reality the doctrine of *stare decisis* was a fairly re-

[37] There have been several efforts to model and test the prediction that an independent judiciary will be willing to enforce interest-group legislative bargains. *See* Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215 (1989); Landes & Posner, *supra* note 9. Others have investigated other aspects of the judicial production of precedents and judicial decisionmaking from an institutional perspective. *See* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002).

cent innovation in the common law, replacing a system of much weaker judicial precedent. A system of strong precedent or *stare decisis*, this Article will show, is an essential element for rent-seeking through the common law.

Second, this Article will describe the historic competitive legal order of the traditional common law. During the era in which the common law evolved, litigants had the ability to choose among many different courts and bodies of law to hear their disputes. Judges were paid by fees paid by the parties, providing judges with an incentive to compete for business and to respond to the needs of litigants through the production of efficient legal rules. Moreover, it provided an ease of exit that reduced the ability of parties to involuntarily redistribute wealth away from parties disfavored by doctrinal developments. Parties could opt out of such a legal system and opt in to a concurrent court. This ease of exit limited their rent-seeking opportunities through litigation.

Third, certain legal doctrines limited the ability to use the court system as a mechanism for rent-seeking activity. In particular, the tendency of traditional common law to produce default rules rather than mandatory rules allowed parties to contract around onerous and inefficient legal rules, thereby preserving efficiency through private ordering. The common law's traditionally strong reliance upon custom also created a tendency toward efficiency and insulated the common law from rent-seeking pressures. As this Article will discuss, because custom evolved from decentralized and consensual processes over long periods of time, it tends to be highly resistant to rent-seeking pressures.

A. Weak Precedent Versus Stare Decisis

As discussed above, Paul Rubin has noted that a necessary condition for efficient legal rules to develop is that both parties to a dispute place relatively equal importance on the precedent developed in the case.[38] Where one party has dramatically more to win from a favorable precedent (or more to lose from an unfavorable precedent), that party will be willing to invest greater resources to secure the desired precedent, leading to a tendency for the law to evolve in a direction favorable to that party, even if the new rule is less efficient than the old rule. Rubin argues that in the early era of the common law, most disputes were between two individuals who were not likely to be repeat players, thus neither side had a relatively stronger incentive than the other to fight for precedents uniquely favorable to his cause.[39] Rubin focuses on the demand side of the fight for legal precedent, noting that parties with a greater stake in the outcome of the case will "bid" higher amounts for a favorable precedent. Thus, there would be no systematic

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[38] *See supra* notes 22–23 and accompanying text.

[39] *See supra* notes 24–27 and accompanying text.

pressures to drive the evolution of the common law away from efficiency. This story seems to be both historically and conceptually correct.

History adds an additional element that renders Rubin's story about the evolution of the common law even more powerful. Looking at the "market" for legal precedent we see that the demand for a legal precedent will be affected not only by the value of a precedent but also by the durability of the precedent and its ability to transmit rents through time. Thus, if a precedent is less durable, the present value of the precedent will decrease because a favorable precedent will transfer less wealth over time. As a result, litigants will be less willing to invest resources *ex ante* to secure a favorable precedent.[40] Thus, where precedent is not durable, neither side to a dispute has a relatively greater interest in the precedent, thereby producing conditions favorable to the production of efficient rules.

The traditional common law provided these conditions. Although most modern lawyers and scholars conceive of the doctrine of *stare decisis* as a formative element of the common law, this is an ahistorical understanding of the development of the common law.[41] The doctrine of *stare decisis*, the idea that the holding of a particular case is treated as binding upon courts deciding later similar cases, is a late nineteenth-century development and represents a clear doctrinal and conceptual break with the prior history of the common law.[42] The widespread adoption of the principle of *stare decisis* was a pivotal turn in the common law, which provided a necessary condition for later efforts to turn the development of the common law toward special-interest purposes. This is not to say that the adoption of a principle of strict *stare decisis* was undesirable from the perspective of economic efficiency or coordination. But it is important to recognize that the adoption of a system of strict *stare decisis* is a *necessary* condition for the common law to become a vehicle for rent-seeking.[43] Absent *stare decisis* it

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[40] *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 229–30 (1997) (noting that parties will spend less money lobbying for legislation if the expected duration of the legislation is small); Landes & Posner, *supra* note 9.

[41] A useful summary of the arguments in favor of stare decisis is provided in Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 650–55 (2001). Precedent as discussed here is horizontal (binding through time) rather than vertical (superior courts binding inferior courts in a hierarchical system). In the time since an initial draft of the current article was authored, debate on this particular issue has become quite spirited. *See* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

[42] Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 449 (1996).

[43] In fact, it has been argued that where both parties lack a continuing interest in the production of precedent, the result will not be the production of efficient rules but rather "random drift" with no tendency toward the production of efficient or inefficient rules. *See* Rubin, *Why is the Common Law Efficient?*, *supra* note 17, at 56–57; John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEG. STUD. 393 (1978). As will be shown below, however, this was not the case historically. Even though the parties to the litigation lacked a continuing interest in the production of precedents, the

is impossible to produce long-term stable precedents that generate returns over time. Thus, there are costs to *stare decisis* as well as benefits, with a major cost stemming from the fact that it makes the law more susceptible to use as a vehicle for rent-seeking and the manipulation of judicial precedent. Indeed, discussions of the benefits of *stare decisis* have often ignored these costs. But it is clear that any discussion of the benefits of *stare decisis* must also consider the inherent costs associated with strict *stare decisis* as well. A brief history of the doctrine of precedent under English common law will help to illustrate the difference and will illuminate why the adoption of *stare decisis* enabled the use of the common law for rent-seeking purposes.

1. Precedent in English Legal History.—Modern commentators rarely look beyond the eighteenth and nineteenth centuries in seeking the history of the English common law. The formative period of the common law, however, was from the twelfth to the seventeenth centuries, and this is where the investigation must begin.[44] During this period there was no well-developed concept of precedent at all. Writing in the thirteenth century, for instance, Bracton refers to more than 500 cases in his treatise but does not treat them as authoritative statements of the content of the law.[45] In fact, Bracton did not espouse a doctrine of precedent, nor did he even ever use the word "precedent."[46] Bracton was aberrant in even citing cases, as most early learned treatises cited no cases at all.[47] "The author of *Fleta*, writing about forty years after Bracton, refers to one case; Britton, who wrote an epitome of Bracton soon after 1290, refers to none; Littleton in his authoritative work on *Tenures* (ca. 1481?) refers to eleven cases."[48] Bracton him-

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existence of competition between multiple courts and legal systems meant that judges and courts had a continuing interest in the production of precedents. Judges were paid from filing fees; therefore even though private parties were not residual claimants of the long-term value of precedents, judges were. As a result, random drift did not result. *See infra* notes 146–151.

[44] The basic structure of the common law and many of its substantive rules, such as many landholding rules, were already established as early as 1135. *See* JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 20–21 (1996); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 33 (2d ed. 1988). Pollock traces the origins of the English common law to the Norman conquest, but allows that "the earliest things which modern lawyers are strictly bound to know" date only to the latter thirteenth century. Sir Frederick Pollock, *English Law Before the Norman Conquest*, 14 L.Q. REV. 291 (1898), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88 (Association of American Law Schools ed., 1968) [hereinafter SELECT ESSAYS]. Regardless of the exact date, it is evident that the roots of the common law reach well back into the Middle Ages.

[45] *See* Berman & Reid, *supra* note 42, at 445; ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 175, 188–91 (1966).

[46] *See* Berman & Reid, *supra* note 42, at 445.

[47] *See* HOGUE, *supra* note 45, at 189; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 343 (5th ed. 1956) ("But it must be observed that whatever use [Bracton] made of cases was necessarily peculiar to himself."). Even as late as the 1760s, Adam Smith cited only a handful of cases in his *Lectures on Jurisprudence*. *See* ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., 1982).

[48] HOGUE, *supra* note 45, at 189.

self had to exert great influence to obtain the loan of plea rolls and was one of the few judges of the era willing to wade through the weighty and unorganized rolls.[49] Few other treatise writers, and certainly no lawyers, would have been willing to exert the energy required to obtain possession of the rolls or to engage in the painstaking trouble of reading through the unorganized masses of parchment.[50] As Plucknett bluntly states, "[a]ny use of cases on Bracton's lines by the profession at large, or even by the bench alone, would have been manifestly impossible."[51]

For early common law judges (including even Bracton), cases were merely illustrations as to how respected individuals had decided cases that came before them.[52] "Cases, that is, judicial decisions, could be used to illustrate legal principles, but were not themselves an authoritative source of law."[53] Prior cases served only as persuasive, not binding, authority and were studied for the soundness of their reasoning, not the authority of their holdings. A series of similar decisions might be considered as evidence of the existence of judicial custom, but those customs were also regarded as only persuasive rather than binding. "If a judge did not approve of a previous decision, or even of a previous custom of the court, he might say that it was wrong and disregard it."[54] In fact, the first known use of the term "precedent" was not until 1557, and in that case the court observed that it

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[49] *See infra* notes 64–67 and accompanying text (discussing plea rolls).

[50] PLUCKNETT, *supra* note 47, at 343. Plucknett observes that the plea rolls are "immense in number and there was and still is no guide to their contents; they have to be read straight through from beginning to end without any assistance from indexes or head-notes." *Id.*

[51] *Id. See also* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 183 (1968) ("By some piece of good fortune Bracton, a royal justice, obtained possession of a large number of rolls. But the ordinary litigant or his advocate would have had no opportunity of searching the rolls, and those who know what these records are like will feel safe in saying that even the king's justices can not have made a habit of searching them for principles of law.").

[52] *See* HOGUE, *supra* note 45, at 189 ("Bracton's use of cases differs from the modern reference to cases. In the twentieth century the authority of the case decided in a higher court has a binding authority on a lower court. But Bracton and other medieval justices cite cases merely to illustrate or to explain the law."); Berman & Reid, *supra* note 42, at 445; *see also* PLUCKNETT, *supra* note 47, at 260 ("[Bracton] never gives us any discussion of the authority of cases and clearly would not understand the modern implications of stare decisis. Indeed, his cases are carefully selected because they illustrate what he believes the law ought to be, and not because they have any binding authority; he freely admits that at the present moment decisions are apt to be on different lines. Bracton's use of cases, therefore, is not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound.").

[53] Berman & Reid, *supra* note 42, at 445; *see also* HOGUE, *supra* note 45, at 175–76 ("[Bracton's] use of the judicial decisions of his predecessors was not the same as the sophisticated twentieth-century doctrine of *stare decisis*, requiring a hierarchy of courts, certain conventions in the reporting of cases, and the printed publication of reports."); PLUCKNETT, *supra* note 47, at 344 ("In Bracton's hands a case may illustrate a legal principle, and the enrolment may be historical proof that the principle was once applied, but the case is not in itself a source of law.").

[54] Berman & Reid, *supra* note 42, at 445.

was ruling *despite* two "presidents" to the contrary.[55] Indeed, Bracton relied on cases primarily to illustrate the ways in which recently decided cases (in his era) had departed from the sounder judicial rulings of earlier eras and to argue that the newer decisions should be ignored.[56] "Bracton first states his principles and then adduces his cases as historical evidence of the accuracy of his statements. This is a vastly different method from" that of precedent—namely, "taking the cases first and deducing rules of law from them."[57] During the formative centuries of the common law, therefore, there was no system of precedent that resembled the current doctrine of *stare decisis*.

In the sixteenth and seventeenth centuries, cases started to become more important as common law courts developed a practice of adhering more strictly in matters of pleading and procedure to their customs and thereby their precedents. But "[t]his principle was not ironclad."[58] Moreover, the principle was adhered to primarily only in procedural matters, not issues of substantive law.[59] Lord Holt observed, for instance, "[t]he law consists not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, idem ius*."[60] Even this adherence in procedural matters was not wholly internally adopted by the judges but was produced primarily by the demands of maintaining the externally-imposed jurisdictional lines between the common law and other types of court.[61] Coke relied on the concept of precedent in his battles against the King, arguing for the historical continuity of the common law tradition. Even Coke's reliance on the concept of precedent in the battles against the King cited precedents only as "examples" of the "true rule" and not "in and of themselves authoritative sources of those rules."[62] The decisions of particular cases, or even a

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[55] Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1732 (1994).

[56] PLUCKNETT, *supra* note 47, at 343–44. Plucknett observes, "Bracton has no hesitation in using cases which we should call out of date or overruled, in order to maintain that the law ought to be something different from what it is. From this it is clear that the whole of Bracton's position would fall if decisions, as such, were in any modern sense a source of law." *Id.* at 344.

[57] PLUCKNETT, *supra* note 47, at 344.

[58] Berman & Reid, *supra* note 42, at 446.

[59] *See* Berman, *supra* note 55, at 1732 ("Prior to Coke, these 'presidents' were largely concerned with procedural matters, and only rarely did judges compare in detail the facts of the cases that came before them with the facts of earlier analogous cases."); CARLETON KEMP ALLEN, LAW IN THE MAKING 143 (2d ed. 1930).

[60] C.H.S. FIFOOT, LORD MANSFIELD 16 (1936) (quoting Holt).

[61] *Id.* More precisely, rival courts cited precedent in order to expand their jurisdiction at the expense of the King's Bench. A primary purpose of legal fictions was to evade jurisdictional limits so that parties could bring actions in the court of their choice, rather than the *de jure* court that they were entitled to use. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 33 (1971); HOGUE, *supra* note 45, at 11 (describing the ability to manipulate pleading forms in order to get access to the court preferred by litigants, notwithstanding formal jurisdictional limits).

[62] Berman & Reid, *supra* note 42, at 447.

group of cases, were still not treated as authoritatively binding on lower courts.

Useful recitations of precedents would not even be technologically feasible until the invention of movable type printing in the fifteenth century and not until the sixteenth century could lawyers easily acquire printed reports of cases.[63] Prior to then, the only authoritative recitation of outcomes (albeit in a highly summary form) were the "plea rolls," which recorded case outcomes and little else. These were quite literally rolls of dusty parchment sewn together, weighing hundreds of pounds and inscribed with handwritten case outcomes.[64] As one scholar has observed, "Plea Rolls were obviously not things which could be produced easily in Court; it was no light matter to search them or have them searched; and there is ample evidence that they were very difficult of access even to prominent counsel."[65] The purpose of the Rolls was to record the results of cases, and in particular, debts owed to the King, not to aid lawyers. The reasoning of the court in reaching a decision was not of import and few lawyers even had access to the rolls.[66] Because the absence of printing made reproduction of the rolls impossible, a lawyer could authoritatively cite a case only if he could in fact access the rolls and identify the case. "When there were no printed records or reports," Hogue asks, "who could verify citations to previous decisions without first obtaining permission to consult the royal plea rolls?"[67]

The inaccessibility and impracticability of the plea rolls led to the development of privately published Year Books that sought to provide some of the information regarding decided cases. But these differed dramatically in form and substance from modern case reporters. The Year Books were intended as teaching tools, not official case reports, and therefore focused on issues of pleading, procedure, and case strategy, rather than case outcomes.[68] In addition to the rulings in the cases, the Year Books attempted to

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[63] HOGUE, *supra* note 45, at 181, 190. The first printed law book, Littleton's *Tenures*, appeared in 1481. *See* BAKER, *supra* note 61, at 116.

[64] *See* 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 185 (4th ed. 1936). Holdsworth states that the plea rolls were a number of membranes "filed" together at the top, distinguishing them from the Chancery Rolls, which consist of a "continuous strip of parchment made by sewing the membranes together at the top." *Id.* at 185 n.1.

[65] ALLEN, *supra* note 59, at 139.

[66] In fact, one reason Bracton cites a substantially larger number of cases than his peers is that as a judge he had access to the case rolls, whereas most lawyers did not. *See* HOGUE, *supra* note 45, at 189. Dan Coquilette observes that the rolls did not record the reasons for the decisions, just the judgment. Moreover, the rolls were closely guarded and available only to a few judges and privileged lawyers. DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 147 (1999).

[67] HOGUE, *supra* note 45, at 171.

[68] Often the case outcome will not even be reported, either because the reporter thought it unimportant or simply because he was absent from court the day the ruling was issued. Instead, the reporters focus on the jousting between the judges and the counsel. The case outcome was often thought unimportant because of the absence of the doctrine of stare decisis. It is not until the doctrine of stare decisis

provide a rudimentary recitation of the relevant facts and arguments in the case. But the Year Books were haphazard, fragmentary, and frequently contradictory.[69] Not only did they often contradict each other in describing the reasoning of cases, they often even disagreed on the case names.[70] Their chronology is often questionable, and judges are often found speaking well after they were dead and long periods of time had transpired with little or no reporting of cases.[71] There were often long time lags between the time a case was decided and the publication of its corresponding opinion.[72] Their origins are sometimes questionable, as several manuscripts were purloined from the lawyers who owned them and then were published without their permission, often with various additions from unknown sources.[73] Moreover, they plainly did not serve the same function as the modern law report, as they were reported and used much more casually.[74] Not only did they report less than current case reporters and in a less rigorous style, but they also often reported *more*—such as private comments by judges and even

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emerges that case reports are thought to be valuable for their recitation of the holding and reasoning of the case. For an excellent summary of the uses and content of the Year Books, see 2 HOLDSWORTH, *supra* note 64, at 551–56.

[69] *See* HOGUE, *supra* note 45, at 189–90; Berman & Reid, *supra* note 42, at 446 (noting that "as historical records" private case reports "were often quite unreliable"). Hogue quotes Justice Fitzherbert's observation to one lawyer, "As against your book I can produce four books where the contrary has been decided." HOGUE, *supra* note 45, at 190 (citing T. Ellis Lewis, *The History of Judicial Precedent*, 47 L.Q. REV. 411). Fifoot, referring to the "poverty of the Reports," derides them as "uninspiring compilations." *See* FIFOOT, *supra* note 60, at 14. In addition, only the decisions of the common law courts were consistently reported. There were numerous other competing court systems in England at the time that decided cases as well but which failed to produce written precedents at all. *See* William S. Holdsworth, *Case Law*, *in* ESSAYS IN LAW & HISTORY 147, 156 (A.L. Goodhart & H.G. Hanbury eds., 1946); *see also infra* Part III.B.

[70] Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 18–19 (1987). As one commentator observes, "*Clerk v. Day* was reported in four different books, and in not one of them correctly—not even as to name. . . . Arbitrary spelling of the names of cases is a bibliographical irritation, and sometimes a difficulty. *Fetter v. Beal* . . . is a pretty good disguise for *Fitter v. Veal* . . . ." PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 185 n.3 (1925).

[71] *See* BAKER, *supra* note 61, at 105–07.

[72] *See* Hart v. Massanari, 266 F.3d 1155, 1166 (9th Cir. 2001) (noting that Heydon's case was decided in 1584 but Coke's account was not published until 1602); *see also* Allen Dillard Boyer, *"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 79 (1997).

[73] *See* Van Vechten Veeder, *The English Reports, 1537–1865*, *in* 2 SELECT ESSAYS, *supra* note 44, at 127.

[74] *See* PLUCKNETT, *supra* note 47, at 344–45.

what was said at mock trials in the Inns of Court.[75] The editorial comments of the reporters were interspersed with the rulings of judges; the statements of well-known counsel were cited as authority.[76] Reporters freely elaborated on the arguments actually advanced by counsel and the judges in individual cases.[77] Not only would the reporters criticize judicial rulings, they would criticize the character and wisdom of the judges themselves; one irreverent reporter attached the nickname "Hervey le Hasty" to judge Hervey le Stanton in recognition of his impetuous style.[78]

Judges and lawyers distinguished among the quality of different Year Books depending on the identity of the authors, with more reliable authors holding greater weight than their competitors. Some reporters were of such poor quality that lawyers were forbidden from citing them in certain courts.[79] Often the assessment of a reporter's supposed quality was determined on whether the reporter agreed with the decision the judge sought to render.[80] Moreover, many Year Books contained cases that were translated into English from the archaic French and Latin that had been used for centuries in the common law courts, raising questions about the accuracy of the translations.[81] To the extent that they were invoked as authority, like the use of precedent generally, the reports in the Year Books focused primarily on issues of procedure rather than substance.[82] Although the Year Books were perhaps better than nothing, they certainly did not provide a sound technological basis for a system that relied on the full and accurate presentation of case results and judicial reasoning, such as a system based on strict *stare decisis*.[83]

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[75] *Id.* at 348. Plucknett's colorful description captures the essential flavor of these reports:

> A large amount of the material which [the Year Books] contain is hardly strictly necessary for professional purposes. Long and rambling conversations are reported at great length. A large amount of irrelevant material is carefully recorded. There seems to be a definite interest in the personalities of judges and serjeants. . . . One cannot avoid the feeling that the anonymous authors of these Year Books took a great delight in the work of compiling them, whatever the technical object was which they had in view.

Id. at 269.

[76] *See* John Maxcy Zane, *The Five Ages of the Bench and Bar of England*, *in* 1 SELECT ESSAYS, *supra* note 44, at 625, 650. Reporters were especially attracted to witty put-downs, bungled pleas, and other entertaining items. *See* 2 HOLDSWORTH, *supra* note 64, at 551.

[77] 5 HOLDSWORTH, *supra* note 64, at 370.

[78] Zane, *supra* note 76, at 650; 2 HOLDSWORTH, *supra* note 64, at 551.

[79] *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEG. HIST. 28, 32 (1959).

[80] *See* Holdsworth, *supra* note 69, at 155. Indeed, there is an entire secondary literature concerned solely with identifying the quality and traditional reputations of various reporters. *See, e.g.*, JOHN W. WALLACE, THE REPORTERS (4th ed. 1882); Veeder, *supra* note 73, at 123.

[81] *See* 5 HOLDSWORTH, *supra* note 64, at 368. French and Latin were the traditional language of the English courts. During the Commonwealth period, however, English was made the official language of the court. Thus, editors were required to translate all of the older reports into English, a task completed with irregular success. *See* Veeder, *supra* note 73, at 127.

[82] *See* PLUCKNETT, *supra* note 47, at 268–70.

[83] *See* POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 277 (A.K.R.

