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Rivalry and superior dispatch: An analysis of competing courts in medieval and early modern England

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ABSTRACT

In most areas, economists look to competition to align incentives, but not so with courts. Many believe that competition enables plaintiff forum shopping, but Adam Smith praised rivalry among courts. This article describes the courts when the common law developed. In many areas of law, courts were monopolized and imposed decisions on unwilling participants. In other areas, however, large degrees of competition and consent were present. In many areas, local, hundred, manorial, county, ecclesiastical, law merchant, chancery, and common law courts competed for customers. When parties had a choice, courts needed to provide a forum that was ex ante value maximizing.

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“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.” – Adam Smith (1776: 280)

1. Introduction

How can the law satisfy the interests of the parties involved? Although F.A. Hayek, Richard Posner, and others have offered reasons why the common law is efficient (Hayek 1973: 94-123; Posner 1998: 25-27; Priest 1980: 94-123; Rubin 1977), this hypothesis has been severely challenged in recent years.¹ Judges often pursue other goals, such as advancing political agendas, redistributing income, or simply advancing their careers (Stephenson, 2009; Gennaioli and Shleifer 2005; Cooter 1983; Roberts and Stratton 2000; Benson 1990; Posner 1994: 1, 13-15, 31). Charles Rowley writes, “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.” (Rowley 1989). In most areas, economists look to competition to align incentives, but not so with legal systems (Landes and Posner 1979: 254; Cowen 1992; Stutter 1995). Lawsuits are unlike most goods for which more consumption benefits all parties involved; because plaintiffs and defendants often have differing interests, a product that is a good for some may be bad for others² (Shavell 1997). Giving plaintiffs the ability to shop around between numerous profit-motivated courts (which can have their judgments institutionally enforced) might serve the wants of plaintiffs, but might not serve the wants of defendants³ (Landes and Posner 1979: 254). In a world with unlimited entry and one-sided agreement, the result could be a race to the bottom as profit-motivated legal systems compete for plaintiffs. Even though bureaucracy is inefficient, dealing with one inefficient producer would likely be better than dealing with multiple efficient producers of negative externalities. In the words of James Buchanan, “If monopoly supply of

¹ The literature on the economic inefficiency of modern American law, especially tort law, is now quite extensive. See, e.g., Tullock (1997); Posner (1996: 1703); Shughart and Tollison (1998); Helland and Tabarrok (2003); Huber (1988); Huber and Litan (1991); Bernstein (1999); Priest (1991). There have been similar criticisms of tendencies in contract law toward principles such as unconscionability that restrict freedom of contract and contract enforceability. See Epstein (1975); Epstein (1980); Rubin (1978).

² In some cases, however, two parties may have an honest disagreement about what to do when an unforeseen contingency occurs, and they may consider the advice of a third party as value enhancing. Adjudication would then be a way of minimizing the costs associated with a dispute. In these cases, informal and cooperative mediation is the most obvious first option.

³ This would not be possible, however, if courts and the enforcement apparatus were not vertically integrated and the court had no way of using law enforcement to uphold its judgment.

'goods' is socially undesirable, monopoly supply of 'bads' should be socially desirable, precisely because of the output restriction" (Buchanan 1973).⁴

Yet, when one observes the history of English law, one notices an enigma. During the centuries in which the common law developed, multiple English courts with overlapping jurisdictions competed over many of the issues that now comprise the common law. Courts that were designed to hear cases in one area used legal fictions that enabled them hear cases that might not have been within their jurisdiction. For example, ecclesiastical courts were able to deal with all matters pertaining to men's souls, so if people engaging in contract swore an oath to God, the ecclesiastical court could adjudicate any disputes related to that contract. As a result, parties potentially could bring their case in a variety of different courts. These courts would charge money per case and would compete for business. Interestingly, Adam Smith actually praised these competing courts. Landes and Posner acknowledge that the historical record appears inconsistent with the prediction that competing courts should generate pro-plaintiff rules: "Why it did not emerge...presents an interesting question for further research" (Landes and Posner 1979: 254).

In this article we outline the competitive aspects of the legal system in medieval and early modern England and describe a mechanism through which competing courts would result in, to use Smith's words, "superior dispatch and impartiality." We begin by offering a hypothesis of what judges are likely to maximize in three possible legal arrangements: monopolized courts, a competitive arrangement in which the plaintiff selects a court that enforces its decision on an unwilling defendant, and a competitive arrangement in which both parties agree on a forum and method of enforcement. We then look at the historical evidence to see how the legal arrangements affect how the law is administered. In some areas, the law was largely monopolized, or if not monopolized, it was imposed on parties without their consent. In these areas, people did not have a choice, and as would be predicted the law was often quite harsh and could tend toward pro-plaintiff forum shopping. In other areas of law, however, a large amount of competition and ex ante consent was present, and in these areas one sees evidence of mutually beneficial legal processes. In areas such as adjudicating disputes over contracts, parties often had a clear choice of forum, and so they would choose courts that were more likely to serve the joint interest of the parties by meeting out fair and efficient justice. As we discuss below, people making a contract could have ecclesiastical courts adjudicate potential disputes if they both swore an oath to God. Or, if they wanted the matter to be adjudicated elsewhere, such as in merchant courts, they would instead "wet the bargain" by having a drink together when they made their contract.

Our hypothesis is that the choice of venue or law provided a powerful instrument for the generation of mutually beneficial legal rules. Under conditions in which both parties agree to law, competition can create a harmony rather than a

⁴ Similarly, Shleifer and Vishny (1993) make the case that one is better off dealing with one bribe collector than an infinite number of bribe collectors. Buchanan and Yoon (2000) model an anticommons situation in which multiple parties have the ability to veto or restrict the decisions of others, thus preventing desirable outcomes from being achieved.

conflict of interests. This contrasts with systems in which courts can enforce judgments and redistributive legal rules on unwilling participants. When courts do not possess that ability, the possibility of using litigation to rent seek is eliminated.

By highlighting the large amount of competition among early English courts, we hope to advance three lines of research in law and economics. The first concerns how and why the common law became so developed and, in particular, the widely observed (if contested) claim that the common law tended toward the production of efficient rules. Authors who look only at the past couple hundred years are missing some of the most important centuries of the development of the common law. The second line of research is on the potential advantages and disadvantages of private law enforcement. Economists such as Becker and Stigler have argued for the importance of private law enforcement (Becker and Stigler 1974), but its role throughout history and in modern times is often unappreciated. Recent research has documented private rules among gentlemanly brokers (Bernstein 1992; Stringham 2003; Banner 1998), unsavory prison gangs (Skarbeck 2010), pirates (Leeson 2007a), and bandits (Leeson 2007d).⁵ Under what conditions does private rule enforcement produce desirable results? The third line of research is on how ex ante selection of tribunals can benefit all parties involved. Benson discusses how arbitration clauses enhance choice and are ex ante utility enhancing for all parties (Benson 1995; Benson 1989; Benson 1999; Benson 1998; Shavell 1995).⁶ In parts of the English history we discuss, the selection of courts was analogous in many ways. In many historical English legal arrangements, as with modern arbitration, parties have a choice over judges and rules, and decisions apply only to parties who consent.⁷ Our research indicates that mutually beneficial alternative dispute resolution has a long history and that competing forces had a beneficial effect on the law.

Our paper is organized as follows. Section 2 discusses Adam Smith's analysis of competing courts and describes a mechanism through which competing courts can serve more than just the plaintiff. Section 3 describes the historical features of the early English common law and highlights the areas in which competition was present. Section 4 describes the beneficial aspects of this competition and how government eventually restricted competition. Section 5 concludes.

⁵ One of the classic economics articles to document the widespread use of private law enforcement is Friedman (1979), which outlines how people in Iceland relied on private law enforcement for hundreds of years. Leeson (2007b) provides a framework to describe when orders will likely be stateless, and Leeson (2008b) describes how parties without a common legal system have an incentive to figure out ways to minimize the costs of disputes. Leeson (2008a) maintains that the concept of spontaneous order can be applied to stateless societies in ways that even many public choice economists such as Tullock (1994) do not appreciate. Leeson (2009) examines a fascinating non-governmental legal system along the English and Scottish border up through the 16th century that was used to mitigate disputes. For an overview of the literature on public choice and stateless societies, see Boettke (2005), Stringham (2005), and Powell and Stringham (2009).

⁶ See also Cooter (1983: 107) and Zywicki (2003: 1551). Zywicki focuses on the problems of rent-seeking after the common law became monopolized; this article focuses on the beneficial aspects of competition before it was.

⁷ We are referring to voluntary arbitration as opposed to court-mandated arbitration.

