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**The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis**

by Todd J. Zywicki

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# **The Rise and Fall of Efficiency in the Common Law:**

## **A Supply-Side Analysis**

By Todd J. Zywicki

Associate Professor of Law

George Mason University School of Law

3301 N. Fairfax Dr.

Arlington, VA 22201

703-993-8091

[tzywicki@gmu.edu](mailto:tzywicki@gmu.edu)

### **Abstract**

This article revisits the debate over the institutional foundations of the efficiency in the common law by examining the supply-side conditions of the production of common law legal rules. Previous models of efficiency in the common law, such as those proposed by Paul Rubin and George Priest, have stressed the “demand” side of the production of common law legal rules. They have argued that the driving force in the evolution of the common law are the actions of private litigants that generate a “demand” for the production of legal rules. It has been argued that these litigation efforts by private parties can explain both the common law’s historic tendency to produce efficient rules as well as its more recent evolution away from efficiency in favor of wealth redistribution. This article does not directly challenge the traditional “demand side” model, but it proposes to supplement the model with a “supply side” model of the evolution of the common law that examines the institutional incentives and constraints of common law judges over time. It is argued that the traditional efficiency of the common law arose in the context of a particular historical institutional setting and that changes in that institutional framework have made the common law more susceptible to rent-seeking pressures and thereby undermined its pro-efficiency orientation.

The article first describes the traditional demand-side explanation for the rise and fall of efficiency in the common law. The article then distinguishes a supply-side model of efficiency in the common law, examining the historical institutional framework that generated the common law. It will be argued that the common law evolved in a particular institutional framework that differed substantially from the modern set of institutional constraints faced by judges and which render the modern understanding of judicial constraints quite anachronistic. The article argues that there were certain characteristics of the institutional structure that produced the common law that tended to encourage the production of efficient common law rules: (1) the doctrine of "weak precedent" under the common law, (2) the polycentric legal order of the judicial system in the era in which the common law was formed, and (3) the reliance of the common law on private ordering, including freedom of contract and custom. The article then explains how changes in this institutional framework has generated a decline of the efficiency of the common law and a rise in rent-seeking pressures that has caused the common law's evolutionary path to deviate in recent decades.

# The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis

By Todd J. Zywicki\*

## TABLE OF CONTENTS

- I. Introduction
- II. Demand Side Models of Legal Evolution
  - A. A Model of Legal Evolution
  - B. Application of the Model to Common Law Evolution
- III. A Supply-Side Model of Efficiency of the Common Law
  - A. Weak Precedent versus *Stare Decisis*
    - 1. Precedent in English Legal History
    - 2. Precedent in the American Common Law
    - 3. Implications of Weak Precedent for Common Law Efficiency
  - B. The Importance of a Polycentric Legal Order
    - 1. Competition Among Courts in England
    - 2. The American Experience: *Swift* and *Erie*
  - C. Doctrinal Tendencies of the Common Law
    - 1. Default Rules and Contract
    - 2. Custom
  - D. Summary
- IV. Conclusion

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## I. Introduction

From its inception, an animating insight of the economic analysis of law has been the observation that the common law process appears to have a strong tendency to produce efficiency-enhancing legal rules.<sup>1</sup> But many recent commentators have also concluded that recent decades have seen an evolution away from this traditional principle, as the common law appears to increasingly reflect interest-group pressures that have attenuated this traditional evolutionary tendency toward efficiency.<sup>2</sup> This duality has deepened the dilemma confronting scholars, requiring an explanation of not only the factors that traditionally drove the common law toward the production of efficient rules, but also requiring an explanation of why the evolution in recent years has differed so dramatically from prior eras.<sup>3</sup> It was traditionally thought that the common law process had built into its structure a self-correcting evolution mechanism that led Lord Mansfield to conclude that over time the common law “works itself pure.”<sup>4</sup> Some leading scholars continue to adhere to Mansfield’s optimism about the self-correcting nature of the common law.<sup>5</sup> In recent years, however, this process of self-correction seems to have gone awry, leading to increased concerns about inefficiency in many areas of the common law and heightened calls for legislative tort reform and restoration of freedom of contract.<sup>6</sup>

Traditional models of the rise and fall of efficiency in the common law, such as those proposed by Paul Rubin and George Priest, have stressed the “demand” side of the production of common law legal rules.<sup>7</sup> They have argued that the driving force in the evolution of the

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<sup>1</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §2.2, pp. 25-27 (5<sup>th</sup> ed. 1998).

<sup>2</sup> The literature on the economic inefficiency of modern American tort law, for instance, is now quite extensive. See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber and Robert E. Litan eds., 1991); David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457 (1999); George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5(3) J. ECON. PERSPECTIVES 31 (1991). Other scholars have challenged these conclusions. See James A. Henderson and Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990). But see A. Havenner, *Not Quite a Revolution in Products Liability* (Manhattan Institute Judicial Studies Program White Paper, 1990) (challenging Henderson and Eisenberg’s conclusions). There have been similar criticisms of tendencies in contract law to principles such as unconscionability to restrict freedom of contract and the enforceability of contracts. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293 (1975); Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEG. STUD. 253 (1980); Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. L. & ECON. 223 (1978).

<sup>3</sup> Indeed, several of those who have criticized the recent developments in common law doctrine are the same scholars who developed the earlier models explaining the tendency of the common law toward efficiency. See *infra* at notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>4</sup> *Omichund v. Barker*, 1 Atk. 21 (K.B. 1744) (shortened version reported in 22 Eng. Rep. 339).

<sup>5</sup> See Mark F. Grady, *Legal Evolution and Precedent*, 3 ANN. REV. L. & ETHICS 147 (1995).

<sup>6</sup> See Todd J. Zywicki, “Public Choice and Tort Reform,” (working paper, George Mason University School of Law), available in <http://www.law.gmu.edu/faculty/papers/authors.html#z>.

<sup>7</sup> The discussion here will focus on Priest and Rubin’s models as representative of the class of models. Numerous related and refined models also exist. A full discussion of this body of literature is outside of the scope of this article. An excellent summary of the various models that have offered, as well as a general survey of early developments in the efficiency thesis of law and economics is presented in Peter H.

common law are the actions of private litigants that generate a “demand” for the production of legal rules. It has been argued that these litigation efforts by private parties can explain both the common law’s historic tendency to produce efficient rules as well as its more recent evolution away from efficiency in favor of wealth redistribution.

This article revisits the debate over the rise and fall of efficiency in the common law by examining the supply-side conditions of the production of common law legal rules. This article does not directly challenge the traditional “demand side” model, but it proposes to supplement the model with a “supply side” model of the evolution of the common law that examines the institutional incentives and constraints of common law judges over time. It is argued that the traditional efficiency of the common law arose in the context of a particular historical institutional setting and that changes in that institutional framework have made the common law more susceptible to rent-seeking pressures and thereby undermined its pro-efficiency orientation. Moreover, it is argued that understanding the supply-side constraints and incentives confronting judges is a *necessary condition* for understanding litigant-driven demand-side models. Whether one seeks to understand efficiency or inefficiency in the common law, it will be essential to understand the institutional structure confronting judges and the incentives provided to produce efficient law. The market for law, like other markets, requires an understanding of both the supply and demand conditions in order to understand the nature of the market.

This article does not seek to reopen the debate over the empirical validity of whether the common law traditionally tended toward efficiency or whether modern developments have tended away from efficiency. For the sake of argument it will simply take as given the assumption that although the traditional common law tended toward efficiency, this tendency has been attenuated and even reversed in some areas in recent decades leading to growing inefficiency in the common law. Making this threshold assumption should not be interpreted as denying the importance of those questions or to ignore the fact that a lively debate on those questions continues to rage. Reasonable arguments could be made, and in fact have been made, on both sides of the question. This article, however, is concerned with a somewhat different inquiry of exploring the evolutionary and institutional mechanisms at work that might explain these tendencies, assuming that they in fact, exist. As a result, this paper simply assumes for the sake of argument that such trends do in fact exist, and seeks to explain them. While far from definitive, this seems to be a reasonable and plausible assumption.

The article first describes the traditional demand-side explanation for the rise and fall of efficiency in the common law. The article then describes and distinguishes a supply-side model of efficiency in the common law, examining the historical institutional framework that generated the common law. Prior explanations have generally ignored the supply-side of the model, in large part because most scholars have made the anachronistic assumption that the institutional structure of the modern common law is fundamentally identical to that of the traditional common law. As this article will show, that assumption is incorrect, and that the modern institutional

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Aronson, *Economic Efficiency and the Common Law: A Critical Survey*, in *LAW AND ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION* 51 (J.-Matthias Graf von der Schulenburg and Goran Skogh eds., 1986).

framework of the common law differs in several important ways from the institutional framework that characterized the common law in its early evolution. The article explains that the spontaneous order nature of the common law system, its emphasis on principles of private ordering and methodological individualism, and certain historical institutional developments, such as a weak doctrine of precedent and a polycentric legal order, provided a framework for the common law to evolve largely insulated from rent-seeking pressures and in favor of efficiency-enhancing rules. The article then explains how changes in this institutional framework has generated a decline of the efficiency of the common law and a rise in rent-seeking pressures.

## II. Demand Side Models of Legal Evolution

### A. A General Model of Legal Evolution

The process of legal evolution can be usefully conceived of as a “market.” For instance, it has been argued that the outcome of the legislative process results from competing efforts by various interest groups who “bid” for favorable pieces of legislation and to prevent legislation harmful to their interests.<sup>8</sup> In this interest-group model, favorable legislation is given to the party that “bids” the most for the legislation.<sup>9</sup> This bidding takes many forms, but can generally be understood as making financial and in-kind investments designed to help a politician to be re-elected or to directly enrich the politician. Those interest groups that can contribute the greatest resources to a candidate are likely to secure favorable legislation; those that are unable or unwilling to contribute resources are likely to be disfavored in the process. Politicians traditionally have been modeled as largely passive “brokers” of these wealth transfers, responding to the demands of special interests.<sup>10</sup> This process of special-interests trying to influence the law to transfer wealth from the public to themselves and to thereby increase their

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<sup>8</sup> For a summary of these models, see Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform* 73 TULANE L. REV. 845 (1999); see also William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975). The constitutional amendment process may similarly be conceived of as a market, as parties bid for desired constitutional amendments. See Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OREGON L. REV. 1007 (1994); Donald J. Boudreaux and A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993).

<sup>9</sup> This is oversimplified. Often it will be the case that the legislative bargain that is struck is the result of a multi-lateral bargain between several interest groups rather than a bilateral bargain where one group wins and another loses. See Zywicki, *Environmental Externalities*, *supra* note, at 848-56. Rather, it will generally be the case that *relatively* well-organized groups will generally be able to take advantage of relatively unorganized groups to transfer wealth to themselves. The question of how the wins and losses are to be allocated as a distributional matter is a second-order question.

<sup>10</sup> This is particularly the case with respect to the Chicago School of political economy. See CHICAGO STUDIES IN POLITICAL ECONOMY (George Stigler, ed., 1988). Politicians do play an active role in some models. See FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 7-13 (1997). The Virginia School of political economy also has paid greater attention to the role of politicians and political entrepreneurship in the special-interest theory of government. For a useful overview and comparison of these various intellectual schools (including the Rochester School as well), see MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY, at p. xvii-xxvi (1997).

wealth above what they would receive in a competitive market (i.e., to earn “economic rents”) is referred to as “rent-seeking.”<sup>11</sup>

In general, parties will be willing to invest resources up to the amount to be transferred in seeking favorable legislation. Consider, for instance, an import quota that if enacted would enrich the American steel industry by a total present value of \$100 million over the expected life of the legislation (say 10 years), as compared with expected profits without the quota. In such a case, the steel industry would be willing to invest up to \$100 million in the form of campaign contributions, media advertising, in-kind campaign help and the like.<sup>12</sup> Of course, some of the benefit—and thus some of the cost—will also flow to the employees of firms in the steel industry.<sup>13</sup> So the “industry” that benefits includes all relevant actors, such as shareholders, employees, management, etc. In contrast, the costs of the quota will be diffuse and borne by the many consumers of steel and steel products, who will now be forced to pay slightly higher prices for raw steel and goods manufactured with steel. The exact division of the \$100 million surplus among these groups is unimportant for current purposes; what matters is the recognition that legal changes can enrich some groups at the expense of others and that rational parties will invest resources so as to bring about legal changes in order to capture these gains, if the benefited parties are sufficiently able to organize to mount an effective lobbying effort.

The demand curve for legal change, therefore, is a function of two variables: (1) the expected total amount of wealth to be transferred by the law in question ( $V$ ), and (2) the durability of the favorable piece of legislation, meaning how long the law will be effective so as to generate wealth over time ( $L$ ).

$$D = (VL),$$

Where

$D$  = demand for a particular legal rule,

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

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

Parties will be willing to invest greater amounts to secure laws that generate greater lump-sum benefits. Thus, the steel industry would be willing to make much larger investments to secure a very strict import quota rather than a mild import quota, because a strict quota will increase their wealth much more than a mild quota. So as the expected value of  $V$  increases, parties will be willing to invest greater sums to secure its passage. The converse is also true: as parties invest greater sums, at the margin it makes it more likely that they will secure favorable

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<sup>11</sup> See Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 294 n.50 (2002) (“Rent-seeking refers to the lobbying process by which special interest groups attempt to procure legislation that transfers wealth (economic ‘rents’) in excess of what the members of such groups could earn in the competitive marketplace to themselves from the public at large.”); see also MCCHESENEY, MONEY FOR NOTHING, *supra* note, at 7-13 (describing rent-seeking).

<sup>12</sup> See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228 (1967).

<sup>13</sup> See Zywicki, *Environmental Externalities*, *supra* note, at 866-68.

legislation, so a greater investment of resources will generally increase the value of any legislation obtained.