The first credible set of reports was provided by Plowden in the mid-sixteenth century, but it was not until the publication of Coke's Reports that a comprehensive collection of case reports that could be cited as precedent first appeared.[84] Even then, it was clear that Coke used the term "precedent" loosely rather than as binding authority, as evidenced by his willingness to freely distort the opinions in earlier cases through selective quotations and omissions.[85] Plucknett observes of Coke, "[a] case in Coke's *Reports*, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history. The whole is dominated by Coke's personality, and derives its authority from him."[86] Despite Coke's limitations, his *Reports* were substantially better than those that followed in subsequent centuries.[87]

It was not until 1673 that English courts first distinguished between precedent and dictum, a necessary predicate for treating cases as authoritative statements of the law.[88] Prior to that time, judges rarely compared in detail the facts of the cases that came before them with the facts of earlier analogous cases. The distinction between holdings and dictum could not be established until the development of fuller and more accurate case reports that accurately related the facts of the case and the holdings therein. The development of greater reliance on cases as sources of law arose from a combination of three elements.[89] First, the invention of the printing press enabled the reproduction and distribution of uniform copies of cases; in fact, sets of yearbooks were among the first printing projects in England.[90]

Kiralfy ed., 4th ed. 1962) [hereinafter POTTER'S] ("The form of the manuscript Year Book and the lack of uniformity due to the absence of printed books prevented the citation of cases in the modern way.").

[84] Berman, *supra* note 55, at 1733; Veeder, *supra* note 73, at 128.

[85] Berman & Reid, *supra* note 42, at 447 ("Coke often distorted the older cases, culling from them the language that supported his own views; he would reach out for anything said by a judge in an earlier case if it seemed to him to reflect a true legal principle."); Veeder, *supra* note 73, at 132 ("In connection with his habit of editing the conclusions of the court in accordance with his own views of the law, it may be added that Coke is not always accurate.").

[86] *See* PLUCKNETT, *supra* note 47, at 281. Plucknett further observes of Coke, "In his hands a law report takes the form of a somewhat rambling disquisition upon the case in question. He frequently gives the pleadings, but less often does he tell us the arguments. As for the decision, it is often impossible to distinguish the remarks of the judge (where it was not Coke himself) from the comments of the reporter. There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question." *Id.* Coke provided his own subjective account of the cases and sometimes was the judge or lawyer in the cases he reported. *See* COQUILETTE, *supra* note 66, at 314.

[87] *See* PLUCKNETT, *supra* note 47, at 281 ("The reporters who succeeded Coke are much lesser men.... Their reports are frequently short and inaccurate, and sometimes unintelligible. Matters are not helped by the fact that one case is commonly reported by three or four reporters, for they are often equally bad.").

[88] Berman, *supra* note 55, at 1732.

[89] *See* COQUILETTE, *supra* note 66, at 273–74.

[90] *Id.* at 273.

Second, this enabled a contemporaneous jurisprudential development that allowed cases to be used as authority for a judicial decision rather than for educational purposes.[91] Finally, this led to an attempt to construct a body of substantive law out of these cases, rather than merely a body of pleadings.[92] Despite earlier efforts, however, not until the publication of Burrow's Report in the mid-eighteenth century was there anything approaching an official set of regular reports of judicial decisions of particular courts.[93]

It was thus not until the seventeenth and eighteenth centuries that the "doctrine" of precedent even began to take on some coherence, although this respect for precedent fell far short of *stare decisis*. During this period, Matthew Hale observed that the decisions of courts "do not make a Law properly so-called," meaning that the decision of a court does not bind subsequent parties or judges.[94] Hale observes, however, that these decisions:

> Have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of the Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former times, and though such Decisions are less than a Law, yet they are a greater evidence thereof than the Opinion of any private Persons, as such, whatsoever.[95]

Cases themselves did not make law but illustrated the principles of the law.[96] But Hale emphasized the existence of a series of consistent decisions in analogous cases over time as providing strong evidence of the existence and validity of a rule. Even a settled pattern of cases was still thought susceptible to reconsideration in the light of reason. Hale still stopped well short of the belief that a mere single case could serve as binding precedent on all later cases, as *stare decisis* requires.

It was only in the nineteenth century, therefore, that precedent began to harden into the concept of *stare decisis*, in which the decision of merely one court is interpreted as binding authority on later courts.[97] Blackstone, for instance, contended that it was the obligation of judges to abide by prior precedents.[98] Despite this admonition, common law judges throughout the eighteenth century frequently second-guessed earlier cases and often re-

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[91] *Id.* at 274.

[92] *Id.*

[93] 5 HOLDSWORTH, *supra* note 64, at 373 (Burrow's reports); PLUCKNETT, *supra* note 47, at 281.

[94] Berman & Reid, *supra* note 42, at 448 (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 68 (1713)).

[95] *Id.*

[96] *See* Holdsworth, *supra* note 69, at 158; *see also id.* at 158 n.4 ("The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases." (quoting *R. v. Bembridge* (1783))).

[97] *See* BRUNO LEONI, FREEDOM AND THE LAW 180 (3d ed. 1991) (distinguishing the concept of "precedent" serving as the generally accepted principle of community from "*binding* precedent in the common-law systems of the Anglo-Saxon countries at the present time").

[98] ALLEN, *supra* note 59, at 147.

fused to follow precedents that they thought unsound.[99] As Allen observes, "To sum up the position at the end of the eighteenth century: the application of precedent was powerful and constant, but no Judge would have been found to admit that he was 'absolutely bound' by any decision of any tribunal."[100] It is thus not until the nineteenth century that the modern version of *stare decisis*—the notion that judges are absolutely bound by prior decisions—took hold.[101]

For the first several centuries of the common law, therefore, single cases standing alone did not make law. Judges generally adhered to the "declaratory theory" of law: that law was "discovered" by judges, rather than "made."[102] A *pattern* of several cases decided in agreement with one another, by contrast, gave rise to a powerful presumption of the correctness of the legal principle. The agreement of several judges in several cases constituted a judicial custom that attested to the wisdom of the rule and its utility in vindicating parties' expectations. As Plucknett stresses, "An important point to remember is that one case constitutes a precedent; several cases serve as evidence of a custom. . . . It is the custom which governs the decision, not the case or cases cited as proof of the custom."[103] He adds, "A single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive."[104] As a result, courts felt free to reject precedents where they believed the case to be wrongly decided.[105] Today, by contrast, a judge is generally believed to be bound by prior cases even when convinced that the prior case was wrongly decided or would work injustice.

2. Precedent in the American Common Law.—A similar view of precedent prevailed in the United States in the eighteenth and nineteenth centuries.[106] As Professor Caleb Nelson has observed, American lawyers rejected the notion that individual cases themselves constituted the law. They, like English lawyers, believed that the substantive common law rested on principles outside of the regime of *stare decisis*.[107] Given this, it

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[99] *Id.*

[100] *Id.* at 150.

[101] *Id.*; *see also* POTTER'S, *supra* note 83, at 277.

[102] *See* Hart v. Massanari, 266 F.3d 1155, 1165 (9th Cir. 2001); 1 F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER (1973); LEONI, *supra* note 97, at 80–85.

[103] PLUCKNETT, *supra* note 47, at 347.

[104] *Id.*; *see also* POTTER'S, *supra* note 83, at 275 ("A bad case could be dismissed as misconceived, but a series of cases in the same sense in all courts would be difficult not to follow.").

[105] PLUCKNETT, *supra* note 47, at 347.

[106] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 21-46 (2001); Thomas R. Lee, *Stare Decisis In Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999). Stare decisis may have taken hold in England later than in America. *See* Kempin, *supra* note 79, at 51.

[107] Nelson, *supra* note 106, at 23–24. Nelson describes these as the "external" sources of the law, contrasting them with the "internal" source of precedent. *Id.*

was thought to be illogical to rely on a system of strict *stare decisis* to settle the substantive rules of law. Like the English system, substantive rules were distinguished from procedural practice. Procedural rules rested purely on the need for consistent and predictable practices, rather than on the notion that one procedural rule might be thought "better" than another. Substantive rules, however, required greater reflection and study, rather than slavish adherence to prior decisions. This distinction was reflected in the ready adoption of strict *stare decisis* for procedural rules and a much later acceptance of the doctrine for substantive rules—an evolution that mirrored those in the English common law.[108] Indeed, as Nelson observes, one dictionary definition of the term "precedent" in the eighteenth century was "a form of pleading that courts had found acceptable in the past."[109]

Eighteenth century Americans rejected the idea that particular cases were themselves the law. Rather, like their English contemporaries, Americans saw particular cases as merely evidence of—or reflections of—underlying legal principles.[110] This may be best illustrated in the terms of so-called "reception" laws enacted by the states shortly after independence. Through these state constitutional and legislative rules, the states provided that rules of the English common law remained in place in the new states.[111] Commentators of the time announced, however, that the acceptance of the English common law did not necessarily require acceptance of the entire body of English *cases*. Thus, the states could feel free to reconsider English judicial decisions to the extent that they were thought inappropriate for the American situation.[112] Virginia Chancellor Creed Taylor observed in this vein, "It was the common law we adopted, and not English decisions."[113] Moreover, the need for a critical review of prior cases was not limited to English decisions but applied with equal force to cases decided after Independence by American courts.[114]

Moreover, the case reports in early America were at least as imprecise as in England, if not worse. Although England could at least reasonably rely on the reports of Coke, Plowden, and Burrow during the seventeenth and eighteenth centuries, Americans had few reliable reports until the nineteenth century.[115] Although some colonial lawyers published private notes

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[108] *See supra* notes 58–62 and accompanying text.

[109] Nelson, *supra* note 106, at 32; *see also id.* at 32 n.115.

[110] *See* Nelson, *supra* note 106, at 25–27; Lee, *supra* note 106, at 660.

[111] *See* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 469 n.249 (1999) (describing reception laws).

[112] *See* Nelson, *supra* note 106, at 28; Kempin, *supra* note 79, at 38–42.

[113] Quoted in Nelson, *supra* note 106, at 27.

[114] *See id.* at 29.

[115] *See* Kempin, *supra* note 79, at 34. There were exceptions for some periods and places, such as Dallas's reports of the Pennsylvania courts and U.S. Supreme Court, but high-quality reporters were rare. I would like to thank Caleb Nelson for pointing out these exceptions.

on cases in their jurisdictions, these volumes focused on the arguments of counsel rather than the court's ruling.[116] Judges often paid little heed to the cases found in private case collections.[117] Like the Year Books, therefore, these reports could not provide a basis for a system of *stare decisis* that relied upon coherent and accurate case reports. Officially published reporters that focused on judicial opinions began to appear in the early nineteenth century but did not become almost universal until the end of the nineteenth century.[118]

As in England, prior cases were all treated as persuasive authority rather than binding authority. It was the sound reasoning of the prior case that demanded respect, not the mere existence of the case. Thus, even in the United States, the decision of a great English common law judge such as Lord Mansfield commanded greater respect than that of a mediocre American judge.[119] But judges showed special deference to a long line of decisions that had all independently reached the same conclusion.[120] The concurrence of many judges through time attested to the wisdom and consensus of a rule, much as social traditions generated through decentralized processes over long periods of time testify to the wisdom and consensus of those practices.[121] Later judges might be reluctant to question this consensus, not because they were compelled to follow the earlier judgments, but because this contrary consensus carried within it great persuasive force. As Professor Nelson observes, however:

> [T]his phenomenon is not quite the same thing as a presumption against overruling erroneous precedents. The influence of a series of decisions did not rest on the notion that judges should presumptively adhere to past decisions even when convinced of their error, but rather on the notion that judges should be exceedingly hesitant to find error where a series of their predecessors had all agreed.[122]

But note that it was only because judges could in fact challenge earlier decisions that they thought incorrect that later judges could draw the inference that consensus agreement among prior judges testified to the soundness of the rule.[123] If the rule was unsound, prior judges could have overruled it. By contrast, in a regime of strict *stare decisis*, it is far more difficult to draw strong inferences about the quality of legal rules solely from the agreement of a series of judges in the rule. After all, latter cases in

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[116] *See id.* at 34–35.

[117] *See id.* at 38.

[118] *See id.* at 35–36; *see also* Hart v. Massanari, 266 F.3d 1155, 1169 (9th Cir. 2001) (noting rise of official reporters in America).

[119] Nelson, *supra* note 106, at 34; Kempin, *supra* note 79, at 38.

[120] Nelson, *supra* note 106, at 34.

[121] *See* Pritchard & Zywicki, *supra* note 111, at 489-93.

[122] Nelson, *supra* note 106, at 35.

[123] *See* Pritchard & Zywicki, *supra* note 111, at 490-93; *see also* Nelson, *supra* note 106, at 36.

the series may merely be the path-dependent result of earlier erroneous decisions, rather than quality decisions in and of themselves.

3. Implications of Weak Precedent for Common Law Efficiency.—Through most of the history of Anglo-American common law, therefore, precedent was flexible and based on the congruence of legal decisions with expectations, reason, and judgment. The convergence of several independently acting judges on similar conclusions attested to the wisdom and consensus support for the rule, rather than the authority of the rule.[124] Precedent was thus more a tradition composed of the decisions of many independent judges acting over time, rather than the sovereign statement of a "law-making" judge.[125] The notion of *stare decisis* as binding precedent was an outgrowth of Benthamite and Hobbesian legal positivism and the belief that law must issue as a sovereign command from the pen of known judicial authors, rather than from the result of a process of spontaneous order.[126] By contrast, the traditional common law judge was not "bound to any past articulation of that law, never absolutely bound to follow a previous decision, and always free to test it against his tradition-shaped judgment of its reasonableness."[127] It was not until the late-eighteenth century, under the influence of Benthamite positivism and technological innovations that made printing and distribution of case reports feasible, that strict *stare decisis* came to supplant weaker forms of judicial precedent.[128]

This historical background is essential to understand the traditional immunity of the common law to efficiency-distorting, rent-seeking influences. Prior to the acceptance of the hard doctrine of *stare decisis*, obtaining a favorable judgment by a party in a given case was of minimal value to that party. Because the decision in that case did not authoritatively bind subsequent courts, each precedent provided minimal long-term value to the

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[124] *See* Pritchard & Zywicki, *supra* note 111, at 491; *see also* Donald Lutz, *Political Participation in Eighteenth Century America*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 19, 34 (Paul Finkelmaen & Stephen E. Gottlieb eds., 1991); J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, *in* J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAY ON POLITICAL THOUGHT AND HISTORY 202, 213 (1971).

[125] *See* Pritchard & Zywicki, *supra* note 111, at 491; Berman & Reid, *supra* note 42, at 449 (referring to "the traditionary concept of precedent" and distinguishing it from "the strict doctrine of stare decisis that first emerged in the latter nineteenth century").

[126] *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 213 (1986); *see also* Berman & Reid, *supra* note 42, at 514 (characterizing the strict doctrine of precedent as "essentially a positivist theory, more congenial to the codification movement but grafted onto the doctrine of precedent"). Writing in 1930 Carlton Kemp Allen expressed dismay that his contemporary judges had become to regard "mere decisions *in themselves* as settling disputed point, and of forgetting the fundamental principle which governs the whole employment of precedent." ALLEN, *supra* note 59, at 157. *See also* Nelson, *supra* note 106, at 38 (noting influence of Bentham on American move toward stricter stare decisis).

[127] ALLEN, *supra* note 59, at 194–95.

[128] In fact, stricter *stare decisis* was adopted in the late-Nineteenth Century in part as a mechanism to constrain judicial discretion and judicial law-making. *See* Nelson, *supra* note 106, at 48.

parties in the case. This was true even with respect to repeat players and institutional parties who *would* indeed have had such an interest if a doctrine of *stare decisis*, in fact, existed. Moreover, the flexibility of reliance on precedent opened the system to self-correction, so that wrongheaded or inefficient decisions could be reversed at low cost by subsequent courts.

Where there is no *stare decisis*, there is no incentive to engage in rent-seeking litigation because there is no single authority empowered to "make" law.[129] Any rent-seeking legal doctrine can be upset by a subsequent judge who recognizes that the rent-seeking doctrine is inconsistent with reason and community consensus and expectations. Capturing a favorable precedent in a *stare decisis* system increases the value of the flow of wealth generated by that precedent. In fact, the presence of *stare decisis* provides incentives to interest groups to try to manipulate the path of cases that come before courts so as to try to influence which cases are heard first and which ones will, thereby, create *stare decisis*-setting precedents.[130] The absence of binding precedent in the form of *stare decisis* reduces the flow of wealth that can be generated from any given case, thereby eliminating the unequal incentives that often exist for one party or the other to invest heavily in altering the evolution of the law. The incentive to invest resources in rent-seeking is a function of the rules of precedent. As precedent becomes more binding through greater deference by later courts to the decisions of earlier courts, this will increase the incentives to invest resources in order to secure a favorable precedent.

Moreover, the absence of binding *stare decisis* limits agency costs by judges. Because subsequent judges retain the power to reconsider earlier decisions, outlier judges have a limited ability to refashion the law according to their policy preferences. Instead, the law will come to reflect the considered and independent judgment of *many* judges rather than one or a small group of judges seeking to change the direction of the law.

This is not to say that, in the end, a legal regime with weak precedent is more efficient than one with strict *stare decisis*.[131] Although strict adherence to *stare decisis* increases the incentives and opportunities for rent-seeking, there may be countervailing benefits that outweigh these costs. It has been argued that *stare decisis* will tend to increase economic efficiency

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[129] *See* LEONI, *supra* note 97, at 83 ("[Law is] something to be described or to be discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all . . . citizens. Nobody enacted that law; nobody could change it by any exercise of his personal will.").

[130] *See* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION-MAKING (2000); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1329–50 (1995); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817–21 (1982).

[131] An excellent discussion of the costs and benefits of a regime of weak precedent rather than strict precedent is presented in Nelson, *supra* note 106, at 54–73.

by increasing the predictability of legal rules.[132] *Stare decisis* also eliminates the need to relitigate issues repeatedly, which conserves time and judicial resources by narrowing the issues in litigation and relieving judges of the need to repeatedly decide settled legal issues. If subsequent judges feel bound by precedent, the *stare decisis* can potentially reduce agency costs. The decision between a regime of *stare decisis* and a weaker adherence to precedent, therefore, is a comparative one. Previous scholars have ignored the rent-seeking incentives created by strict adherence to precedent. Alternatively, this analysis may require revisiting the purpose of *stare decisis*, and, in particular, reexamining the distinction between vertical *stare decisis* in a hierarchical court system and horizontal *stare decisis* in equal courts through time or with coequal jurisdictions. For instance, it may be that vertical *stare decisis* is necessary to create predictability; nonetheless, one might still argue for attenuated use of *stare decisis* through time or for decisions made by coequal courts.[133]

Once the full costs of *stare decisis* (including rent-seeking costs) are recognized, it may be that a different conception of precedent provides a better balance of these offsetting costs and benefits than does *stare decisis*. F.A. Hayek, for instance, argues that precedent should adhere to the more abstract *concepts and principles* that emerge from the accumulation of cases under the common law, rather than by adhering mechanically to the narrow *holdings* in particular cases as binding precedent.[134]

In addition, it may be that different contexts call for different rules of precedent, depending on how these offsetting factors balance out. For instance, where there appears to be unusually high incentives to engage in strategic litigation, the costs of strict *stare decisis* are higher, and thus a less rigid rule of precedent may be appropriate. This may explain, for instance, why the Supreme Court applies a more flexible rule of precedent to prior decisions on constitutional issues than on other issues.[135] Because of the

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[132] *See* Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986).

[133] For instance, as will be discussed below, the shared jurisdictions of state and federal courts to make common law under the *Swift v. Tyson* regime might suggest that neither court be formally bound by the decisions of the other. By contrast, under *Erie R.R. v. Tompkins*, federal courts are bound by the decisions of state courts. *See infra* notes 327–362.

[134] *See* 1 HAYEK, *supra* note 102. Allen similarly appeals to the principles and concepts of the common law as being of preeminence, not individual case holdings. ALLEN, *supra* note 59, at 175. This appears to have been the traditional belief of the common law as well. *See* Kempin, *supra* note 79, at 39. Kempin quotes from *Hammond v. Ridgely's Lessee*:

> I cannot perceive why on any principle either of law or policy, an opinion of any court should be deemed of binding authority when the foundation of that opinion is taken away. It is the principle that should govern, the substance and not the shadow. Sound policy does indeed require, that principles laid down, and acted upon by courts of last resort, should not be lightly shaken, as it is to established principles, and not to isolated opinions, that parties look in making their contracts.

Id.

[135] *See* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53.

heightened durability and incentives for special-interest litigation regarding constitutional issues, there is a particular concern about parties investing resources to secure favorable precedents in this context, and thus it may be appropriate to apply a less rigid rule of precedent in this setting. A less-rigid adherence to precedent may also be appropriate in situations where the predictability per se of particular rules is not as important; thus the benefits of *stare decisis* may be smaller relative to the costs in terms of incentives to expend resources on strategic litigation.

In weighing the costs and benefits of *stare decisis*, therefore, it is essential to remember that increased rent-seeking will be an inherent part of *every* system that includes *stare decisis*. Because *stare decisis* allows one holding to control the outcome of cases in the future, it will have a capital value to repeat players who will be encouraged to invest resources to alter the future development of the law. Thus, one benefit of *stare decisis* is that it conserves time and judicial resources in subsequent cases because, once decided, an issue does not have to be relitigated repeatedly. But this benefit comes at a cost. The more durable the precedent, the more parties will invest in the *original* case to try to win a favorable precedent. The greater, therefore, will be the incentive to try to manipulate the path of precedent. Thus, the subsequent costs saved by not having to relitigate the issue will be at least partially, and perhaps fully, offset by the higher stakes in the precedent-creating case and the larger investments that parties will be willing to make to secure a favorable precedent. These costs are inherent and cannot be eliminated because so long as there are benefits to be gained by strategic litigation, private parties will be willing to invest resources to try to capture those gains. The proper comparison for purposes of determining whether *stare decisis* is still, in the end, an efficient doctrine must include these inherent rent-seeking costs in the equation.[136]

B. A Competitive Legal Order

A second important institutional feature that historically influenced the common law's evolution was the competitive, or "polycentric," legal order in which the common law developed. During the era that the common law developed, there were multiple English courts with overlapping jurisdictions over most of the issues that comprise common law.[137] As a result, par-

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[136] Many notable scholars have offered economic analyses of stare decisis, but none have previously considered these rent-seeking aspects of stare decisis as a cost of the doctrine. *See, e.g.*, Erin O'Hara, *Social Constraint or Implicit Collusion? Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993); Lewis Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

[137] It should be stressed that even though the analysis here will focus on the English experience, especially with respect to the common law, competitive legal order was not unique to England. Indeed, a competitive legal system was even more developed in continental Europe and persisted longer than in England. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL

ties potentially could bring a particular lawsuit in a variety of different courts. In turn, this created competition among these various courts for business. Moreover, there was no clear hierarchy of appellate courts. It further appears that, in general, this competition was conducted on the basis of which court provided the speediest and highest quality judicial system. Some have argued that this should have spawned pro-plaintiff, rather than efficiency-enhancing, legal rules; but, as will be discussed below, this inter-jurisdictional competition was constrained by certain forces that limited the ability of courts to compete for business by providing pro-plaintiff rules.[138] At the same time, this competitive process limited the ability of courts and special interest litigants to use the courts as a mechanism for wealth transfers. America benefited from a similar institutional regime under the doctrine of *Swift v. Tyson*,[139] which established jurisdictional competition in America during the nineteenth century, thereby limiting rent-seeking litigation and encouraging the development of efficient law.