2. Can competing courts advance mutual interests?

Following Thomas Hobbes and John Locke, most modern thinkers assume that law must be provided by one entity. However, 250 years ago, competition between courts was analyzed (and praised) by none other than Adam Smith. In both *Lectures on Jurisprudence* and *Wealth of Nations*, Smith wrote that courts benefit from rivalry just like anything else. Although the Crown had a *de jure* monopoly over law, in many areas there was *de facto* competition, and Smith considered this competition beneficial. Smith described the lack of monopoly:

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 (Smith [1776] 1976: 241)

Through the use of legal fictions, the courts could evade *de jure* limitations on their respective jurisdictions and hear cases in other areas. As a result, the jurisdictions of courts overlapped in many areas of the law. The courts collected fees for the cases they adjudicated, so naturally they had an incentive to compete for cases. But even though many courts competed, Smith clearly stated that courts did not attract business by providing pro-plaintiff rules:

In consequence of such fictions, 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 (Smith [1776] 1976: 241)

It is surprising for courts to be both fast and fair, attributes that seem beneficial to all parties, not just the plaintiffs. Smith went on to ascribe the positive characteristics of the common law to the historical competition between 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 (Smith [1776] 1976: 241-242).

Smith also believed that the system helped respect individual liberty: “Another thing which tended to support the liberty of the people and render the proceedings in the courts very exact, was the rivalry which arose betwixt them”⁸ (Smith [1776] 1976: 280). In addition, Smith noted that requiring judges to compete for fees caused them to work harder and more efficiently, thereby

⁸ See also Smith ([1776] 1976: 423) (“During the improvement of the law of England there arose rivalships among the several courts.”)

removing incentives for judges to shirk or to indulge their personal preferences.⁹ According to Smith, beneficial arrangements arose because of competition, rather than welfare maximizing and economically savvy government judges or some ex post government review of law.

Thus, Smith sees the competition among courts in the formative centuries of the common law as a process of benign competition (Zywicki 2006). This poses a puzzle to the theoretical model in Landes and Posner, which predicts that competition among courts would have led to the production of pro-plaintiff rules as judges sought to attract litigants to file cases in their courts. We believe that the explanation for this puzzle stems from the nature of the competition, which can differ from how most people envision unrestricted entry in law.

In certain areas, most notably contract enforcement, the competitive system had two important aspects: competition and consent. Consent here refers to what Brennan and Buchanan (1985) term contractual agreement. Here parties are agreeing on the rules and their method of enforcement. When both parties agree to a forum at the contract stage when they are potential plaintiffs and potential defendants, competing courts must offer a forum that both sides can trust. Without competition and contractual agreement, a court's incentives are changed, and the interests of all clients need not be their number one concern. Landes and Posner raised this potential solution when they wrote, "This problem can be overcome only if the parties to a contract agree in advance to the submission of any dispute arising from the contract to a particular tribunal" (Landes and Posner 1979: 254).

Consent, however, can be present even without it being express, formal, or by written contract (such as a formal choice of law or choice of forum clause) if the parties have an implicit understanding of which court and which law (or extralegal rules) will control in the event of a dispute. The agreement as to which system of rules will control a given dispute may be self-enforcing even if the underlying

⁹ See also Smith (1776: 423) ("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. (Posner 1994: 1, 13-15, 31). This concern about excess judicial 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" (Burdick 1968: 34, 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 immeasurably given to drunkenness" (see Burdick 1968: 36). Spellman argued that this tendency toward drunkenness also explained the common law prohibition on providing jurors with meat, drink, fire, or candlelight until they agreed upon their verdict.

agreement itself is subject to dispute if, for example, participants in a given industry, market, or profession share a general understanding that disputes will be resolved under a particular set of rules.¹⁰

With the discussions of Adam Smith, William Landes and Richard Posner in mind, let us offer a framework to analyze why courts might act in various ways depending on the legal arrangement and also the payment structure for the courts. For simplicity, we can describe three types of legal arrangements, one with a legal monopoly and two with legal competition: (1) monopoly courts where neither party has a choice of forum, (2) competing courts where the plaintiff chooses the venue and the defendant does not, and (3) competing courts where both parties must agree on the legal venue. One could also apply this logic to the parts of a court system (the judges, the forum, the procedures, and the rules), but we will refer to the entire court as a whole or refer to one part of the group (e.g., the judges) as representative of the whole (the courts).¹¹ Once we outline the different legal arrangements, we can offer hypotheses of what judges or courts are likely to maximize in each of the three cases.

We assume that a given judge seeks to maximize his own utility, subject to constraint. Judges may have any number of elements in their utility functions: prestige, power, wealth, leisure, or their ability to impose their ideological worldview on society.¹² An important part of our argument is that what matters in

¹⁰ Arbitration was common (Powell 1983; Horwitz and Oldham 1993), although the extent to which contracts involved formal written choice of law or choice of forum clauses is unclear. But even if contracts lacked formal written choice of forum or choice of law provisions, it does not imply that arbitration did not exist or that everyone used the same courts or laws.

One possible explanation for a relative absence of written choice of forum provisions was simply that merchant transactions were often informal and not reduced to writing (Basile 1998: 14). The informality of many merchant agreements is reflected in the fact that while the common law often required written or sealed agreements, seals generally were not required in London and Bristol, leading commercial centers where merchants found those formal requirements unwieldy and refused to follow them (Barbour 1914: 19).

¹¹ Within a court verdicts can be decided by juries, a judge, a panel of judges, or other combinations. Tullock (1980) offers reasons why juries are error prone, which we believe is often quite true. In this article we focus less on the makeup of courts and more on the institutional arrangements that are likely to increase or decrease errors.

¹² Posner (1994) asks “What Do Judges and Justices Maximize?” and answers “The Same Thing Everyone Else Does.” The individual preferences and the court compensation scheme will obviously influence the actions of a judge. If a monopolist judge is compensated only with a flat fee per case (through court fees or general tax revenue), he will have more of an incentive to hear as many cases as possible and less of an incentive to be concerned about what is right. If a monopolist judge was given a fixed budget per year (such as the salaries that most government judges collect) with the prospect of getting promoted his choice to hear more or fewer cases will depend on his objectives including what choices are more likely to advance his salary over the long run. Judges whose appointments depend on the political process will to a large degree act as agents for politicians or those who influence the political process. Shughart and Tollison (1998) and Stephenson (2009) provide an excellent overview of how and why judges can engage in politically motivated adjudication. Shughart and Tollison (1998) discuss how judges should not be viewed as checks and balances against the legislature but actually agents of it. To predict how a judge will act we would want to know the objectives of the judge and those who determine the hiring, promotion, and compensation of judges.

predicting how judges will behave are the constraints they face, rather than their preferences. We argue that under proper constraints and incentives—a regime defined by a properly-designed system of competition—judges will be induced to satisfy the parties’ interests rather than their self-interest. Moreover, we will argue that in the foundational era of the common law when judges were subject to competition and were paid in part by fees provided by the litigants, they faced constraints and incentives that led them to satisfy the needs of the parties who came before them, rather than their self-interest. By contrast, in a scheme of monopoly courts, judges will have greater opportunity to pursue their own preferences at the expense of the parties.

Under regime (1), a monopoly arrangement, neither party has a choice of venue or ultimate judge. The only choice parties can influence is whether to have a lawsuit, but after that both parties are dependent on what members of the monopolist court system choose to do. A judge in a monopolist situation could use his position to maximize the joint gains of both parties (minimizing the joint losses of both parties), to benefit a specific party at the expense of joint gains, or himself (such as by increasing his consumption of leisure). How a judge acts will depend on the incentives he faces such as whether he needs to run for election or cater to politicians who appoint and promote him. The judge could siphon some or all of the surplus to benefit the plaintiff, the defendant, other third parties, the state, or the judge himself. Judges that can redistribute property rights may also encourage various forms of rent seeking because much is at stake.¹³ Under a monopoly system the hypothesis is that the agents in the legal system maximize their subjective welfare, whatever form that takes, such as leisure, power, or the imposition of ideological preferences.

Under (2), a competitive arrangement in which the plaintiff, but not the defendant, selects the court, the hypothesis is that the courts will cater toward the plaintiff.¹⁴ Such a system requires compelling the defendant to follow a judgment whether he likes it or not. Setting aside the possibility of counter bribes, the defendant is a subject, not a customer, so his welfare becomes secondary. Under this system one would expect to see all of the problems of plaintiff forum shopping and pro-plaintiff rules that Landes and Posner identify. With competition and one-sided

¹³ For an empirical study investigating whether campaign contributions to judges may affect those judges’ decisions, see Palmer and Levendis (2008).

¹⁴ Competing private judges do not have a fixed, tax-financed budget, as with most government judges. Private judges can be paid a flat annual salary by an organization that hires them to do in house adjudication, or they can be paid a fixed fee per case, the number of hours devoted to the matter, or some measure of performance. The private judges will likely look at who is paying for their services and will serve them. If judges are paid by plaintiffs (or fees exacted from losing defendants who have no say in the matter) the judge will be more likely to serve the plaintiff.

We also could describe a hybrid system (between 1 and 2) that involves competition between government judges who are able to enforce their decisions on unwilling subjects. Competing government judges with fixed budgets (no monetary incentives at the margin) could simply have different preferences, and those who happen to cater to plaintiffs would get the most requests. Or if government judges’ fees, salaries, or long run career prospects are influenced by the number of cases plaintiffs bring to them, they will have additional incentives to cater to the plaintiff.

agreement, the hypothesis is that the judge maximizes the welfare of the customers, the plaintiffs.