The Value,  $V$ , of a favorable legal rule will also be a function of the ability of detrimentally affected parties to avoid paying the costs of a law. Consider, for instance, a minimum wage law. An essential element of a minimum wage law is that parties cannot contract around the law by agreeing to pay less than the statutory minimum. If they could, this would obviously frustrate the entire purpose of the law. Thus, if detrimentally-affected parties cannot escape the reach of the law, then wealth can be transferred from them to the benefited groups. By contrast, if escape by detrimentally affected parties is easy, then the amount of wealth that can be transferred from those groups to beneficiaries is limited.

Parties will also be willing to invest greater amounts to secure laws that generate more long-lasting benefits. Most favorable legislation does not generate benefits in the short-term. Rather, most legislation generates modest benefits over a long period of time. For instance, occupational licensing of attorneys has the effect of increasing the earnings of lawyers over the span of a 40 year career, rather than generating a one-time lump-sum benefit upon graduation.<sup>14</sup> Thus, as  $L$  increases, meaning that the expected longevity is likely to go up, parties will be willing to invest more in order to secure favorable legislation. For instance, a law that will generate benefits of \$1 million for 20 years if enacted will be much more valuable to the interest group favored than will a law will generate \$1 million but for one year only. Parties will be willing to invest more to secure the enactment of a law of longer duration, rather than shorter. This increases the present value of the benefits to be generated over the life of the wealth-transferring law.

### ***B. Application of the Model to Common Law Evolution***

Although originally designed to explain legislative activity, Paul Rubin has argued that change in the common law also can be analyzed by applying this general model.<sup>15</sup> We can think of the demand side of the market as private litigants, bringing actions before courts and requesting that the courts produce legal rulings and legal opinions designed to resolve the dispute. Judges can be conceived as providing the supply side of the market, as they produce the service of dispute resolution and often reasoned legal opinions and precedents that are designed to provide guidance to future litigants

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<sup>14</sup> Of course, these economic rents are to some extent dissipated by investments to join the profession. Thus, for instance, law schools can charge higher tuition to students and students will be willing to pay higher tuition, because a law degree is required to practice law. Thus, law schools are part of the “industry” that benefits from restrictive licensing of lawyers.

<sup>15</sup> See Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977); see also Paul H. Rubin, Christopher Curran, and John F. Curran, *Litigation versus Legislation: Forum Shopping by Rent Seekers*, 107 PUBLIC CHOICE 295 (2001); Martin J. Bailey and Paul H. Rubin, *A Positive Theory of Legal Change*, 14 INT’L REV. L. & ECON. 467, 476 (1994); Paul H. Rubin and Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEG. STUD. 807 (1994); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEG. STUD. 205 (1982). Gordon Tullock described a similar model, but less concretely than Rubin. See GORDON TULLOCK, TRIALS ON TRIAL: A PURE THEORY OF LEGAL PROCEDURE 197-206 (198).



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

Rubin's model, therefore, turns on the same two factors as the model of legislative change: the amount of money at issue in the particular case (*V*), and the period of time over which parties can capture the benefits of a change in the law (*L*).<sup>16</sup> But there is a fundamental difference between legislative change and common law change. For legislative change, one legislature has no ability to bind the hands of a subsequent legislature. Thus, in theory at least, all legislative bargains can be undone as governing coalitions in the legislature change.<sup>17</sup> For the common law, however, the doctrine of *stare decisis* means that, in theory at least, all court decisions will be binding on all subsequent courts. Thus, there is an inherent stability to the common law process as compared to the legislative process. As a result, even if the value of a favorable legal rule is relatively small in any given case, that benefit may be multiplied over many cases over many years and may give rise to a relatively large bounty in present value terms for any group that can capture it. For similar reasons it has been observed that obtaining a constitutional rule protected by supermajoritarian voting rules will be more durable than a mere legislative rule, because the constitutional rule will be more difficult to reverse at a later date. In theory, at least, the doctrine of *stare decisis* suggests that common law rules might be more durable than legislative rules. As will be discussed below, however, this does not necessarily mean that common law rules will be able to redistribute greater amounts of wealth than legislative rules because other factors that may reduce the amount of wealth that can be transferred.

Because of the long-term nature of the economic rents generated by certain economic rules, Rubin observes that repeat-players in litigation will be the parties with the greatest

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<sup>16</sup> See Rubin, *Common Law and Statute Law*, *supra* note, at 206.

<sup>17</sup> See Zywicki, *Senators and Special Interests*, *supra* note, at 1028-29. In practice, of course, there are a large number of constitutional and other rules that limit the ability of one legislature to overturn the work of prior legislatures.

incentives to bring litigation designed to generate new precedents. Groups that are better able to organize will also be able to invest greater resources in legal change. Of course, if the first variable predominates, meaning that the stakes in a given case are sufficiently high that parties will be willing to invest large amounts solely on the outcome of the case without concern for the future value of the precedent generated by the case, then there is no reason to engage in collective action to change the law. If both parties to a dispute have equal and sufficiently high stakes, then their investments will tend to cancel out and the law will tend toward efficiency. If both parties have equal but low stakes, such as in small-claims court, then one would expect largely random drift in the doctrinal evolution of the law. If one party has a greater stake in the dispute and is able to solve any relevant collective action problems, however, then Rubin predicts that the law will evolve in a direction favorable to that party.<sup>18</sup>

Rubin argues that this model can explain the evolution of the common law as a historical matter. Rubin argues that in the 19<sup>th</sup> century (and presumably before), rule making (both common law and statutory) was dominated by individual actors acting independently, rather than by organized special interests acting collectively.<sup>19</sup> This was for several reasons. First, most disputes that arose were between two individuals or an individual and a very small business. Thus, there was little benefit to be captured by a party from strategic litigation. Moreover, each individual usually stood in a reciprocal relationship with all other individuals, thus an individual or small business who is a plaintiff today was equally likely to be a defendant tomorrow, reducing the incentive to litigate for one-sided rules and favoring advocacy in favor of stable and efficient rules. Finally, Rubin argues, the structure of litigation and high costs of communication made it very difficult for groups to solve collective action problems in order to aggregate their interests into a coherent and effective litigation strategy. Thus, for much of the common law's evolution, most litigation was between two individual parties, both with substantially equal stakes in the outcome. The result was that the common law tended toward efficiency.<sup>20</sup>

Subsequent innovations changed this dynamic. First, the industrial revolution brought about the innovation of large-scale manufacturing enterprises. Unlike private parties, these new firms had a strong interest in the path of legal change especially in areas such as nuisance law and tort law. Rubin argues that this gave them unequal stakes may have been sufficient to cause them to invest in legal change in their favor.<sup>21</sup> In recent decades a more modern and more potent form of strategic legal change has been occasioned by the Association of Trial Lawyers of America (ATLA). ATLA is the trade group of America's tort lawyers. Rubin and Bailey

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<sup>18</sup> See Rubin, *Common Law and Statute Law*, *supra* note, at 206 (“[F]or efficiency to result from these models parties to particular disputes must represent symmetrically all future interests in such disputes. If this condition is not satisfied, the models indicate that the law will not be driven toward efficiency. Rather, the law will come to favor those parties which do have future interests in cases of the sort under consideration, whether or not it is efficient for such parties to be victorious.”); see also Marc Galanter, *Why the “Haves” Come out Ahead: Speculation on the Limits of Legal Change*, 9 *LAW & SOC. REV.* 95 (1974).

<sup>19</sup> Rubin, *Common Law and Statute Law*, *supra* note, at 212-215.

<sup>20</sup> As Rubin notes, this same dynamic meant that statute law also tended toward efficiency during this era. *Id.*

<sup>21</sup> He leaves open the question of whether this change was efficiency-enhancing or not. *See id.* at 213.

argue that ATLA has created a class of residual claimants for legal change in the tort law, namely the lawyers for tort plaintiffs. Thus even though individual tort plaintiffs are not repeat players, tort *lawyers* are. Moreover, tort lawyers benefit from changing the law so as to increase liability, increase litigation, and increase the damages available from tort lawsuits. Thus, they have high stakes from the generation of legal precedents. ATLA also serves to organize these lawyers into a coherent group that effectively lobbies for legal change.

Rubin suggests that it is unnecessary to consider the supply side of the market for legal change for his model to work.<sup>22</sup> Nonetheless, he leaves open the possibility that changes in the supply side of the market, such as by changes in the proclivity or ability of judges to supply certain types of legal rules, can supplement his model of legal change.<sup>23</sup> Thus, in understanding the evolution of the common law, it is not necessary to force an either-or choice between demand side and supply side stories. In fact, most markets are best understood by examining both sides.<sup>24</sup> The point of this article is not offer a supply-side story as an alternative to demand-side models. Rather, it is to offer a supply-side story as a *supplement* to demand-side stories. As the subsequent discussion will show, there were crucial historical changes in the supply-side of the common law “market” that were necessary for Rubin’s model of rent-seeking litigation to be feasible. The argument thus builds upon Rubin’s demand-side model, especially as it relates to the stake of litigation and the ability to manipulate the path of legal precedent. As will be shown, Rubin’s argument rests on important assumptions about the nature of legal precedent, the ability of parties to manipulate the path of legal evolution, and the ability to involuntarily bind parties to inefficient legal rules by making exit costly. There are thus certain institutional arrangements that are necessary for a rent-seeking model of the common law to be feasible and there are certain institutional arrangements that are more resistant to rent-seeking pressures than other institutional frameworks.

George Priest has offered a similar model of the evolution of the common law.<sup>25</sup> Like Rubin, Priest emphasizes the demand side of the market for common law evolution, grounding his models in the actions of private litigants. Priest argues that inefficient rules will tend to lead to more societal conflict and thereby will be the subject of more litigation over time. Assuming that legal rules are subject to being reversed according to a random process that leads judges to periodically reverse prior legal rules, Priest argues that this will cause inefficient rules to be relitigated more often and therefore reversed more often than efficient rules. Over time this will cause a pronounced tendency in the law toward the production and maintenance of efficient

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<sup>22</sup> Rubin and Bailey stress the point that a strength of their model is that it can explain the evolution of the common law without accounting for changes in judicial preferences. See Bailey and Paul H. Rubin, *Positive Theory*, *supra* note, at 476. This does not rule out the possibility that legal change may occur as a result of a change in the incentives and constraints facing judges, however, which is the argument advanced in this paper.

<sup>23</sup> See Bailey and Rubin, *Positive Theory*, *supra* note, 475-76.

<sup>24</sup> See Robert Cooter and Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

<sup>25</sup> See George L. Priest, *The Common Law Process and the Selection of Efficiency Rules*, 6 J. LEG. STUD. 65 (1977).

legal rules. As with Rubin, Priest's model can be understood as a demand-side model, where judges passively respond to the actions of private litigants.

A variety of criticisms of Priest's model could be offered.<sup>26</sup> For current purposes, however, the crucial point to recognize is that although Priest may be able to provide an explanation for why the common law might evolve toward efficiency, his model provides no explanation of why the common law might evolve *away* from efficiency. This criticism is telling, in that it is evident that Priest believes that the common law has departed from the efficiency norm in recent years.<sup>27</sup> In explaining this evolution, Priest has abandoned his demand-side model of common law evolution, instead turning to a supply-side model grounded in an intellectual and ideological revolution among common law judges that has caused them to deviate from sound economics in the direction of using tort law as an instrument of social justice and insurance and insufficient institutional constraints to prevent judges from pursuing these goals.<sup>28</sup> As this article will show, the ability of judges to indulge their ideological preferences is dependent on certain institutional arrangements that make it possible for judges to bind private-decisionmakers and to thereby impose their ideological preferences.

### III. A Supply-Side Model of Efficiency of the Common Law

In contrast to these demand-side models of common law evolution, the supply-side has largely been ignored. The only prior supply side model of efficiency that has been offered is Judge Richard Posner's argument that common law judges will have a preference or "taste" for efficiency.<sup>29</sup> According to Posner, judges have a "taste" or "preference" for efficient rules that guides their decision-making. Because of limited external constraints on judges, they can indulge their preferences, whatever those preferences may be. The argument is somewhat obscure and not overly persuasive. According to Posner, the common law system – at least at the appellate level where most legal rules are formulated – is highly impersonal, meaning that the judge has little ability or inclination to try to decide on the basis of which litigant is a "better" or more morally worthy person. Unlike trial judges, appellate judges receive little information about the litigants. Moreover, ethical rules usually require judges to recuse themselves from cases where they have a financial interest, rendering the outcome independent from the resulting financial consequences to the parties. As a result, judges will usually have an incentive to treat lawsuits as interactions between two competing economic activities, leading them "almost by default" to weigh the economic value of the two competing activities. Thus, even if judges have preferences that they weigh more highly than efficiency, their institutional constraints will lead

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<sup>26</sup> For a summary of several of those criticisms, see POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note, at §21.5, p. 614.

<sup>27</sup> See Priest, *Modern Expansion*, *supra* note; see also George L. Priest, *Products Liability, Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICIES* 184 (Robert E. Litan & Clifford Winston eds., 1988).

<sup>28</sup> See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521 (1987) [hereinafter Priest, *The Current Insurance Crisis*]; George L. Priest, *Puzzles of the Tort Crisis*, 48 *OHIO ST. L.J.* 497 (1987) [hereinafter Priest, *Puzzles of the Tort Crisis*]; George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. LEGAL STUD.* 461 (1985).

<sup>29</sup> See POSNER, *ECONOMIC ANALYSIS*, *supra* note, at § 19.2.

them to recognize that these other goals are unobtainable. Thus, even if judges have only a weak preference for efficiency they will pursue this end by default because of their inability to accomplish any other ends. Given this, Posner argues that judges will act as if they have a “taste” for efficiency that will lead them to seek efficiency in their decisions. But this preference is weak, and it is a preference by default, in that judges are constrained from pursuing other goals.