1. Competition Among Courts in England.

a. Multiple overlapping jurisdictions.—The common law is generally thought of as purely the law that was created by the King's Bench, primarily in nineteenth-century England. But the King's Bench was just one of several legal systems that existed and thrived through the formative period of the common law's evolution. The common law that emerged in the nineteenth century resulted not just from the decisionmaking of wise judges of the King's Bench, but was rather the result of a long period of competition and collaboration between that court and numerous other courts with jurisdiction to resolve disputes.[140] Legal historian Arthur Hogue cautions, "We should remember that the law enforced in royal courts, and common to all the realm of England, was in competition with concurrent rules enforced in other courts."[141] As the common law courts eventually ab-

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TRADITION (1983); *see also* Tom Bell, *Polycentric Law*, 7 HUMANE STUD. REV. 1 (1991), *available at* http://www.theihs.org/libertyguide/hsr/hsr.php/12.html. The focus on England in the current analysis is simply because of the Article's focus on the efficiency of the common law in England and America, but a similar dynamic applied in continental Europe as well.

[138] *See* discussion *infra* at notes 300–313 and accompanying text.

[139] 41 U.S. 1 (1842).

[140] Much of the common law was already developed by the thirteenth century. *See* Charles Rowley, *The Common Law in Public Choice Perspective: A Theoretical and Institutional Critique*, 12 HAMLINE L. REV. 355, 371 (1989); BAKER, *supra* note 61, at 9. Baker writes:

> The common law was not all invented in a day, or a year, but arose out a long process of jurisdictional transfer in which many old customs were abandoned but many more were preserved. To appreciate how the ancient customs of England were accommodated to the unifying innovations of the Normans and Angevines, regard must be had not merely to the views of the great men in the king's court at Westminster, but also to what was happening from day to day in the shires, hundreds and boroughs throughout the land.

Id.

[141] HOGUE, *supra* note 45, at 5.

sorbed these rival courts, "the common law . . . absorbed much, if not all, of the judicial business of its competitors and may have borrowed heavily from them in the process of aggrandizement."[142]

As an initial matter, ecclesiastical courts declared themselves independent from secular authorities with respect to all issues under their scope, claiming exclusive jurisdiction over issues of family law and inheritance and concurrent jurisdiction over many other issues, including contract law.[143] In turn, "[s]ecular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law, and mercantile law."[144] Within the royal court system alone there were seven types of courts: (1) General Eyres, (2) Common Please, (3) King's Bench, (4) Exchequr, (5) Commissions of Assize, (6) *Oyer* and *Terminer*, and (7) Gaol Delivery.[145] There were many courts, national and local, royal and ecclesiastical, public and private. Although each was formally defined by a particular jurisdiction, their jurisdictional reach often overlapped and even where they did not, the limits were often evaded through the use of fictions designed to circumvent these formal limits.[146]

During the crucial centuries of the evolution of English law, judicial salaries in all courts were paid in large part from the fees paid by litigants, which provided judges with incentives to maximize the number of cases heard and to expand the jurisdictional reach of their court. Holdsworth observes that even though common law judges began earning state-sponsored salaries as early as 1268, these "were by no means regularly paid."[147] The salaries were often years in arrears and remained irregular until the mid-seventeenth century.[148] Through the Middle Ages, therefore, the right to earn income from fees was "the most valuable" and constituted "a considerable sum."[149] In fact, in 1826, when common law judges were denied the right to earn income from fees, their salaries were more than doubled, apparently to compensate for the loss.[150] Many of the chief rivals of the common law courts, such as the law merchant courts, were wholly private institutions that received no government subsidy and thus were even more reliant on litigant fees than were the common law courts. As a result, judges had an incentive to compete for business and to draw cases to their courts.[151]

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[142] *Id.*

[143] BERMAN, *supra* note 137, at 10; *see also* COQUILETTE, *supra* note 66, at 183 (noting that Church courts were the most important alternative to royal common law courts).

[144] BERMAN, *supra* note 137, at 10.

[145] HOGUE, *supra* note 45, at 189.

[146] *See infra* notes 154–157 (discussing use of fictions to evade jurisdictional limits).

[147] 1 HOLDSWORTH, *supra* note 64, at 252.

[148] *Id.* at 252.

[149] *Id.* at 254.

[150] *Id.* at 255.

[151] Hudson observes that despite the large number of courts with overlapping jurisdictions "[t]here is little sign of a confusion of courts in Anglo-Norman England" and that "[t]he lack of rigid jurisdic-

Many courts had overlapping jurisdictions with one another. In some instances this concurrent jurisdiction was express. But more commonly, this shared jurisdiction arose in defiance of official jurisdictional limits. Courts ferociously sought to expand their own jurisdictions while protecting themselves from the encroachments of others. The King's Bench, the Exchequer, and the Court of Common Pleas heard many of the same cases and were consistently locked in heated conflicts over allegations that one of these courts was exceeding its jurisdictional limits and invading on the proper jurisdiction of a rival.[152] Although they supposedly had independent jurisdictions, through the use of legal fictions and other mechanisms, by 1700, the three could be said to have acquired comparable jurisdictions over most legal claims.[153] Technically, each of the courts was limited in its jurisdictional reach. But these limitations were difficult to define and easily evaded, such as by the use of procedural fictions designed to camouflage actions in order to shoehorn them into particular courts.[154] For instance, church courts held exclusive jurisdiction over matters of testamentary succession and marriages, but it could often be difficult to determine whether particular situations fell under the church's jurisdiction or that of some other court.[155] The use of fictions allowed courts to reclassify the form of

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tional rules need not have been a disadvantage for disputants." *See* HUDSON, *supra* note 44, at 51. "At the same time," he adds, "court-holders may have competed to settle disputes, since doing so could increase their authority and bring profit." *Id.* at 26. *See also* BRUCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 443 (2d ed. 1980); BAKER, *supra* note 61, at 31; William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 235 (1979).

[152] *See* PLUCKNETT, *supra* note 47, at 210 (observing that the "competition between the King's Bench, Common Pleas and Exchequer . . . resulted in these three courts having coordinate jurisdiction in many common classes of cases"); BAKER, *supra* note 61, at 36 ("[B]efore 1700 the three major courts had acquired comparable jurisdiction over common pleas."); *id.* (noting that although each court had some limited exclusive jurisdiction, "the bulk of ordinary business was shared between the three courts"). Indeed, as noted above, these conflicts over jurisdiction were the primary issues recorded in early published opinions, rather than the substantive results generated in those cases. Only cases involving freehold of land were required to come before the King's courts in the twelfth and thirteenth centuries. *See* Rowley, *supra* note 140, at 371.

[153] *See* BAKER, *supra* note 61, at 46.

[154] *See* HUDSON, *supra* note 44, at 26 ("There were not strict rules of jurisdiction determining the court to which every dispute must come."). As noted above, a stricter doctrine of precedent emerged first in this area to police jurisdictional lines among these rival courts. *See* discussion *supra* notes 59–61 and accompanying text. As Professor Hirsch has observed, the use of fictions to provide legal flexibility is also important with respect to *vertical* stare decisis. Fictions, or "contraptions," provide lower courts with wiggle room to escape the reach of troublesome precedents imposed by superior courts. *See* Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527 (2000).

[155] *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 23–24 (2d ed. 1981). Milsom writes:

> [M]any difficulties arose. Testamentary jurisdiction was clearly for the church; but was the church's nominee or some other to represent the dead man in the lay courts if he died owing or being owed an enforceable debt? Questions about the fact and validity of marriage were clearly for the church, and therefore questions of legitimacy; but were its determinations to bind the lay courts in deciding upon inheritance? . . . How could the frontier be defined?

Id.

pleading in a case, thereby claiming jurisdiction over cases that the court would otherwise lack authority to hear. For instance, the Court of Exchequer had jurisdiction over debts owed to the King, but not debts between two private parties. Nonetheless, it was said that if a creditor owed the King (such as for taxes), then the failure of a debtor to repay a debt imperiled the ability of the creditor to pay the King. As a result, it was said that the Exchequer could hear the dispute between the debtor and creditor.[156] This was a relatively simple fiction, however; the number and complexity of fictions multiplied so as to evade formal jurisdictional limitations.[157] Even the Magna Carta itself arose in large part as a protest by the lords against the King's efforts to infringe upon the jurisdiction of the lords' courts in order to capture those cases for political and financial reasons.[158] In fact, the phrase "*lex terrae*" in Magna Carta arguably referred not only to the common law, but to all of the other jurisdictions in the kingdom, "including ecclesiastical law, admiralty law, martial law, the law of nations, the law merchant, natural law, and . . . 'the law of the state.'"[159]

This created a system of competition among the courts for filings, leading courts to compete to provide the most unbiased, accurate, reasonable, and prompt resolution of disputes.[160] Litigants could "vote with their feet," patronizing those courts that provided the most effective justice. This meant that judges had to respond to their customers, the individuals who actually used the courts, rather than powerful special interests trying to impose rent-seeking rules involuntarily on passive citizens. This competitive process also led courts to recognize the legal innovations of their rivals, generating flexibility and high-quality justice. As Plucknett observes, even though the various courts were rivals, they "were, in fact, on intimate terms. It did not matter so much that they were usually terms of rivalry," he continues, "for even then they kept close watch upon developments in other institutions, and competed in providing the best remedy."[161]

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[156] For instance, *Hadley v. Baxendale*, a chestnut of first-year Contracts courses dealing with the recoverability of consequential damages for breach of contract, was decided by the Exchequer Court. 9 Ex. 341, 156 Eng. Rep. 145 (1845).

[157] *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968) (describing many of the fictions used by courts to assert jurisdiction over disputes); *see also* MILSOM, *supra note* 155, at 61–63 (describing some of the fictions used to allow courts to assert jurisdiction over disputes); PLUCKNETT, *supra* note 47, at 644 (describing development of doctrine of *indebitatus assumpsit* as attempt by King's Bench to infringe on the exclusive jurisdiction of Common Pleas over actions in Debt).

[158] *See* HUDSON, *supra* note 44, at 225.

[159] MARY ELIZABETH BASILE ET AL., *LEX MERCATORIA* AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE 139 (1998) (quoting Sir Francis Ashley).

[160] Some have argued that this competition should have produced a tendency toward pro-plaintiff legal rules in order to induce plaintiffs to choose one court over another. Why this did not occur is discussed *infra* at notes 300–326 and accompanying text.

[161] PLUCKNETT, *supra* note 47, at 650.

In addition, this competitive process also contributed to the intellectual development of the law. Because of the slipperiness of jurisdictional labels, judges and litigants were required to look beyond mechanical jurisdictional labels to understand the substance of the underlying claims in order to determine whether jurisdiction was appropriate. Because these jurisdictional assaults and defenses took the form of fictions, this required additional skill and understanding to pierce the superficial categorization of a claim to understand the conceptual structure of the underlying action. This need to look beyond form to the underlying substance of the action made the law more coherent and intellectually sound. Moreover, because court systems were constantly borrowing ideas from one another, the development of the law was encouraged. Because the category labels differed from one court to another, in order to adopt a rival's innovation it was necessary to dig below the form to the underlying substance of the claim. To transfer concepts from one court to another thus required courts to abstract away from the forms of pleadings that were unique to each court to coherent conceptual categories that could be transferred from one court to another. Thus, interjurisdictional competition forced courts to abstract away from particular cases to higher conceptual categories and provided a powerful impetus for the improvement and rationalization of the law.[162]

As a result of this proliferation of courts with overlapping jurisdictions, Harold Berman observes, "The same person might be subject to the ecclesiastical courts in one type of case, the king's courts in another, his lord's courts in a third, the manorial court in a fourth, a town court in a fifth, [and] a merchants' court in a sixth."[163] Hogue similarly observes:

> Save when a matter of freehold was at issue, Englishmen were not compelled to present their causes before the king's courts. Men were free to take their cases into the local courts of the counties, which administered local, customary law; men might seek justice from the church courts administering rules of canon law, which touched many matters, especially those related to wills and testaments, marriage and divorce, and contracts involving a pledge of faith; feudal barons might accept jurisdiction of a baronial overlord whose court applied rules of feudal custom; townsmen might bring their causes before the court of a borough, which would judge them by rules of the law merchant.[164]

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[162] *See id.* ("[S]ince development took the form of modifying the different forms of action, it was inevitable that there should be a good deal of overlapping, and consequently the boundaries between forms of action became obscure. Hence it was all the more easy to emphasize substance above form.").

[163] BERMAN, *supra* note 137, at 10. *See also* Rowley, *supra* note 140, at 371. Rowley notes that other than freehold cases, Englishmen:

> could take their cases to the county courts, which administered local, customary law, or into the church courts, which administered canon law; or into the borough courts which administered the law merchant; or, in the case of feudal barons, into the courts of a baronial overlord which would apply the rules of feudal custom.

Id.

[164] HOGUE, *supra* note 45, at 5.

Because of the competitive interaction of these different systems of law, Hogue adds, "All these courts and systems of law deserve mention in an account of the growth of the common law."[165]

Even if the common law is defined as the law of the royal courts, this law was shaped both by the internal dynamics of the various royal courts as well as their interaction with other courts outside the framework of the royal courts.[166] "This arrangement, seemingly impracticable to modern eyes, was a feature of English public life for five centuries."[167] In fact, as late as 1765, Blackstone observed in his *Commentaries* that multiple types of law still prevailed in England, including natural law, divine law, the law of nations, the English common law, local customary law, Roman law (governing Oxford and Cambridge Universities), ecclesiastical law, statutory law, and the law merchant.[168]

In short, a market for law prevailed, with numerous court systems competing for market share in order to increase their fees.[169] This competitive process generated rules that satisfied the demand of consumers (here, litigants) for fairness, consistency, and reasonableness. Although law and

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[165] *Id.*

[166] *See* BAKER, *supra* note 61, at 9. Baker notes:

> [I]n seeking the origins of the common law it is misleading to study solely the work of the royal judges. Sometimes the reason why a royal court would not allow an action or grant a remedy in a particular case was not that the matter was unknown to 'English law', but that the action pertained to some other jurisdiction or that the remedy was available elsewhere. . . . It is even more essential to understand the balance of jurisdictions when considering the evolution of the common law itself.

Id.

[167] *Id.* at 29. Along these lines, Harold Berman writes:

> For some four hundred years these secular legal systems co-existed alongside the canon law, and alongside each other, within every territory of Europe. With the national Protestant Revolutions of the sixteenth and seventeenth centuries, the various co-existing jurisdictions were, in effect, nationalized; nevertheless, the existence of plural jurisdictions and plural bodies of law within each country has remained a significant characteristic of the Western legal tradition at least until the latter party of the twentieth century.

Harold J. Berman, *The Western Legal Tradition in a Millenial Perspective: Past and Future*, 60 LA. L. REV. 739, 740 (2000).

[168] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 3–27 (1765) (reprinted 1966).

[169] *See* BERMAN, *supra* note 137, at 10 ("Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems."); *see also* LON L. FULLER, ANATOMY OF THE LAW 123 (1968) ("A possible . . . objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been more common than unitary systems."); S.F.C. Milsom, *Introduction*, *in* POLLOCK & MAITLAND, *supra* note 51, at xcv. Milson writes:

> Different and more or less conflicting systems of law, different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned.

Id.

economics scholars generally recognize the advantages of markets in ordering individual and social affairs, recent scholars have curiously overlooked this important historical element of the development of the common law's efficiency.[170] But the point was actually recognized by Adam Smith. Smith observed in the *Wealth of Nations*, "The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognizance of many suits which were not originally intended to fall under its jurisdiction."[171] Through the use of legal fictions, Smith noted, the courts could evade *de jure* limitations on their respective jurisdictions and thereby compete for the business of litigants. "In consequence of such fictions," Smith observed, "It came in many cases, to depend altogether upon the parties before what court they would chuse to have their cause tried; and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could."[172] Smith ascribed the positive evolution of English law to the competition between the various courts:

> The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure, formed by this emulation, which anciently took place between their respective judges; each judge endeavouring to give, in his own court, the speediest and most effectual remedy, which the law would admit, for every sort of injustice.[173]

In his *Lectures on Jurisprudence*, Smith observed, "Another thing which tended to support the liberty of the people and render the proceedings in the courts very exact, was the rivalship which arose betwixt them."[174] Smith also noted that requiring judges to compete for fees would cause them to work harder and more efficiently, thereby removing incentives for judges to shirk or to indulge their personal preferences.[175]

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[170] Exceptions are R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUDIES 397, 406–07 (1981); Goodman, *supra* note 43; and Rowley, *supra* note 140. The point is also noted in passing in Tom W. Bell, *The Common Law in Cyberspace*, 97 MICH. L. REV. 1746, 1768 (1999) and Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 910–11 (1992).

[171] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. V, ch. 1, pt. 22, at 241 (Edward Cannan ed., 1976).

[172] *Id.* at 241.

[173] *Id.* at 241–42.

[174] ADAM SMITH, *Report of 1762–63*, *in* LECTURES ON JURISPRUDENCE, *supra* note 47, at 280; *see also* ADAM SMITH, *Report dated 1766*, *in* LECTURES ON JURISPRUDENCE, *supra* note 47, at 423 ("During the improvement of the law of England there arose rivalships among the several courts.").

[175] ADAM SMITH, *Report of 1762–63*, *in* LECTURES ON JURISPRUDENCE, *supra* note 47, at 241 ("Public services are never better performed than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them."). Posner has postulated that because judges are insulated from market pressures they will tend to consume leisure and shirk on their obligations. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-15, 31 (1994). This concern about excess ju-

The presence of a market for law with several competing suppliers provides an important part of the explanation as to why the common law system tended to generate efficient rules. The King's Bench must be understood as just one actor within a system of several competing producers of law. The "common law," therefore, is the law that evolved from this competitive process, and the borrowing, winnowing, and evolutionary process that it generated. As with any market process, therefore, the end result of this process can be understood as a spontaneous order, created by the interactions of the many individuals who comprise the process rather than by a particular identifiable author.[176] Where there are numerous suppliers of a service and individuals can freely choose among them, this competition will limit the ability to use the court system as a mechanism for redistributing wealth. Where authorities lack the power to coerce parties into their jurisdiction and impose their will, it is difficult to enact inefficient rules because parties can exit the disfavored jurisdiction. Merchants, for instance, have long used the law merchant courts (today international commercial arbitration) to escape unwise and overreaching legal rules. The lesson of the historical record is that, under such conditions, the court system responded by providing decisions that reflected widespread consensus and efficiency, rather than the interests of a few well-organized special interests.

b. Effects of competition on legal development.—Moreover, many of the concepts and doctrines later associated with the common law had their genesis in other courts, such as the law merchant, chancery, or ecclesiastical courts. The development of contract law provides a case study of how competition among courts led to the development of efficiency-

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dicial consumption of leisure was not merely hypothetical. Apparently common law judges were notorious for shirking on their duties when they could get away with it. Burdick quotes the great English legal historian Sir John Fortescue's comments on the work habits of the common law judiciary:

> You are to know further, that the judges of England do not sit in the King's courts above three hours in the day, that is from eight in the morning till eleven. The courts are not open in the afternoon. The suitors of the court betake themselves to the *pervise*, and other places, to advise with the Sergeants at Law, and other their counsel, about their affairs. The judges when they have taken their refreshments spend the rest of the day in the study of the laws, reading the Holy Scriptures, and other innocent amusements at their pleasure. It seems rather a life of contemplation than of action.

Francis Marion Burdick, *Contributions of the Law Merchant to the Common Law*, *in* 3 SELECT ESSAYS, *supra* note 44, at 36. Sir Henry Spellman, by contrast, believed that the unwillingness of the common law judges to work in the afternoon was caused by less "innocent amusements":

> It is now to be considered why high courts of justice sit not in the afternoon . . . Our ancestors and other northern nations being more prone to distemper and excess of diet used the forenoon only, lest repletion should bring upon them drowsiness and oppression of spirits. To confess the truth our Saxons were immeasureably given to drunkenness.

Id. at 36 n.3. Spellman argued that this tendency toward drunkenness also explained the common law prohibition on providing jurors with meat, drink, fire, or candle light until they agreed upon their verdict. *Id. See also* Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 5 AM. L. & ECON. REV. (forthcoming 2003) (providing empirical test of judicial utility functions).

[176] *See* 1 HAYEK, *supra* note 102, at 94–123 (describing common law as "spontaneous order").

enhancing legal rules. For much of the history of the common law, Berman observes, contract law in the common law courts remained poorly developed and the system of pleading and proof remained highly formal. The common law courts were thus a stagnant, intellectual backwater for dealing with legal issues involving persons rather than land. Land law dominated English law, especially in the common law courts. "Compared with relationships concerning land," Milsom observes, "Other kinds of legal relationship, and in particular those which we talk about under the headings of contract and tort, were of little consequence."[177] Therefore, "If . . . we allow the age to speak for itself, it will not have so much to say about them. And if we mainly allow the records of the king's courts to speak for the age, we shall hear relatively even less."[178]

This "arrested development" of the common law of contract, Fifoot adds, "was due not so much to the paucity of litigation as to the lack of any comprehensive principle under which isolated decisions could be adjusted."[179] This lack of coherent contract doctrine caused litigants to eschew the common law courts as for resolving difficult questions of contract law.[180] The common law courts thus handled routine matters such as "recognizances," which were essentially penal bonds on which creditors could levy upon the failure of the debtor to perform on a contract. They were thus probably not properly characterized as independent contractual obligations at all but rather glorified debt-collection devices.[181] Parties would often use the common law courts in a collusive or even fictitious manner to create a judgment on a debt of record that the creditor could later use to collect upon default.[182] To the extent that this constituted the bulk of the actions in the royal courts, it is easier to understand why the royal courts failed to develop a more robust body of contract defenses and the like. Simpson, for instance, estimates that in the sample year of 1572, 503 actions were brought on bonds in contrast to only three actions brought in assumpsit.[183]

Although legal developments in the common law courts may have ceased during this time, they continued apace in rival jurisdictions. Contract law was highly developed in several of the other courts, leading parties

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[177] Milsom, *supra* note 169, at xlix.