Under (3), a competitive arrangement that involves ex ante consent from all parties, the hypothesis is that the courts will maximize the expected well being (or minimize the joint losses) of both parties in a potential dispute. Joint agreement on a tribunal is simplest to analyze when it occurs at the stage of the initial contract, before a dispute has taken place (and when neither party knows whether they will be the future plaintiff or defendant). However, joint selection of a tribunal can also take place after a dispute occurs. If the selection of the tribunal takes place at the contract stage, as with modern day arbitration clauses that specify a specific forum (and choice of substantive law as well), the adjudicator will need a reputation of unbiased judgment; otherwise, both parties would not agree.

If the selection of a tribunal takes place after a dispute occurs, parties may agree to an unbiased adjudicator if they want to resolve the dispute in good faith. But even if the parties have less cooperative motives, they must agree on an adjudicator when the adjudication system lacks an institutional enforcement mechanism. For example, in modern times when a government judge issues a verdict, he calls on the government police to enforce it, but a mediator at a Diamond Dealer's Club has no such power. Members of a club might face other incentives (such as being considered an upstanding club member) to follow the mediator's decision, but the decision to follow the mediator is not compelled with force. As a result, parties will need to work together to pick an adjudicator trusted by both of them.

Whether the selection occurs before or after a dispute arises, forward-looking parties will also likely want to pick an adjudicator that minimizes the joint losses in settling disputes. Exceptions could occur, but a court that charged more in fees than the amount at stake in a dispute would find only the odd customer compared to the court that maximized the expected value (or minimized the expected losses) of both parties.¹⁵ Under a competitive arrangement with two-sided consent, the hypothesis is that the legal system will provide rules and adjudication methods that are ex ante beneficial to all parties involved.

One could model these systems with many more details, but keeping it simple enables us to easily highlight the main point. A judge will maximize different objectives depending on the incentives of the institutional arrangement. Under a monopoly the hypothesis is that judges maximize their own utility, which may or

¹⁵ Here we are describing private judges that compete on a case-by-case basis and get paid by the case or the hour. In addition, we could describe a private judge who is paid a fixed salary by an organization, and the incentives ultimately would be similar. For example, if a club such as a stock exchange had an in-house judge who made trials costly compared to what is at stake, the organization would be negatively affected. Members of an organization do not want that to happen and thus have an incentive to hire a judge who would minimize the costs of disputes (Stringham 2002). Similarly with medieval fairs, the right to hold piepowder courts was ancillary to the right to hold a fair. Thus the incentive to provide fair, speedy justice was related to the desire to maximize the business of the fair; the judicial proceedings were vertically integrated to the business of the fair which was held every year (Zywicki 2003).

may not align with the well-being of the litigants. Under a competitive arrangement in which the plaintiff, but not the defendant, selects the court, the hypothesis is that judges will likely cater to one side. And under a competitive system in which both parties agree *ex ante*, the hypothesis is that judges will work to serve the *ex ante* interests of both parties, which may often be a rule that maximizes joint value and minimizes transaction costs.¹⁶ With this basic framework in mind, let us look at the historical record in English law to examine the degree to which each of the above arrangements were present and see to what extent the hypotheses are true.

3. Competing courts in medieval and early modern England

Before the Norman invasion in 1066, the law was extremely decentralized, and afterward the law became more centralized.¹⁷ But even up until the seventeenth and eighteenth centuries, many aspects of the English legal system had a great deal of *de facto* competition. In many areas the competition was far from perfect. In fact, royal courts often attempted to prevent competition, and in many

¹⁶ Many lawyers such as Bebchuk and Ferrell (2001) and Kahan and Kamar (2002) argue that competition often favors companies and fails to benefit consumers. They believe that having a competitive choice of rules can result in a race to the bottom (in terms of what would be good for consumers) rather than a race to the top. Many of these arguments boil down to agency problems, in that the potential for choosing rules that reduce the value of a firm's owner arises from the fact that firm managers hold substantial control over the firm's state of incorporation, subject to only to shareholders' very loose constraints. Whether a firm will choose to incorporate in a state that enhances the total value of the firm is thus an empirical question of the degree of decision-making autonomy by managers and constraints by shareholders. Which effect will predominate is indeterminate as an *a priori* matter (Zywicki 2006). By contrast, where principal-agent problems are less pronounced, such as with limited liability companies, a strong tendency toward value enhancing rules would be predicted (Ribstein & Kobayashi 2001).

A related critique of the tendency of competition to produce good rules is suggested by Klerman (2007 p.1215), who argues that competing adjudicators might have an incentive to offer suboptimal rules. He writes, "Of course, a court might have thought it could develop a competitive advantage by creating efficient law and then hoping parties would use forum selection clauses to increase the caseload of that court." But he concludes, "Even if a court could really have counted on widespread use of forum selection clauses, this strategy might not have been beneficial if, as is likely, efficient rules would have generated less litigation." This argument is faulty in that at the time the individual parties enter into a contract, they will seek to choose a set of rules to govern the contract and any disputes that minimizes the cost of any potential litigation, as this reduction of *ex post* dispute costs will be reflected in a reduction of *ex ante* transaction costs of contracting. Thus, any given court will provide rules that reduce overall litigation and litigation costs if by doing so that court can draw more business to itself, even if this reduces the overall volume of litigation. The alternative line of reasoning neglects the idea in economics that sellers must continually compete for consumers and those consistently trying to hawk inferior products are less likely to be stay in business in the long run (Klein, 1997). In this article we do not adopt a framework that often assumes consumer irrationality and instead we adopt a more traditional economic framework about more choice being better that can be found in Mahoney (1997) and Romano (1998).

¹⁷ See Benson (1994) (discussing the rise of government policing after the Norman conquest); see also Klerman (2001) (documenting the punishments for various torts) and Holdsworth (1906: 143) (discussing how by the end of the thirteenth century the Crown had exclusive jurisdiction over treason and felony).

areas of society, illiberal laws restricted how much money people could make or where they could live (Quigley 1996). But in certain areas of law, the legal system featured a large amount of consent (from an *ex ante* perspective) and competition. In those areas, individuals could select the tribunal that offered the best settlement of disputes, and where choice existed it led to relatively beneficial rules. Formally, the “common law” courts referred to the Royal Courts of the realm: the Court of Common Pleas, the Court of King’s Bench, and the Court of the Exchequer. But in fact, the royal courts were just one of several legal systems that existed through the formative period of the common law’s evolution.¹⁸ There were local courts, manorial courts, merchant courts, and ecclesiastical courts, which were independent from the royal courts (Hogue 1966: 5).¹⁹ In addition to competition from non-governmental courts, the three common law courts faced a degree of competition from other government courts, such as Chancery Courts, where people could go if they felt they were not getting justice in common law courts.

Eventually, as noted below, the royal courts absorbed these several other courts and incorporated many of their doctrines into the common law. Our interest in this article is in the development of legal doctrine in England; thus, unless otherwise noted, when we refer to the “common law” in this article, we refer generally to the body of law produced by all of these competing courts during this period, rather than the “common law courts” narrowly and technically defined.

De jure, each of the courts (local courts, manorial courts, merchant courts, ecclesiastical courts, and so on) were limited in their jurisdictional reach. But these limitations could often be evaded with procedural fictions designed to camouflage actions and shoehorn them into particular courts.²⁰ For instance, *de jure* ecclesiastical or Church Courts held exclusive jurisdiction over matters of testamentary succession and marriages, but *de facto* determination of whether particular situations fell under the Church’s jurisdiction or that of some other court was often difficult (Milsom 1969: 23-24). People could take cases to courts that would otherwise lack authority if the court could recharacterize the form of pleading in a case. For instance, the court of exchequer had jurisdiction over debts owed to the King, but not debts between two private parties. Nonetheless, if a creditor owed the King (such as for taxes), then the failure of a debtor to repay a

¹⁸ Many people consider modern common law to be the invention of seventeenth and eighteenth century jurists, but many of the principles that became incorporated into the common law already had been developed by the thirteenth century. See also Rowley (1989), Baker (1971), and Hogue (1966: 5).

¹⁹ Hogue elaborates on this competition, “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.” See also Berman (1983: 10) and Rowley (1989:371).

²⁰ See Hudson (1996: 26) (“There were no strict rules of jurisdiction determining the court to which every dispute must come.”).

debt was said to imperil the ability of the creditor to pay the King. As a result, the parties were permitted to have their case handled by the exchequer if they so desired. This was a relatively simple fiction, however; the number and complexity of legal fictions multiplied so as to evade formal jurisdictional limitations.²¹

Courts wished to hear more cases because they generated their revenues from the fees paid by litigants (Baker 1971: 31; Landes and Posner 1979).²² However, many of these courts lacked the ability to claim jurisdiction over unwilling litigants, and did not have police at their disposal to enforce their decisions.²³ Under these conditions, courts were pure adjudicators, and the litigants were in the driver's seat. Here judges needed to respond to their customers because customers who had a choice would not patronize courts if they were overly bureaucratic, time consuming, or unfair. Judges had to focus on the substance of the underlying actions, rather than the formal labels and terms of pleading used in each of the court systems. They also had to keep up with and recognize the legal innovations of their rivals, which generated flexible and high-quality justice (Plucknett 1956: 650).