The weaknesses in this argument are obvious and have been extensively-discussed elsewhere. First, it is difficult to verify. Second, Posner's assumption seems inconsistent with the observation that that many judges are at least as concerned with redistributive goals as efficiency goals. In fact, common experience indicates that many judges have strong tastes for distributional goals, and that they pursue these goals in their judicial role. Third, it fails to explain why the common law might evolve in an efficient manner at some times during history, but inefficiently at other times. Posner also has argued that nineteenth century judges were moral utilitarians, which led them to embrace the primacy of efficiency as a goal. But, of course, this merely restates the "preferences" theory without any further support, albeit somewhat greater explanation. Fourth, it is questionable whether even most well-intentioned judge possesses the expertise and knowledge to devise efficient legal rules even if he desired to do so.<sup>30</sup>

There is thus no prevailing positive theory of the supply-side incentives of judges to produce efficient rules.<sup>31</sup> Posner's argument thus turns on both the postulated taste of judges for efficiency, institutional constraints that prevent them from pursuing other preferences, and a recognition by judges that it is in fact futile for them to try to accomplish other goals. Rather than postulating an assumption of judicial preferences for efficiency, this article argue that driving force in legal evolution on the supply side of the equation is not judicial tastes, but rather the incentives and constraints that judges face in carrying out their tasks. Moreover, this article will offer a supply-side model that dovetails with the demand-side models of common law evolution previously described. In turn, this will force us to focus on the structure of incentives and constraints confronted by judges that encourage or discourage judges from pursuing their personal preferences at the expense of litigants and society. This article is an effort to fill this gap by postulating a supply-side model of efficiency in the common law that focuses on the incentives of judges to produce efficient common law rules.

This Part of the article will show that there were particular institutional arrangements that characterized the common law in its formative period. These institutions made the common law resistant to rent-seeking litigation pressures and also help to explain the common law's historic tendency toward the production of efficient rules. It will also be argued that each of these

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<sup>30</sup> See Gerald O'Driscoll, Jr., *Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried*, 9 J. LEG. STUD. 355 (1980); Mario Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980); see also Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L. J. 583 (1992).

<sup>31</sup> There have been several efforts to model and test the prediction that an independent judiciary will be willing to enforce interest-group legislative bargains. See Gary M. Anderson, William F. Shughart II, & Robert D. Tollison, *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J. L. & ECON. 215 (1989); William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

factors have changed over time, thereby making the common law process more susceptible to problems of rent-seeking through litigation. Thus, the focus here is on the constraints that led common law judges to the production of efficient rules even if their personal preferences did not incline them to do so. It will thus be argued that Rubin and Priest's models rest on a change in the institutional constraints on judges. The effect of this change in institutional constraints was to increase the possibilities for litigants to transfer wealth through strategic litigation, both through an increasing incentive and opportunity to engage in rent-seeking litigation in terms of the Rubin model, as well as creating greater agency costs for judges to indulge their ideological preferences in terms of the Priest model.

Several institutional features will be spotlighted. First, it will be shown that Rubin's model rests on a particular understanding of the role of legal precedent and *stare decisis* in the common law. Although it is reasonable to assume the presence of *stare decisis* as a permanent element of the common law system, in reality the doctrine of *stare decisis* was a fairly recent innovation in the common law, replacing a system of much weaker judicial precedent. A system of strong precedent or *stare decisis*, it will be shown, is an essential element for rent-seeking through the common law.

Second, the historic polycentric legal order of the traditional common law will be described. The existence of overlapping and competing courts with concurrent jurisdictions created a competition among different courts. The ability of litigants to choose their forums and to bring a claim in any of several courts provided a powerful instrument for the generation of efficient legal rules. Moreover, it provided an ease of exit that reduced the ability of parties to involuntarily redistribute wealth away from parties disfavored by doctrinal developments. Parties could opt-out of such a legal system and opt-in to a concurrent court. This ease of exit limited reduced the rent-seeking opportunities through litigation.

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

#### **A. *Weak Precedent versus Stare Decisis***

As discussed above, Paul Rubin has noted that a necessary condition for efficient legal rules to develop is that both of the parties to a dispute place relatively equal importance on the precedent developed in the case.<sup>32</sup> Where one party has dramatically more to win from a favorable precedent (or more to lose from an unfavorable precedent), that party will be expected to invest greater resources to secure the desired precedent, leading to an evolution of the law in a direction favorable to that party, even if the new rule is less efficient than the old

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<sup>32</sup> See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text.

rule.<sup>33</sup> Rubin argues that in the early era of the common law, most disputes were between two individuals who were not likely to be repeat players, thus neither side had a strong incentive to fight for precedents uniquely favorable to their cause.<sup>34</sup> Rubin focuses on the demand side of the fight for legal precedent, noting that parties with a greater interest in precedent will “bid” higher amounts for a favorable precedent. Thus, there would be no systematic pressures to drive the evolution of the common law away from efficiency. This story seems to be both historically and conceptually correct.

History adds an additional element that renders Rubin’s story about the evolution of the common law even more powerful by looking at the supply side of the “market” for legal precedent. The value of a precedent will be affected by the value of a precedent but by the durability of the precedent and its ability to transmit rents through time. Thus, if a precedent is less durable, the present value of the precedent will decrease because a favorable precedent will transfer less wealth through time. As a result, litigants will be less willing to invest resources *ex ante* to secure a favorable precedent.<sup>35</sup> Thus, where precedent is not durable, neither side in a dispute has a relatively greater interest in the precedent, thereby producing conditions favorable to the production of efficient rules.

The traditional common law provided these conditions. Although most modern lawyers and scholars conceive of the doctrine of *stare decisis* as a formative element of the common law, this is an ahistorical understanding of the development of the common law.<sup>36</sup> The doctrine of *stare decisis*, or the idea that the holding of a particular case is treated as binding upon courts deciding later similar cases, is a late-nineteenth century development and represents a clear doctrinal and conceptual break with the prior history of the common law.<sup>37</sup> The adoption of a principle of *stare decisis* was a pivotal turn in the common law, which provided a necessary condition for later efforts to turn the development of the common law toward special-interest purposes. This is not to say that the adoption of a principle of strict *stare decisis* was undesirable from the perspective of economic efficiency or coordination. But it is important to recognize that the adoption of a system of strict *stare decisis* is a *necessary* condition for the

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<sup>33</sup> For further discussion, see *infra* notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>34</sup> See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>35</sup> See Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEVELAND ST. L. REV. 165, 229-30 (1997) (noting that parties will spend less money lobbying for legislation if the expected duration of the legislation is small); Landes & Posner, *Independent Judiciary*, *supra* note.

<sup>36</sup> A useful summary of the arguments in favor of *stare decisis* is provided in Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 650-55 (2001). Precedent as discussed here is horizontal (binding through time) rather than vertical (superior courts binding inferior courts in a hierarchical system). In the time since an initial draft of the current article was authored, debate on this particular issue has become quite spirited. See *Hart v. Massanari*, 266 F.3d 1155 (9<sup>th</sup> Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8<sup>th</sup> Cir. 2000).

<sup>37</sup> Harold J. Berman and Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L. J. 437, 449 (1996).

common law to become a vehicle for rent-seeking.<sup>38</sup> Absent *stare decisis* it is impossible to produce long-term stable precedents that generate returns over time. Thus, there are costs to *stare decisis* as well as benefits, with a major cost being the fact that it makes the law more susceptible to being used a vehicle for rent-seeking and the manipulation of judicial precedent. Indeed, discussions of the benefits of *stare decisis* have often ignored these costs. But it is clear that any discussion of the benefits of *stare decisis* must also consider the inherent costs associated with strict *stare decisis* as well. A brief history of the doctrine of precedent under English common law will help to illustrate the difference, as well as illuminating why the adoption of *stare decisis* enabled the use of the common law for rent-seeking purposes.

### 1. Precedent in English Legal History

Modern commentators rarely look beyond the eighteenth and nineteenth centuries in seeking the history of the English common law. The formative period of the common law, however, was from the twelfth to the seventeenth centuries, and this is where the investigation must begin.<sup>39</sup> During this period there was no well-developed concept of precedent at all. Writing in the thirteenth century, for instance, Bracton refers to more than 500 cases in his treatise but does not treat them as authoritative statements of the content of the law.<sup>40</sup> In fact, Bracton did not espouse a doctrine of precedent, nor did he even ever use the word “precedent.”<sup>41</sup> Bracton was aberrant in even citing cases, as most early learned treatises cited no cases at all.<sup>42</sup> The author of *Fleta*, writing about forty years after Bracton, refers to one case; Britton, who wrote an epitome of Bracton soon after 1290, refers to none; Littleton in his authoritative work on *Tenures* (ca. 1481?) refers to eleven cases.<sup>43</sup> Bracton himself had to exert great influence to obtain the loan of plea rolls, and was one of the few judges of the era

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<sup>38</sup> In fact, it has been argued that where both parties lack a continuing interest in the production of precedent, the result will not be the production of efficient rules but rather “random drift” with no tendency toward the production of efficient or inefficient rules. See Rubin, *Why is the Common Law Efficient?*, *supra* note; John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEG. STUD. 393 (1978). As will be shown below, however, this was not the case historically. Even though the parties to the litigation lacked a continuing interest in the production of precedents, the existence of competition between multiple courts and legal systems meant that judges and courts had a continuing interest in the production of precedents. Thus, even though the parties were not residual claimants of the long-term value of precedents, judges were. As a result, random drift did not result. See *infra* (discussing polycentric law).

<sup>39</sup> The basic structure of the common law and many of its substantive rules, such as many landholding rules, were already established as early as 1135. See HUDSON, *supra* note, at 20-21; R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 33 (2d ed. 1988). Pollock traces the origins of the English common law to the Norman conquest, but allows that “the earliest things which modern lawyers are strictly bound to know” date only to the latter thirteenth century. Sir Frederick Pollock, *English Law Before the Norman Conquest*, 14 LAW Q. REV. 291 (1898), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL THEORY 88, at 88 (1968). Regardless of the exact date, it is evident that the roots of the common law reach well back into the Middle Ages.

<sup>40</sup> See Berman & Reid, *supra* note, at 445; ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 185 (1966)

<sup>41</sup> See Berman & Reid, *supra* note, at 445.

<sup>42</sup> See HOGUE, *supra* note, at 185; PLUCKNETT, *supra* note, at 343 (“But it must be observed that whatever use [Bracton] made of cases was necessarily peculiar to himself.”). Even as late as the 1760s, Adam Smith cited only a handful of cases in his *Lectures on Jurisprudence*. See ADAM SMITH, *LECTURES ON JURISPRUDENCE* (R.L. Meek, D.D. Raphael, and P.G. Stein eds., 1982) (Liberty Classics Edition).

<sup>43</sup> See HOGUE, *supra* note, at 201.



willing to wade through the weighty and unorganized rolls.<sup>44</sup> Few other treatise writers, and certainly no lawyers, would have been willing to exert the energy required to obtain possession of the rolls or to engage in the painstaking trouble of reading through the unorganized masses of parchment.<sup>45</sup> As Plucknett bluntly states, “Any use of cases on Bracton’s lines by the profession at large, or even by the bench alone, would have been manifestly impossible.”<sup>46</sup>

For early common law judges (including even Bracton), cases were merely illustrations as to how respected individuals have decided cases that came before them.<sup>47</sup> “Cases, that is, judicial decisions, could be used to illustrate legal principles, but were not themselves an authoritative source of law.”<sup>48</sup> Prior cases served only as persuasive, not binding, authority and were studied for the soundness of their reasoning, not the authority of their holdings. A series of similar decisions might be considered as evidence of the existence of judicial custom, but those customs were also regarded as only persuasive not binding. “If a judge did not approve of a previous decision, or even of a previous custom of the court, he might say that it was wrong and disregard it.”<sup>49</sup> In fact, the first known use of the term “precedent” was not until 1557, and in that case the court observed that it was making its ruling *despite* two “presidents” to the contrary.<sup>50</sup> Indeed, Bracton relied on cases primarily to illustrate the ways in which recently decided cases (in his era) had departed from the sounder judicial rulings of earlier eras, and to

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<sup>44</sup> See *infra* at notes \_\_\_\_-\_\_\_\_ and accompanying text (discussing plea rolls).

<sup>45</sup> PLUCKNETT, *supra* note, at 343. Plucknett observes that the plea rolls are “immense in number and there was and still is no guide to their contents; they have to be read straight through from beginning to end without any assistance from indexes or head-notes.” *Id.*

<sup>46</sup> *Id.* See also 1 POLLOCK & MAITLAND, *supra* note, at 183 (“By some piece of good fortune Bracton, a royal justice, obtained possession of a large number of rolls. But the ordinary litigant or his advocate would have had no opportunity of searching the rolls, and those who know what these records are like will feel safe in saying that even the king’s justices can not have made a habit of searching them for principles of law.”).

<sup>47</sup> See HOGUE, *supra* note, at 201 (“Bracton’s use of cases differs from the modern reference to cases. In the twentieth century the authority of the case decided in a higher court has a binding authority on a lower court. But Bracton and other medieval justices cite cases merely to illustrate or to explain the law.”); Berman & Reid, *supra* note, at 445; see also THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 260 (5<sup>th</sup> ed. 1956) (“[Bracton] never gives us any discussion of the authority of cases and clearly would not understand the modern implications of *stare decisis*. Indeed, his cases are carefully selected because they illustrate what he believes the law ought to be, and not because they have any binding authority; he freely admits that at the present moment decisions are apt to be on different lines. Bracton’s use of cases, therefore, is not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound.”).