[178] *Id.*; *see also id.* at lii ("[A]t no time was the action of covenant common in the king's courts, except as a basis for levying fines . . . ."); BAKER, *supra* note 61, at 271 ("Compared with the local and ecclesiastical courts, the medieval royal courts played a limited part in the field of contract.").

[179] FIFOOT, *supra* note 60, at 14.

[180] Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, *in* 1 SELECT ESSAYS, *supra* note 44, at 208, 238 (quoting J. Davies); *id.* at 239 (quoting Blackstone).

[181] W.T. Barbour, *The History of Contract in Early English Equity*, *in* 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 54 (Paul Vinogradoff ed., 1974) (reprint of 1914 edition).

[182] *See* PLUCKNETT, *supra* note 47, at 631.

[183] *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 125 (1987).

to ignore the royal courts and resolve their disputes elsewhere. These rival courts included local courts, ecclesiastical courts, law merchant courts, and Chancery. Although they will be discussed distinctly here for purposes of exposition, in practice, the boundaries among these systems were highly fluid as there was a great deal of cross-fertilization between them.

(1) Local courts.—Local courts resolved many issues of contract law and other forms of personal legal relations for centuries. These courts included both town and feudal courts.[184] Independent local courts in towns and manors gave remedies in cases where the King's courts would not; Plucknett observes that these country courts "developed a reasonable mass of settled practice" for dealing with contract disputes even though they did not have well theorized concept of contract law.[185] These local courts provided a place of first resort for the bulk of Englanders pursuing claims in contract or tort.[186]

(2) Ecclesiastical courts.—Ecclesiastical courts were also a major rival. The ecclesiastical courts offered a similarly highly developed body of contract law and other law, leading many laymen to bring their cases in the ecclesiastical courts.[187] William Stubbs notes that the canon law courts "claimed jurisdiction over everything that had to do with the souls of men," a claim that potentially included almost any "region of social obligation."[188] The assertion of authority over all "spiritual matters" meant in practice that the church was able to create a sort of "shadow claim" for almost every claim recognized in other legal jurisdictions, from contract, to debt, to criminal law, to testamentary succession.[189] In addition to this subject matter jurisdiction, "any person could bring suit in an ecclesiastical court, or could remove a case from a secular court to an ecclesiastical court, even against the will of the other party, on the ground of 'default of secular justice.'"[190] Even though ordinary contracts fell under the jurisdiction of lay courts, breaking a promise, especially one made under oath, was also a

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[184] *See* BAKER, *supra* note 61, at 25.

[185] PLUCKNETT, *supra* note 47, at 635; Milsom, *supra* note 169, at *l* ("Nobody has ever doubted that most litigation in what we should call contract and tort took place in lesser courts than the king's . . . .").

[186] *See* POLLOCK & MAITLAND, *supra* note 51, at 109.

[187] *See* Berman, *supra* note 167, at 743; Milsom, *supra* note 169, at lii. The strong intellectual framework of the canon law, especially when compared to the English common law, owed much to the incorporation of Roman law into the canon law, which provided a systematic framework of legal principles. *See* BERMAN, *supra* note 137, at 245.

[188] William Stubbs, *The History of the Canon Law in England*, *in* 1 SELECT ESSAYS, *supra* note 44, at 248, 270.

[189] *See* Stubbs, *supra* note 188, at 270–71. Baker notes that the Church had "pervasive jurisdiction over the lives of most ordinary people." BAKER, *supra* note 61, at 112. Stubbs describes the irritation of Henry III and Edward II regarding the extravagant jurisdictional claims of the ecclesiastical courts. *See* Stubbs, *supra* note 188, at 272.

[190] BERMAN, *supra* note 137, at 223.

sin.[191] As a result, ecclesiastical courts could assert jurisdiction over many contract cases.[192] Whereas the common law required all contracts to be in writing and made under seal, ecclesiastical courts were more flexible.[193] Other areas of the law affecting laymen, such as family law and intestate succession, were almost completely under the jurisdiction of the ecclesiastical courts.[194] Common law innovations in procedural areas also owe a large debt to canon law influence.[195] Even the mundane issues of contract and property law could be characterized as raising spiritual issues that could trigger the church's jurisdiction.[196] The availability of rival courts under independent powers—Pope and King—provided a powerful mechanism for legal development.[197] This was both direct, by the innovations of the ecclesiastical courts, as well as indirect by pressuring other courts to innovate.[198] Also, many of the Chancellors of the Chancery Court were clerics who were trained in the canon law tradition and brought principles of the canon law with them to the Chancery bench.[199] Canon law, as incorporated into the Chancery Courts, was the root of such fundamental equitable principles as the requirements of good faith and fair dealing in transactions, as well as the remedy of specific performance.[200] Canon law also enabled the systematization of the otherwise ad hoc exercise of the Chancellor's discre-

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[191] *See* MILSOM, *supra* note 155, at 23.

[192] Pollock and Maitland observe that as a result of the potentially vast reach of the church's jurisdiction over the pledge of faith, only "[w]ith great difficulty were the Courts Christian prevented from appropriating a vast region in the province of contract." POLLOCK & MAITLAND, *supra* note 51, at 128. *See also id.* at 131 ("Large then is the province of ecclesiastical law; but it might have been much larger.").

[193] *See* COQUILETTE, *supra* note 66, at 184–85.

[194] *See* MILSOM, *supra* note 155, at 23; Scrutton, *supra* note 180, at 226; BERMAN, *supra* note 137, at 223. The independence and strength of the ecclesiastical courts in England through the end of the Eighteenth-Century at least is suggested by Alexander Hamilton's comparison in the *Federalist Papers* of the Probate Courts in early America "to the spiritual courts in England." THE FEDERALIST No. 83 at 502 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The church's jurisdiction to deal with intestate succession arose from its power to decide issues of legitimacy and paternity. Of course, in each of these areas the ecclesiastical courts faced rivals from other jurisdictions seeking to infringe on the Church's jurisdiction.

[195] *See* POLLOCK & MAITLAND, *supra* note 51, at 134.

[196] Stubbs notes that the Bishop of London, for instance, entertained suits alleging that a guild member had breached his oath by improperly revealing "the art and mysteries" of his guild to non-members. *See* Stubbs, *supra* note 188, at 271.

[197] *See* BERMAN, *supra* note 137, at 225 ("Every person in Western Christendom lived under both canon law and one or more secular legal systems.").

[198] *See* Milsom, *supra* note 169, at xcviii ("the wide and flexible jurisdiction of the spiritual power was of great service in the middle ages, both in supplementing the justice of secular courts, and in stimulating them by its formidable competition to improve their doctrine and practice").

[199] *See* 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 241–42 (1903).

[200] *Id.* at 241–42 (noting that "the ecclesiastical bias of the chancellors" led them to interpose "good faith and honest dealing" into the Chancery's contract doctrine); *see also* BARBOUR, *supra* note 181, at 163.

tion.[201] This fierce rivalry between the ecclesiastical courts and other courts persisted for hundreds of years and was ended only when the Reformation brought the church, and hence its courts, under the King's power.[202]

(3) Law merchant courts.—Most important in the realm of commercial law and contracts was the law merchant, or *lex mercatoria*.[203] The law merchant was born in the commercial city-states of Italy in the early medieval period.[204] The birth of the law merchant in Italy was fortuitous, as this also encouraged cross-fertilization between the law merchant and canon law. The universal reach of the church crossing national boundaries also had the effect of universalizing law, creating a type of "law of nations" that could be applied nearly uniformly throughout Europe.[205] As a result, the ecclesiastical law provided a powerful complement to the universalizing nature of the law merchant, which found its expression through the customs of merchants, which were largely universal as well.[206] The canon law offered a long and intellectually robust legal tradition that could be grafted onto the law merchant. Whereas the law merchant was a collection of informal procedures and customary law, the canon law provided an intellectual framework that could be used to organize the law merchant into a coherent legal system. But equally important, the canon law offered an intellectual framework to synthesize the law merchant without creating an oppressive set of procedural and substantive rules that would have the effect of strangling it. For instance, canon law provided a moral grounding for enforcement of practices of good faith and fair dealing, which still serve as the

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[201] BARBOUR, *supra* note 181, at 158 (noting indirect reception of canon law into Chancery).

[202] *See* Stubbs, *supra* note 188, at 270 (noting that "for four hundred years, from the Conquest to the Reformation," the canon law and common law courts "stood side by side, with rival bodies of administrators and rival or conflicting processes"). As Stubbs observes, the ecclesiastical courts had their own bar and educational system as well. *Id.* at 266. Stubbs also observes that many clerics were quite ambivalent about the great activity of the ecclesiastical courts, arguing that it distracted the church from spiritual matters in its focus on secular matters of contract enforcement and the like. *See id.* at 269. Moreover, although the punishment for many wrongs was penance, in practice liable parties would provide civil compensation to commute the term of penance. *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 112 (2d ed., 1979).

[203] For general overviews of the history and characteristics of the law merchant, see BERMAN, *supra* note 137, at 333–56 (stressing legal rules) and Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989) (providing economic analysis of law merchant).

[204] *See* 5 HOLDSWORTH, *supra* note 64, at 65–102 (reviewing history of Italian law merchant).

[205] Berman observes:

> The mercantile community had its own law, the lex mercatoria, just as the church had its own law, the jus canonicum. The merchants were, of course, members of the church and hence subject to the canon law, but they were also members of the mercantile community and hence subject to the law merchant. When the two bodies of law conflicted, it might not be clear which of the two should prevail.

BERMAN, *supra* note 137, at 346.

[206] *See* 5 HOLDSWORTH, *supra* note 64, at 79–80 (noting overlap between ecclesiastical law and law merchant).

foundation of commercial law and practice today.[207] "[R]unning through all the mass of particular rules" of the canon law system were "two guiding principles that the procedure must be simple and speedy, and the law must be equitable."[208] These principles provided a powerful organizing standard for the emergence of the law merchant. As Holdsworth observes, these principles justified the "purging of the law of barren technicalities which enabled the merchants" to devise their own procedures and substantive law free from the heavy-hand of legal formalities.[209] "That the usages and practice of the merchants themselves were the main source of the law is clear from the literature on the subject."[210] In addition, the *lex mercatoria* also reflected influences of Roman law,[211] the *Lex Rhodia* customary commercial law of the Mediterranean identified in the third century,[212] and the influences of the Middle East, where long-distance trade and complex commerce emerged earlier than in Europe.[213]

In fact, much of the fabric of sophisticated contract law was rooted in the law merchant, not the common law courts. Thus, the law merchant offered a range of innovative equitable defenses, such as defenses of fraud, duress, and mistake.[214] The law merchant also developed rules protecting bona-fide purchasers for value well before the common law did.[215] The common law did not adopt these defenses until the incorporation of the law merchant into the common law many years later. Thus, the law merchant modernized contract law well before the common law courts did.[216] Indeed,

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[207] *See id.* at 81.

[208] *See id.* at 83.

[209] *See id.*

[210] *See id.* at 130. The first great treatise on the law merchant, Gerard Malynes's *Lex Mercatoria* (published in 1622) was authored by a merchant, not a lawyer. *Id.* at 131–32. Malynes's most prominent successor, Marius (1670), was also a merchant. *See* A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 265 (1902).

[211] BERMAN, *supra* note 137, at 339.

[212] LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 8 (1983).

[213] WYNDHAM A. BEWES, THE ROMANCE OF THE LAW MERCHANT: BEING AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW WITH SOME ACCOUNT OF THE COMMERCE AND FAIRS OF THE MIDDLE AGES 11 (1923). In elevating the purported influence of Middle Eastern legal sources, Bewes also questions the influence of Roman law.

[214] *See* Bruce L. Benson, *Law Merchant*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 500, 503 (Peter Newman ed., 1998); BERMAN, *supra* note 137, at 343; TRAKMAN, *supra* note 212, at 12; *see also* Krell v. Henry, 2 K.B. 740, 748 (1903) (noting Roman Law origins of excuse doctrines such as impossibility and frustration).

[215] DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 129 (1990).

[216] BASILE ET AL., *supra* note 159, at 136. The authors note:

> At the common law a person's writings could only be pleaded against him if they were sealed and delivered, whereas in a suit between merchants, bills of Lading, Bills of Exchange, being but tickets without Seals, Letters of advice and credences, Policies of assurance, Assignations of Debts, all of which are of no force at the Common Law, are of good credit and force by the Law Merchant.

Id. *See also* BEWES, *supra* note 213, at 19. Bewes notes:

the law merchant courts themselves faced competition from other courts—the common law courts, ecclesiastical courts, etc.[217] As a result, the law merchant confronted the same competitive pressures to innovate and modernize that the other jurisdictions also confronted.

Founded in the Mediterranean, the law merchant eventually migrated to England through the pressures of international trade as England joined the family of commercial nations.[218] England, in turn, followed the world trend of creating a set of unique courts and a body of procedural and substantive rules that drew merchants into its courts.[219] Disputes between merchants over contracts, notes, or other commercial affairs were tried in these specialized tribunals.[220] As Thomas Scrutton observed, "If you read the [common] law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable."[221] He then provides the answer to his puzzle: "The

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> Now, it is above all things necessary to bear in mind that the [law merchant] courts enforced the custom of merchants and the customers made the law: and we may as well remember that the two great distinctive elements in the merchants' law, as enforced in their own courts, were good faith and dispatch, for speed and honesty must be obtained, though by means not sanctioned by the common law, which was and ever has been a laggard, and by its halting procedure hinders the rapid course of commercial justice.

Id.

[217] *See* Benson, *supra* note 214, at 504 (noting that merchants took disputes to ecclesiastical courts); BASILE ET AL., *supra* note 159, at 126 (noting competition with common law, admiralty courts, conciliar courts, and the Chancery).

[218] Although the discussion here focuses primarily on the law merchant as it evolved in fairs, towns, and markets, it should be noted that the term itself also conventionally includes the law developed to govern international trade on the seas, and thus was equally important to the development of mercantile and admiralty law. These two branches of the law merchant were substantially identical; therefore, I discuss only the "commercial" branch here. *See* 1 HOLDSWORTH, *supra* note 199, at 303. Holdsworth states:

> It is clear that both the maritime and commercial law of the Middle Ages grew up amid similar surroundings, governed the relations of persons engaged in similar pursuits, was enforced in similar tribunals. It is not therefore surprising that, from that time to this, the relations between them have always been of the closest.

Id.

[219] Holdsworth notes that the law merchant in England evolved in a way different from the rest of Europe, as the law merchant was melded with unique English historical conditions. *See* 5 HOLDSWORTH, *supra* note 64, at 67.

[220] Holdsworth distinguishes three distinct periods in the history of the law merchant. In the first, the law merchant was applied provincially in local town courts. In the second, the law merchant emerged as in independent court system, applying a set of unique procedures and applying a universal *lex mercatoria*, rooted in merchant practice rather than in local law-making. Third, the law merchant was incorporated by Lord Mansfield into the common law as a form of merchant custom, melding the substantive rules of the merchant law with the procedures of the common law. *See* William Searle Holdsworth, *The Development of the Law Merchant and Its Courts*, *in* 1 SELECT ESSAYS, *supra* note 44, at 289, 293, *excerpted from* 1 HOLDSWORTH, *supra* note 199, at 300–37. I will focus here on the second period and its incorporation by Lord Mansfield.

[221] *See* Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, 3 SELECT

reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile customs."[222] In fact, the common law courts were jurisdictionally prohibited from hearing cases involving contracts that were made and to be performed outside England because of the inability to collect the relevant facts through the process of a jury trial.[223] The common law also lacked jurisdiction over torts committed abroad.[224] Given the relatively undeveloped nature of the English economy relative to the rest of Europe during the Middle Ages, most large commercial activity was performed by foreign merchants; thus, this jurisdictional limitation barred the common law courts from hearing almost all important commercial litigation.[225] In addition, because many commercial transactions were, by definition, transnational, it was desirable to have a uniform transnational body of law that did not vary according to the nationalities of the contracting parties.[226] The law merchant courts applied to both international and domestic transactions between merchants.[227] Indeed, over time the law merchant rules became available for *all* commercial transactions in which either of the parties was a merchant, including domestic trades,[228] so that during the Stuart era, "the bulk of mercantile litigation was . . . committed to private arbitration."[229] Thus, there was no demand by merchants for the common

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ESSAYS, *supra* note 44, at 1, 7; *see also* BASILE ET AL., *supra* note 159, at 137.

[222] Scrutton, *supra* note 221, at 2; see also Burdick, *supra* note 175, at 43. Burdick notes:

> It is apparent . . . that for several centuries there was a true body of law in England which was known as the law merchant. It was as distinct from the law administered by the common law courts, as was the civil or the canon law. It was a part of the unwritten law of the realm, although its existence and its enforcement had been recognized and provided for by statutes. Until the Seventeenth Century, it was rarely referred to in common law tribunals.

Id.

[223] *See* 5 HOLDSWORTH, *supra* note 64, at 119, 140; WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 367 (2d ed. 1932). Eventually the common law courts were able to use fictions to evade this jurisdictional limitation. *See* 5 HOLDSWORTH, *supra* note 64, at 40 and *infra* notes 320–323 and accompanying text. This jurisdictional barrier was eventually overcome by a fiction in the sixteenth century, but commercial litigation did not become a significant part of the common law until the seventeenth century. *See* BARBOUR, *supra* note 181, at 76–77; H.W. ARTHURS, "WITHOUT THE LAW": ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND 54 (1985).

[224] *See* 1 HOLDSWORTH, *supra* note 199, at 307 n.2.

[225] *See* 5 HOLDSWORTH, *supra* note 64, at 115.

[226] *See* ARTHURS, *supra* note 223, at 53.

[227] *See* Holdsworth, *supra* note 220, at 298.

[228] *See id.* at 292–93, 298; BASILE ET AL., *supra* note 159, at 2 (showing a reproduction of *Lex Mercatoria* and arguing that law merchant applies to transaction involving a merchant's "merchandise"); *id.* at 96 (noting that "merchant" was defined "broadly" to include "all those enfeoffed and resident in the 'five places' [in which merchant courts existed] and by suggesting that 'markets' include the entire geographical area of the same places").

[229] FIFOOT, *supra* note 60, at 8; *see also* WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 21 (photo. reprint 1969) (1904) (concluding that the Law Merchant existed and

law to innovate because merchants were satisfied with the rules produced by the *lex mercatoria*. On the other side, there was little opportunity or social need for the common law to innovate because contract and other disputes were being adequately resolved in the law merchant courts and elsewhere.[230]

Law merchant courts prospered in towns, fairs, and various markets.[231] Medieval trading fairs and major commercial towns provided courts for merchants to resolve disputes over contracts and torts.[232] These were referred to as the courts of "piepowder," so named because the courts heard and ruled on cases before the dust could fall from the feet of the merchants at the fairs.[233] The right to hold a trading fair included within it a right to offer a piepowder court to resolve disputes arising during the fair.[234] These courts offered swift resolution of disputes with a minimum of procedural formalities.[235] Rather than the archaic substantive rules of the common law, the law merchant courts offered law grounded in commercial custom consistent with the merchants' expectations.[236] Juries were composed of merchants themselves, often drawn from multiple nationalities.[237] The *Carta Mercatoria* of 1303 promised protection for foreign merchants, including access to speedy justice in the event of a dispute as well as the promise that any jury would be half composed of foreign merchants.[238] Lawyers were generally barred from the proceedings as disruptive of the speedy and in-

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that it was "the private international law of the Middle Ages"); Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, *in* 3 LAW: A CENTURY OF PROGRESS 342, 375 (1937) ("For centuries commercial causes were determined by a law of their own, the law merchant.").

[230] *See* WALSH, *supra* note 223, at 362. The author states:

> One reason why the law of contract lagged so far behind in its development was that merchants, shippers, and traders had a special law of their own administered in special courts for them alone. . . . This law took care of the controversies arising in connection with business, so that very few questions of this nature arose in the regular courts prior to the seventeenth century.

Id.

[231] Holdsworth, *supra* note 220, at 298. The law merchant prevailed in five places: cities, fairs, seaports, market-towns, and boroughs. BASILE ET AL., *supra* note 159, at 23.

[232] On the fair courts, see Scrutton, *supra* note 221, at 9–11.

[233] *Id.* at 9 (referring to court as the Court *Pepoudrous*).

[234] *See* Holdsworth, *Development*, *supra* note 220, at 298.

[235] *See* Benson, *supra* note 203, at 650. In fact, one significant advantage of the law merchant courts was that they generally were open for business. The common law courts, by contrast, sat only in the mornings and often disposed of cases at a leisurely pace. *See supra* note 175 and accompanying text (describing practice of common law courts not to meet in the afternoon). By contrast, law merchant court was held twice per day, before and after dinner. BASILE ET AL., *supra* note 159, at 60.

[236] Burdick, *supra* note 175, at 40. Often the customs reflected the nature of the merchants themselves. Rather than a "pledge of faith" as under the ecclesiastical law, for example, the merchants instead pointed to the "wetting of a bargain," *i.e.*, buying a drink to memorialize a deal, as an important evidentiary act. *See* Scrutton, *supra* note 180, at 10. The reliance on commercial custom in the *lex mercatoria* would later provide the impetus for Karl Llewellyn's advocacy of the incorporation of commercial custom into Article 2 of the UCC.

[237] *See* CARTER, *supra* note 210, at 254–55.

[238] *See* 1 HOLDSWORTH, *supra* note 199, at 311.

formal resolutions of disputes.[239] The courts of various fairs maintained information networks that made possible the transnational enforcement of judgments. As a result, an unpaid judgment from a fair held in England, for instance, could be enforced against a merchant in a piepowder court in Italy. The failure to perform the judgment resulted not only in punishment to the merchant, but the exclusion of the merchant's fellow countrymen from the fair.[240]

The courts of the Staple also provided their own sets of arbitral merchant courts to resolve disputes arising in the markets of the most important articles of commerce in England, such as wool, woolfells, leather, lead, and tin.[241] Under the "Statute of the Staple," enacted in 1353, common law courts were specifically prohibited from hearing disputes arising from contracts made on the staple markets and the staple courts were expressly instructed to apply the law merchant and commercial custom and not the common law.[242] The jurisdiction of the staple courts was both broad and exclusive, including claims of debt, covenant, and trespass, and excluding the King's courts in all cases but freehold or felony.[243] Under the *Carta Mercatoria*, Edward I expressly granted merchants the right to enter into contracts consistent with commercial custom, rather than forcing them to fit their transactions into the form favored by the common law.[244] As Holdsworth summed up the situation in the era of the flourishing law merchant, "With the merchant, his courts and his law the common law had little con-

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[239] *See* 5 HOLDSWORTH, *supra* note 64, at 96.