In areas with a large degree of voluntary competition, significant improvements in legal rules and procedures occurred. In many cases courts elevated legal rules from the status of mere precedents (and forms of pleadings unique to each court) to more abstract and generalized conceptual categories that could be transferred from one court to another. This competition provided a powerful impetus for the improvement of law. Courts competed to provide the most

²¹ See Milsom (1969: 61-63); Plucknett (1956: 644) (describing the development of the doctrine of *indebitatus assumpsit* as an attempt by King's Bench to infringe on the exclusive jurisdiction of Common Pleas over actions in Debt).

²² Evidence about exact compensation schemes in each of the types of courts is often unavailable, but some information exists. Klerman (2007: 1188-9) provides some examples of some judges' compensation in the sixteenth, seventeenth, and eighteenth centuries. Judges working for the King's Bench and Common Pleas were given a salary, but earned as much as 67 percent of their total income from fees. Chancery judges and officials also were paid by fees from the business that they did. Holdsworth (1903a: 258) reports that in 1826 the fees paid to the Lord Chancellor were over 12,601 English pounds solely in exercise of its bankruptcy jurisdiction. These large fees encouraged the Chancellor to expand its jurisdiction, especially in jurisdictional areas such as bankruptcy.

Holdsworth (1903a: 221) notes that payment of governmental officials from fees for services rendered was consistent with the practice of the Middle Ages and was a "proper method of payment" in its early history. But the size of the chancery court was strictly limited by statute and was unable to expand as its caseload increased. This over time led to high levels of congestion and delay in the court as the chancery expanded its docket, eventually leading to a decline in the court's business (Holdsworth 1903a: 227). To address the persistent problem of delay, beginning in the mid-nineteenth century Chancery's jurisdiction was reduced repeatedly by law.

²³ This was especially the case with private courts that lacked the ability to call on police to have their judgments enforced. But Powell (1983: 50) points out that even the royal courts had limited ability to have their judgments enforced. He writes, "The starting-point is to appreciate the limitations of royal power to enforce the law. Throughout the middle ages the Crown lacked the resources to maintain the standing army or salaried police force which would have been necessary to enforce a primarily punitive system of justice. The administration of justice depended instead on the co-operation of local society at all levels, with the scope for graft and inefficiency this entailed. In such circumstances, where the coercive apparatus serving the courts was weak and the influence of the local community powerful, it was inevitable that the mediatory, restitutive functions of justice would prevail over the punitive."

unbiased, accurate, reasonable, and prompt resolution of disputes.²⁴ This is the rivalry observed by Smith: If any one of these characteristics was deficient, customers could take their business elsewhere. These rival courts included local courts, ecclesiastical courts, law merchant courts, and chancery courts. Although these will be discussed distinctly for purposes of exposition, in practice, the boundaries between these systems were highly fluid; a great deal of cross-fertilization occurred.²⁵

3.1 Local Courts: Hundred Courts, Manorial Courts, and County Courts

For centuries, contract law in the common law courts (King's Bench and Common Pleas) remained poorly developed, and the system of pleading and proof highly formal. The King's Bench and Common Pleas courts were often considered stagnant intellectual backwaters for disputes between individuals (Milsom 1968: xlix). Issues of contract law or tort law hardly appear in the records for the first several centuries of the royal courts' history (Milsom 1968: xlix, lii; Baker 1971: 271). Nevertheless, legal developments in these areas continued apace in rival jurisdictions outside of the royal courts.

Local courts resolved many issues of contract law and other forms of personal legal relations for centuries. One of the most important types of court was the Hundred Courts and related Burghal Courts (Chrimes 1956: 23), which date back to at least the eighth century (Chrimes 1956: 7).²⁶ These courts seem to have been created for purposes of mutual protection, and they would make pledges about the lawfulness of their members (Holdsworth 1903a: 11). By the time of Edward the Confessor in the eleventh century, more than 350 different Hundred Courts were in private hands (Chrimes 1956: 10). People who had a conflict could have it

²⁴ See Berman (1983: 10); see also Fuller (1968: 123), Milsom (1968: xcv), and Hudson (1996: 51).

²⁵ Hogue (1966: 5) explains: "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. . . . All these courts and systems of law deserve mention in an account of growth of the common law, for by the end of thirteenth century the common law had absorbed much, if not all, of the judicial business of its competitors and may have borrowed heavily from them in the process of aggrandizement."

In the United States under the regime of *Swift v. Tyson*, a similar opportunity for inter-court competition took place between federal and state courts in cases involving diversity jurisdiction (Zywicki 2003: 1613-20). This quasi-competitive regime tended to promote more economically sensible laws in the federal courts, as opposed to state courts, which provided incentives to cater to in-state interests at the expense of out-of-state parties, especially corporate defendants. This tendency, however, was attenuated by the absence of strong incentives for judges to compete, as all judges were government salaried. As a result, the federal courts during the *Swift* era were frequently criticized for being unduly slow and facing long case backlogs.

²⁶ "Hundred" courts were named after the administrative and geographic institution of the hundred, a geographic subdivision of a shire. It is believed that the name in English may have derived from an administrative grouping of one hundred families or households (Southal et al. 2009).

resolved in these hundred courts rather than resorting to courts run by far-off kings.²⁷

In addition, manors, which are sometimes considered commercial enterprises, often had their own courts to deal with people on their land (Holdsworth 1903a: 179, 184). The universities, such as Oxford and Cambridge, had courts that dealt with treasons, felonies, and contracts within their bounds (Holdsworth 1903a: 175). Local courts also included town courts and feudal courts for vassals (Baker 1979a: 25). Independent local courts in towns and manors gave remedies in cases in which the King's courts would not; county courts devised ways for dealing with contract disputes even though they did not have a well-theorized concept of contract law. These local courts provided a place of first resort for the bulk of Englanders pursuing claims in contract or tort. (Plucknett 1956: 635; Milsom 1968; Pollock & Maitland 1968: 109).

3.2 Ecclesiastical courts

Ecclesiastical courts were also an important source of competition during medieval times. How much coercion the Church used in enforcing certain rules such as those against heresy or other violations of personal morality is a matter of debate, but let us assume that in certain areas they did use coercion (Holdsworth 1903a: 616). Yet, in other areas, the ecclesiastical courts clearly did not use coercion and attracted customers to them voluntarily. The ecclesiastical courts, which drew on principles of Roman law as well, offered highly developed body of contract law and other law, leading many laymen to bring their non-spiritual cases to ecclesiastical courts (Helmholz 2004: 86; Berman 1983: 743; Milsom 1968: lii; Berman 2000: 245). Helmholz (2004: 240) writes, "ecclesiastical jurisdiction remained a separate system of law in England. It did not become one part of the national or common law." Their heyday as independent courts was between the eleventh through sixteenth century, although they live on today albeit in a more limited role. The canon law system was guided by two principles: simple and fast procedures, and equitable rules (Holdsworth 1903a: 83). Ecclesiastical courts attracted a lot of petty cases because for years common law courts appear to have been expensive or inefficient (Chrimes 1956: 74). Because ecclesiastical courts "claimed jurisdiction over everything that had to do with the souls of men" (Stubbs 1968: 248, 270), the Church was able to create a sort of shadow claim for almost any dispute from contract to testamentary succession²⁸ (Baker 1971). Because of the international reach of the medieval Church throughout Western Europe and the corollary reach of its judicial system, the Church courts provided a source of relatively unbiased and consistent justice. Moreover, the Church's need to have legal rules that could be applied consistently across national boundaries generated a

²⁷ There were other levels of royal power, such as eyres (itinerant royal justices), but as authors such as Powell (1983: 49) write, their ability to enforce laws was often quite limited. Klerman (2001: 11) points out that the eyres came by only every four years at the turn of the thirteenth century and "as long as twelve to twenty-five years at the century's end."

²⁸ Stubbs describes the irritation of Henry III, Edward II, and others regarding the extravagant jurisdictional claims of the ecclesiastical courts (Stubbs 1968: 272).

need for refinement, sophistication, and abstractness in legal concepts that led to the improvement in the intellectual sophistication of the Church legal system.

Some areas affecting laymen, such as family law and intestate succession, were clearly under the jurisdiction of the ecclesiastical courts²⁹ (Milsom 1968: 23; Scrutton 1907: 226; Berman 1983: 223). But although ordinary contracts fell under the jurisdiction of lay courts, because breaking a promise made under oath was also a sin, the ecclesiastical courts were permitted to hear contract disputes³⁰ (Milsom 1968). Even mundane issues of contract and property law could be characterized as raising spiritual issues that would allow the Church to assert jurisdiction (Stubbs 1968: 277). One court's records from the fifteenth century indicate that more than half of its cases dealt with "breaches of faith" (Helmholz 2004: 360). Typically the ecclesiastical court would require parties to fulfill their promises and deliver what they owed. "When specific performance would have been either inappropriate or impossible, the judges ordered public penance to be performed" (Helmholz 2004: 366). One way to commute the term of penance was to pay civil compensation (Baker 1971: 112). The penalty for noncompliance was excommunication, and a party against whom such an adverse judgment was rendered would be allowed to petition the court for a rehearing only if they paid restitution to the party they wronged.