<sup>48</sup> Berman & Reid, *supra* note, at 445; see also HOGUE, *supra* note, at 185-86 (“[Bracton’s] use of the judicial decisions of his predecessors was not the same as the sophisticated twentieth-century doctrine of *stare decisis*, requiring a hierarchy of courts, certain conventions in the reporting of cases, and the printed publication of reports.”); PLUCKNETT, *supra* note, at 344 (“In Bracton’s hands a case may illustrate a legal principle, and the enrolment may be historical proof that the principle was once applied, but the case is not in itself a source of law.”).

<sup>49</sup> Berman & Reid, *supra* note, at 445.

<sup>50</sup> Berman, *Origins of Historical Jurisprudence*, *supra* note, at 1732.

argue that the newer decisions should be ignored.<sup>51</sup> “Bracton first states his principles and then adduces his cases as historical evidence of the accuracy of his statements. This is a vastly different method from taking the cases first and deducing rules of law from them.”<sup>52</sup> During the formative centuries of the common law, therefore, there was no system of precedent that resembled the current doctrine of *stare decisis*.

In sixteenth and seventeenth centuries, cases started to become more important as common law courts developed a practice of adhering more strictly in matters of pleading and procedure to their customs, and thereby their precedents. But “[t]his principle was not ironclad.”<sup>53</sup> Moreover, the principle was adhered to primarily only in procedural matters, not issues of substantive law.<sup>54</sup> Lord Holt observed, for instance, “The law consists not in particular instances and precedents, but in the reason of the law and *ubi eadem ratio, idem ius*.”<sup>55</sup> Even this adherence in procedural matters was not wholly internally adopted by the judges, but was produced primarily by the demands of maintaining the externally-imposed jurisdictional lines between the common law and other types of court.<sup>56</sup> Coke relied on the concept of precedent in his battles against the King, arguing for the historical continuity of the common law tradition. Even Coke’s reliance on the concept of precedent in the battles against the King cited precedents only “examples” of the “true rule” and not “in and of themselves authoritative sources of those rules.”<sup>57</sup> The decisions of particular cases, or even a group of cases were still not treated as authoritatively binding on lower courts.

Useful recitations of precedents would not even be technologically feasible until the invention of movable type printing in the fifteenth century and not until the sixteenth century could lawyers easily acquire printed reports of cases.<sup>58</sup> Prior to then, the only authoritative recitation of outcomes (albeit in a highly summary form) were the “plea rolls,” which recorded case outcomes and little else. These were quite literally rolls of dusty parchment sewn together,

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<sup>51</sup> PLUCKNETT, *supra* note, at 343-44. Plucknett observes, “Bracton has no hesitation in using cases which we should call out of date or overruled, in order to maintain that the law ought to be something different from what it is. From this it is clear that the whole of Bracton’s position would fall if decisions, as such, were in any modern sense a source of law.” *Id.* at 344.

<sup>52</sup> PLUCKNETT, *supra* note, at 344.

<sup>53</sup> *Id.* at 446.

<sup>54</sup> See Berman, *Origins of Historical Jurisprudence*, *supra* note, at 1732 (“Prior to Coke, these ‘presidents’ were largely concerned with procedural matters, and only rarely did judges compare in detail the facts of the cases that came before them with the facts of earlier analogous cases.”); CARLTON KEMP ALLEN, *LAW IN THE MAKING* 143 (2d ed. 1930).

<sup>55</sup> C.H.S. FIFOOT, *LORD MANSFIELD* 16 (1936) (quoting Holt).

<sup>56</sup> *Id.* More precisely, rival courts cited precedent in order to expand their jurisdiction at the expense of the King’s Bench. A primary purpose of legal fictions was to evade jurisdictional limits so that parties could bring actions in the court of their choice, rather than the *de jure* court that they were entitled to use. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 33 (1971); HOGUE, *supra* note, at 11 (describing the ability to manipulate pleading forms in order to get access to the court preferred by litigants, notwithstanding formal jurisdictional limits). The effect of competing jurisdictions on the evolution of the law is discussed further *infra* at notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>57</sup> Berman & Reid, *supra* note, at 447.

<sup>58</sup> HOGUE, *supra* note, at 181, 202. The first printed law book, Littleton’s *Tenures*, appeared in 1481. See BAKER, *INTRODUCTION*, *supra* note, at 154.

weighing hundreds of pounds and inscribed with handwritten case outcomes.<sup>59</sup> As one scholar has observed, “Plea Rolls were obviously not things which could be produced easily in Court; it was no light matter to search them or have them searched; and there is ample evidence that they were very difficult of access even to prominent counsel.”<sup>60</sup> The purpose of the Rolls was to record the results of cases, and in particular, debts owed to the King, not to aid lawyers. The reasoning of the court in reaching a decision was not of import and few lawyers even had access to the rolls.<sup>61</sup> Because the absence of printing made reproduction of the rolls impossible, a lawyer could authoritatively cite a case only if he could in fact access the rolls and identify the case. “When there were not printed records or reports,” Hogue asks, “who could verify citations to previous decisions without first obtaining permission to consult the royal plea rolls?”<sup>62</sup>

The inaccessibility and impracticability of the plea rolls led to the development of privately published Year Books that sought to provide some of the information regarding decided cases. But these differed dramatically in form and substance from the model of officially-reported cases that prevail today. The Year Books were intended as teaching tools, not official case reports, and therefore focused on issues of pleading, procedure, and case strategy, rather than case outcomes.<sup>63</sup> In addition to the rulings in the cases, the Year Books attempted to provide a rudimentary recitation of the relevant facts and arguments in the case. But the Year Books were haphazard, fragmentary, and frequently contradictory.<sup>64</sup> Not only did they often contradict each other in describing the reasoning of cases, they often even disagreed on the case names.<sup>65</sup> Their chronology is often questionable, and judges are often found speaking

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<sup>59</sup> See 2 HOLDSWORTH, *supra* note, at 185. Holdsworth states that the plea rolls were a number of membranes “filed” together at the top, distinguishing them from the Chancery Rolls which consist of a “continuous strip of parchment made by sewing the membranes together at the top.” *Id.* at 185 n.1.

<sup>60</sup> ALLEN, LAW, *supra* note, at 139.

<sup>61</sup> In fact, one reason Bracton cites a substantially larger number of cases than his peers is that as a judge he had access to the case rolls, whereas most lawyers did not. See HOGUE, *supra* note, at 181.

<sup>62</sup> HOGUE, *supra* note, at 181.

<sup>63</sup> Often the case outcome will not even be reported, either because the reporter thought it unimportant or simply because he was absent from court the day the ruling was issued. Instead, the reporters focus on the jousting between the judges and the counsel. The case outcome was often thought unimportant because of the absence of the doctrine of *stare decisis*. It is not until the doctrine of *stare decisis* emerges that case reports are thought to be valuable for their recitation of the holding and reasoning of the case. For an excellent summary of the uses and content of the Year Books, see 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 551-556 (4<sup>th</sup> ed. 1936).

<sup>64</sup> See HOGUE, *supra* note, at 202; Berman & Reid, *supra* note, at 446 (noting that “as historical records” private case reports “were often quite unreliable”). Hogue quotes Justice Fitzherbert’s observation to one lawyer, “As against your book I can produce four books where the contrary has been decided.” HOGUE, *supra* note, at 202 (citing T. Ellis Lewis, *The History of Judicial Precedent*, 47 LAW Q. REV. 411). Fifoot, referring to the “poverty of the Reports,” derides them as “uninspiring compilations.” See FIFOOT, *supra* note, at 14. In addition, only the decisions of the common law courts were consistently reported. There were numerous other competing court systems in England at the time which decided cases as well but which failed to produce written precedents at all. See Holdsworth, *Case Law*, *supra* note, at 156; see also *infra* at notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>65</sup> Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 18-19 (1987). As one commentator observes, “*Clerk v. Day* was reported in four different books, and in not one of them correctly--not even as to name. . . . Arbitrary spelling of the names of cases is a

well after they were dead and long periods of time transpired with little or no reporting of cases.<sup>66</sup> There were often long time lags between deciding a case and publication of the case opinion.<sup>67</sup> Their origins are sometimes questionable, as several manuscripts were purloined from the lawyers who owned them and then were published without their permission, often with various additions from unknown sources.<sup>68</sup> Moreover, they plainly did not serve the same function as the modern law report, but were reported and used much more casually.<sup>69</sup> Not only did they report less than current case reporters and in a less rigorous style, but they also reported *more*—such as private comments by judges and even what was said at mock trials in the Inns of Court.<sup>70</sup> The editorial comments of the reporters are interspersed with the rulings of judges; the statements of well-known counsel are cited as authority.<sup>71</sup> Reporters freely elaborated on the arguments actually advanced by counsel and the judges in the case.<sup>72</sup> Not only would the reporters criticize judicial rulings, they would criticize the character and wisdom of the judges themselves; one reporter nicknamed judge Hervey le Stanton jurist “Hervey le Hasty” for his precipitous style.<sup>73</sup> Judges and lawyers distinguished among the quality of different Year Books depending on the identity of the authors, with more reliable authors holding greater weight than their competitors. Some reporters were of such poor quality that lawyers were forbidden from citing them in certain courts.<sup>74</sup> Often the assessment of a reporter’s supposed quality was determined on the agreement of the reporter with the decision the judge sought to render.<sup>75</sup> Moreover, many Year Books contained cases that were translated into English from the archaic French and Latin that had been used for centuries in the common law courts, raising questions about the accuracy of the translations.<sup>76</sup> To the extent

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bibliographical irritation, and sometimes a difficulty. *Fetter v. Beal* ... is a pretty good disguise for *Fitter v. Veal* . . . .” PERCY H. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 185 n.3 (1925).

<sup>66</sup> See BAKER, INTRODUCTION, *supra* note, at 155-157.

<sup>67</sup> See *Hart*, 266 F.3d at 1166 (noting that Heydon's case was decided in 1584 but Coke's account was not published until 1602); see also Allen Dillard Boyer, “*Understanding, Authority, and Will*”: *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 79 (1997).

<sup>68</sup> See Van Vechten Veeder, *The English Reports, 1537-1865*, in 2 SELECT ESSAYS, *supra* note, at 127.

<sup>69</sup> See PLUCKNETT, *supra* note, at 344-45.

<sup>70</sup> *Id.* at 348. Plucknett’s colorful description captures the essential flavor of these reports: “A large amount of the material which [the Year Books] contain is hardly strictly necessary for professional purposes. Long and rambling conversations are reported at great length. A large amount of irrelevant material is carefully recorded. There seems to be a definite interest in the personalities of judges and serjeants. . . . One cannot avoid the feeling that the anonymous authors of these Year Books took a great delight in the work of compiling them, whatever the technical object was which they had in view.” *Id.* at 269.

<sup>71</sup> See John Maxcy Zane, *The Five Ages of the Bench and Bar of England*, in 1 SELECTED ESSAYS, *supra* note, at 625, 650. Reporters were especially attracted to witty put-downs, bungled pleas, and other entertaining items. See 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 551 (4<sup>th</sup> ed. 1936).

<sup>72</sup> 5 HOLDSWORTH, *supra* note, at 370.

<sup>73</sup> Zane, *supra* note, at 650; 2 HOLDSWORTH, *supra* note, at 551.

<sup>74</sup> See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEG. HIST. 28, 32 (1959).

<sup>75</sup> See Holdsworth, *Case Law*, *supra* note, at 155. Indeed, there is an entire secondary literature concerned solely with identifying the quality and traditional reputations of various reporters. See, e.g., WALLACE, *THE REPORTERS* (4<sup>th</sup> ed. 1882); Veeder, *supra* note, at 123.

<sup>76</sup> See 5 HOLDSWORTH, *supra* note, at 368. French and Latin were the traditional language of the English courts. During the Commonwealth period, however, English was made the official language of the court.

that they were invoked as authority, like the use of precedent generally, the reports in the Year Books focused primarily on issues of procedure rather than substance.<sup>77</sup> Although the Year Books were perhaps better than nothing, they certainly did not provide a sound technological basis for a system that relied on the full and accurate presentation of case results and judicial reasoning, such as a system based on strict *stare decisis*.<sup>78</sup>

The first credible set of reports was provided by Plowden in the mid-Sixteenth Century, but it was not until the publication of Coke's Reports that a comprehensive collection of case reports first appeared that could be cited as precedent.<sup>79</sup> Even then, it was clear that Coke used the term "precedent" loosely rather than as binding authority, as evidenced by his willingness to freely distort the opinions in earlier cases by selective quotations and omissions.<sup>80</sup> Plucknett observes of Coke, "A case in Coke's *Reports*, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history. The whole is dominated by Coke's personality, and derives its authority from him."<sup>81</sup> Despite Coke's limitations, his *Reports* were substantially better than those that followed in subsequent centuries.<sup>82</sup>

It was not until 1673 that English courts first distinguished between "precedent" and *dictum*, a necessary predicate for treating cases as authoritative statements of the law.<sup>83</sup> Prior to that time, judges rarely compared in detail the facts of the cases that came before them with the facts of earlier analogous cases. The distinction between holdings and *dictum* could not be established until the development of fuller and more accurate case reports that accurately related the facts of the case and the holdings therein. Again, this did not and could not occur until Coke's Reports and the invention of the printing press. Not until the middle of the eighteenth

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Thus, editors were required to translate all of the older reports into English, a task completed with irregular success. See Veeder, *supra* note, at 127.

<sup>77</sup> See PLUCKNETT, *supra* note, at 268-70.

<sup>78</sup> See POTTER'S HISTORICAL INTRODUCTION, *supra* note, at 277 ("The form of the manuscript Year Book and the lack of uniformity due to the absence of printed books prevented the citation of cases in the modern way.").

<sup>79</sup> Berman, *Origins of Historical Jurisprudence*, *supra* note, at 1733; Veeder, *supra* note, at 128.