[240] *See id.* at 98, 107.

[241] Holdsworth, *supra* note 220, at 302. The staple courts eventually died out with the decline of trade through the staple markets in the sixteenth century. *See* WALSH, *supra* note 223, at 367. These "staple courts" bear a strong resemblance to the private systems of adjudication that currently prevail in various commodities markets. Compare the rules governing the Staple Court provided by *The Little Red Book of Bristol*, *reprinted in* CARTER, *supra* note 210, at app. III, with Lisa Bernstein's description of the rules governing the National Grain and Feed Association in Lisa Bernstein, *Merchant Law in Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

[242] *See* CARTER, *supra* note 210, at 261; *see also* Holdsworth, *supra* note 220, at 302. For a general overview of the Courts of Staple, see Bernard Edward Spencer Brodhurst, *The Merchants of the Staple*, *in* 3 SELECT ESSAYS, *supra* note 44, at 16. The Statute of the Staple provided, in relevant part, "all merchants coming to the staple, their servants and household, shall be ruled by mercantile law (*la lei* marchant) concerning all things touching the staple, and not by the common law of the land, nor by the usage of cities, boroughs, or other towns." BASILE ET AL., *supra* note 159, at 129 (quoting The Statute of the Staple, 1353, 27 Edw. 3, c. 8 (Eng.)). Some recent commentators have argued that, notwithstanding its language, the Statute of the Staple did not actually deprive the common law courts of jurisdiction over these disputes, but that the Statute simply empowered the staple markets to establish *additional* locations for adjudicating disputes. *See* Charles J. Reid, Jr., *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law*, 53 BUS. LAW 835, 837 n.2 (1998) (book review).

[243] Holdsworth, *supra* note 220, at 302.

[244] PLUCKNETT, *supra* note 47, at 636.

cern."[245] In part, this was because of the incompetence of the common law courts to deal credibly with commercial disputes.[246] To understand the common law of England, especially prior to the eighteenth century, therefore, it is crucial to understand the history of the law merchant as a rival jurisdiction to the common law.[247]

Through the leadership of Coke and Mansfield, the law merchant was eventually incorporated into the common law.[248] Under Coke's lead, the common law began to chip away at the jurisdiction of the law merchant courts over commercial disputes beginning in the seventeenth century by increasingly looking to merchant custom as a source of legal understanding.[249] Mansfield completed the revolution in the commercial jurisprudence of the common law courts by incorporating the law merchant into the common law.[250] In so doing, Mansfield overthrew the common law's encrusted and dysfunctional precedent regarding economic relations among merchants to try to increase control of the common law courts over commercial law matters.[251] The law merchant had proven itself responsive to the innovations and needs of commercial practice, whereas the common law remained loyal to archaic doctrines from an earlier age of commerce and earlier technologies. Mansfield largely adopted the law merchant's rules on everything from rules of evidence to the substantive rules of negotiable instruments in response to competitive pressures from the law merchant court system.[252] Modern conceptions of partnership and other business forms originated in the law merchant,[253] as did warranties of quality and the fellow-servant doc-

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[245] Holdsworth, *supra* note 220, at 303.

[246] *Id.* at 316 (detailing cases that illustrated "the incompetence of the Common Law Courts to deal with the [commercial] jurisdiction which they claimed").

[247] *See* Milsom, *supra* note 169, at xxvii.

[248] Some doctrines were incorporated directly into the common law; others were incorporated indirectly, passing first through other courts such as Star Chamber, Admiralty, or Equity, before finally passing into the common law. *See* 5 HOLDSWORTH, *supra* note 64, at 135.

[249] *See* Scrutton, *supra* note 221, at 12–13.

[250] *Id.* at 13; *see also* COQUILLETTE, *supra* note 66, at 449–53 (discussing Mansfield's commercial law jurisprudence); Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 948–62 (1987).

[251] *See* FIFOOT, *supra* note 60, at 93–117 (describing Mansfield's commercial law jurisprudence); PLUCKNETT, *supra* note 47, at 657–70 (describing absorption of merchant law rules into the common law); Bruce L. Benson, *To Arbitrate or To Litigate: That Is the Question*, 8 EUR. J.L. & ECON. 91, 125 (1999); HOGUE, *supra* note 45, at 234 ("It was the achievement of Mansfield to incorporate the law merchant into the common law and to fashion what had been a body of special customary law into general rules within a larger system."). Mansfield is often called "the founder of the commercial law" of England. Holdsworth, *supra* note 220, at 331; *see also* CARTER, *supra* note 210, at 270.

[252] *See* BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE 225–26 (1990). This dynamic continues today, as the inefficiencies and unworkable doctrines of national legal systems have led most cross-border commercial traffic to be governed by systems of commercial arbitration rather than country-specific legal systems. *Id.* at 226–27.

[253] *See* Burdick, *supra* note 175, at 48; 5 HOLDSWORTH, *supra* note 64, at 111. An extensive list of the various legal concepts that originated with the law merchant is provided by Berman. *See* BERMAN,

trine.[254] In addition, Mansfield made substantial use of special merchant juries as a mechanism for bringing merchant custom into the common law and making it a basis for an integration of merchant practice into the common law.[255] Still other law merchant concepts found their way into the common law through the initial mediation of the Chancery Court, as the Chancery sought to draw business to itself in the great competition with the common law courts.[256]

The stricter form of the incorporation thesis has been questioned in recent years.[257] For current purposes, however, quibbles over the direct historical lineage of the law merchant into the common law are largely beside the point. There is little question that, at the very least, the law merchant courts innovated in the realm of commercial law well before the common law recognized many of these concepts and that the competition among these courts drove the common law under Coke to innovate to preserve its market share.[258] Moreover, it is evident from the historical record that Lord

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supra note 137, at 349–50.

[254] 5 HOLDSWORTH, *supra* note 64, at 110–11. Walsh observes that a claim for damages for a breach of warranty was recognized under the law merchant some two centuries before the common law. *See* WALSH, *supra* note 223, at 366.

[255] *See* FIFOOT, *supra* note 60, at 104–05.

[256] *See* Burdick, *supra* note 175, at 50. One commentator argues that following the eventual demise of the law merchant as an independent court, but for Mansfield's correction of "the illiberal policy of the common lawyers," merchants would have likely gravitated toward the Chancery to resolve their legal issues. CARTER, *supra* note 210, at 250–51.

[257] Legal historians dispute whether the law merchant in England offered only expedited procedures, different substantive rules, or both. Recent legal historians have also questioned whether there was in fact an independent set of law merchant courts, or whether this was merely the application of merchant custom in the common law courts. The discussion in the text will follow the traditional view, one which seems to continue to gain the allegiance of the majority of legal historians, from Holdsworth, to Maitland, down to Harold Berman. Revisionists include such notables as Professor James Rogers and J.H. Baker. Rogers, although acknowledging that the "incorporation" thesis remains the dominant belief among legal historians and that law merchant courts developed speedier and streamlined procedures for resolving disputes, argues that the common law's commercial jurisprudence was "home grown." In this Article, I will adopt the traditional view while rendering no independent assessment of Professor Roger's critique one way or the other. *See* JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW 20 (1995). Rogers argues:

> In the standard accounts of the history of commercial law, the law merchant is usually taken to have been a body of substantive law based on mercantile custom, distinct from the common law applied in the central courts. Although this view has won nearly universal acceptance among writers on commercial law, the evidence shows that it is quite inaccurate.

Id. Baker notes that "[i]t might seem absurdly heretical to question the almost universally accepted history" of the incorporation thesis, but nonetheless concludes that Lord Mansfield's eighteenth-century commercial law innovations and the recognition of merchant custom arose internally from the common law, rather than being incorporated from the law merchant courts. *See* J.H. Baker, *The Law Merchant and the Common Law Before 1700*, *in* THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 341, 343 (J. H. Baker ed. 1986).

[258] As Arthur comments, "[i]n a sense, Mansfield's work can be construed as the ultimate triumph of the common law over a rival system. If so, it is a triumph of a peculiar sort: the victorious system in

Mansfield was clearly aware of the law merchant and many of its principles. In responding to this interjurisdictional competition, therefore, the rivalry had the effect of driving the common law toward efficiency.

(4) Chancery court.—Finally, standing behind the common law was the Court of Chancery. It was well understood that, in part, the inflexibility and lack of creativity of the common law was justified by the recognition that any undue hardship caused by the common law's rigor could be ameliorated by the equitable remedies available in Chancery. In the name of predictability and consistency, common law therefore adopted bright-line rules that occasionally worked hardship in particular cases.[259] Nonetheless, this hardship was not the end of the story, as it was well recognized that individuals could resort to equity to prevent the injustice.[260] Baker writes, "if the common law remained inflexible, the Chancery was an obvious source of relief. It could give better remedies than the common law courts, and could give remedies where the regular courts gave none."[261] Equity provided a defense where, for instance, a bond was wholly or partially satisfied but not recovered by the debtor.[262] Equity also provided relief in situations of contractual mistake and created the equity of redemption primarily for situations of mistake or bad faith.[263] Chancery could also enforce promises not made through a written sealed document, which the common law required.[264] Among other inconven-

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effect adopted as its own the form and substance of the vanquished." ARTHURS, *supra* note 223, at 55.

[259] Baker details a number of the harsher common law doctrines. *See* BAKER, *supra* note 202, at 87. It should be noted, however, that although harsh, some of these rules may not have been as irrational as they appeared at first glance. For instance, the rule that forced debtors to pay twice if they failed to have their bond cancelled upon repayment may not have been a simple-minded rule that sought to avoid "destroying certainty and condoning carelessness." *Id.* at 88. Instead, it was likely an attempt to advance the concept of negotiability in commercial notes. This again points out the mistake of examining the common law in isolation from its larger context of courts. Again, these equitable defenses were later merged into the common law when Chancery was abolished.

[260] *See* COQUILLETTE, *supra* note 66, at 186 (noting that "Chancery permitted the common law courts to adhere to strict forms and rules without worrying about the 'hard case' which would make poor precedent if decided compassionately"); *see also* BARBOUR, *supra* note 181, at 68 ("We do not mean to say that relief [in Chancery] was given in every case in which it was sought, but it is apparent that there was a general belief that in equity wrongs which escaped the common law courts would be remedied."); *id.* at 85 (quoting *Doctor and Student*, "And if such default happen in any person whereby he is without remedy at the common law, yet he may be holden by a subpoena . . .").

[261] *See* BAKER, *supra* note 202, at 272; *see also* Margaret E. Avery, *The History of the Equitable Jurisdiction of Chancery Before 1460*, 42 BULL. INST. HIST. RES. 129, 132 (1969) ("The disadvantages of the common law procedure in the later middle ages are well known: it was rigid, ponderous, expensive and susceptible to many abuses.").

[262] *See* COQUILLETTE, *supra* note 66, at 186.

[263] *See* 1 HOLDSWORTH, *supra* note 199, at 244; *see also* Avery, *supra* note 261, at 134–35.

[264] *See* Avery, *supra* note 261, at 134–35. Perversely, this rule ran both ways in that failure to seal the document made the contract unenforceable, whereas sealing the document made the contract enforceable even if the affixing of the seal was inadvertent or even if an individual's seal was lost or stolen and improperly affixed. *See* BARBOUR, *supra* note 181, at 22. Similarly, if the written deed evidencing

iences of this common law doctrine was that it made executory promises unenforceable.[265] Given the widespread recognition of the interaction between common law and equity at the time, it would be inaccurate to end one's analysis by merely pointing out the absurdity of some of the common law's rules. Exceptions from the common law's harsh rules were to be sought in Chancery, and Chancery aggressively competed to win business away from the common law.[266]

In principle, the Chancery court could act whenever the operation of the common law would work an injustice, as for a "breach of conscience"[267] or where common law provided no adequate remedy.[268] This mandate was often construed broadly.[269] For example, Chancery relief was available in cases of fraud, forgery, and duress, for which no relief was available at common law.[270] Chancery was also invoked to enforce contracts made abroad, which, as noted, were unenforceable at common law.[271] Chancery could also be invoked to enforce performance where the plaintiff was too poor to afford expensive common law writs or where a rich and powerful

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a debt was destroyed or lost, then the debt itself was destroyed. *Id.* at 100–01. Interestingly, however, seals were not generally required in London or Bristol, leading commercial centers where merchants found the formalities of the common law to be unwieldy and therefore merchant custom eschewed them. *See id.* at 19.

[265] *See* BARBOUR, *supra* note 181, at 19.

[266] Avery, *supra* note 261, at 132. Avery states:

> Deficiencies in the substance and execution of the common law were the main reason for the chancellor's intervention, and a study of the Proceedings reveals some of the most serious of these weaknesses, and shows the ways in which the chancellor was able to offer superior remedies, thus attracting suitors to his court.

Id.

[267] BARBOUR, *supra* note 181, at 153.

[268] *See id.* at 54–58.

[269] *See id.* at 68. Barbour notes:

> Theoretically, appeal is to be made to the chancellor only where there is no remedy at law, but this allowed a very wide latitude to the chancellor's discretion, and in fact, if he chose to assume jurisdiction in a particular case, there was no means of preventing the use of the subpoena. Equity might enjoin a plaintiff from prosecuting an action at law, but the King's Bench or Common Pleas had no process to restrain a petitioner from bringing suit in chancery.

Id. The author also comments:

> The primary limitation imposed on the use of the subpoena lay in the fact that it could be brought only in case the petitioner could show an absence of remedy at law. . . . Such, at all events, was the theory. However, the chancellor did not interpret this limitation strictly; he recognized a variety of circumstances which might produce a failure of legal remedy, and if the constant complaint of serjeants and judges is any criterion, we may assume that in spite of this limitation he found means of invading what was regarded as the peculiar domain of the common law.

Id. at 151. *See also id.* at 75 (noting that inability of itinerant merchants or soldiers to secure a speedy remedy from cumbersome common law process was sufficient grounds for invoking Chancery's jurisdiction). Indeed, some petitioners would plead that the defendant's behavior was animated by witchcraft, invoking equitable jurisdiction on the ground that this constituted a violation of conscience. *See id.* at 68–69.

[270] *See* 1 HOLDSWORTH, *supra* note 64, at 243–44.

[271] *See* BARBOUR, *supra* note 181, at 76–77.

defendant was able to exercise undue influence over local judges and jurors.[272]

Chancery could intervene on the basis of the inadequacy of the common law remedy available to a party for a breach of contract, not just because of the inadequacy of the common law conception of contract. This allowed the Chancery court to act to award specific performance of a contract, a remedy unavailable at common law.[273] For a time in the fifteenth and sixteenth centuries, the common law courts feared that Chancery's flexibility and procedural advantages would allow the Chancery courts to displace the common law courts as the dominant legal institutions of England. In fact, the common law courts did lose a substantial number of cases to Chancery.[274] Especially in the latter period of the era of competing courts, the Chancery court provided an ever-present threat and rival to the common law.[275] Merchants and commoners were especially disfavored by the common law's adherence to arcane and expensive legal formalities and, therefore, found recourse in Chancery to enforce their contracts.[276] Spurred by this competition, the common law courts responded by designing procedural and substantive innovations "which would win back the patronage of the litigants and the lawyers who advised them."[277] For instance, Coke's impetus for introducing the law merchant into the common law was in large part a response to the Chancery's earlier successes in doing the same.[278]

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[272] *Id.* at 78–79.

[273] *See* 1 HOLDSWORTH, *supra* note 199, at 243; BARBOUR, *supra* note 181, at 84.

[274] *See* BAKER, *supra* note 202, at 36. A dramatic recitation of the struggle between common law and equity is provided by Holdsworth. *See* 1 HOLDSWORTH, *supra* note 199, at 247–51.

[275] Farnsworth notes that the impetus for the common law to develop *assumpsit* into a legitimate body of contract law was "encouraged by the fear that the Chancellor would" and that the common law courts were "conscious of the expanding jurisdiction of Chancery and anxious to preserve their own powers." E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 595 (1969).

[276] *See* BARBOUR, *supra* note 181, at 153 ("The deficiencies of the common law became the more apparent as trade increased; merchants were not prepared to embody their contracts in a highly technical form. The very essence of business development lies in the possibility of fluid and formless agreements which may be easily made and easily changed."); *id.* ("Nor was it only the commercial class which felt the restraint of a rigid and unyielding system of law. There were hosts of 'accords' and 'bargains' among people of humble life, who from ignorance or lack of means did not observe the technicalities of legal forms.").

[277] *See* BAKER, *supra* note 202, at 37; BARBOUR, *supra* note 181, at 66 ("In fact, there can be little doubt that the eagerness displayed by certain judges to extend Assumpsit from misfeasance to nonfeasance was prompted by the strong desire to retain jurisdiction that was fast slipping away."). Those courts most threatened by the competition from Chancery, such as the King's Bench, also responded the most dramatically with procedural and substantive improvements. BAKER, *supra* note 61, at 37; 2 HOLDSWORTH, *supra* note 64, at 456 (noting that the "competition of chancellor" awakened "even the most conservative common lawyer to the necessity of endeavouring to meet [the] demands" of an economically dynamic society).

[278] *See* Burdick, *supra* note 175, at 50; BASILE ET AL., *supra* note 159, at 146–47 (describing growth of commercial cases in Chancery and competition with Admiralty courts for business). Because Chancery and the law merchant were both grounded in concepts of justice and equity, rather than law, it

Although the competition from other courts to the common law was in the realm of personal law, such as contracts and torts, students of the law will recognize that the Chancery courts played a powerful role in generating improvements to the law of real property as well. In particular, the development of such vehicles as equitable trusts provided individuals with dramatic legal innovations that made it easier for them to execute their legal affairs. It should not be surprising that the great innovation in property forms thus arose during an era of robust inter-jurisdictional competition between the common law and chancery.[279] Absent competition from Chancery, there was no dynamic at work to drive the common law toward innovation in property forms. This led the common law to stagnate. This likely explains the otherwise puzzling *numerus clausus* doctrine of the common law, which limits the forms of property rights that can be designed in real property.[280] Cases involving the ownership and transfer of real property were the sole jurisdiction of the common law courts.[281]

Monopolies generally exercise their monopoly power by restricting supply. In the context of real property law, the common law's monopoly on real property matters may explain the supply restriction on real property forms. Competition, by contrast, should have the effect of increasing supply over the monopoly rate of provision. This seems to be what occurred during the era of flourishing competition between common law and Chancery law, when Chancery developed a number of fictions to evade the common law's monopoly.[282] Through the Statute of Uses the common law was able to "capture . . . the more important of those uses, which had become a new species of property under the fostering hand of the Chancellor."[283] Thus, by imitating the Chancery innovations—and by increasing the forms of property available under the common law—the common law was able to maintain its market share. By contrast, the reinstatement of a mo-

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proved much easier for Chancery to digest the law merchant into its processes than it later did for the common law. *See* CARTER, *supra* note 210, at 263.

[279] *See* 1 HOLDSWORTH, *supra* note 199, at 239; Avery, *supra* note 261, at 138–39 (noting that the increase in Chancery business in the Fifteenth Century came "not from businessmen, but from landowners and that . . . it was a reflection of their desire for greater freedom to dispose of their land as they wished").

[280] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

[281] Avery argues that this was primarily to ensure tax collection on land transfers at sale and death. *See* Avery, *supra* note 261, at 143. Barbour notes that notwithstanding this jurisdictional limit, contracts to convey land (*e.g.*, a promissory contract where the deed had not yet been executed) could be enforced in Chancery by specific performance. Barbour, *supra* note 181, at 117.

[282] *See* Avery, *supra* note 261, at 141; *id.* at 143 ("Chancery in this period was not a court for the poor and needy . . . it was a tribunal for landowners who wished to escape the restrictions imposed by common law upon their freedom to deal with their lands as they wished.").

[283] *See* 1 HOLDSWORTH, *supra* note 199, at 241.

nopoly court system brought with it a traditional restriction of supply—in this context, the restrictions of the *numerous clausus* doctrine.[284]

(5) The common law response.—In turn, the common law courts were actively competing with these courts; for example, it appears that the eventual demise of the vibrancy of the local courts was a result of being outbid by the competing common law.[285] In response to the vibrancy of the merchant law courts, common law judges developed the notion of *assumpsit* as a mechanism for adjudicating contract claims that fell outside the traditional "procedural shackles" of debt and covenant that had stymied the development of the common law.[286] Assumpsit allowed the common law for the first time to develop a coherent mechanism for developing a true contract doctrine.[287] In fact, the undeveloped state of traditional contract law may be best evidenced by the fact that assumpsit developed from tort concepts, not from debt actions or any other form of action, because common law simply lacked the intellectual structure to deal with promissory obligations.[288]

At other times, however, this competition was not so benign.[289] For instance, the King's establishment of Admiralty courts in the fourteenth century to compete against local mercantile courts was driven not by the desire to improve the law but to force all foreign trade to pass through these monopolistic organizations, primarily to simplify customs control.[290] Nevertheless, the Admiralty courts expressly rejected the strict pleading requirements of the common law courts, following procedures much more similar to those of the law merchant courts.[291] Similarly, the Reformation predictably narrowed the independent jurisdiction of the ecclesiastical courts on issues of contract law.[292] As for the law merchant, Baker observes

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[284] The administration of property in America today largely remains under provision by geographic monopolies at state and local levels. By contrast, contract law is subject to greater choice of law opportunities, creating a degree of competition in the provision of contract terms, enforcement, and remedies. Consistent with the hypothesis in the text, a diversity of contract terms has proliferated, whereas property law retains the restrictive set of property forms identified by the *numerous clauses* doctrine.

[285] *See* VAN CAENEGEM, *supra* note 44, at 33. The greatest competitive advantage of the common law courts was its adoption and regular use of juries. *See id.* at 62–84; *see also* 1 POLLOCK & MAITLAND, *supra* note 51, at 203 (describing demise of local courts as result of free choice of litigants).

[286] Baker, *supra* note 257, at 354; *see also* Farnsworth, *supra* note 275, at 593–94 (discussing the limits on using existing forms of "covenant" and "debt" from developing into a sophisticated body of contract law).

[287] *See* 5 HOLDSWORTH, *supra* note 64, at 117.

[288] BARBOUR, *supra* note 181, at 40; *id.* at 117 ("Assumpsit did not originally lie upon a promise or bargain as such."); *see also* Farnsworth, *supra* note 275, at 594–95.