Some clerics were hesitant about the great activity of the ecclesiastical courts, arguing that their focus on secular matters of contract enforcement and the like distracted the Church from spiritual matters (Stubbs 1968: 269). But as long as someone had broken an oath, the church courts considered it worthwhile to address it. The result was that the availability of rival courts under independent powers—Pope and king—provided a powerful mechanism for legal development. This legal improvement was both direct, through the innovations of the ecclesiastical courts, as well as indirect, through pressure on other courts to innovate (Milsom 1968: xcvi). For example, many of the Chancellors of the Chancery Court were clerics trained in canon law, and so they brought the principles of the canon law to the Chancery bench (Holdsworth 1903a: 241-42). Fundamental equitable principles, such as the requirements of good faith and fair dealing in transactions and the remedy of specific performance, have roots in canon law³¹ (Holdsworth 1903a: 242). The universal reach of the Church, which crossed regional or national boundaries, also had the effect of universalizing law, creating a type of "law of nations" that could be applied nearly uniformly throughout Europe despite separate jurisdictions (Berman 1983: 346). The fierce rivalry between the ecclesiastical courts and other courts persisted for hundreds of years in England, and only ended

²⁹ The independence and strength of the ecclesiastical courts in England through at least the end of the eighteenth century is suggested by Alexander Hamilton's statement in *Federalist no. 83* that the Probate Courts of early America were "analogous in certain matters to the spiritual courts in England" (Hamilton [1788] 1961: 502).

³⁰ Pollock and Maitland observe that as a result of the potentially vast reach of the Church's jurisdiction over the pledge of faith, only "with great difficulty were the Courts Christian prevented from appropriating a vast region in the province of contract" (Pollock & Maitland 1968: 128, 131).

³¹ See also Uniform Commercial Code.

when Henry VIII brought the Church, and hence its courts, much more under the King's power (Stubbs 1968: 277, 266).

3.3 Law merchant courts

In the realm of commercial law, the most important courts were those of the law merchant, or *lex mercatoria*.³² The law merchant was born in the commercial city-states of Italy in the early medieval period (Holdsworth 1903a: 65-102) and borrowed greatly from the canon law, Roman law (Berman 1983: 339), the *Lex Rhodia* customary commercial law of the Mediterranean traceable to the third century (Trakman 1983: 8), and the trading practices of the Middle East, where commerce emerged earlier than in Europe (Bewes 1923: 11). Although some authors question the extent to which the law merchant was a fully autonomous universal law dating back to antiquity (Baker 1971; Donahue, Jr. 2004; Kadens 2004; Sachs 2006), whether or not one agrees with those claims, disputing the existence or importance of specialized merchant courts would be futile.³³ The first known treatise on the law merchant appeared in the thirteenth century, and academic commentary on the law merchant has been consistently in circulation since that time (Basile 1998). Richard Posner, among others, has drawn attention to the importance of "Medieval merchants' courts, which were private courts that created commercial law which was eventually absorbed by public courts" (quoted in Goldberg 1979: 347).

Rather than the archaic formalistic rules of the common law, the law merchant courts offered law grounded in commercial custom (Burdick 1968: 40). For example, rather than a "pledge of faith," as under the ecclesiastical law, the merchants instead pointed to the "wetting of a bargain," i.e., buying a drink to memorialize a deal, as an important evidentiary act (Scrutton 1909). Other customs included "putting down a godspenny or shaking hands to indicate when a deal had been done" (Kadens 2004: 57). Because the law was created by merchants for merchants, they did not want it to be overly technical, or to include useless legal formalities or unnecessary procedures³⁴ (Holdsworth 1903a: 130). Disputes over contracts, notes, or other commercial affairs were tried before these specialized tribunals. Juries were composed of merchants themselves, often drawn from multiple nationalities (Carter 1902), and lawyers generally were barred from the

³² For general overviews of the history and characteristics of the law merchant, see Berman (1983: 333-56) (stressing legal rules) and Benson (1989) (providing economic analysis of the law merchant).

³³ Like Benson (forthcoming) and Leeson (2007c), we are far from convinced by the claims that the law merchant did not exist or that the law merchant was entirely dependent on government enforcement. The best-researched article in this line of argumentation is Sachs (2006), but Sachs's only focus of study is the fair court plea rolls from St. Ives between 1270 and 1340. Just because he finds little mention of the law merchant as an autonomous universal body of law in these court documents does not mean that the law merchant did not exist or was unimportant throughout Europe or the middle ages.

³⁴ The first great treatise on the law merchant, Gerard Malynes's *Lex Mercatoria* (published in 1622) was authored by a merchant, not a lawyer (Holdsworth 1903aa: 131-32). His most prominent successor, Marius (1670), was also a merchant (Carter 1986: 265).

proceedings as being disruptive to the speedy and informal resolution of disputes (Holdsworth 1903a: 98).

Law merchant courts prospered in towns, fairs, and various markets³⁵ (Holdsworth 1903a: 298). Medieval trading fairs and major commercial towns provided courts for merchants to resolve disputes over contracts and torts (Scrutton 1909). These were referred to as the courts of “piepowder,” which refers to the dusty feet of the merchants³⁶ (Scrutton 1909). The right to hold a trading fair included within it a right to offer a piepowder court to resolve disputes arising during the fair (Holdsworth 1903a: 298). These courts offered swift resolution of disputes with a minimum of procedural formalities³⁷ (Benson 1989: 650). 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. Failure to comply with the judgment resulted not only in punishment to the merchant, but the exclusion of the merchant’s fellow countrymen from the fair. Because foreign merchants dominated most large-scale international trade, the law merchant controlled the development of commercial law (Holdsworth 1903a: 298). Indeed, over time the law merchant rules came to govern almost all commercial transactions in which either of the parties was a merchant (Holdsworth 1903a: 98, 107, 115).

There were also courts of Staple that resolved disputes arising in the markets of the most important articles of commerce in England at the time, including wool, woollens, leather, lead, and tin³⁸ (Holdsworth 1903a: 302). Under the “Statute of the Staple,” enacted in 1353, common law courts were specifically prohibited from hearing disputes arising from contracts made within the staple markets, and the staple courts were expressly instructed to apply the law merchant and not the common law³⁹ (Carter 1902: 261; Brodhurst 1909). The jurisdiction of the staple

³⁵ According to a notable thirteenth century treatise, the law merchant prevailed in five places: cities, fairs, seaports, market towns, and boroughs. See also Basile (1998).

³⁶ Scrutton (1909) (referring to court as the Court *Pepoudrous*).

³⁷ In fact, one significant advantage of the law merchant courts was that they were open for business more often. The common law courts, by contrast, sat only in the mornings and often disposed of cases at a leisurely pace. By contrast, the law merchant court was held twice per day, before and after dinner (Basile 1998: 60).

³⁸ The staple courts eventually died out with the decline of trade in those goods in the sixteenth century (Walsh 1932: 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 (1986) in Appendix III, with Lisa Bernstein’s description of the rules governing the National Grain and Feed Association (Bernstein 1996).

³⁹ The Statute of the Staple provided, in relevant part, “[A]ll merchants coming to the staple, their servants and household, shall be ruled by mercantile law (*la lei merchant*) 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 1998: 129, quoting the Statute of the Staple (1353)). Some commentators argue that, notwithstanding its apparently clear language, the Statute of Staple did not actually deprive the common law courts of jurisdiction over these disputes and instead simply empowered the staple markets to establish *additional* locations for adjudicating disputes (Reid, Jr. 1998: 837). Even if this is true, we are not aware of any evidence that parties litigated frequently in common law courts.

court was broad, including claims concerning debt, covenant, and trespass under its head, and excluding the king's courts in all cases but freehold or felony (Holdsworth 1903a: 302). Indeed, 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 (Plucknett 1956: 636).

Because other courts commonly handled commercial disputes (Plucknett 1956: 2; Burdick 1909: 43), the seventeenth century Reports of the Common Law Courts contain very little on commerce (Scrutton 1909 Basile 1998: 137). As legal historian 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" (Scrutton 1909: 447; see also Basile 1998: 137). He then provides the answer to his puzzle: "The 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"⁴⁰ (Scrutton 1909; Burdick 1909: 43; Basile 1998: 168). William Blackstone (1756: 263-64) similarly noted that merchants of different states would be unwilling to permit their transactions to be governed by the "municipal law" of either country. As a result, he observed that "the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of." Moreover, he noted that when English courts did hear merchant disputes, "even in matters related to inland trade," English courts frequently applied merchant custom to resolve the dispute. Legal historian William F. Walsh (1932: 362) similarly observed, "One reason why the law of contract [in common law courts] 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."