<sup>80</sup> Berman & Reid, *supra* note, at 447 ("Coke often distorted the older cases, culling from them the language that supported his own views; he would reach out for anything said by a judge in an earlier case if it seemed to him to reflect a true legal principle."); Veeder, *supra* note, at 132 ("In connection with his habit of editing the conclusions of the court in accordance with his own views of the law, it may be added that Coke is not always accurate.").

<sup>81</sup> See PLUCKNETT, *supra* note, at 281. Plucknett further observes of Coke, "In his hands a law report takes the form of a somewhat rambling disquisition upon the case in question. He frequently gives the pleadings, but less often does he tell us the arguments. As for the decision, it is often impossible to distinguish the remarks of the judge (where it was not Coke himself) from the comments of the reporter. There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question. *Id.* at 281.

<sup>82</sup> See PLUCKNETT, *supra* note, at 281 ("The reporters who succeeded Coke are much lesser men. . . . Their reports are frequently short and inaccurate, and sometimes unintelligible. Matters are not helped by the fact that one case is commonly reported by three or four reporters, for they are often equally bad.").

<sup>83</sup> Berman, *Origins*, *supra* note, at 1732.

century is there anything approaching an official set of regular reports of judicial decisions of particular courts.<sup>84</sup>

It was thus not until the seventeenth and eighteenth centuries that the “doctrine” of precedent even began to take on some coherence, although this respect for precedent fell far short of *stare decisis*. During this period, Matthew Hale observed that the decisions of courts “do not make a Law properly so-called,” meaning that the decision of a court does not bind subsequent parties or judges.<sup>85</sup> Hale observes, however, that these decisions “have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of the Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former times, and though such Decisions are less than a Law, yet they are a greater evidence thereof than the Opinion of any private Persons, as such, whatsoever.”<sup>86</sup> Cases themselves do not make law; cases illustrate the principles of the law.<sup>87</sup> But Hale emphasizes the existence of a series of consistent decisions in analogous cases over time as providing strong evidence of the existence and validity of a rule. But even a settled pattern of cases is still thought susceptible to reconsideration in the light of reason. Hale still stops well short of the belief that a mere single case could serve as binding precedent on all later cases, as *stare decisis* requires. It was only in the nineteenth century, therefore, that precedent begins to harden into the concept of *stare decisis*, where the decision of merely one court was interpreted as binding authority on later courts.<sup>88</sup> Blackstone, for instance, contended that it was the obligation of judges to abide by prior precedents.<sup>89</sup> Despite this admonition, common law judges throughout the eighteenth century frequently second-guessed earlier cases and often refused to follow precedents that they thought unsound.<sup>90</sup> As Allen observes, “To sum up the position at the end of the eighteenth century: the application of precedent was powerful and constant, but no Judge would have been found to admit that he was ‘absolutely bound’ by any decision of any tribunal.”<sup>91</sup> It is thus not until the Nineteenth Century that the modern version of *stare decisis*—the notion that judges are absolutely bound by prior decisions—took hold.<sup>92</sup>

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<sup>84</sup> 5 HOLDSWORTH, *supra* note, at 373 (Burrow’s reports); PLUCKNETT, *supra* note, at 281.

<sup>85</sup> Berman & Reid, *supra* note, at 448 (quoting Matthew Hale, *The History of the Common Law of England* 68 (1713)); see also William S. Holdsworth, *Case Law*, in *ESSAYS IN LAW & HISTORY* 147, 152 (A.L. Goodhart and H.G. Hanbury eds. 1946) (noting agreement of Coke, Hale, and Blackstone on this point).

<sup>86</sup> Berman & Reid, *supra* note, at 448 (quoting Matthew Hale, *The History of the Common Law of England* 68 (1713)).

<sup>87</sup> See Holdsworth, *Case Law*, *supra* note, at 158; see *id.* at 158 n.4 (“The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases.” Quoting *R. v. Bembridge* (1783)).

<sup>88</sup> See BRUNO LEONI, *FREEDOM AND THE LAW* 180 (3d ed. 1991) (distinguishing the concept of “precedent” serving as the generally accepted principle of community from “binding precedent in the common-law systems of the Anglo-Saxon countries at the present time”).

<sup>89</sup> ALLEN, *LAW*, *supra* note, at 147.

<sup>90</sup> ALLEN, *LAW* *supra* note, at 147.

<sup>91</sup> ALLEN, *LAW* *supra* note, at 150.

<sup>92</sup> *Id.*; see also POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS (4<sup>th</sup> ed. A.K.R. Kiralfy, ed. 1962).

For the first several centuries of the common law, therefore, single cases standing alone did not make law. Judges generally adhered to the “declaratory theory” of law that law was “discovered” by judges, not “made.”<sup>93</sup> A *pattern* of several cases decided in agreement with one another, by contrast, gave rise to a powerful presumption of the correctness of the legal principle. The agreement of several judges in several cases constituted a judicial custom that attested to the wisdom of the rule and its utility in vindicating parties’ expectations. As Plucknett stresses, “An important point to remember is that one case constitutes a precedent; several cases serve as evidence of a custom. . . . It is the custom which governs the decision, not the case or cases cited as proof of the custom.” He adds, “A single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive.”<sup>94</sup> As a result, courts felt free to reject precedents where they believed the case to be wrongly decided.<sup>95</sup> Today, by contrast, a judge is generally believed to be bound by prior cases even where convinced that the prior case was wrongly-decided or would work injustice.

## 2. Precedent in the American Common Law

A similar view of precedent prevailed in the United States in the Eighteenth and Nineteenth Centuries.<sup>96</sup> As Professor Caleb Nelson has observed, American lawyers rejected the notion that individual cases themselves constituted the law. They, like English lawyers, believed that the substantive common law rested on principles outside of the regime of *stare decisis*.<sup>97</sup> Given this, it was thought to be illogical to rely on a system of strict *stare decisis* to settle the substantive rules of law. Like the English system, substantive rules were distinguished from procedural practice. Procedural rules rested purely on the need for consistent and predictable practices, rather than on the notion that one procedural rule might be thought “better” than another. Substantive rules, however, required greater reflection and study, rather than slavish adherence to prior decisions. This distinction was reflected in the ready adoption of strict *stare decisis* for procedural rules and a much-later acceptance of the doctrine for substantive rules, an evolution that mirrored those in the English common law.<sup>98</sup> Indeed, as Nelson observes, one dictionary definition of the term “precedent” in the Eighteenth century was “a form of pleading that courts had found acceptable in the past.”<sup>99</sup>

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<sup>93</sup> See *Hall*, 266 F.3d at 1165; F.A. HAYEK, 1 LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER (1973); LEONI, *supra* note, at 80-85.

<sup>94</sup> PLUCKNETT, *supra* note, at 347; see also POTTER’S HISTORICAL INTRODUCTION, *supra* note, at 275 (“A bad case could be dismissed as misconceived, but a series of cases in the same sense in all courts would be difficult not to follow.”).

<sup>95</sup> PLUCKNETT, *supra* note, at 347.

<sup>96</sup> See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 21-46 (2001); Thomas R. Lee, *Stare Decisis In Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999). *Stare decisis* may have taken hold in England later than in America. See Kempin, *supra* note, at 51.

<sup>97</sup> Nelson describes these as the “external” sources of the law, contrasting them with the “internal” source of precedent. Nelson, *supra* note, at 23-24.

<sup>98</sup> See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying law.

<sup>99</sup> Nelson, *supra* note, at 32; see also *id.* at 32 n.115.

Eighteenth century Americans rejected the idea that particular cases were themselves the law. Rather, like their English contemporaries, particular cases were merely evidence of or reflections of underlying legal principles.<sup>100</sup> This may be best illustrated in the terms of the so-called “reception” laws enacted by the states shortly after Independence. Through these state constitutional and legislative rules, the states provided that rules of the English common law remained in place in the new states.<sup>101</sup> Commentators of the time announced, however, that the acceptance of the English common law did not necessarily require acceptance of the entire body of English *cases*. Thus, the states could feel free to reconsider any disapproved English judicial decisions to the extent that they were thought inappropriate for the American situation.<sup>102</sup> Virginia Chancellor Creed Taylor observed in this vein, “it was the common law we adopted, and not English decisions.”<sup>103</sup> Moreover, the need for a critical review of prior cases was not limited to English decisions, but applied with equal force to cases decided after Independence by American courts.<sup>104</sup>

Moreover, the case reports in early America were at least as bad as in England, if not worse. Although England could at least reasonably rely on the reports of Coke, Plowden, and Burrow during the Seventeenth and Eighteenth Centuries, Americans had no reliable reports until the Nineteenth Century.<sup>105</sup> Although some colonial lawyers published private notes on cases in their jurisdictions, these volumes focused on the arguments of counsel rather than the court’s ruling.<sup>106</sup> Judges often paid little heed to the cases found in private case collections.<sup>107</sup> Like the Year Books, therefore, these reports could not provide a basis for a system of *stare decisis* that relied upon coherent and accurate case reports. Officially-published reporters that focused on judicial opinions did not appear until the early Nineteenth Century, but became almost universal by the end of the Nineteenth Century.<sup>108</sup>

As in England, therefore, prior cases were all treated as persuasive authority rather than binding authority. It was the sound reasoning of the prior case that demanded respect, not the mere existence of the case. Thus, even in the United States the decision of a great English common law judge such as Lord Mansfield commanded greater respect than a mediocre American judge.<sup>109</sup> But judges showed special deference to a long line of decisions that had all independently reached the same conclusion.<sup>110</sup> The concurrence of many judges through time attested to the wisdom and consensus of the rule, much as social traditions generated through decentralized processes over long periods of time testify to the wisdom and consensus of those

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<sup>100</sup> See Nelson, *supra* note, at 25-27; Lee, *supra* note, at 660.

<sup>101</sup> See Pritchard and Zywicki, *supra* notes, at 469 n.249 (describing reception laws).

<sup>102</sup> See Nelson, *supra* note, at 28; Kempin, *supra* note, at 38-42.

<sup>103</sup> Quoted in Nelson, *supra* note, at 27.

<sup>104</sup> See Nelson, *supra* note, at 29.

<sup>105</sup> See Kempin, *supra* note, at 34.

<sup>106</sup> See Kempin, *supra* note, at 34-35.

<sup>107</sup> See Kempin, *supra* note, at 38.

<sup>108</sup> See Kempin, *supra* note, at 35-36; see also Hart, 266 F.3d at 1169 (noting rise of official reporters in America).

<sup>109</sup> Nelson, *supra* note, at 34; Kempin, *supra* note, at 38.

<sup>110</sup> Nelson, *supra* note, at 34.



practices.<sup>111</sup> Later judges might be reluctant to question this consensus, not because they were compelled to follow the earlier judgments, but that this contrary consensus carried within it great persuasive force. As Professor Nelson observes, however, “[T]his phenomenon is not quite the same thing as a presumption against overruling erroneous precedents. The influence of a series of decisions did not rest on the notion that judges should presumptively adhere to past decisions even when convinced of their error, but rather on the notion that judges should be exceedingly hesitant to find error where a series of their predecessors had all agreed.”<sup>112</sup> But note that it was only because judges could in fact challenge earlier decisions that they thought incorrect that later judges could draw the inference that consensus agreement among prior judges testified to the soundness of the rule.<sup>113</sup> If the rule was unsound, prior judges could have overruled it. By contrast, in a regime of strict *stare decisis* it is far more difficult to draw strong inferences about the quality of legal rules solely from the agreement of a series of judges in the rule. After all, later cases in the series may merely be the path-dependent result of earlier erroneous decisions, rather than reflecting quality in themselves.

### 3. Implications of Weak Precedent for Common Law Efficiency

Through most of the history of the Anglo-American common law, therefore, precedent was flexible and based on the congruence of legal decisions with expectations, reason, and judgment. The convergence of several independently-acting judges on similar conclusions attested to the wisdom and consensus support for the rule, rather than the authority of the rule.<sup>114</sup> Precedent was thus more in the nature of a tradition composed of the decisions of many independent judges acting over time, rather than the sovereign statement of a “law-making” judge.<sup>115</sup> The notion of *stare decisis* as binding precedent was an outgrowth of Benthamite and Hobbesian legal positivism and the belief that law must issue as a sovereign command from the pen of know judicial authors, rather than reflecting the result of a process of spontaneous order.<sup>116</sup> By contrast, the traditional common law judge was not “bound to any past articulation of that law, never absolutely bound to follow a previous decision, and always free to test it

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<sup>111</sup> See Pritchard & Zywicki, *supra* note, at 489-93.

<sup>112</sup> Nelson, *supra* note, at 35.

<sup>113</sup> See Pritchard & Zywicki, *supra* note, at \_\_\_\_; see also Nelson, *supra* note, at 36.

<sup>114</sup> See Pritchard and Zywicki, *supra* note, at 491; see also Donald Lutz, *Political Participation in Eighteenth Century America*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 19, 34 (Paul Finkelmaen & Stephen E. Gottlieb eds., 1991); J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in POLITICS, LANGUAGE AND TIME: ESSAY ON POLITICAL THOUGHT AND HISTORY 202, 213 (1971).

<sup>115</sup> See Pritchard and Zywicki, *supra* note, at 491; Berman & Reid, *supra* note at 449 (referring to “the traditionary concept of precedent” and distinguishing it from “the strict doctrine of *stare decisis* that first emerged in the latter nineteenth century”).