[289] *See* BASILE ET AL., *supra* note 159, at 161; Farnsworth, *supra* note 275, at 592 (noting that the common law "achieved its success [in contract law] less on its intrinsic merits than as a by-product of the victories of the common law courts in their jurisdictional struggles with their competitors").

[290] *See* PLUCKNETT, *supra* note 47, at 660 n.2.

[291] *See id.* at 661; Holdsworth, *supra* note 220, at 316.

[292] *See* Farnsworth, *supra* note 275, at 592.

that the reasons for its decline are not wholly clear. In large part, it appears to have been a victim of the creeping power of the common law courts, which imposed its own bureaucratic practices and asserted the right to hear appeals from the law merchant courts. Eventually, this creeping legalization of the law merchant courts undermined the flexibility and speed that had attracted merchants to the law merchant courts in the first place.[293]

Regardless of the reason, over time, and especially under Coke's influential leadership, the common law eventually came to displace these competing jurisdictions and to assert control over the commercial law of England. Although this increased the power of the King and the common law judges, Holdsworth observes:

> To the litigant [it] meant much inconvenience. To the commercial law of this country it meant a slower development. But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future, which consolidated the victories won in the political contests of the 17th century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity.[294]

Similarly, Plucknett observes, "It is therefore not unfair to say that Coke's influence made for the establishment of a supreme common law, and for the abolition or severe restriction of all other forms of law in the country. His triumph therefore introduced a certain narrowness and conservatism which stood in the way of reform."[295]

Thus, even though contract law in the common law courts remained relatively undeveloped during this period, it appears that this gap was filled by local courts, law merchant courts (the *lex mercatoria*), and ecclesiastical courts. Plucknett speculates that the strength of these competing legal systems may explain why the common law remained so undeveloped. He writes:

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[293] Baker, *supra* note 257, at 352; *accord* 1 HOLDSWORTH, *supra* note 199, at 335. Baker surmises that the judges of the common law may have increased their power because of a perception that the procedural informality and substantive flexibility of the law merchant system was inconsistent with the strictures of due process. *See* Baker, *supra* note 257, at 352–53. Burdick contends without elaborating that the common law judges made a practice out of "enticing or coercing their suitors into the courts of common law." Burdick, *supra* note 175, at 44. On the other hand, many scholars question the purported demise of the law merchant, noting the continued importance of the law merchant in modern times, especially in international arbitration and the rise of arbitration and alternative dispute resolution. *See* Oliver Volckart & Antje Mangels, *Are the Roots of the Modern* Lex Mercatoria *Really Medieval?*, 65 S. ECON. J. 427, 432 (1999) (noting that almost 90% of all border-crossing commercial transactions contain an arbitration clause). For a general discussion of the importance of the modern law merchant, see Bruce L. Benson, *Arbitration in the Shadow of the Law*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 93 (1998); Benson, *supra* note 203, at 654–60; TRAKMAN, *supra* note 212.

[294] Holdsworth, *supra* note 220, at 319.

[295] PLUCKNETT, *supra* note 47, at 284.

> It may be said with some fairness that the existence on the one hand of mercantile jurisdictions, and on the other of the spiritual courts which could bring moral pressure to bear, together with the remedies available locally, afford some explanation for the common law courts declining to expend their law of contract. . . . [T]he common law apparently felt that it could abstain with a clear conscience, knowing that the matter was already in the expert hands of the Church and the merchants . . . .[296]

In contrast to the ecclesiastical and law merchant courts, the common law itself developed a relatively inflexible, formalistic, and cumbersome regime.[297] The rigors of the forms of action undermined the coherent evolution of the common law system of contract, causing the common law to lag well behind these other legal regimes that provided the engine for reform of contract law. Church courts were also well ahead of lay courts in the evolution of modern rules of proof and procedure in contract disputes.[298] On the other hand, the absorption of these principles into the common law enabled improvement of the law by extending their reach to all transactions, rather than limiting their application to just the individuals subject to the various specialized jurisdictions, such as merchants or shippers.[299]

c. Constrained competition and the production of efficient rules.—A better understanding of the history of the common law system also provides the answer to Landes and Posner's puzzle as to why competition among courts did not generate pro-plaintiff doctrine in the several courts of the land.[300] In fact, Landes and Posner acknowledge that the historical record appears to be inconsistent with the prediction of their model that courts would compete by generating pro-plaintiff rules.[301] "Why it did

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[296] *Id.* at 636; *see also* BAKER, *supra* note 202, at 272; Farnsworth, *supra* note 275, at 592 (noting that there was "no great pressure for enforceability as contracts were not a significant part of the business of the common law courts").

[297] PLUCKNETT, *supra* note 47, at 636.

[298] *See* MILSOM, *supra* note 155, at 25.

[299] *See* Holdsworth, *supra* note 220, at 330 (describing law merchant foundation of negotiability principle for bills of exchange and later extension through the common law to all persons); William Cranch, *Promissory Notes Before and After Lord Holt*, *in* 3 SELECT ESSAYS, *supra* note 44, at 74 (same).

[300] William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 253–54 (1979). It is also interesting to note that, in researching this article, I did not locate any contemporary evidence that lawyers or litigants thought that courts of the early common law system improperly favored plaintiffs. By contrast, as noted above, the historical record is replete with references to the beneficial effects of competition. The silence in the historical record presents a striking difference from the sustained criticism of America's analogous regime under *Swift v. Tyson*, discussed below.

[301] *Id.* at 255. Landes and Posner argue:

> Left unexplained by this analysis is the actual pattern of competition in the English courts during the centuries when the judges were paid out of litigant fees and plaintiffs frequently had a choice among competing courts. There is evidence of competition among the courts for plaintiffs through substantive and procedural innovation, but none (of which we are aware) of the kind of blatant plaintiff favoritism that our economic analysis predicts would emerge in such a competitive setting.

not emerge . . . presents an interesting question for further research."[302] Indeed, in the *common law* courts, there was in fact much pro-plaintiff doctrine, such as a notable absence of defenses to contract and the like.[303] These courts were little more than debt collection courts that required little in the way of developed contract jurisprudence and responded in kind.

In the *other* courts, however, such as the *lex mercatoria*, ecclesiastical, and Chancery courts, a different dynamic was at work. In law merchant courts, for instance, legal disputes were characterized by a high degree of reciprocity. Because merchant law was rooted in the customs of traders, this reflected the reciprocal nature of inclusive customs.[304] Merchants could never predict which side of a dispute they would be on. As a result, they did not favor either pro-plaintiff or pro-defendant rules. Instead, they favored efficient rules that minimized the transaction costs of conducting transactions. In the Staple Courts, the rules of the exchange were established by its members who would be governed by those rules. Because they would be ongoing members of the exchange engaging in repeat, reciprocal transactions, there was a built-in incentive to adopt efficiency-enhancing rules to govern the exchange.

In the trading fairs of the middle ages, a different dynamic was at work. The right to hold a fair was the prerogative of the King, but the King could grant franchises to local lords to hold fairs. With this grant came the power to establish a special law of the fair and a court system to administer it. As with the Staple Courts, this special law of the fair was independent of the royal law. Holdsworth observes, "[T]he administration of the law has always been a profitable thing; and therefore, the grantee of the franchise naturally kept it in his own hands."[305] Because the fair owner was thus the residual claimant of both the proceeds of the fair as well as the ancillary legal system, he had an incentive to maximize the popularity of the fair and the commerce conducted there. With respect to the legal system provided, therefore, the fair owner had a natural incentive to provide timely justice and efficiency-enhancing rules, rather than favoring one party or the other.

Nor would the ecclesiastical courts have been expected to provide pro-plaintiff rules. Rather, the rules provided in these courts reflected the influence of Canon and Roman law. Canon law doctrines reflected the influence

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Id. Daniel Klerman has recently challenged this conclusion, arguing that history suggests that competing jurisdictions did, in fact, lead the common law to develop pro-plaintiff rules, and that this tendency was not eliminated until the Crown asserted a monopoly over the English legal system. *See* Daniel Klerman, Jurisdictional Competition and the Evolution of the Common Law (unpublished work presented at George Mason University School of Law, March 19, 2001).

[302] Landes & Posner, *supra* note 300, at 255.

[303] *See* Klerman, *supra* note 301.

[304] *See* Francesco Parisi, *Toward a Theory of Spontaneous Law*, 6 CONST. POL. ECON. 211 (1995); *see also* VINCY FON & FRANCESCO PARISI, CUSTOMARY LAW AND ARTICULATION THEORIES: AN ECONOMIC ANALYSIS (George Mason University School of Law, Working Paper No. 02-24, 2002).

[305] 5 HOLDSWORTH, *supra* note 64, at 94.

of equitable considerations rooted in church teachings, thus the law was required to be fair, equitable, and reasonable, thereby limiting the ability of Canon law courts to compete on a purely pro-plaintiff doctrine. Roman law reflected a heritage similar to that of the law merchant, a body of law that evolved through reciprocity-based interactions that tended to promote individual liberty and private ordering.[306] The Chancery courts reflected many of these same influences of Canon law and Roman law.

In addition, in many of these interactions the parties had a preexisting relationship amenable to private contractual ordering, such as for products liability, medical malpractice, or some other relationship. Traditionally, these were understood as relations of a contractual nature and would thus be driven by the logic of the evolution of contract law, not tort law.[307] Only in recent decades has tort law expanded to fill the areas traditionally governed by contract law. Moreover, as noted, most of the disputes in question arose from conflicts between two individuals, not between institutional repeat players. Under these conditions, reciprocity norms would tend to govern the evolution of legal doctrine, rather than rent-seeking norms. Moreover, conflicts between pure strangers unrelated by contractual or customary relationships were likely very rare during the era in which the common law evolved. Thus, the relevant margin on which courts would have been competing by producing legal doctrine would have been in the far more common situation in which a preexisting relationship between parties existed.

Perhaps most crucial was the fact that, even though parties faced few formal constraints on where to bring their suits, this choice of jurisdiction was actually made *ex ante* rather than *ex post* most of the time. When the parties chose their jurisdiction, therefore, they did not know whether they would be more likely to be the plaintiff or the defendant in any subsequent litigation and so would be unlikely to prefer a biased court over an unbiased one. To be sure, there is no evidence of widespread use of choice of law or choice of forum clauses within contracts. But there were clearly-established norms and expectations as to which court would hear a lawsuit arising under a given contract. Thus, there were a set of default expectations as to which court would hear a given case. These were default expectations to which parties tacitly adhered. For merchants, for instance, it was expected that the law merchant would hear disputes that arose unless some other court (such as common law) was expressly specified.[308] Similarly,

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[306] LEONI, *supra* note 97, at 22. Leoni notes that Roman law was grounded in custom and operated on a system of weak precedent rather than strict stare decisis.

[307] Landes and Posner recognize that if this condition is met, then competition among courts may work fine. *See* Landes & Posner, *Adjudication*, *supra* note 300, at 258 ("The general conclusion is that we can expect more efficient rules of contract and commercial law (including corporation law, which is also based on consensual arrangements) than of tort or criminal law, because parties to contracts face a competitive supply of court systems.").

[308] *See* BASILE ET AL., *supra* note 159, at 24 (noting that within the five sites where the law merchant functioned, "mercantile law is always to be upheld unless both parties openly and expressly agree

Chancery could act only if it could be shown that an inadequate remedy was available at common law or application of common law would work an injustice, thereby further limiting its ability to compete for business through the provision of pro-plaintiff rules.[309] This set of assumptions about the default courts that would hear a given case meant that forum choice was, in fact, *ex ante* and made when the parties were uncertain as to which would be the possible plaintiff or defendant under a subsequent suit. Once a given forum was implicitly chosen *ex ante*, breach of the agreement was enforced by the threat of ostracism against merchants who refused to allow the case to be heard in the agreed-upon forum or failed to abide by the judgment of the court.[310] Ostracism from the merchant community effectively ended the offending merchant's career.[311] Making the choice of forum *ex ante* thus promoted beneficial forum-shopping for efficient law and discouraged forum-shopping for law that systematically favored one party over another.[312]

This also explains why court precedent tended toward efficiency, rather than acting as a random drift between efficiency and inefficiency, as previous models predicted it would.[313] Earlier law and economics scholars focused on the incentives of litigants to push the law toward efficiency or inefficiency. And it is true that where there is weak precedent, litigants do in fact lack such an incentive and random drift may result. But in a competitive legal order, *judges*, rather than litigants, were the residual claimants for the results of legal doctrine. Because judges were paid from legal fees, they would maximize their fees when business increased. And, as the foregoing analysis has demonstrated, a particular court maximized its business through the provision of efficient legal rules, giving judges an incentive to push for efficient rules. As a result, random drift would not result; instead, there would be an incentive for judges to favor efficient rules because they could capture the benefits that accrued from such rules.

When the common law courts swallowed up these other courts, the preexisting body of law flowed directly into the common law. Rather than a piecemeal acceptance of these doctrines, the common law adopted entire bodies of law that had grown up in an environment of reciprocal interactions. This direct incorporation of these entire bodies of law accounts for the sudden appearance of systematic and coherent bodies of law in the common law during a concentrated period in the eighteenth and nineteenth centuries. It also accounts for why the competition among courts generated

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on the common law"); *id.* at 27 (where plaintiff and defendant disagree about which law should prevail, "he who demands mercantile law should always be heard, whether he is the plaintiff or defendant. And the plea should be brought to conclusion according to mercantile law . . . .").

309 Farnsworth, *supra* note 275, at 592.

310 *See* Benson, *supra* note 203, at 649–50.

311 *Id.*

312 For a similar argument in a modern context, see Kimberly A. Moore and Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI.-KENT L. REV. 1325, 1339 (2002).

313 *See* discussion *supra* note 43.

efficient law, rather than pro-plaintiff law. As the jurisdiction of the royal courts expanded over time, eventually many of the doctrines first developed in these rival courts were absorbed into the common law courts.[314] It was during this period that the common law first adopted the distinction between contract and tort, a distinction that had long prevailed in the law applied in Chancery, Admiralty, Star Chamber, and other royal courts.[315] Notions of unjust enrichment and quasi-contract prevailed in numerous other courts well before being received into the common law, albeit it an altered form.[316] The fundamental concept of negotiability in bills of exchange emerged among merchants as early as the thirteenth century; the common law did not recognize the doctrine until 1603.[317] The concept of respondeat superior, the idea that employers are vicariously liable for the harm caused by the negligence of their employees, was incorporated into the common law from the maritime law of the Admiralty courts and the law merchant.[318] Berman and Reid note that other developments in the common law in the early eighteenth century reflect the powerful influence of courts such as the law merchant and maritime courts.[319]

The discussion here should be qualified in one respect, however, in that it may overstate the differences between the royal courts on one hand and other competing courts on the other. Through the use of legal fictions, it appears that there may have been some changes going on in the current law that were not fully recognized until later dates. As previously noted, legal fictions had long been used by courts seeking to expand their jurisdiction.[320] Beginning in the seventeenth century, however, the courts started using fictions to change the *substantive* laws as well.[321] Through the use of fictions, such as the action of "special assumpsit," the common law courts expanded their jurisdiction to take account of a wide variety of contracts that previously had been subject to the jurisdiction of the Chancery, Admiralty, High Commission, and Star Chamber. Baker argues, for instance, that the recog-

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[314] Holdsworth, *supra* note 220, at 319 n.1 (enumerating various modern legal doctrines that were developed in rival courts well before their adoption by the common law courts).

[315] Berman & Reid, *supra* note 42, at 462.

[316] *Id.* at 467; *see also* FIFOOT, *supra* note 60, at 131–32 (describing merchant basis of quasi-contract as exception to consideration doctrine).

[317] Holdsworth, *supra* note 220, at 304. Rogers forcefully argues that the importance of negotiability, and therefore the role of the law merchant in spurring legal innovation, has been traditionally overemphasized by Holdsworth and others. *See* ROGERS, *supra* note 257, at 5. Holdsworth, however, identifies several other key common law concepts that can be traced to law merchant origins. *See* Holdsworth, *supra* note 220, at 327.

[318] Berman & Reid, *supra* note 42, at 461–463.

[319] *Id.*

[320] *See supra* notes 154–157 and accompanying text; *see also* Berman & Reid, *supra* note 42, at 459.

[321] *See Berman & Reid, supra* note 42, at 459. For more on the use of fictions in the common law, see HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 16 (1st ed. 1917).

nition of a claim in *assumpsit* merely gave the common law courts an express mechanism for hearing cases that they were deciding already, merely under different procedural headings.[322] Similarly, the common law courts lacked the power to hear cases entered into with traders from other countries; nonetheless, by engaging in jurisdictional fictions the common law was able to assert jurisdiction over the growing commercial practice.[323] Although this served to "unify[ ] the English law of contract," it also hardened contract law doctrines, depriving its contract law of the flexibility that characterized the contract law of the other courts.[324]

Subject to this slight qualification, the history of the English common law suggests that those who examine only the body of law developed in the royal courts prior to the nineteenth century in order to understand the actual "law of England" may be looking in the wrong place. Much legal modernization was actually being carried out in courts other than the common law courts, and those were the courts where parties were litigating their claims. Except for control over land, multiple courts maintained competing jurisdictions with the common law on almost all other matters that touched the personal legal affairs of Englanders. Many of the eventual innovations of the common law courts in later times were merely the absorption of these well-developed bodies of law from other courts into the common law, rather than a fundamental redirection of the common law itself. Moreover, through the use of legal fictions many of these changes, such as the adoption of negligence principles, may have been implicitly operating prior to the nineteenth century although they were not formally announced until then.

Thus, the market for law created by the competitive nature of the historic common law gave rise to a pro-efficiency dynamic of market competition. As Rowley concludes

> The competitive nature of early common law evolution inevitably provided a powerful impulse for the law to reflect the interests of the litigants and, in this sense, to be efficient. For exit, and to a lesser extent voice, were available weapons to those who became disenchanted with the writs and their court interpretations.[325]

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[322] Baker, *supra* note 257, at 366–67.

[323] *See* Holdsworth, *supra* note 220, at 315.

> The common law had not in the past claimed jurisdiction over contracts made or offences committed abroad, and probably not over contracts made and offences committed in ports intra fluxum et refluxum maris. Such jurisdiction was coveted. By supposing these contracts or offences to have been made or committed in England the Common Law Courts assumed jurisdiction; and thus by a 'new strange poetical fiction,' and by the help of 'imaginary sign-posts in Cheapside' they endeavoured to capture jurisdiction over the growing commercial business of the country.

Id. (citations omitted).

[324] Berman & Reid, *supra* note 42, at 461.

[325] Rowley, *supra* note 140, at 371.

At the same time, this nonhierarchical and decentralized institutional structure insulated the common law from rent-seeking pressures and constrained judges. Judicial agency costs only became a real problem after the centralization of the legal system and the demise of competing legal jurisdictions. Prior to that time, the ability of parties to "vote with their feet" constrained judicial power to pursue personal preferences. Thus, it may be that this need to constrain judicial discretion through stricter *stare decisis* was a response to the breakdown of the traditional mechanism for constraining judges. Given this interdependent relationship between rules of precedent on one hand and the structure of the court system on the other, Judge Kozinski may not be correct in his intuition: "It is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm."[326] To be sure, the nature of precedent has changed since the nineteenth century, but this is because the nature of the court system has changed, as well. The demise of a competitive legal order in fact suggests a need for a doctrine of *stare decisis* as a mechanism to control judicial discretion in the absence of the opportunity of parties to choose their court. The common law emerged from this dynamic process of competition, as entrepreneurial competitors created new legal doctrines and copied successful innovations from one another. This helped to create efficiency in the common law and insulate it from public choice influences.

2. The American Experience: Swift *and* Erie.—Through the nineteenth century, the United States had a legal regime similar to the competitive legal order in England. Under the doctrine of *Swift v. Tyson*,[327] which prevailed until *Erie Railroad v. Tompkins*,[328] the United States had a similar system of competing courts with overlapping jurisdictions. Although similar, the systems were not identical, leading to different evolutionary paths. Under *Swift*, common law cases in diversity actions could be brought either under the common law of a particular state or under general federal common law, thereby generating overlapping common law jurisdictions for the same act. Traditional mythology has held that this created an incentive for forum-shopping by plaintiffs seeking pro-plaintiff legal rules, and that as a result, Justice Brandeis rejected the *Swift* doctrine in *Erie*, ruling that there can be no general federal common law.[329] The conclusion that *Swift* should have been abandoned because of rampant negative forum-shopping is questionable.[330] On the other hand, there were some important

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[326] Hart v. Massanari, 266 F.3d 1155, 1167 (9th Cir. 2001).

[327] 41 U.S. 1 (1842).

[328] 304 U.S. 64 (1938).

[329] *Id.* at 78. This historical argument obviously mirrors the more theoretical argument of Landes and Posner. *See* discussion *supra* notes 300–303 and accompanying text.

[330] Clearly I will not attempt a comprehensive analysis of the *Erie* debate in this paper. As Judge Henry Friendly observed almost 40 years ago, "If a considerable pond of ink about *Erie* had already ac-

differences between the English competitive system and the American system under *Swift v. Tyson* that eventually created several problems with the American system. Nonetheless, there is ample evidence that availability of competing courts under *Swift* explains much of the evolution toward efficient legal doctrines in the United States in the nineteenth century. Moreover, *Erie*'s abandonment of *Swift* and its replacement with a less competitive regime has reduced a power constraint on rent-seeking in the state courts that has led to many of the problems in common law doctrine in recent years.

The diversity jurisdiction of the federal courts empowers those courts to hear disputes that arise between residents of two different states. Under *Swift v. Tyson*, however, the federal courts provided more than just a forum to diversity disputes. The federal courts also had the power to develop their own common law to apply to those disputes. This effectively gave litigants not only a choice of *forum*, but also a choice of *law*. Moreover, the federal courts and state courts shared jurisdiction within the same geographic area, subject only to the limitation that the disputants could establish diversity.

Recent scholarship has suggested that *Erie* was not animated by excessive forum shopping, but was intended to prevent individuals from escaping inefficient and burdensome state regulation that was generally animated by the influence of special interests.[331] Judges on the lower federal courts, the product of three successive Republican administrations (Harding, Coolidge, and Hoover), were hostile to progressive state laws that interfered with common law principles of freedom of contract.[332] Following *Lochner v. New York*[333] and its progeny, the federal courts relied on time-honored common law principles to strike down those regulations. In response, Roosevelt Supreme Court appointees sought to preclude these diversity cases from reaching the federal courts; *Erie* eliminated much of the incentive to sue in federal court.[334] Brandeis, a progressive, was particularly disturbed by the aggressive approach of the federal courts and sought to deprive the

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cumulated in 1945, this has now become a rather large lake." *See* Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 383 (1964). Since then, the lake has expanded into a sea, if not an ocean. I will seek to add but a few drops to this watershed, as it relates to the themes of this Article.