In fact, the common law courts were jurisdictionally prohibited from hearing cases involving contracts that were to be performed outside England because of the inability to collect the relevant facts through the process of a jury trial⁴¹ (Holdsworth 1903a: 119, 140; Walsh 1932: 367). The common law also lacked jurisdiction over torts committed abroad and did not deal with disputes between merchants, in large part because of the incompetence of the common law courts to deal with commercial disputes. This multiplicity of courts was not technically part of

⁴⁰ Burdick (1968: 43) 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.»

⁴¹ Eventually the common law courts also used fictions to evade this jurisdictional limitation (Holdsworth 1903aa: 140).

the common law system, so most transactions (and certainly most important transactions) were governed by courts outside the common law system, such as the law merchant (Holdsworth 1903a: 303, 307, 316).

Despite the informal nature of the law merchant, much of sophisticated contract law is rooted in law merchant rather than common law courts (Basile 1998: 136). The law merchant offered a range of equitable defenses (use of concepts of justice or fairness and not merely legal formalities and technicalities) generally thought to be economically efficient for the parties involved and protected the consensual nature of the transaction, such as defenses of fraud, duress, and mistake (Benson 1998: 500, 503; Berman 1983: 343; Trakman 1983: 12); it also developed rules protecting bona-fide purchasers for value well before the common law (North 1990: 129). The common law courts adopted these defenses centuries later. Although the common law courts tended to stagnate under the weight of legal formalities, law merchant courts modernized the commercial law of England, providing the model for the subsequent incorporation of law merchant norms into the common law.

3.4 Chancery Court

Another alternative to common law courts was the Court of Chancery, which, although not private, supplied a margin competition. The Court of Chancery had some monopoly privileges, and perhaps for that reason it exhibited many problems (Holdsworth 1903a: 427). In some areas, however, it was much more flexible than the common law courts, and during the fifteenth and sixteenth centuries the common law courts actually feared that Chancery's procedural advantages would allow it to displace the common law courts as the dominant legal institutions of England. In fact, the common law courts lost a substantial number of cases to Chancery⁴² (Baker 1971: 36), and they responded to the competition by designing procedural and substantive innovations to "win back the patronage of the litigants and the lawyers who advised them" (Baker 1971: 37; Holdsworth 1903a: 456).

In the name of predictability and consistency, the common law courts had adopted bright-line rules that often ended up being too inflexible (Baker 1971: 87).⁴³ But if someone suffered hardship, they often were able to go the Court of Chancery to pray for judgments in equity.⁴⁴ For example, the common law courts typically refused to consider equitable defenses, thereby producing some startling results such as refusing to discharge a paid debt if the debtor failed to obtain a

⁴² Holdsworth also provides a dramatic recitation of the struggle between common law and equity (Holdsworth 1903a: 247-51).

⁴³ Klerman (2004, 2007) argues that within in English common law courts narrowly defined (Court of Common Pleas, King's Bench, and Court of the Exchequer), there was a tendency toward the production of pro-plaintiff rules.

⁴⁴ Baker observes, "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" (Baker 1979: 272). Coquilette (1999: 186) similarly observes that the safety valve of Chancery "permitted the courts to adhere to strict forms and rules without worrying about the 'hard case' which would make poor precedent if decided dispassionately."

written receipt or cancellation of the loan instrument (Klerman 2007: 1191).⁴⁵ Chancery, by contrast, could grant relief in such instances and enjoin further pursuit of the debt in the court of Common Pleas (*ibid.*). More generally, Chancery could provide relief in situations of contractual mistake and created the equity of redemption primarily for situations of mistake or bad faith (Holdsworth 1903a: 244). In principle, the Chancery court could act whenever the operation of the common law would work an injustice. Thus, when common law relief was unavailable in cases of fraud, forgery and duress, victims could resort to Chancery to rectify the situation (Holdsworth 1903a: 243-44).

Chancery's mandate was often construed broadly. The Chancery court could intervene on the basis of the inadequacy of the common law remedy available for a breach of contract as well as the inadequacy of the common law conception of contract (such as the absence of equitable defenses). This allowed the Chancery court to act to award specific performance of a contract, a remedy unavailable in the common law (Holdsworth 1903a: 243). Chancery provided a defense, for example, where a bond was wholly or partially satisfied but not recovered by the debtor and created the equity of redemption for situations of mistake or bad faith. Equity also could enforce promises not made through written sealed documents and provided relief in situations of contractual mistake. Although sluggish in responding to competition, common law judges were not entirely passive. For example, Coke's impetus for introducing law merchant concepts into the common law was spurred in part by the Chancery's success in doing the same and the desire to limit Chancery's incursions into the common law's jurisdiction. (Burdick 1909: 50; Basile 1998: 146-47).

Cases involving the ownership and transfer of real property were *de jure* the sole jurisdiction of the common law courts. But the Chancery developed various fictions to evade the common law's monopoly and played a powerful role in generating improvements in the law of real property. In particular, Chancery's invention of vehicles such as equitable trusts provided individuals with dramatic legal innovations that made it easier for them to execute their affairs. The great innovation in property forms thus arose during an era of interjurisdictional competition between the common law and Chancery (Holdsworth 1903a: 243).

4. The consequences of competitive versus monopolized courts

During the centuries when the common law developed, many competing bodies created and adjudicated law. In certain areas competition was restricted, but

⁴⁵ Despite their tendency to work hardship in particular cases, some of these rules may not have been as irrational as they appear at first glance. For example, the rule that required debtors to pay twice if they failed to have their bonds canceled upon repayment may not have been designed to punish careless debtors but instead have been a means to promote the concept of negotiability in commercial notes (Zywicki 2003: 1601). Other rules are ambiguous, such as the early recognition of the right of a third-party beneficiary to enforce a promise, which was later reversed in England after the system became less competitive but continues as a valid right of action in the United States (Klerman 2007: 1505-6).

in other areas competition was quite free. The areas with more competition had better results. The area of contract law can be considered the gold standard because in many cases contracting parties could select easily from any number of courts.⁴⁶ Parties were not only free to contract around a previous court's potentially precedential ruling, but they could contract around entire systems. Competitive pressures nudged courts with peculiar rules or procedures to catch up and innovate if they wanted to attract customers.⁴⁷ Beyond contract law, Powell (1983: 52) documents how "Arbitration was also popular among the county gentry for the resolution of property disputes, and for the establishment of compensation for physical assault and homicide." In areas of law in which governmental rules prevented competition, we observe less beneficial rules and procedures. As is common in history, certain groups sought to restrict competition, and over time the legal system in England became more monopolized and less consumer focused. Therefore, an overall assessment would have to be mixed. Nevertheless, the beneficial effects of competition were lasting, and many of the innovations during this time exist in the law today.

4.1. Beneficial effects of competition on the common law

One of the benefits of competition is that beneficial practices can be both discovered and copied. The most fitting or optimal legal practices are not always known. Legal competition enables groups to experiment, and when one group discovers a good rule or procedure, others can adopt it.⁴⁸ One area in which rivalry led to emulation and improvement was the common law courts, which were relatively inflexible, formalistic, and cumbersome compared to the law merchant and ecclesiastical courts (Plucknett 1956: 272). The rigors of the forms of action required in the common law system of contract undermined its coherent evolution, causing the common law to lag well behind these other, more innovative, legal regimes. Church courts were also well ahead of lay courts in the evolution of modern rules of proof and procedure in contract disputes (Milsom 1968: 25).

Thus, even though contract law in the common law courts remained relatively undeveloped during this period, local courts, law merchant courts, and ecclesiastical courts met this demand sufficiently. Legal historians such as Plucknett (1956: 272) speculate that the strength of these competing legal systems might

⁴⁶ Agreeing on a forum before a dispute occurs is also very easy for parties entering into a contract. Thinking about this issue in modern times, when parties have a preexisting relationship amenable to private contractual ordering, such as for product liability, medical malpractice, or some other relationship, the problem of forum shopping may not arise. Traditionally, these relationships were understood as relations of a contractual nature and thus driven by the logic of the evolution of contract law, not tort. Only in recent decades has tort law expanded to fill the areas traditionally governed by contract law. Landes and Posner (1979: 258) recognize that if parties have a contractual relationship, then competition among courts may work well.

⁴⁷ Modern advocates of expansive choice of law contractual rights make a similar argument. See O'Hara and Ribstein (2009).