<sup>116</sup> See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 213 (1986); see also Berman & Reid, *supra* note, at 514 (characterizing the strict doctrine of precedent as “essentially a positivist theory, more congenial to the codification movement but grafted onto the doctrine of precedent”). Writing in 1930 Carlton Kemp Allen expressed shock and dismay that his contemporary judges had become to regard “mere decisions *in themselves* as settling disputed point, and of forgetting the fundamental principle which governs the whole employment of precedent.” ALLEN, LAW IN THE MAKING, *supra* note, at 157. See also Nelson, *supra* note, at 38 (noting influence of Bentham on American move toward stricter *stare decisis*).

against his tradition-shaped judgment of its reasonableness.”<sup>117</sup> It was not until the late-Eighteenth century, under the influence of Benthamite positivism and technological innovations that made printing and distribution of case reports feasible, that strict *stare decisis* came to supplant weaker forms of judicial precedent.<sup>118</sup>

This historical background is essential for understanding the traditional immunity of the common law to efficiency-distorting, rent-seeking influences. Prior to the acceptance of the hard doctrine of *stare decisis*, obtaining a favorable judgment by a party in a given case was of minimal value. Because the decision in that case did not authoritatively bind subsequent courts, each precedent provided minimal long-term value to the parties in the case. This was true even with respect to repeat players and institutional parties who *would* indeed have had such an interest if a doctrine of *stare decisis*, in fact existed. Moreover, the flexibility of reliance on precedent opened the system to self-correction, so that wrongheaded or inefficient decisions could be reversed at low cost by subsequent courts.

Where there is no precedent, there is no incentive to engage in rent-seeking litigation because there is no single authority empowered to “make” law.<sup>119</sup> Any rent-seeking legal doctrine can be upset by a subsequent judge who recognizes that the rent-seeking doctrine is inconsistent with reason and community consensus and expectations. Capturing a favorable precedent in a *stare decisis* system increases the value of the flow of wealth generated by that precedent. In fact, the presence of *stare decisis* provides incentives to interest groups to try to manipulate the path of cases that come before courts so as to try to influence which cases are heard first and create *stare decisis*-setting precedents.<sup>120</sup> The absence of binding precedent in the form of *stare decisis* reduces the flow of wealth that can be generated from any given case, thereby eliminating the unequal incentives that often exist for one party or the other to invest heavily in altering the evolution of the law.

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

This is not say that, on net, a regime with strict *stare decisis* will be better or worse for society.<sup>121</sup> It has been argued that *stare decisis* will tend to increase economic efficiency by

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<sup>117</sup> *Id.* at 194-95.

<sup>118</sup> In fact, stricter *stare decisis* was adopted in the late-Nineteenth Century in part as a mechanism to constrain judicial discretion and judicial law-making. See Nelson, *supra* note, at 48.

<sup>119</sup> See LEONI, *supra* note, at 83 (“[Law is] something to be described or to be discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all . . . citizens. Nobody enacted that law; nobody could change it by any exercise of his personal will.”).

<sup>120</sup> See MAXWELL L. STEARNS, *THE ECONOMICS OF SUPREME COURT DECISION-MAKING* (2000); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1329-50 (1995); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817-21 (1982).

<sup>121</sup> An excellent discussion of the costs and benefits of a regime of weak precedent rather than strict precedent is presented in Nelson, *supra* note, at 53-73.

increasing the predictability of legal rules.<sup>122</sup> But it must be recognized that this benefit is obtained at substantial cost, namely that *stare decisis* creates greater incentives for special interest groups to invest resources in order to obtain favorable precedents that will pay out returns over time. The possible value of a regime of strict precedent, therefore, must be comparative between these two offsetting factors. Alternatively, this analysis may require revisiting the purpose of *stare decisis*, and in particular the distinction between vertical *stare decisis* in a hierarchical court system and horizontal *stare decisis* of equal courts through time or with coequal jurisdictions. For instance, it may be that vertical *stare decisis* is necessary to create predictability; nonetheless, one might still argue for attenuated use of *stare decisis* through time or for decisions made by coequal courts.<sup>123</sup>

It must be recognized that in weighing the costs and benefits of *stare decisis*, therefore, it is essential to remember that rent-seeking will be an inherent part of every system that includes *stare decisis*. Because *stare decisis* allows one opinion to control the outcome of cases in the future, it will have a capital value to repeat-players who will thus be encouraged to invest resources to alter the future development of the law. Thus, a benefit of *stare decisis* is that it conserves time and judicial resources because once decided an issue does not have to be relitigated repeatedly. The more durable the precedent, however, the more parties will invest in the *original* case to try to win a favorable precedent and the greater will be the incentive to try to manipulate the path of precedent. These costs are inherent and cannot be eliminated. The proper comparison for purposes of determining whether *stare decisis* is on net an efficient doctrine must take include these inherent rent-seeking costs in the equation, a point which previous scholars have not taken into account.<sup>124</sup>

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<sup>122</sup> See Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986). Hayek, by contrast, argues that expectations will be best maintained by adhering to the more abstract *concepts* that emerge from the spontaneous order of the common law, rather than by adhering mechanically to the narrow *holdings* in particular cases as binding precedent. See HAYEK, RULES AND ORDER, *supra* note. Allen similarly appeals to the principles and concepts of the common law as being of preeminence, not individual case holdings. ALLEN, LAW IN THE MAKING, *supra* note, at 175. This appears to have been the traditional belief of the common law as well. See Kempin, *supra* note, at 39 (quoting *Hammond v. Ridgely's Lessee*: "But I cannot perceive why on any principle either of law or policy, an opinion of any court should be deemed of binding authority when the foundation of that opinion is taken away. It is the principle that should govern, the substance and not the shadow. Sound policy does indeed require, that principles laid down, and acted upon by courts of last resort, should not be lightly shaken, as it is to established principles, and not to isolated opinions, that parties look in making their contracts.").

<sup>123</sup> For instance, as will be discussed below, the shared jurisdictions of state and federal courts to make common law under the *Swift v. Tyson* regime might suggest that neither court be formally bound by the decisions of the other. By contrast, under *Erie R.R. v. Tompkins*, federal courts are bound by the decisions of state courts. See *infra* at notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>124</sup> Many notable scholars have offered economic analyses of *stare decisis*, but none have previously considered these rent-seeking aspects of *stare decisis* as a cost of the doctrine. See, e.g., Erin O'Hara, *Social Constraint or Implicit Collusion? Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993); Lewis Korhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Jonathan R. Macy, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

## **B. The Importance of a Polycentric Legal Order**

A second important historical institutional feature that affected the generation of the common law was the polycentric legal order in which the common law developed. During the era that the common law developed, there were multiple English courts with overlapping jurisdictions over most of the issues that comprise the common law.<sup>125</sup> As a result, parties potentially could bring a particular lawsuit in a variety of different courts. In turn, this seems to have created a type of competition among these various courts for business. Moreover, there was no clear hierarchy of appellate courts. It further appears that, in general, this competition was conducted on the basis of which court provided the speediest and highest quality judicial system. At the same time, this competitive process limited the ability of courts and special interest litigants to use the courts as a mechanism for wealth transfers. America benefited from a similar institutional regime under the doctrine of *Swift v. Tyson*, which established jurisdictional competition in America during the nineteenth century, thereby limiting rent-seeking litigation and encouraging the development of efficient law.

### **1. Competition Among Courts in England**

The common law is generally thought of as purely the law that was created by the King's Bench, primarily in the late-seventeenth and eighteenth centuries in England. But the King's Bench was just one of several legal systems that existed and thrived through the formative period of the common law's evolution. The common law that emerged in the eighteenth-century resulted not just from the decision-making of wise judges of the King's Bench, but was rather the result of a long period of competition and collaboration between that court and numerous other courts with jurisdiction to resolve disputes.<sup>126</sup> "We should remember," Arthur Hogue cautions, "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."<sup>127</sup>

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<sup>125</sup> It should be stressed that even though the analysis here will focus on the English experience, especially with respect to the common law, polycentric legal order was not unique to England. Indeed, a polycentric legal system was even more developed in continental Europe and persisted longer than in England. See BERMAN, LAW AND REVOLUTION, *supra* note. The focus on England in the current analysis is simply because of the article's focus on the efficiency of the common law in England and America, but a similar dynamic applied in Europe as well.

<sup>126</sup> Much of the common law was already developed by the thirteenth century. See Rowley, *supra* note, at 371. See BAKER, *supra* note, at 9 ("The common law was not all invented in a day, or a year, but arose out a long process of jurisdictional transfer in which many old customs were abandoned but many more were preserved. To appreciate how the ancient customs of England were accommodated to the unifying innovations of the Normans and Angevines, regard must be had not merely to the views of the great men in the king's court at Westminster, but also to what was happening from day to day in the shires, hundreds and boroughs throughout the land.").

<sup>127</sup> HOGUE, *supra* note, at 5. 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

As an initial matter, ecclesiastical courts declared themselves independent from secular authorities with respect to all issues under their scope.<sup>128</sup> In turn, “Secular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law, and mercantile law.”<sup>129</sup> Technically, each of the courts were limited in their jurisdictional reach. But these limitations were difficult to define and easily evaded, such as by the use of procedural fictions designed to camouflage actions in such a manner as to try to shoehorn cases into particular courts.<sup>130</sup> For instance, Church courts held exclusive jurisdiction over matters of testamentary succession and marriages, but it could often be difficult to determine whether particular situations fell under the church’s jurisdiction or that of some other court.<sup>131</sup> The use of fictions allowed courts to recharacterize the form of pleading in a case, thereby claiming jurisdiction over cases that the court would otherwise lack authority to hear. For instance, the court of exchequer had jurisdiction over debts owed to the King, but not debts between two private parties. Nonetheless, it was said that if a creditor owed the King (such as for taxes), then the failure of a debtor to repay a debt imperiled the ability of the creditor to pay the King. As a result, it was said that the exchequer could hear the dispute between the debtor and creditor. This was a relatively simple fiction, however; the number and complexity of fictions multiplied so as to evade formal jurisdictional limitations.<sup>132</sup>

Courts ferociously sought to protect their own jurisdictions while aggressively seeking to expand into the jurisdictions of other courts. The King’s Bench, the Exchequer, and the Court of Common Pleas heard many of the same cases and were consistently locked in heated conflicts over allegations that one of these courts was exceeding its jurisdictional limits and invading on the proper jurisdiction of a rival.<sup>133</sup> Although they supposedly had independent

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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.” *Id.*

<sup>128</sup> HAROLD J. BERMAN, *LAW & REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 10 (1983).

<sup>129</sup> *Id.*

<sup>130</sup> See JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA* 26 (1996) (“There were no strict rules of jurisdiction determining the court to which every dispute must come.”).

<sup>131</sup> See MILSOM, *supra note*, at 23-24 (“[M]any difficulties arose. Testamentary jurisdiction was clearly for the church; but was the church’s nominee or some other to represent the dead man in the lay courts if he died owing or being owed an enforceable debt? Questions about the fact and validity of marriage were clearly for the church, and therefore questions of legitimacy; but were its determinations to bind the lay courts in deciding upon inheritance? . . . How could the frontier be defined?”).

<sup>132</sup> See MILSOM, *supra note*, at 61-63 (describing some of the fictions used to allow courts to assert jurisdiction over disputes); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 644 (5<sup>th</sup> ed. 1956) (describing development of doctrine of *indebitatus assumpsit* as attempt by King’s Bench to infringe on the exclusive jurisdiction of Common Pleas over actions in Debt).

<sup>133</sup> See PLUCKNETT, *supra note*, at 210 (observing that the “competition between the King’s Bench, Common Pleas and Exchequer . . . resulted in these three courts having coordinate jurisdiction in many common classes of cases”); Baker, *supra note*, at 36 (“[B]efore 1700 the three major courts had acquired

jurisdictions, through the use of legal fictions and other mechanisms, by 1700 the three could be said to have acquired comparable jurisdictions over most legal claims.<sup>134</sup> Even the Magna Carta itself arose in large part as a protest by the lords against the King's efforts to infringe upon the jurisdiction of the lords' courts.<sup>135</sup> As a result of this panoply of courts, Harold Berman summarizes, "The same person might be subject to the ecclesiastical courts in one type of case, the king's courts in another, his lord's courts in a third, the manorial court in a fourth, a town court in a fifth, [and] a merchants' court in a sixth."<sup>136</sup> 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 as well as their interaction with other courts outside the framework of the royal courts.<sup>137</sup> "This arrangement, seemingly impracticable to modern eyes, was a feature of English public life for five centuries."<sup>138</sup> In fact as late as 1765 Blackstone observed in his *Commentaries* that multiple types of law still prevailed in England, including natural law, divine law, the law of nations, the English common law, local customary law, Roman law (governing Oxford and Cambridge Universities), ecclesiastical law, the law merchant, statutory law, and the law merchant.<sup>139</sup>

Each of these courts generated their revenues from the fees paid by litigants.<sup>140</sup> This created a system of competition among the courts for filings, leading courts to compete to

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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 were the most important royal courts that comprised the common law, there were actually seven such courts: (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, *supra* note, at 189. Indeed, as noted above, these conflicts over jurisdiction were the primary issues recorded in early published opinions, rather than the substantive results generated in those cases. Only cases involving freehold of land were required to come before the King's courts in the twelfth and thirteenth centuries. See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text; see also Rowley, *supra* note, at 371.

<sup>134</sup> See BAKER, INTRODUCTION, *supra* note, at 46.

<sup>135</sup> See HUDSON, *supra* note, at 225.

<sup>136</sup> BERMAN, *supra* note, at 10. See also Rowley, *supra* note, at 371 (noting that other than freehold cases, Englishmen "could take their cases to the county courts, which administered local, customary law, or into the church courts, which administered canon law; or into the borough courts which administered the law merchant; or, in the case of feudal barons, into the courts of a baronial overlord which would apply the rules of feudal custom").

<sup>137</sup> See BAKER, *supra* note, at 9 ("[I]n seeking the origins of the common law it is misleading to study solely the work of the royal judges. Sometimes the reason why a royal court would not allow an action or grant a remedy in a particular case was not that the matter was unknown to 'English law', but that the action pertained to some other jurisdiction or that the remedy was available elsewhere. . . . It is even more essential to understand the balance of jurisdictions when considering the evolution of the common law itself.").