[331] The historical record is ambiguous on the degree of nonuniformity between private law applied in state and federal court, nor is it clear whether nonuniformity was more pronounced in some areas of law rather than others. *Compare* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 881–86 & n.23 (1931) (concluding that there was no substantial problem of nonuniformity) *with* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 524–30 (1928).

[332] *See* Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 375 (1995).

[333] 198 U.S. 45 (1905).

[334] *See* William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1096 (1993).

federal courts of this power.[335] Brandeis observed in 1905 that the leading lawyers in the United States were "engaged mainly in supporting the claims of corporations; often in endeavoring to evade or nullify the . . . crude laws by which legislators sought to regulate the power or curb the excesses of corporations."[336] This is ironic, for, as previously noted, the presence of overlapping legal jurisdictions was a source of freedom that allowed individuals to escape the clutches of special interest-oriented legal rules.

Justice Story implicitly recognized the importance of this issue in *Swift*, as his opinion in *Swift* was animated by the desire to allow the federal courts to develop the commercially sophisticated and modern practices of the law merchant.[337] And, in fact, history clearly indicates that the body of commercial law developed in the federal courts during the *Swift* era was substantially more efficient than the law in the state courts.[338] Because federal law was grounded in commercial custom it tended to produce predictable and efficiency enhancing law.[339] By contrast, state law was provincial, ignorant, and dominated by the rent-seeking influences of local special interests.[340] By prohibiting competition between the state and federal legal systems within the same jurisdictions for the same acts, this competition was ended, leaving individuals subject to the regulation of the states. True, competition among different states continued, but this competition is limited and subject to the risks of judicial enforcement (or non-enforcement) of choice-of-law clauses in contracts. The elimination of the ability to forum-shop into federal court, therefore, did not merely eliminate access to one court at the margin; instead, it eliminated access to the many skilled federal judges and the efficiency-enhancing law that they had created over many decades of decision-making.

It was traditionally understood that the diversity jurisdiction of the federal courts was intended not only to serve as an alternative forum to protect out-of-state interests, but also to provide an alternative body of law to pro-

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[335] Brandeis cursed "bigness and centralization" generally and thus sought to decentralize lawmaking authority to the states. TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 150 (1981).

[336] FREYER, *supra* note 335, at 151.

[337] Swift v. Tyson, 41 U.S. 1 (1842). There is substantial commentary on the law merchant foundations of *Swift*. *See* Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After* Erie, 26 DENV. J. INT'L L. & POL'Y 807, 813 (1998); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1791 (1997); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1283–85 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517–20 (1984).

[338] *See* RANDALL BRIDWELL AND RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 5 (1977).

[339] *See id.* at 92.

[340] *See* Zywicki, *Senators and Special Interests*, *supra* note 9, at 1019–21 (discussing the special interest roots of much progressive legislation).

tect out-of-state interests, especially creditors.[341] In fact, it was generally understood that it would be largely pointless to provide an alternative forum to litigate cases if the court would still apply parochial state laws that could discriminate against out-of-state interests under the guise of facial neutrality.[342] As Justice Story observed in a different case:

> [I]n controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature, I think that it can hardly be maintained, that the laws of a state, to which they have no reference however, narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all of the objects for which the constitution has provided a national court.[343]

Tony Freyer echoes Story's analysis, noting that the "national courts were established in order to protect the rights of citizens of different states and nations from unfavorable local *law*."[344]

Swift created the opportunity for forum-shopping by giving plaintiffs and defendants the choice of whether to sue in state court or in federal court in diversity cases. As Bridwell and Whitten observe, "This kind of 'forum shopping' was exactly what the diversity jurisdiction was designed to accomplish."[345] At the time, this choice actually tended to vindicate the parties' legitimate expectations by establishing a background of rules to govern the dispute. Like the *ex ante* expectation of forum choice under the English system, it was generally understood by the parties when they entered into a contract under the *Swift* system just which court system would govern a subsequent dispute.[346] Where the exchange took place between individuals of different states, it was generally supposed that the general customary rules of merchants would apply. By contrast, where the exchange took place between individuals of the same state, it was generally understood that local law and custom would control, which might differ from general customary law. Indeed, *Swift v. Tyson* turned on the question of the negotiability of a bill drawn in Maine and accepted in New York, giving it an interstate character from the outset. As a result, Swift was entitled to rely on the fact that the general principles of the commercial world (*i.e.*, the law merchant) would apply to govern disputes over the negotiability of the note,

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[341] *See* FREYER, *supra* note 335, at 20 (noting that prior to *Swift*, "outright local prejudice against out-of-state creditors" created uncertainty in commercial relations).

[342] *Id.* at 83.

[343] Van Reimsdyk v. Kane, 28 F. Cas. 1062 (C.C.D. R.I. 1812) (No. 16,871) (emphasis omitted), *rev'd on other grounds sub nom.* Clark v. Van Reimsdyk, 13 U.S. 153 (1815), *quoted in* BRIDWELL & WHITTEN, *supra* note 338, at 81.

[344] FREYER, *supra* note 335, at 32 (emphasis added).

[345] BRIDWELL & WHITTEN, *supra* note 338, at 91; *see also* FREYER, *supra* note 335, at 26.

[346] *See* BRIDWELL & WHITTEN, *supra* note 338, at 5 (arguing that federal common law protected parties' expectations better than did state laws).

rather than the parochial rules of New York. Popularly elected state judges consistently acted to deny the rights of out-of-state creditors; federal judges applying law merchant principles, by contrast, were able to enforce these contracts reliably.

In addition, Justice Story's opinion in *Swift* rests in part on the common law's distinction between the flexible concept of "precedent" that still prevailed in the nineteenth century on one hand and the more rigid concept of *stare decisis* that emerged in the common law in the twentieth century on the other. "It will hardly be contended," Story argues, "that the decisions of courts constitute laws." Echoing English commentators, Story concludes that judicial decisions "are, at most only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."[347] Under the *Swift* view, judicial precedent does not become fixed as "law" unless it was enacted by the state legislature or has become so well-established through time and widespread acceptance of its reasonableness and usefulness that it is not likely to be overruled.[348] It follows, therefore, that, just as a subsequent state judge could reconsider the decision of his predecessor, so, too, could a federal judge reconsider the decision of a prior state judge. It was the reason of the rule, rather than its authority, that bound subsequent judges.[349]

Thus, *Swift* did not rest in the belief that the federal courts are animated by some "brooding omnipresence in the sky," as famously caricatured by Oliver Wendell Holmes in his critique of federal common law.[350] Rather, Story's opinion rests on the traditional common law distinction that isolated judicial decisions do not become binding principles of law until they have been tested repeatedly by courts and individual actors. The best law is that which is tested and sifted through time by many judges. Moreover, merchant custom was seen as a surer source of principles than common law precedent.[351] The failure to grasp the essence of the opinion in *Swift* is thus

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[347] *Swift*, 41 U.S. at 18; *see also* FREYER, *supra* note 335, at 26.

[348] *See* Clark, *Federal Common Law*, *supra* note 337, at 1291.

[349] *See* BRIDWELL & WHITTEN, *supra* note 338, at 13 ("If the federal courts had been bound to follow all state judicial precedents under such a common law process, the nonresident in a diversity action would thus have been deprived of the independent forum the Constitution envisioned Congress might provide.").

[350] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ."). *Jensen* was an admiralty case, but Holmes's critique there was similar to his criticisms of federal common law under *Swift*. *See also* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370–72 (1910) (Holmes, J., dissenting). Freyer observes that notwithstanding Holmes's criticism of expansions of *Swift*, early in his legal career Holmes helped to edit the Twelfth Edition of Kent's *Commentaries on American Law*. Drafts of Holmes's work indicate that he seemed to agree with *Swift*, at least as it related to commercial law, but disagreed with its extensions in subsequent cases. FREYER, *supra* note 335, at 86–87.

[351] FREYER, *supra* note 335, at 43.

more a reflection of the postivist prejudices of twentieth century scholars than of the naiveté of Justice Story.[352]

To the extent that there is any validity to the traditional criticism of *Swift* that it permitted inefficient forum shopping, these criticisms are clearly overstated. *Erie* itself was a case involving strangers. Even if such stranger cases may give rise to pro-plaintiff legal doctrines, this says nothing at all about whether interjurisdictional competition should be prohibited for situations where the parties have a preexisting relationship.[353] Even in modern society, many so-called "stranger" cases really are not. Most products liability cases, after all, arise from consensual transactions. Moreover, there are likely to be preexisting relationships through insurance companies and other institutions that turn seemingly stranger-based conflicts into semi-contractual cases.[354] Thus, even if it were thought necessary to limit jurisdictional competition where there is no preexisting relationship between the parties, this does not mean that such limits should be imposed where the parties can explicitly or implicitly consent *ex ante* to particular jurisdictions. Indeed, as noted, *Swift* was developed in exactly this sort of case and was only later extended to govern cases with facts such as *Erie*'s.[355] One could

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[352] In *Kuhn v. Fairmont Coal*, decided in 1910, the Supreme Court adhered to this distinction between settled principles of common law and judicial decisions that had stood the test of time and those judicial decisions that were still subject to reconsideration and analysis. Thus, Justice Harlan wrote there, "Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes also the law governing the courts of the United States sitting in that state." *Kuhn*, 215 U.S. at 359. "But where the law has not been thus settled," Harlan added, "it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence." *Id.* at n.1 (quoting *Bucher v. Cheshire R. Co.*, 125 U.S. 555). In fact, in his dissenting opinion in *Erie*, Justice Butler continued to emphasize that the final authority of the validity of a common law rule was its compliance with tests of reason or long-standing utility. He wrote, "Whenever possible, *consistent with standards sustained by reason and authority constituting the general law*, this Court has followed applicable decisions of the state courts." *Erie*, 304 U.S. at 85 (Butler, J., dissenting) (emphasis added).

[353] *Swift* was conceived in a case of negotiable instruments, an area of law that is essentially contractual in nature and which is governed today by the Uniform Commercial Code. By the time of *Erie*, *Swift* had expanded dramatically to govern numerous areas of private law. *See* Jack Goldsmith and Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 687 (1998); *see also* Lessig, *supra* note 337, at 1792 (distinguishing contractual relations in *Swift* from tort law); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1475–76 (noting expansion of *Swift* beyond law merchant context); FREYER, *supra* note 335, at 69–72 (noting expansion of *Swift* doctrine beyond original contractual and law merchant roots); BRIDWELL & WHITTEN, *supra* note 339, at 96–97 (discussing expansion of *Swift*).

[354] *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 284–97 (1998); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 751-53 (1999); Stephen J. Ware, *Arbitration & Assimilation*, 77 WASH. U. L.Q. 1053, 1053 (1999).

[355] *See* BRIDWELL & WHITTEN, *supra* note 338, at 97 (criticizing later cases for extending principle of *Swift* beyond its proper bounds).

easily distinguish cases like *Swift* from cases like *Erie* if one were so inclined.[356]

Erie effectively created a series of territorial monopolies for the production of common law. In fact, unlike the competitive nature of the traditional common law that constrained the ability to use legal doctrine to transfer wealth, *Erie* creates the conditions for effective forum shopping and for the production of pro-plaintiff rules. Thus, jurisdictions such as Alabama have established themselves as providing pro-plaintiff legal regimes within their geographical monopolies.[357] Moreover, there are political dynamics at work in such states that create incentives for lawyers to demand pro-plaintiff rules and for judges to supply those rules.[358] By contrast, defendants have little ability to counteract these tendencies. Contractual choice of law provides parties with the ability to contract *ex ante* for the rules of a particular state, which will tend to promote efficient forum-shopping with respect to contracts that contain those terms.[359] An *ex ante* commitment to arbitration will also place some limits on negative forum-shopping. But these are imperfect responses to the problem of negative forum-shopping. Enforcement of choice-of-law and mandatory arbitration clauses is imperfect,[360] and the growth of tort law into the traditional contract domain over the past several decades[361] makes these remedies an imperfect substitute for full competition by courts with overlapping jurisdiction. Given the permissive jurisdictional rules today, it will be difficult for defendants to force cases to be filed in a less pro-plaintiff state.

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[356] *Id.* at 121 ("It seems absolutely clear that tort law was vastly different in kind from the general customs of the commercial world, and that it should have been treated as a local mater to be controlled by state law as defined in state decisions."). Many of the criticisms of the expansion of *Swift* also are critical of the "public" law extensions of *Swift* rather than private law. For a discussion of those issues, see generally Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000).

[357] *See* ZYWICKI, *supra* note 6. Indeed, the fact that *Erie* only prohibited forum-shopping between state and federal court (primarily by defendants under the removal power), and did not prohibit forum-shopping among other state courts, adds further credence to the thesis that Brandeis was more concerned about preserving state regulatory power rather than a principled concern about forum shopping.

[358] Often the motivation is for judges to build political support in states with elected judiciaries by redistributing wealth from out-of-state defendants to in-state plaintiffs. *See generally* Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999). But in some of the most notable plaintiff's "heavens" in Alabama and Mississippi, there is some evidence that the volume of litigation itself provides a substantial economic benefit to the local economy.

[359] *See* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1154 (2000).

[360] *See* STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION §§ 2.25, 2.28 (2001); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISPUTE RESOLUTION 89, 89 (2001); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration in Alabama*, 15 J.L. & POLITICS 645, 661–62 (1999).

[361] *See generally* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); GRANT GILMORE, THE DEATH OF CONTRACT (1974).

And as a result of *Erie*, there is no other forum to provide a different substantive law. Thus, whereas states have clear incentives to provide pro-plaintiff rules, there are few countervailing incentives to provide pro-defendant legal doctrines. It is the current regime of geographical monopolies and unlimited choice of forum by plaintiffs that present the real conditions for the development of pro-plaintiff legal rules. Absent competition among court systems, there is little reason to believe that the common law will evolve toward efficiency.

Nonetheless, a closer examination of the *Swift* regime suggests that the American regime was not quite as robust as the English regime. Most crucially, it appears that the federal courts in America did not act under quite as strong incentives to favor efficiency. First, American judges were not paid on the cases that they heard. As a result, they possessed a much greater incentive to shirk on their workload, which was eventually reflected in the massive backlogs of cases that eventually piled up in the federal courts in the waning years of the *Swift* regime.[362] Second, they faced no external constraints that forced them to adhere to norms of reciprocity in adjudication. The law merchant judge, for instance, drew his authority from the commitment to implement merchant custom. Ecclesiastical judges drew their authority from the commitment to act in compliance with equity and church teaching. Federal judges under *Swift* faced no such constraints. Thus, they had limited constraints and limited feedback on their decision-making. Third, the courts erroneously expanded the logic of the case beyond its proper boundaries, thereby allowing pernicious forum shopping that tended to defeat legitimate expectations, rather than the beneficial forum shopping contemplated by Story and which prevailed for most of the nineteenth century.

3. Summary of the Importance of Competitive Legal Order.—The competitive legal order of the common law's institutional framework has been crucially important in understanding the rise and fall of efficiency in the common law. As Charles Rowley posits the dilemma, "Neither Hayek nor Posner has presented a convincing explanation as to why, or through what mechanism, the judiciary should be supportive of the law of liberty or the law of efficiency in a largely monopolistic court bureaucracy such as that which characterizes twentieth century Britain and the U.S."[363] During the formative era of the common law, the common law courts were just one of many courts in which litigants could have their claims heard. Each of these courts competed with the others for business, seeking to provide speedy, fair, and effective justice. This competition among courts led to innovation and incentives to provide efficient legal rules. Courts that attempted to turn the law into a mechanism of wealth redistribution were

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[362] FREYER, *supra* note 335, at 76.

[363] Rowley, *supra* note 140, at 372.

confronted by the inability to coerce unwilling parties to provide those wealth transfers. By contrast, the demise of competitive law in England and the United States has increased the incentives and opportunities for rent-seeking. Litigants have limited ability to exit jurisdictions with inefficient legal regimes.

This historical inquiry also raises questions about *Erie*'s analysis of *Swift*. *Erie* itself and scholars who have studied *Erie* focused only on the evils of forum shopping; few have focused on the possible *benefits* of forum shopping. Positive forum shopping generates experimentation and produces laws conducive to economic efficiency and coordination. By allowing exit from inefficient state regulation, *Swift* also created pressure for the production of efficient law and thereby enabled the production of efficient law. To be sure, some of this competition persists today as a result of the ability to use choice-of-law clauses to exit a particular state's inefficient legal regime.[364] But this ability to exit through choice-of-law is limited, most notably by the requirement of some sort of geographic contacts. By contrast, under the *Swift* regime, federal law and state law were operative within the *same* jurisdiction, greatly heightening the ability of parties to exit and the competition to produce efficient law. Moreover, contacts under current law may often be tenous at best, causing parties to later be surprised by the choice-of-law clause. Under *Swift*, however, parties could always be aware that federal law could apply to the transaction. To be sure, there were forum shopping evils, especially as *Swift* was expanded beyond its original scope. Nonetheless, by eliminating *all* forum shopping between state and federal court, *Erie* effectively threw out the proverbial baby with the bath water, eliminating efficient as well as inefficient forum shopping.

C. Doctrinal Tendencies of the Common Law

A final factor that tended to promote the efficiency of the common law was that it was traditionally understood primarily as a mechanism for private ordering, rather than for collective goals. This bias was evidenced in at least two important ways that improved the efficiency of the law and reduced its vulnerability to rent-seeking. First, the common law was primarily comprised of a system of default rules, rather than mandatory rules. This allowed individuals the freedom to contract around inefficient common law rules and thereby to create their own wealth enhancing rules. Second, the common law provided great respect for custom that arose through voluntary individual interaction. By enforcing contracts and customs, the common law reinforced the view that the purpose of the law was to enable private ordering by essentially allowing the parties free reign to devise the rules that would govern their transactions.

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[364] *See* O'Hara & Ribstein, *supra* note 359, at 1154–55.

In many ways the arguments for the efficiency of custom and contract flow from a common source, namely individuals designing their own rules to govern their affairs. Contractual bargains represent express individual choice to arrange affairs in a given way. Custom represents implicit design and acquiescence of individuals in a pattern of affairs that emerges spontaneously, but otherwise is similar to contract. Moreover, this analysis intertwines with the previous arguments about weak precedent and competitive law. As this Article will show, the presence of competition among legal systems forced courts to provide laws conducive to private ordering and therefore, provided laws rooted in custom. The freedom of the parties to choose their law meant that law had to conform to their preferences and expectations. Private parties were not forced, therefore, to fit their behavior into judicially constructed categories. In turn, a legal system based on custom requires a legal system grounded on weak precedent rather than *stare decisis*, so as to preserve the flexibility of customary law.

1. Default Rules and Contract.—Common law rules historically tended to be default rules, rather than mandatory rules. This meant that the parties could contract around an inefficient common law rule, thereby designing a more efficient rule to govern the transaction.[365] So long as the benefit from contracting for a tailor-made legal rule exceeded the transaction costs of express contracting, then parties will do so. Voluntary agreements by parties to alter majoritarian default rules by voluntary contract are generally Pareto efficient. Those with subjective or idiosyncratic preferences could thus draft their own tailor-made rules for their particular situations. Thus, even if the efficient rule is the rule that is preferred by most parties, there are other parties who would prefer some alternative arrangement. These parties have a "subjective" valuation that is distinct from the majority preferences.[366] Freedom of contract allows these parties to design contractual arrangements that suit their purposes, while majoritarian default rules are suitable for most contracting parties.[367] Lord Mansfield's views are illustrative: "If the parties do not choose to contract according to the es-

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[365] Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1002 (1996); Louis De Alessi & Robert J. Staaf, *The Common Law Process: Efficiency or Order?*, 2 CONST. POL. ECON. 107, 116 (1991).

[366] JAMES M. BUCHANAN, *Introduction: L.S.E. Cost Theory in Retrospect*, *in* L.S.E. ESSAYS ON COST 1 (James M. Buchanan & G.F. Thirlby eds., 1981); JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY (1969); LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (1963); Donald J. Boudreaux et al., *Talk is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765 (1999); Zywicki, *supra* note 365, at 966–80; Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379 (1983).

[367] *See* Luis De Alessi & Robert J. Staaf, *Subjective Value in Contract Law*, 145 J. INSTITUTIONAL & THEORETICAL ECON. 561 (1989); *see also* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

tablished rule, they are at liberty, as between themselves, to vary it."[368] Allowing these parties to tailor their own rules further enhances economic efficiency.

Moreover, the ability of parties to contract around contract default rules also makes the legal system more resistant to rent-seeking pressures by reducing the incentive for parties to use the court system to try to obtain rules that redistribute wealth rather than promote efficiency.[369] Although the winner in a given case may gain a windfall from the promulgation of an inefficient rule, this windfall will likely be a one-time-only boon. Parties can "exit" the inefficient legal rule by contracting around it, reallocating the risk to the party who is in the best position to bear the risk.[370] Where the parties can contract around an inefficient rule there will be little incentive to seek inefficient rules or for judges to create such rules. Forcing the parties to contract around the inefficient rule, however, requires the use of real economic resources that could otherwise be deployed to a higher social use. The inefficient rule creates deadweight social loss that could be avoided by the promulgation of a more efficient legal rule. At the same time, the ability to contract around the inefficient rule reduces its usefulness as a mechanism for redistributing social wealth on an ongoing basis. Thus, even if judges or interest groups seek to use the common law process to redistribute wealth, the ability to contract around inefficient rules generally makes the common law a very cumbersome and inefficient mechanism for accomplishing the desired end.

Modern law has substantially reduced the ability of parties to contract around inefficient rules, particularly as legislative and mandatory common law rules have increasingly come to squeeze out contract default rules in many areas of society and the economy. Traditionally, the common law was conceived as a set of off-the-rack default rules that could be freely modified by the mutual consent of contracting parties. The whole point of strict products liability, by contrast, was to supplant this regime of default rules with a network of immutable rules that parties were specifically forbidden to contract around. In particular, courts reconceived contractual warranty cases as strict products liability cases. Thus, in *Henningsen v. Bloomfield Motors, Inc.*,[371] the New Jersey Supreme Court ruled that cases involving personal injury from product use would no longer be governed by warranty law, even though warranty law had controlled such actions for 100 years. The New Jersey Supreme Court believed product warranties were

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[368] Quoted in FIFOOT, *supra* note 60, at 99.