⁴⁸ As Smith wrote about competition in general, "Rivalship and emulation render excellency, even in mean professions, an object of ambition, and frequently occasion the very greatest exertions" (Smith 1776: 110).

explain why the common law remained so undeveloped. If law merchant courts or ecclesiastical courts were sufficiently meeting demand, the royal courts may have not seen much of a market in hearing commercial or religious cases.⁴⁹

Klerman (2004, 2007) challenges the received wisdom⁵⁰ and argues that competition did in fact promote pro-plaintiff rules. He uses game theory to develop a model about why he predicts pro-plaintiff rules when judges are allowed to collect fees. Klerman (2004) discusses how common law courts had limited defenses in contract disputes and how in the nineteenth century some pro-defendant rules were passed (2007: 1206). He then presents empirical evidence about cases before the King's Bench and Common Pleas. First he compares the percentage of cases won by plaintiffs the year before and the year after the statutes of 1799 and 1825 denied fees to the King's Bench and Common Pleas judges. Klerman (2007: 1207) finds that in a comparison of the year before and the year after the 1799 statute, the percentage of cases won by plaintiffs decreased by 5%. Furthermore, the percentage of cases won by plaintiffs decreased by 2% between 1824 and 1826. In the four years that he analyzes, the King's Bench and Common Pleas decided 420 cases. Klerman (2007:1210) also looks at the major cases highlighted in three modern histories of law to compare the time periods of 1600-1798 versus 1800-1872. Klerman finds that of the major cases that the authors chose to highlight, the percentage won by plaintiffs declines between 4 and 19% depending on the textbook. Klerman concludes that competition led to forum shopping and pro-plaintiff rules.

Klerman's analysis is extremely thorough and illuminating, although not necessarily dispositive. For example, there remains, among other concerns, a benchmarking problem—perhaps, for example, the adoption of salaried compensation provided new incentives for judges to shirk, thus leading to a tendency toward inefficient, pro-defendant rules to reduce their caseloads (at least in the short run). It may also be that rules perceived as pro-plaintiff actually were not quite so in practice. For example, while the failure of a debtor to receive a receipt evidencing his payment of a debt did mean that the debt was not discharged, if a written deed evidencing a debt was destroyed or lost, the debt itself was destroyed, relieving the debtor of his payment obligation (Barbour 1914). This suggests that the rule may not have been intended as a pro-plaintiff rule, but rather as a formalistic rule that simply tied the existence of the debt to the paper evidencing the debt.

Let us grant *arguendo*, however, that he is correct that the royal courts were indeed pro-plaintiff. This says nothing of the legal system (including the nonroyal courts) as a whole, especially in the hundreds of years leading up to time period he analyzes. Klerman (2007: 1186) writes, "Because of their limited powers, this article will pay little attention to nonroyal courts." Yet, by restricting his analysis to the

⁴⁹ The common law courts eventually extended their reach into the area of contract law as well. Klerman (2007: 1188-9) documents that in 1797, King's Bench and Common Pleas judges received both a salary and a significant amount in fees, so it seems likely that hearing more cases in different areas would have been a way to generate more income.

⁵⁰ Klerman (2004: 2) admits, "Many lawyers will find the assertion of pro-plaintiff bias in the common law absurd."

royal courts, Klerman misses the fact that contract law was quite developed and quite common in other courts. Royal law courts seem to have been little more than debt collection courts that required little in the way of developed contract jurisprudence. We question the extent to which the roughly 100 yearly cases in the King's Bench and Common Pleas on which Klerman bases his analysis are representative of the typical contract dispute in England at that time or the many centuries before.

Over time the common law courts realized that they were behind the curve and began incorporating many legal principles from other courts, especially those concerning commercial law. By the seventeenth century, the common law courts had adopted many law merchant rules, ranging from rules of evidence to the substantive rules of negotiable instruments, in response to competitive pressures from the law merchant court system (Benson 1990: 225-226). Modern conceptions of partnership and other business forms originated in the law merchant courts⁵¹ (Burdick 1909: 48; Holdsworth 1903a: 110), as did warranties of quality⁵² (Holdsworth 1903a: 110-111). Still other law merchant concepts found their way into the common law through the initial mediation of the Chancery Court as it sought to draw business to itself in the great competition with the common law courts (Burdick 1909: 50; Carter 1902: 250-51).

In response to the vibrancy of the merchant law courts, common law judges developed the notion of *assumpsit*, an action to recover damages in response to breach of contract. This created 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 (Baker 1979a: 354).⁵³ *Assumpsit* allowed the common law to develop for the first time a coherent mechanism for creating a true contract doctrine (Holdsworth 1903a: 117).⁵⁴

In contrast to Klerman, we believe that interjurisdictional competition had the effect of making the common law courts adopt better sets of rules. Numerous

⁵¹ Berman (1983: 349-50) provides an extensive list of the various legal concepts that originated with the law merchant.

⁵² Walsh (1932: 366) observes that a claim for damages for a breach of warranty was recognized under the law merchant some two centuries before the common law.

⁵³ Barbour (1914: 66) notes, "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."

⁵⁴ Allan Farnsworth (1969: 595) noted that the impetus for the common law courts to develop *assumpsit* into a fully-developed 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." Merchants and commoners were especially inconvenienced by the common law's adherence to arcane and expensive legal formalities and turned to Chancery courts to enforce their contracts. As noted by Barbour (1914: 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." Holdsworth (1903b: 456) noted 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. Basile et al., (1998) also describe the growth of commercial cases in Chancery and competition by Admiralty courts as well for litigants' business.

legal historians accept that the legal order was both polycentric and stable for centuries (Zywicki 2006). With the exception of Klerman's claims of a tendency to produce pro-plaintiff rules *within* the narrow confines of the royal courts (which we believe reflected the fact that most contract disputes were heard in other courts during this period), historians have consistently remarked on the stable and generally good outputs. This absence of serious complaints about the results of the inter-court competition provides further circumstantial evidence of the productive nature of the rivalry among courts, reinforcing the direct observations of Smith and others to that effect.

4.2. Areas where competition and consent were strong

Competition was clearly present. Now let us turn to the subject of consent. In many areas of law, the system was not consent based, and this resulted in people being roped into laws with which they did not agree. One can conjure up any number of dour tales from novels about the Middle Ages to imagine how this might have looked.

But in other areas, selecting and following court decisions appears to occur through full agreement without physical compulsion. Canon law and later secular law included the legal concept *compromissio*,⁵⁵ in which people voluntarily agreed to submit to arbitrators (Goodich 1995:31).⁵⁶ Powell (1983: 55) writes:

Since submission to arbitration—the *compromissio*—was a voluntary undertaking, the participants enjoyed considerable discretion as to the detailed arrangements, especially regarding the selection of arbitrators and the nature and extent of the issues to be decided. With certain exceptions, the legal system offered a very restricted choice of judges, whereas the choice of arbitrators was left entirely to the parties themselves.

Undoubtedly entering into the *compromissio* was agreed to, but how did arbitrators encourage parties to follow the award, the *arbitrium*, *ex post*? Likely many mechanisms were used, but one involved conditional bonds in which both parties acknowledged themselves in debt to the other party. These bonds were submitted to a neutral party who held them and had the ability to release them after the decision (Powell 1983: 56).

The easiest way to make sure that an award will not be biased is for both parties to agree to the judge *ex ante*. This is one potential, and perhaps the biggest, reason why competition did not generate pro-plaintiff doctrine in the several courts of the land.⁵⁷ When both parties must agree to an arbitrator or forum before a

⁵⁵ Readers can figure out which English words are related to *compromissio*. Hint: the correct answers do not include coercion.

⁵⁶ Powell (1983: 53) writes, "The *compromissio* defined the arbitrators' powers and the form of arbitration, identified the issues in dispute and usually set a term for completion of the award. Procedure was in general left to the discretion of the arbitrators."

⁵⁷ Perhaps even more persuasive, there is almost no evidence that this existence of multiple court systems generated rampant pro-plaintiff forum shopping. Even Klerman (2004: 2) admits that the law was not entirely pro-plaintiff, saying that an "absurd state of law never materialized" and recognizing that one of the constraints on common law courts was the Chancery Courts.

dispute occurs, they have an incentive to pick an one with mutually beneficial procedures and rules rather than one that systematically favors one party over another.

How did people opt into various courts? The ecclesiastical courts, for example, encouraged parties to make an oath to God at the time of the contract if the parties wanted the option of having their case heard in ecclesiastical courts. Historian Helmholz explains, "Parties had to simply add a form of words to any secular contract and they could invoke the spiritual forum" (Helmholz 2004). This was the medieval equivalent of the modern-day arbitration clause.⁵⁸ At least as early as 1350 (Powell 1983: 55) and past the time when Arbitration Act was enacted in 1698, arbitration was widespread.⁵⁹ As one 1694 document likely authored by John Locke states, "Arbitrament is much esteemed and greatly favoured in our Common Law... to prevent the great Trouble and frequent Expense of Law-Suits" (reprinted in Horwitz and Oldham 1993: 141).

Making a case about a breach of faith enabled ecclesiastical courts to deal with all types of cases that would otherwise have been outside their realm. In contrast, if parties sealed an agreement by having a drink together or followed other customs, they could use merchant courts. Merchants who entered fairs opted into a legal system for that fair, and presumably would do so only if the courts were unbiased. Because the fair owner was the residual claimant of the fair, he would thus have an incentive to make all aspects of the fair, including the courts, attractive for business. In fact, fairs and the dispute resolution services that accompanied them were a lucrative source of revenue for lords and others who hosted fairs. And, although the common law courts were not frequently used for commercial disputes, people could specify that they wanted their case heard there, but only if both parties agreed.⁶⁰ The default option was merchant courts, but it appears that merchants had many options. Basile (1998: 227) observes, based on a 13th century treatise on the law merchant in which the 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." Merchants had incentives both to have potential disputes adjudicated in a fair way and to follow the adjudicators' judgments because otherwise they would be viewed as unreliable and boycotted by other merchants (Benson 1989).