<sup>138</sup> BAKER, *supra* note, at 29; see also Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LOUISIANA L. REV. 739, 740 (2000) ("For some four hundred years these secular legal systems co-existed alongside the canon law, and alongside each other, within every territory of Europe. With the national Protestant Revolutions of the sixteenth and seventeenth centuries, the various co-existing jurisdictions were, in effect, nationalized; nevertheless, the existence of plural jurisdictions and plural bodies of law within each country has remained a significant characteristic of the Western legal tradition at least until the latter party of the twentieth century.").

<sup>139</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 3-27 (1765) (reprinted 1966).

<sup>140</sup> BAKER, *supra* note, at 31; William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

provide the most unbiased, accurate, reasonable, and prompt resolution of disputes.<sup>141</sup> Litigants could vote with their feet, patronizing those courts that provided the most effective judgment. This meant that judges had to respond to their customers, the individuals who actually used the courts, rather than powerful special interests trying to impose rent-seeking rules involuntarily on passive citizens. This competitive process also led courts to recognize the legal innovations of their rivals, generating flexibility and high-quality justice. As Plucknett observes, even though the various courts were rivals, they “were, in fact, on intimate terms. It did not matter so much that they were usually terms of rivalry,” he continues, “for even then they kept close watch upon developments in other institutions, and competed in providing the best remedy.”<sup>142</sup> Equally important, this competitive process forced the various courts 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. This required the judges of the various courts to elevate the various legal rules from the status of mere precedents and forms of pleadings that were unique to each court to conceptual categories that could be transferred from one court to another. This need to elevate particular cases to higher conceptual categories provided a powerful impetus for improvement and rationalization of the law.<sup>143</sup>

In short, a market for law prevailed, with numerous court systems competing for market share.<sup>144</sup> This competitive process generated rules that satisfied the demand of consumers for fairness, consistency, and reasonableness. Although law and economics scholars generally recognize the advantages of markets in ordering individual and social affairs, recent scholars have curiously overlooked this important historical element of the development of the common law’s efficiency.<sup>145</sup> But the point was actually recognized as early as Adam Smith. Smith observed in the *Wealth of Nations*, “The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavoured to draw

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<sup>141</sup> Some have argued that this competition should have produced a tendency toward pro-plaintiff legal rules in order to induce plaintiffs to choose one court over another. Why this did not occur is discussed *infra* at notes \_\_\_ - \_\_\_ and accompanying text.

<sup>142</sup> PLUCKNETT, *supra* note, at 650.

<sup>143</sup> *See id.* (“[S]ince development took the form of modifying the different forms of action, it was inevitable that there should be a good deal of overlapping, and consequently the boundaries between forms of action became obscure. Hence it was all the more easy to emphasize substance above form.”).

<sup>144</sup> *See* BERMAN, *supra* note, at 10 (“Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems.”); *see also* LON L. FULLER, ANATOMY OF THE LAW 123 (1968) (“A possible . . . objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been more common than unitary systems.”); Milsom, *Introduction*, *supra* note, at xciv (“Different and more or less conflicting systems of law, different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned.”); HUDSON, *supra* note, at 51 (noting that despite large number of courts with overlapping jurisdictions “there is little sign of a confusion of courts in Anglo-Norman England” and that “[t]he lack of rigid jurisdictional rules need not have been a disadvantage for disputants”); *id.* at 26 (“At the same time, court-holders may have competed to settle disputes, since doing so could increase their authority and bring profit.”).

<sup>145</sup> Exceptions are R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUDIES 397, 406-07 (1981), Goodman, *supra* note, and Charles Rowley, *supra* note.

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.”<sup>146</sup> Through the use of legal fictions, the courts could evade *de jure* limitations on their respective jurisdictions and thereby compete for the business of litigants. “In consequence of such fictions,” Smith observes, “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.”<sup>147</sup> Smith went on to ascribe the positive evolution of the English common law to the competition between the various courts: “The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure, formed by this emulation, which anciently took place between their respective judges; each judge endeavouring to give, in his own court, the speediest and most effectual remedy, which the law would admit, for every sort of injustice.”<sup>148</sup> In his *Lectures on Jurisprudence* Smith observed, “Another thing which tended to support the liberty of the people and render the proceedings in the courts very exact, was the rivalry which arose betwixt them.”<sup>149</sup> Smith also noted that requiring judges to compete for fees would cause them to work harder and more efficiently, thereby removing incentives for judges to shirk or to indulge their personal preferences.<sup>150</sup>

The presence of a market for law with several competing producers of law provides a powerful part of the explanation of why the common law system tended to generate efficient

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<sup>146</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS at Book V, Chapter 1, part 22, p. 241 (Edward Cannan ed., 1976) (University of Chicago Press edition).

<sup>147</sup> *Id.* at 241.

<sup>148</sup> *Id.* at 241-42.

<sup>149</sup> ADAM SMITH, LECTURES ON JURISPRUDENCE, *Report of 1762-3*, at p. 280; *see also id.*, *Report dated 1766*, at p. 423 (“During the improvement of the law of England there arose rivalships among the several courts.”).

<sup>150</sup> *Id.* at 241 (“Public services are never better performed than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them.”). Posner has postulated that because judges are insulated from market pressures they will tend to consume leisure and shirk on their obligations. *See Posner, What Do Judges Maximize?*, *supra* note. 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.” Quoted in Francis Marion Burdick, *Contributions of the Law Merchant to the Common Law*, reprinted in 3 SELECT ESSAYS, *supra* note, at 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, supra* note, at 36 n.3. Spellman argued that this tendency toward drunkenness also explained the common law prohibition on providing jurors with meat, drink, fire, or candle light until they agreed upon their verdict. *Id.*



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

Moreover, many of the concepts and doctrines later associated with the common law had their genesis in other courts, such as the law merchant, chancery, or ecclesiastical courts. For much of the history of the common law, Berman observes, 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 common law courts were thus really a stagnant, intellectual backwater for dealing with legal issues involving persons rather than land. Milsom observes that land law dominated English law, especially in the common law courts. "Compared with relationships concerning land, other kinds of legal relationship, and in particular those which we talk about under the headings of contract and tort, were of little consequence. If therefore we allow the age to speak for itself, it will not have so much to say about them. And if we mainly allow the records of the king's courts to speak for the age, we shall hear relatively even less."<sup>151</sup> This "arrested development" of the common law of contract, Fifoot adds, "was due not so much to the paucity of litigation as to the lack of any comprehensive principle to which isolated decisions could be adjusted."<sup>152</sup> The common law courts thus handled routine matters such as "recognizances," which were essentially penal bonds on which creditors could levy upon the failure of the debtor to perform on a contract. They were thus probably not properly characterized as independent contractual obligations at all, but rather glorified debt-collection devices. Parties would often use the common law courts in a collusive or even fictitious manner to create a judgment on a debt of record that the creditor could later use to collect upon default.<sup>153</sup> To the extent that this provided the bulk of the actions in the royal courts, it is easier to understand why the royal courts failed to develop a more robust body of contract defenses and the like. Simpson, for instance, estimates that in the sample year

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<sup>151</sup> Milson, *Introduction, supra* note, at xlix' *id.* at lii ("[A]t no time was the action of covenant common in the king's courts, except as a basis for levying fines . . ."); BAKER, INTRODUCTION, *supra* note, at 271 ("Compared with the local and ecclesiastical courts, the medieval royal courts played a limited part in the field of contract.").

<sup>152</sup> FIFOOT, *supra* note, at 14.

<sup>153</sup> See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 631 (5<sup>th</sup> ed. 1956).

of 1572, 503 actions were brought on bonds in contrast to only three actions brought in *assumpsit*.<sup>154</sup>

Although legal developments in the common law courts may have stagnated during this time, they continued apace in rival jurisdictions. Contract law was highly developed in several of the other courts, leading parties to ignore the royal courts and resolve their disputes elsewhere. Generations of legal historians have remarked on the paucity of contract law disputes brought in the common law courts for the first several centuries of its history.<sup>155</sup> These rival courts included local courts, ecclesiastical courts, law merchant courts, and Chancery. Although they will be discussed distinctly here for purposes of exposition, in practice, the boundaries between these systems were highly fluid as there was a great deal of cross-fertilization between them.

Local courts resolved many issues of contract law and other forms of personal legal relations for centuries. These courts included both town and feudal courts.<sup>156</sup> Independent local courts in towns and manors gave remedies in cases where the King's courts would not; Plucknett observes that these country courts "developed a reasonable mass of settled practice" for dealing with contract disputes even though they did not have well-theorized concept of contract law.<sup>157</sup> These local courts provided a place of first resort for the bulk of Englanders pursuing claims in contract or tort.<sup>158</sup>

Ecclesiastical courts were also a major rival. The ecclesiastical courts also offered a highly-developed body of contract law and other law, leading many layman to bring their cases in the ecclesiastical courts.<sup>159</sup> William Stubbs notes that the canon law courts "claimed jurisdiction over everything that had to do with the souls of men," a claim that potentially includes almost any "region of social obligation."<sup>160</sup> The assertion of authority over all "spiritual matters" meant in practice that the church was able to create a sort of "shadow claim" for almost every claim recognized in other legal jurisdictions, from contract, to debt, to criminal law, to testamentary succession.<sup>161</sup> In addition to this subject matter jurisdiction, "any person could

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<sup>154</sup> See A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 125 (1987).

<sup>155</sup> Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, reprinted in 1 *SELECT ESSAYS* 208, at 238 (quoting J. Davies); *id.* at 239 (quoting Blackstone).

<sup>156</sup> See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 25 (2d ed. 1979).

<sup>157</sup> PLUCKNETT, *supra* note, at 635; Milsom, *Introduction*, *supra* note, at 1 ("Nobody has ever doubted that most litigation in what we should call contract and tort took place in lesser courts than the king's . . .").

<sup>158</sup> See POLLOCK & MAITLAND, *supra* note, at 109.

<sup>159</sup> See Berman, *Western Legal Tradition*, *supra* note, at 743; Milsom, *Introduction*, *supra* note, at lii. The strong intellectual framework of the canon law, especially when compared to the English common law, owed much to the incorporation of Roman law into the canon law, which provided a systematic framework of legal principles. See BERMAN, *LAW & REVOLUTION*, *supra* note, at 245.

<sup>160</sup> William Stubbs, *The History of the Canon Law in England*, reprinted in 1 *SELECT ESSAYS*, *supra* note, at 248, 270.

<sup>161</sup> See Stubbs, *The History of the Canon Law in England*, *supra* note, at 270-71. Baker notes that the Church had "pervasive jurisdiction over the lives of most ordinary people." BAKER, *INTRODUCTION*, *supra* note, 112. Stubbs describes the irritation of Henry III, Edward II, and Kings, regarding the extravagant jurisdictional claims of the ecclesiastical courts. See Stubbs, *The History of the Canon Law in England*, *supra* note, at 272.

bring suit in an ecclesiastical court, or could remove a case from a secular court to an ecclesiastical court, even against the will of the other party, on the ground of ‘default of secular justice.’”<sup>162</sup> Even though ordinary contracts fell under the jurisdiction of lay courts, breaking a promise, especially one made under oath, was also a sin.<sup>163</sup> As a result, ecclesiastical courts could assert jurisdiction over many contract cases.<sup>164</sup> Other areas of the law affecting laymen, such as family law and intestate succession, were almost completely under the jurisdiction of the ecclesiastical courts.<sup>165</sup> Common law innovations in procedural areas also owe a large debt to canon law influence.<sup>166</sup> Even the mundane issues of contract and property law could be characterized as raising spiritual issues that could trigger the church’s jurisdiction.<sup>167</sup> The availability of rival courts under independent powers—Pope and king—provided a powerful mechanism for legal development.<sup>168</sup> This was both direct, by the innovations of the ecclesiastical courts, as well as indirect by pressuring other courts to innovate.<sup>169</sup> Also, many of the Chancellors of the Chancery Court were clerics who were trained in the canon law tradition and brought the principles of the canon law with them to the Chancery bench.<sup>170</sup> Canon law was root of such fundamental equitable principles as the requirements of good faith and fair dealing in transactions, as well as the remedy of specific performance.<sup>171</sup> This fierce rivalry between the ecclesiastical courts and other courts persisted for hundreds of years, and was ended only when the Reformation brought the church, and hence its courts, under the King’s power.<sup>172</sup>

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<sup>162</sup> BERMAN, *LAW & REVOLUTION*, *supra* note, at 223.

<sup>163</sup> *See* MILSOM, *supra* note, at 23.

<sup>164</sup> 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, *supra* note, at 128. *See also id.* at 131 (“Large then is the province of ecclesiastical law; but it might have been much larger.”).

<sup>165</sup> *See* MILSOM, *supra* note, at 23; Scrutton, *Roman Law Influence*, *supra* note, at 226; BERMAN, *LAW & REVOLUTION*, *supra* note, at 223. The independence and strength of the ecclesiastical courts in England through the end of the Eighteenth-Century at least is suggested by Alexander Hamilton’s comparison in the *Federalist Papers* that the Probate Courts of early America were “analogous in certain matters to the spiritual courts in England.” THE FEDERALIST No. 83 (Alexander Hamilton), at 502 (Clinton Rossiter ed. 1961). The church’s jurisdiction to deal with intestate succession arose from its power to decide issues of legitimacy and paternity. Of course, in each of these areas the ecclesiastical courts faced rivals from other jurisdictions seeking to infringe on the Church’s jurisdiction.

<sup>166</sup> *See* POLLOCK & MAITLAND, *supra* note, at 134.

<sup>167</sup> Stubbs notes that the Bishop of London, for instance, entertained suits alleging that a guild member had breached his oath by improperly revealing “the art and mysteries” of his guild to non-members. *See* Stubbs, *History of the Canon Law in England*, *supra* note, at 271.