[369] Of course, when combined with a competitive court system, these two features gave parties a great ability to escape inefficient legal rules in favor of preferred rules.

[370] *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[371] 161 A.2d 69 (N.J. 1960).

tools for exploiting consumers and denied such warranties any future effect.[372]

The replacement of default warranty rules with immutable tort rules was advanced with *Greenman v. Yuba Power Products, Inc.*[373] In *Greenman*, Chief Justice Roger Traynor articulated the standard of strict tort liability for personal injuries caused by products. Traynor concluded that consumers possessed neither the sophistication nor power to freely bargain about warranty terms for mass-produced consumer goods.[374] Moreover, strict liability for manufacturers would provide insurance to injured victims who might not otherwise be covered by insurance. By contrast, Traynor argued, manufacturers were uniformly in a better position to control the risk of product defects and could obtain insurance, the cost of which could be spread among numerous other consumers. Finally, the revolution was complete in 1964 when the American Law Institute adopted the strict liability standard in the Restatement (Second) of Torts, § 402A.[375]

This inability to contract around rules has also imposed a forced uniformity on implied contractual terms, making it virtually impossible for idiosyncratic bargainers to contract around the rule. For instance, parties who place a high subjective value on a particular term or activity may simply be unable to acquire that product at any price because of the inability to make a binding contractual waiver of liability. This is the case even if the individual is knowingly assuming the risk of some particular activity. Thus, there is additional social loss in the form of the opportunity cost of foregone value-creating transfers that would otherwise be executed in the presence of greater contractual freedom.[376] At the very least, the difficulty of drafting a contractual waiver of liability will substantially increase the cost of entering into a contract to partake of the activity. Not only will it be expensive to draft an adequate contractual waiver of liability, but the difficulty in doing so will tend to reduce the number of suppliers of the product, thus raising the costs of finding a trading partner.

By making it impossible to contract out of this regime of mandatory rules, one-size-fits-all legal rules have weakened the dynamic evolution of the common law that allowed for change in response to the needs of those governed by it. This dynamic regime was changed to a regime where all further changes would be required to go through judicial gate-keepers,

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[372] As such, their logic followed the intellectual framework pioneered by Friedrich Kessler, that such warranty contracts constituted "contracts of adhesion" and were the result of coercion by corporations rather than bargained-for consent. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943).

[373] 377 P.2d 897 (Cal. 1962).

[374] *Id.* at 900–01.

[375] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[376] Robert J. Staaf & Bruce Yandle, *Collective and Private Choice, Constitution, Statutes and the Common Law*, *in* ECONOMIC ANALYSIS OF LAW—A COLLECTION OF APPLICATIONS 254, 260 (Wolfgang Weigel ed., 1991).

thereby defeating the private ordering purpose of contract law. As Richard Epstein observed, through this process of legally-imposed uniformity, "The system of product liability was stripped of its powers of self-correction. In essence, *Henningsen*, *Greenman*, and the Restatement (Second) of Torts reserved to the courts a legal monopoly to fashion the relevant terms and conditions on which all products should be sold in all relevant markets."[377] Epstein concluded that the once-flowing river of the common law that "works itself pure" has arguably been replaced by a "Procrustean bed" of judicially imposed uniformity.[378]

The increased use of mandatory rules has also made the common law more susceptible to rent-seeking pressures. Through mandatory rules, private parties have the ability to impose rules that serve their private ends, rather than general efficiency. Because unwilling parties cannot escape the reach of these rules, they are compelled to provide wealth transfers to rent-seeking interests. In turn, the increased ability to provide such wealth transfers increases the incentives to private parties to invest in lobbying and litigation to secure wealth transferring rules.

2. Custom.—Traditionally the common law tended to enhance efficiency through its heavy reliance on custom and traditions, sifted by judicial reason, as sources of legal principles.[379] Customs that evolve over long periods of time through decentralized, voluntary, and inclusive institutional processes will usually be the source of sound legal principles.[380] Customs that arise spontaneously through the voluntary interactions of many individuals over long periods of time will be subject to testing, feedback, and voluntary acceptance. Such customs have survived testing across the generations as well as by many people within a given community. People in a given community have incorporated those customs into their expectations and behaviors. Thus, there is reason to believe that customs that have survived this process of selection have embedded within them a certain tacit and unarticulated wisdom.[381] As the Ninth Circuit observed in *Hart*, "The

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[377] Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202 (1989).

[378] *Id.*

[379] *See* Pritchard & Zywicki, *supra* note 111, at 460–68; *see also* ALLEN, *supra* note 59; POCOCK, *supra* note 124, at 202; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694 (1996).

[380] It is important to note that this observation applies only to "inclusive" customs, such as commercial custom, but not to "exclusive" customs such as a custom race or sex discrimination. The difference is that in the former all affected parties participate in the formation and maintenance of the custom, whereas in the latter one group maintains a custom of receiving benefits while imposing costs on another group, thus the custom is not likely to be efficient with respect to the party bearing the costs.

[381] Pritchard & Zywicki, *supra* note 111, at 451–57; EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 34–35 (L. G. Mitchell ed., 1993); F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); MICHAEL OAKESHOTT, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 407 (1991); POCOCK, *supra* note 124, at 379; Michael W. McConnell, *The Role of De-*

common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance."[382]

Customary law is likely to be most reliable in situations where parties interact in a series of multiple, reciprocal arrangements and disputes.[383] In this evolutionary setting, the efficiency effects of custom are comparable to free contract. As with explicit contractual bargaining, where all parties are aware of a custom and participate in its development, there is reason to believe that the custom reflects consent, consensus, and the basis of individual expectations. Reciprocity makes it likely that any particular party will not always be on the same side in any given dispute, making that party more likely to favor a rule that favors efficiency overall rather than systematically favoring either plaintiffs or defendants. Repeat interactions make it likely that over time the party will, in fact, be on both sides of the transaction over time; it also reduces the likelihood that any particular interaction will be the final one. This symmetry of interaction and repeated dealing creates conditions favorable to the evolution of efficient customs. Thus, the history of the law merchant is accurately identified as a particularly fortuitous institutional arrangement for the generation of efficient legal rules.[384] Chancery also looked to merchant custom for guidance.[385] Blackstone singled out the customs of merchants as an especially important area of customary law.[386] But relations of reciprocity characterize many social and economic interactions, not just those among merchants.[387]

Customs and traditions that arise spontaneously from decentralized and repeated voluntary interactions will also tend to be relatively well protected from public choice pressures and from well organized special interests. For special interests to succeed in the task of using law to redistribute wealth to themselves, they require some point of pressure or leverage by which they can compel other individuals to surrender wealth to them. Customs, however, arise spontaneously from the decentralized and voluntary interactions of many anonymous individuals. Unlike the positivist model that requires a sovereign issuing "top-down" commands, customary law offers a "bottom-up" process as legal rules emerge from the expectations and agreements

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mocratic Politics in Transforming Moral Convictions into Law, 98 YALE L.J. 1501, 1504 (1989).

[382] Hart v. Massanari, 266 F.3d 1155, 1167 (9th Cir. 2001).

[383] "The key conditions are reciprocity and high frequency." Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. Legal Stud. 1, 11 (1992). *See also* Todd J. Zywicki, The Reciprocity Instinct (George Mason University School of Law, Working Paper October 1, 2001) (on file with author) (specifying conditions for "reciprocal altruism" to survive in nature).

[384] BERMAN, *supra* note 137, at 333–56; Benson, *supra* note 203, at 649–50; TRAKMAN, *supra* note 212, at 8.

[385] BARBOUR, *supra* note 181, at 154.

[386] *See* 1 BLACKSTONE, *supra* note 168, at 75.

[387] Berman, *supra* note 167, at 757.

generated by voluntary agreement and interaction.[388] Thus, there is no point of leverage on which a special interest can press to change the custom in the preferred manner. Moreover, because custom is fluid, attempts to change one element of a customary relationship will tend to be counteracted by other changes. By its very nature, therefore, custom will tend to be highly resilient and highly protected from public choice pressures. Because the common law traditionally was rooted in custom, the common law was similarly resistant to interest group pressures.[389]

Again, the reliance on custom went hand-in-hand with the competitive legal order and weak precedent that characterized the common law. The flexibility and ability of custom to change and adapt over time made it unwise to try to hem in legal change through strict rules of precedent. Moreover, given the choice, parties would have been expected to favor the application of well established and widely shared customary practices to resolve their disputes, rather than the formal and alien concept of the common law. Thus, the heavy reliance on custom in judicial decisionmaking was in large part a reflection of the fact that this preference was shared by the litigants themselves.

Traditional common law theorists recognized that custom and contract are both rooted in the wellspring of individual consent. This reliance on individual consent reinforced both that the common law was a spontaneous order as well as the notion that the common law was a mechanism for private ordering. Thus, John Selden, one of the most influential common law theorists, placed heavy reliance on the importance of consensual obligations as the foundation for the moral authority of the law.[390] Selden believed that the most important rule of natural law was the absolute obligation of complying with one's contracts, both divine and with humans.[391] He also saw the obligations of customary law as having binding force because he viewed

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[388] *See id.* ("[I]n the Western legal tradition, especially in its earlier phases, it has been taken for granted that law comes not only, and not primarily, from the lawmaking power of the state but also, and primarily, from relationships created on the ground by individuals and groups in their interactions with each other. Not the state, not the governmental authorities, but people, the community, has been understood to be a primary source of law. . . . In the past it has been understood that customary law, unofficial law, is a primary source of state law, official law, and that one of the principal functions of state law is to enforce the rights and obligations that arise from customary law.").

[389] Pritchard & Zywicki, *supra* note 111, at 460–68; Parisi, *Toward a Theory of Spontaneous Law*, *supra* note 304, at 212.

[390] Berman, *supra* note 55, at 1699.

[391] *Id.* Selden derived the sanctity of contractual relations between people from the covenant between God and Noah. Just as Noah's obligations arose from this contractual covenant, Selden believed that covenants between people were imbued with a comparable religious component. *Id.* Berman argues that the obligation of keeping one's contracts was for Selden the "most important rule of natural law." *Id.* (citing RICHARD TUCK, NATURAL RIGHTS THEORIES (1984)).

customary law as essentially consensual in nature.[392] Mansfield also stressed the customary basis of commercial transactions.[393]

The American experience, again, was similar. As Bridwell and Whitten observed, the defining characteristic of the federal court's commercial law jurisprudence under *Swift v. Tyson* was its willingness to rely on commercial custom to decide cases. State regulation often sought to further some defined public goal, whether for the public good or to benefit discrete special interests. By contrast, the federal courts deferred to the expectations of the parties under the contract, seeking to "discover" their intent and expectations. "[C]ommercial law was . . . customary law."[394] Indeed, the customary basis of law reinforced the federal court's authority over commercial law:

> Under this view of the commercial law as custom, the function of diversity jurisdiction in commercial cases should be apparent. In a customary law system in which the purpose of a grant of subject matter jurisdiction is to protect nonresidents from local bias, the intentions and expectations of the parties to every dispute had to be determined by a tribunal independent of the apprehended local prejudice.[395]

Commercial custom was universal and consistent; thus the federal courts were the appropriate place to implement this uniformity. The role of custom in the modern law has been greatly reduced. Traditionally, courts were highly deferential toward custom. Custom, embedded in a network of private contract and a market, was seen as a powerful institution for transmitting information and for ratifying consent. Custom was seen as an offshoot of contract, a collection of tacit understandings and agreements that implicitly allocated the parties' respective rights and obligations. But, during the liability revolution of recent decades, custom has come to be viewed with the same jaundiced eye as freedom of contract; as freedom of contract came under increasing attack, so did custom.[396] Rather than being viewed as a source of consent and tacit wisdom, custom increasingly was seen as exclusive rather than inclusive, a mechanism for powerful interests to escape liability for the harms they caused. Custom, it was suggested, did not arise spontaneously through voluntary interaction. Rather it was "created" by manufacturers and medical professionals and then "imposed" upon powerless and uninformed buyers. Thus, consumers were not really involved in the evolution of the custom and, to the extent they appeared to be, their involvement was poorly informed. As with contractual limitations on liability, therefore, it was essential for judges to intervene to second guess the results of custom. Thus, custom has gradually moved away from being a

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[392] Berman, *supra* note 55, at 1699.

[393] FIFOOT, *supra* note 60, at 99.

[394] BRIDWELL & WHITTEN, *supra* note 338, at 66; *see also id.* at 15.

[395] *Id.* at 67.

[396] *Discussion of Paper by Richard Epstein*, 10 CARDOZO L. REV. 2223, 2238 (1989).

per se defense regarding the reasonableness of precautions and instead become mere evidence of reasonableness.[397] Some form of cost-benefit analysis is the prevailing standard, "leaving custom with a subordinate role in the overall analysis."[398] Although the roots of this transition lay in several cases in the early twentieth century, compliance with custom remained a per se defense against liability in most jurisdictions during most of the twentieth century. In part, the durability of the defense may have resulted from the fact that "courts saw it as providing a salutary 'policy' check on potentially vast liability."[399] During the 1960s and 1970s, however, the evidentiary rule governing custom gradually came to supplant the rule of treating compliance custom as a per se defense. Thus, the role of custom in tort law was diminished during the era of the liability revolution.

More fundamentally, modern lawyers and judges reject the notion that legal rules should be driven by custom and the spontaneously generated practices of merchants, consumers, and private actors. Instead, the purpose of law is believed to be to satisfy articulated social goals, whether economic, social, or moral. Whereas the law was previously understood as purpose-independent inputs into individual action and the coordination of individual plans, today it is more accurate to see individual action and behavior as a means to the accomplishment of prescribed social goals that the law is designed to accomplish. With this has come the belief that custom is valuable only if it serves some larger social goal beyond the coordination of the affairs of private individuals. As a result, law results from political struggle rather than the customs that emerge from private action.[400]

3. Summary of Contract and Custom.—The discussion in this subpart has been somewhat abbreviated, as the underlying concepts are quite well established. For current purposes, however, it is most important to recognize the crucial role of contract and custom in the rise and fall of the efficiency of the common law. Both tended to promote efficient rules while also being resistant to rent-seeking pressures.

The adherence to freedom of contract permitted parties to contract around inefficient rules which placed pressure on courts to innovate. If

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[397] Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 4–7 (1999).

[398] Epstein, *supra* note 383, at 2.

[399] Hetcher, *supra* note 397, at 17.

[400] *See* Todd J. Zywicki, *Hayek versus Posner on the Economic Analysis of Law*, REV. AUSTRIAN ECON. (forthcoming 2003); *see also* HAYEK, *supra* note 102, at 85 ("The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans."); James M. Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483, 489 (1974) ("The working of 'law,' as an activity, is not guided by nor should it be guided by explicit criteria for 'social improvement.' Law, in this vision, is a stabilizing institution providing the necessary framework within which individuals can plan their own affairs predictably and with minimal external interferences.").

those parties who are supposed to provide wealth transfers under an inefficient rule are able to escape that rule through freedom of contract, this will reduce the incentive of litigants to demand and judges to provide inefficient rules.

The common law's heavy reliance on custom also promoted the efficiency of the common law. Custom is largely immune to rent-seeking pressures. Custom is diffuse, decentralized, and consensual; thus there is no point of "leverage" that can be used to try to manipulate the path of custom's evolution. Thus, judicial reliance on custom also attenuated rent-seeking pressures as it is difficult to direct the path of customary evolution.

It may be fairly argued that these doctrinal tendencies—reliance on contract and custom—are themselves produced by the institutional factors discussed earlier. In part, this is true. Because courts competed for business, they had to provide rules favored by the parties and responsive to their needs. These rules were found in the rules and expectations created by the parties themselves through custom rather than in judicial precedent. Moreover the inability of courts to bind unwilling parties led to a reliance on default rules and freedom of contract, rather than to mandatory rules. But these doctrinal tendencies also retain independent significance in that it appears that these factors retained vitality for some time even after the decline of the institutional factors that generated them. Thus, these doctrinal tendencies had a residual effect of perpetuating these legal rules for some time afterward. Moreover, these factors have independent significance in that they were part of the judicial mindset of the traditional common law. Thus, they are independently relevant in explaining the rise and fall of efficiency in the common law. Judges traditionally believed in the propriety of reliance on custom and contract, which had efficiency-enhancing consequences. To the extent that this jurisprudential mindset has changed, this change has been reflected in the rules produced by the common law process.

D. Summary

For purposes of exposition, the foregoing discussion has distinguished among various different elements of the historical institutional structure of the common law that contributed to its propensity to generate efficient rules. But it should be stressed that each of these elements was closely intertwined with one another and that they all contributed to the formation of a legal system that was quite distinct from the modern common law system. As noted, the practice of weak precedent prevailed during an era of jurisdictional competition and a vision of the law rooted in private ordering. Reflection demonstrates the interconnections between these elements.[401] A fully mature doctrine of *stare decisis* requires a formalized and hierarchical legal system to enforce vertical *stare decisis* through the enforcement by

[401] *See* Kempin, *supra* note 79, at 32–33.

higher courts against lower courts in the hierarchy. Enforcement of horizontal *stare decisis* also requires a formalized legal process for promoting uniformity of the law through time. Both forms of *stare decisis*, therefore, cannot exist without a formal and hierarchical court structure.[402] For instance, assume that the Exchequer Court laid down a ruling. This case would not be binding on any other court in the system, such as ecclesiastical courts, law merchant, or the like. In short, *stare decisis* of the modern type cannot exist in a competitive legal order. Absent a developed concept of *stare decisis*, judges naturally gravitated toward a spontaneous order notion of law, looking for the concepts and logic in the law, rather than the authority of a previously decided case.

Moreover, it is almost certainly no coincidence that the hardened notion of *stare decisis* emerged contemporaneously with the enactment of the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876.[403] These laws ended the competitive legal order that had prevailed in England for some 600 years, uniting the common law courts and Chancery courts under one hierarchical umbrella. The creation of a hierarchical legal system also made possible for the first time a coherent application of the strict doctrine of *stare decisis*.[404] In turn, this necessitated the creation of a formalized system of case reporting that accurately reported case holdings, rather than the heterogeneous reporting practices of the Year Books. In turn, this motivated the intellectual revolution that shunned the spontaneous order or "declaratory" theory of law in favor of a more positivist conception of the law. This also generated, for the first time, the contention that *stare decisis* was needed to constrain judges from overstepping their proper bounds. Absent *stare decisis*, it was feared, judges would use their power to impose their personal preferences on society. As noted, this concern was traditionally ameliorated by the fact that judges only had persuasive law-making authority because parties could choose to have their case heard in rival jurisdictions. The creation of a hierarchical legal system, however, enabled judges to issue rulings and then compel their enforcement on both current and future parties. This new and vast grant of power to judges raised concerns of judicial lawlessness, thereby putting greater weight on the importance of *stare decisis* in constraining judges.

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[402] *See* Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001).

> The concept of binding precedent could only develop once two conditions were met: The development of a hierarchical system of appellate courts with clear lines of authority, and a case reporting system that enabled later courts to know precisely what was said in earlier opinions. As we have seen, these developments did not come about—either here or in England—until the nineteenth century, long after Article III of the Constitution was written.

Id.

[403] *See* 1 HOLDSWORTH, *supra* note 199, at 408.

[404] To be sure, there were earlier courts and commentators who advocated a stricter adherence to *stare decisis* in both England and America. But absent a clearly-organized hierarchical legal system, it would not have been possible to effectuate a stricter adherence to precedent in practice.

In the United States, a similar force was at work. *Swift v. Tyson* rested on the institutional freedom that parties had to seek relief in either state or federal courts, each of which developed its own legal system. The intellectual foundation for this system was the notion that the law was a spontaneous order, not a set of isolated cases. Thus, *Swift v. Tyson* also adopted the traditional weaker view of the weight of precedent of the earlier English era. By contrast, the overruling of *Swift* by *Erie* caused both an institutional and intellectual revolution. *Erie* not only required the abandonment of competing legal systems, but also carried with it the positivist notion that legal cases are themselves the law in the same way that discrete statutory enactments of state legislatures are the law. Thus, the declaratory theory of law became untenable as well.

IV. CONCLUSION

Until the mid-nineteenth century, the institutional and intellectual structure of the common law was very different from its modern form. This is not merely historical pedantry, because it was during this period that the essence of the common law was formed. In particular, the doctrines of the common law that were later recognized as the pro-efficiency doctrines were laid down during this period. But they were laid down in a variety of different courts and only later absorbed into the common law. Subsequent changes undermined the institutional framework that had supported the development of efficiency-enhancing common law rules. These institutional changes provided a necessary condition for the later deviation of the common law process away from efficiency and toward rent-seeking rules.

Paul Rubin's model of efficiency and inefficiency relies on the assumption of the presence of strong precedent (*stare decisis*) that binds later courts through time, on strong court hierarchies that allow superior courts to bind inferior courts (thereby preventing litigant exit), on restrictions to contracting around inefficient rules, and finally, on judicial decisionmaking as the primary source of law rather than custom. Without the presence of these factors, litigants will find it futile to manipulate the evolutionary path of the law because of the inability to maintain the wealth enhancing rule through time or because of the inability to coerce unwilling parties to subject themselves to the rule. During the formative period of the common law, each of these four factors tended toward the production of economic efficiency. By contrast, in the past century, each of these factors has changed, increasing the incentives for rent-seeking litigation and limiting the ability of other parties to escape the reach of these rules through exit or choice. Thus, these supply-side changes were a necessary condition before Rubin's demand-side model could adequately describe reality.

George Priest's model of legal evolution also rests on changes in the supply side of the equation. Priest attributes the rising inefficiency of the common law in recent decades to the pursuit by judges of ideological and

redistributive policy preferences. As this Article has demonstrated, for this to occur it first is necessary to have an institutional framework that permits high agency costs for judges such that they can pursue their personal preferences to the exclusion of serving the needs of the parties. The historic system of weak precedent, a competitive legal order, freedom of contract, and customary law insured that judges would be unable to pursue their personal preferences at the expense of the public. As these factors changed over time, however, the legal system became more vulnerable to influence by judges' ideological preferences, thereby creating opportunities for greater judicial control over the path of the law.

Understanding the efficiency and inefficiency of the common law, therefore, requires an understanding of the supply side of common law rulemaking. Examining the demand side alone will be insufficient to fully understand the evolutionary process. This Article has provided a model to explain both why the early common law tended toward the production of efficient rules, as well as why the modern common law has increasingly tended toward the production of inefficient rules.