⁵⁸ One fifteenth-century ecclesiastical lawyer advised those who wanted to be able to avail themselves of the ecclesiastical courts in the event of a later dispute to swear an oath to God: "Et si quis vellet deducere placitum in foro ecclesiastico, oportet quod exponere faciat fides cum iuramento solempni interposito" (quoted in Helmholz 2004: 359).

⁵⁹ For in-depth discussions of how common arbitration was in medieval and early modern England, see Powell (1983) and Horwitz and Oldham (1993). Horwitz and Oldham (1993: 149) explain how arbitrators consisted of different types of people depending on the cases. They also (1993:146) highlight how insurance contracts often included arbitration clauses with statements such as this one from 1727: "Difference shall be submitted to the Judgment and Determination of Arbitrators indifferently chosen, whose Award ... shall be conclusive and binding to all parties."

⁶⁰ See Basile (1998: 24) (which notes that within the five sites where the law merchant functioned, "mercantile law is always to be upheld unless both parties openly and expressly agree on the common law").

In other areas of law, people did not have an ex ante choice, and consent was not present, so we should not expect mutually beneficial law in all areas. But when people had a choice, the law appears to be quite fair. Because merchant law was rooted in the customs of traders, it reflected the reciprocal nature of inclusive customs. Merchants could never predict on which side of a dispute they would be, and as a result they did not favor either pro-plaintiff or pro-defendant rules. As such, they would likely want to favor rules that minimized the costs of potential disputes. Ecclesiastical courts also do not appear to have been biased toward pro-plaintiff rules. Rather, the rules of these courts reflected the influence of canon and Roman law. Canon law doctrines reflected the influence of equitable considerations rooted in Church teachings, including the “golden rule” of reciprocity. Thus, the law was required to be fair, equitable, and reasonable, thereby constraining the ability of ecclesiastical courts to compete on pure pro-plaintiff doctrine. Roman law reflected a heritage similar to that of the law merchant, as it too arose from reciprocity-based interactions and customary law that eventually evolved into formal law (see Leoni 1991). Chancery law, influenced heavily by Roman and ecclesiastical law, showed some traits similar to those of these reciprocity-based systems.⁶¹

There is one final important issue with regard to consent. A very interesting aspect of the legal system was that most of these courts lacked the ability to have police enforce their judgments (Milgrom 1990: 1-23) and even “the coercive powers of the government remained relatively weak” (Powell 1983: 57). People chose to follow judgments for various reasons, such as incentives to remain a member of a group, but physical compulsion was not involved. The only major threat of ecclesiastical courts was excommunication, so people followed their judgments only if they wanted to remain in the Church’s good graces (Helmholz 2004: 288). The same is true of law merchant courts that lacked the ability to jail people, and whose only major threat was telling other merchants.⁶² Contracts were effectively enforced by the threat of ostracism against any merchant who refused to go to court or to abide by the judgment of the court (Benson 1989: 649-50). This provided important incentives because ostracism from the merchant community could end an offending merchant’s career (Benson 1989: 649-50). The incentives to follow judgments may have been strong, so in some sense we might say the judgments constrained future choice sets, but that enforcement relied on economic incentives alone rather than on state coercion.

⁶¹ That informal norms and implicit agreements (and sometimes formal contracts) provided a default understanding with respect to the law that governed a dispute does not eliminate the possibility of forum shopping in which one party defects from the established norm and pursues litigation in a different court, such as a royal court. Although defection seems to have been theoretically possible in some instances, the historical record provides little evidence that this was common. Why is an interesting issue for further research, but it seems plausible that defection was constrained by reputational concerns and repeat dealing, which encourage performance even when merchants are reluctant.

⁶² Sachs (2006) presents evidence of the abbot in St. Ives jailing people and extrapolates that all merchant courts had to act in such a way, but Benson (forthcoming) provides a detailed rebuttal to this notion and the evidence presented by Sachs.

4.3 Areas in which competition was restricted

The courts did not always welcome competition in their own domain; in fact, in many cases they sought to restrict it to the extent possible. When it came to entering the domains of others, however, they often welcomed the opportunity.⁶³ Even the Magna Carta arose in large part as a protest by the lords against the King's efforts to infringe upon the jurisdiction of the lords' courts and the revenues they generated (Hudson 1996: 225). Thus, 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 and by their interaction with courts outside that framework (Baker 1971: 9).

The history of the English legal system shows that many courts competed for centuries. Nevertheless, the competition did not persist, as the government expanded its monopoly over law. The move toward monopoly seems best described by problems of public choice rather than public-interested response to perceived market failures (see Benson 1994). 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 (Plucknett 1956: 660). 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 (Plucknett 1956: 661; Holdsworth 1903a: 316). Similarly, the establishment of the Church of England and subsequent government involvement narrowed the independent jurisdiction of the ecclesiastical courts on issues of contract law. "The abolition of the episcopacy in the 1640s had brought an end to the effective jurisdiction of the ecclesiastical courts" (Helmholz 2004: 309).

Likewise, the law merchant courts appear to have been victims of the creeping power of the common law courts, which imposed their own bureaucratic practices on law merchant courts and asserted the right to hear appeals from them. The changing legislation surrounding the law merchant courts undermined the flexibility and speed that had attracted merchants to these courts in the first place (Holdsworth 1903a: 335). In the late fifteenth century the government enacted a statute that restricted law merchant jurisdiction to the limits of fairs (Holdsworth 1903a: 539). By the times of Edward Coke (1552-1634) or later William Murray Mansfield (1705-93), the common law increasingly displaced these rival

⁶³ 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 the proper jurisdiction of a rival. See Plucknett (1956: 210); Baker (1979: 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, "[T]he bulk of ordinary business was shared between the three courts."). Although these three cases were the most important royal courts that comprised the common law, seven such courts actually existed: (1) General Eyres, (2) Common Pleas, (3) King's Bench, (4) Exchequer, (5) Commissions of Assize, (6) *Oyer and Terminer*, and (7) Gaol Delivery (Hogue 1966: 189).

jurisdictions and asserted control over the commercial law of England. Evidence also indicates that this more bureaucratic system became less innovative and eventually more vulnerable to special-interest manipulation (Plucknett 1956: 284; see also Holdsworth 1903a: 319). Furthermore, as government introduced more measures to enforce its court judgments, the ability to opt in or out of specific legal systems diminished. This introduced the potential to use courts for rent seeking, which one can observe more and more ever since. The fact that the state was successful in extending its monopoly over legal dispute resolution does not necessarily mean that monopoly was efficient or that the system it replaced was flawed.

5. Conclusion

From the Middle Ages through the Early Modern Era in England, many different courts competed. During this time one sees monopolization and coercion in certain areas, but in other areas a large degree of competition and consent. Much of what is still in the modern common law emerged from this dynamic competitive process in which entrepreneurial competitors created new legal doctrines and copied the successful innovations of each other. Indeed, those who examine only the body of law developed in the royal courts prior to the nineteenth century to understand the "law of England" may be looking in the wrong place. Much legal modernization actually occurred in courts other than the common law courts, as those were the courts in which parties were litigating their claims. Except for certain areas such as control over land, multiple courts maintained competing jurisdictions with the common law on matters that touched the personal legal affairs of the English. Many of the later innovations of the common law courts were merely the absorption of these well-developed bodies of law from other courts 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 operated implicitly prior to the nineteenth century, although they were not formally announced before then.

In addition to encouraging innovation, the nonhierarchical and decentralized structure insulated the common law from much of the rent-seeking associated with modern courts. Judicial agency costs became a real problem only after moves toward monopolization of the legal system and the demise of competing legal jurisdictions. When courts lacked the ability to coerce parties into their jurisdiction, parties could "vote with their feet." Merchants, for instance, could often escape unwise and overreaching legal rules by using the law merchant, or, in today's world, international commercial arbitration. The lesson of the historical record is that a free court system can respond by providing decisions that reflect consensus, rather than the interests of a few well-organized special interests.

In contrast to previous scholars, such as Posner, who offers a theory of how government judges will implicitly make the right decision, and Rubin and Priest, who offer theories of how a monopolist system can weed out bad rules *ex post*, we believe that a key to a good legal system is for private parties to have a choice of courts. Private parties are not omniscient, but they typically know more about the

optimal choices for them, and care more with their well being than does the state, so they have an incentive to seek forums that serve them best. Equally important, the inability to coerce parties into the jurisdiction of certain courts eliminated the incentive and opportunity to engage in rent-seeking through litigation. And because competitive courts must attract clients, they have an incentive to have superior dispatch and to be impartial. Although government eventually restricted competition between courts, history shows that a choice of legal systems can function well and satisfy consumer needs.

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