<sup>168</sup> *See* BERMAN, *LAW & REVOLUTION*, *supra* note, at 225 (“Every person in Western Christendom lived under both canon law and one or more secular legal systems.”).

<sup>169</sup> *See* Milsom, *Introduction*, *supra* note, at xcvi (“the wide and flexible jurisdiction of the spiritual power was of great service in the middle ages, both in supplementing the justice of secular courts, and in stimulating them by its formidable competition to improve their doctrine and practice”).

<sup>170</sup> *See* 1 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 241-42 (1903).

<sup>171</sup> *Id.* at 242.

<sup>172</sup> *See* Stubbs, *The History of the Canon Law in England*, *supra* note, 270 (noting that “for four hundred years, from the Conquest to the Reformation,” the canon law and common law courts “stood side by side, with rival bodies of administrators and rival or conflicting processes”). As Stubbs observes, the

Most important in the realm of commercial law and contracts was the law merchant, or *lex mercatoria*.<sup>173</sup> The law merchant was born in the commercial city-states of Italy in the early medieval period.<sup>174</sup> The birth of the law merchant in Italy was fortuitous, as this also encouraged cross-fertilization between the law merchant and canon law. The universal reach of the Church crossing national boundaries also had the effect of universalizing law, creating a type of “law of nations” that could be applied nearly uniformly throughout Europe.<sup>175</sup> As a result, the ecclesiastical law provided a powerful complement to the universalizing nature of the law merchant, which found its expression through the customs of merchants, which were largely universal as well.<sup>176</sup> The canon law offered a long and intellectually robust legal tradition that could be grafted onto the law merchant. Whereas the law merchant was a collection of informal procedures and customary law, the canon law provided an intellectual framework that could be used to organize the law merchant into a coherent legal system. But equally important, the canon law offered an intellectual framework to synthesize the law merchant without creating an oppressive set of procedural and substantive rules that would have the effect of strangling it. For instance, canon law provided a moral grounding for enforcement of practices of good faith and fair dealing which still provide the foundation of commercial law and practice today.<sup>177</sup> “[R]unning through all the mass of particular rules” of the canon law system were “two guiding principles that the procedure must be simple and speedy, and the law must be equitable.”<sup>178</sup> These principles provided a powerful organizing principle for the emergence of the law merchant. As Holdsworth observes, these principles justified the “purging of the law of barren technicalities which enable the merchants” to devise their own procedures and substantive law free from the heavy-hand of legal formalities.<sup>179</sup> “That the usages and practice of the merchants themselves were the main source of the law is clear from the literature on the subject.”<sup>180</sup> In

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ecclesiastical courts had their own bar and educational system as well. *Id.* at 266. Stubbs also observes that many clerics were quite ambivalent about the great activity of the ecclesiastical courts, arguing that it distracted the church away from spiritual matters in its focus on secular matters of contract enforcement and the like. *See id.* at 269. Moreover, although the punishment for many wrongs was penance, in practice liable parties would provide civil compensation to commute the term of penance. *See* BAKER, INTRODUCTION, *supra* note, at 112.

<sup>173</sup> For general overviews of the history and characteristics of the law merchant, *see* BERMAN, LAW & REVOLUTION, *supra* note, at 333-56 (stressing legal rules) and Bruce L. Benson, *The Spontaneous Evolution fo Commercial Law*, 55 S. ECON. J. 644 (1989) (providing economic analysis of law merchant).

<sup>174</sup> *See* 5 HOLDSWORTH, *supra* note, at 65-102 (reviewing history of Italian law merchant).

<sup>175</sup> Berman observes, “The mercantile community had its own law, the *lex mercatoria*, just as the church had its own law, the *jus canonicum*. The merchants were, or course members of the church and hence subject to the canon law, but they were also members of the mercantile community and hence subject to the law merchant. When the two bodies of law conflicted, it might not be clear which of the two should prevail.” BERMAN, LAW & REVOLUTION, *supra* note, at 346.

<sup>176</sup> *See* 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 79-80 (2d ed. 1937) (noting overlap between ecclesiastical law and law merchant).

<sup>177</sup> *See* 5 HOLDSWORTH, *supra* note, at 81; *see also* Uniform Commercial Code.

<sup>178</sup> *See* 5 HOLDSWORTH, *supra* note, at 83.

<sup>179</sup> *See* 5 HOLDSWORTH, *supra* note, at 83.

<sup>180</sup> *See* 5 HOLDSWORTH, *supra* note, at 130. The first great treatise on the law merchant, Gerard Malynes’s *Lex Mercatoria* (published in 1622) was authored by a merchant, not a lawyer, *Id.* at 131-32, as was his most prominent successor, Marius (1670). *See* CARTER, *supra* note, at 265.

addition, the *lex mercatoria* also reflected influences of Roman law,<sup>181</sup> the *Lex Rhodia* customary commercial law of the Mediterranean identified in the third century,<sup>182</sup> and to the Middle East, where commerce emerged earlier than in Europe<sup>183</sup>.

In fact, much of the fabric of sophisticated contract law was rooted in the law merchant, not the common law courts. Thus, the law merchant offered a range of innovative equitable defenses, such as defenses of fraud, duress, and mistake.<sup>184</sup> The law merchant also developed rules protecting bona-fide purchasers for value well before the common law did.<sup>185</sup> The common law did not adopt these defenses until the incorporation of the law merchant into the common law many years later. Thus, the law merchant modernized contract law well before the common law courts did.<sup>186</sup> Indeed, the law merchant courts themselves faced competition from other courts--the common law, ecclesiastical, etc.<sup>187</sup> As a result, the law merchant confronted the same competitive pressures to innovate and modernize that the other jurisdictions also confronted.

The law merchant eventually migrated to England through the pressures of international trade as England joined the family of commercial nations.<sup>188</sup> England in turn followed the world trend of creating a set of unique courts and a body of procedural and substantive rules that drew merchants into its courts.<sup>189</sup> Disputes between merchants over contracts, notes, or other

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<sup>181</sup> BERMAN, LAW AND REVOLUTION, *supra* note, at 339.

<sup>182</sup> TRAKMAN, LAW MERCHANT, *supra* note, at 8.

<sup>183</sup> WILLIAM A. BEWES, THE ROMANCE OF THE LAW MERCHANT: BEING AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW WITH SOME ACCOUNT OF THE COMMERCE AND FAIRS OF THE MIDDLE AGES 11 (1923).

<sup>184</sup> See Bruce L. Benson, *Law Merchant*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 500, 503 (Peter Newman, ed. 1998); BERMAN, LAW & REVOLUTION, *supra* note, at 343; LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 12 (1983).

<sup>185</sup> DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 129 (1990).

<sup>186</sup> MARY ELIZABETH BASILE, JANE FAIR BESTOR, DANIEL R. COQUILLETTE, AND CHARLES DONAHUE, JR., *LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE* 136 (1998) (noting that "at the common law a person's writings could only be pleaded against him if they were sealed and delivered, whereas in a suit between merchants, 'bills of Lading, Bills of Exchange, being but tickets without Seals, Letters of advice and credences, Policies of assurance, Assignations of Debts, all of which are of no force at the Common Law, are of good credit and force by the Law Merchant'").

<sup>187</sup> See Benson, *Law Merchant*, *supra* note, at 504 (noting that merchants took disputes to ecclesiastical courts); BASILE, *LEX MERCATORIA*, *supra* note, at 126 (noting competition with common law, admiralty courts, conciliar courts, and the Chancery).

<sup>188</sup> Although the discussion here focuses primarily on the law merchant as it evolved in fairs, towns, and markets, it should be noted that the term itself also conventionally includes the law developed to govern international trade on the seas, and thus was equally important to the development of mercantile and Admiralty law. These two branches of the law merchant were substantially identical, therefore I discuss only the "commercial" branch here. See 1 HOLDSWORTH, *supra* note, at 303 ("It is clear that both the maritime and commercial law of the Middle Ages grew up in similar surroundings, governed the relations of persons engaged in similar pursuits, was enforced in similar tribunals. It is not therefore surprising that, from that time to this, the relations between them have always been of the closest.").

<sup>189</sup> Holdsworth notes that the law merchant in England evolved in a way different from the rest of Europe, as the law merchant was melded with unique English historical conditions. See *id.* at 67.

commercial affairs, were tried in these specialized tribunals.<sup>190</sup> As Thomas Scrutton observed, “If you read the [common] law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable.”<sup>191</sup> 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.”<sup>192</sup> In fact, the common law courts were jurisdictionally prohibited from hearing cases involving contracts that were to be performed outside England because of the unavailability to collect the relevant facts through the process of a jury trial.<sup>193</sup> The common law also lacked jurisdiction over torts committed abroad.<sup>194</sup> Given the relatively undeveloped nature of the English economy relative to the rest of Europe during the Middle Ages, this jurisdictional limitation barred the common law courts from almost all important commercial litigation. Because most large commercial activity was performed by foreign merchants, the law merchant dominated the development of the commercial law.<sup>195</sup> The law merchant courts applied to both international and domestic transactions between merchants.<sup>196</sup> Indeed, over time the law merchant rules came to govern *all* commercial transactions in which either of the parties was a merchant, including domestic traders.<sup>197</sup> During the Stuart era, the bulk of mercantile litigation was . . . committed to private

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<sup>190</sup> Holdsworth distinguishes three distinct periods in the history of the law merchant. In the first, the law merchant was applied provincially in local town courts. In the second, the law merchant emerged as an independent court system, applying a set of unique procedures and applying a universal *lex mercatoria*, rooted in merchant practice rather than in local law-making. Third, the law merchant was incorporated by Lord Mansfield into the common law as a form of merchant custom, melding the substantive rules of the merchant law with the procedures of the common law. See William Searle Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 SELECT ESSAYS, *supra* note, at 289, 293, excerpted from 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 300-337 (1903). I will focus here on the second period and its incorporation by Lord Mansfield.

<sup>191</sup> See Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS, *supra* note, at 1; BASILE, *LEX MERCATORIA*, *supra* note, at 137.

<sup>192</sup> *Id.* at 2; Burdick, *supra* note, at 43 (“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.”).

<sup>193</sup> See 5 HOLDSWORTH, *supra* note, at 119, 140; WALSH, *supra* note, at 367. Eventually the common law courts were able to use fictions to evade this jurisdictional limitation. See 5 HOLDSWORTH, *supra* note, at 140 and *infra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>194</sup> See 1 HOLDSWORTH, *supra* note, at 307 n.2.

<sup>195</sup> See 5 HOLDSWORTH, *supra* note, at 115.

<sup>196</sup> See Holdsworth, *Development*, *supra* note, at 298.

<sup>197</sup> See Holdsworth, *Development*, *supra* note, at 298; *LEX MERCATORIA*, in BASILE at 3 (arguing that law merchant applies to transaction involving a merchant's "merchandise"); BASILE, *supra* note, at 96 (noting that "merchant" was defined "broadly" to include "all those enfeoffed and resident in the 'five places' [in which merchant court's existed] and by suggesting that 'markets' include the entire geographical area of the same places").

arbitration.”<sup>198</sup> Thus, there was no demand by merchants for the common law to innovate because merchants were satisfied with the rules produced by the *lex mercatoria*. On the other side, there was little opportunity or social need for the common law to innovate because contract and other disputes were being adequately resolved in the law merchant courts and elsewhere.<sup>199</sup>

Law merchant courts prospered in towns, fairs, and various markets.<sup>200</sup> Medieval trading fairs and major commercial towns provided courts for merchants to resolve disputes over contracts and torts.<sup>201</sup> These were referred to as the courts of “piepowder,” so named because the courts heard and ruled on cases before the dust could fall from the feet of the merchants at the fairs.<sup>202</sup> The right to hold a trading fair included within it a right to offer a piepowder court to resolve disputes arising during the fair.<sup>203</sup> These courts offered swift resolution of disputes with a minimum of procedural formalities.<sup>204</sup> Rather than the archaic substantive rules of the common law, the law merchant courts offered law grounded in commercial custom consistent with the merchants’ expectations.<sup>205</sup> Juries were composed of merchants themselves, often drawn from multiple nationalities.<sup>206</sup> The *Carta Mercatoria* of 1303 promised protection for foreign merchants, including access to speedy justice in the event of a dispute as well as promising that any jury would be composed of half foreign merchants.<sup>207</sup> Lawyers were generally barred from the proceedings as disruptive of the speedy and informal

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<sup>198</sup> C.H.S. FOOT, LORD MANSFIELD (1936); see also WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 21 (1904, reprint 1969) (concluding that “Law Merchant existed” and that it was “the private international law of the Middle Ages”); A.N. SACK, *Conflicts of Laws in the History of the English Law*, in LAW: A CENTURY OF PROGRESS 342, 375 (1937) (“For centuries commercial causes were determined by a law of their own, the law merchant.”).

<sup>199</sup> See WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 362 (2d ed. 1932, reprint edition 1993) (“One reason why the law of contract lagged so far behind in its development was that merchants, shippers, and traders had a special law of their own administered in special courts for them alone. . . . This law took care of the controversies arising in connection with business, so that very few questions of this nature arose in the regular courts prior to the seventeenth century.”).

<sup>200</sup> Holdsworth, *Development*, *supra* note, at 298. The law merchant prevailed in five places: cities, fairs, seaports, market-towns, and boroughs. BASILE, *supra* note, at 23.

<sup>201</sup> On the fair courts, see Scrutton, *General Survey*, *supra* note.

<sup>202</sup> Scrutton, *General Survey*, *supra* note, at 9 (referring to court as the Court *Pepoudrous*).

<sup>203</sup> See Holdsworth, *Development*, *supra* note, at 298.

<sup>204</sup> See Benson, *Spontaneous Evolution*, *supra* note, at 650. In fact, one significant advantage of the law merchant courts was that they generally were open for business. The common law courts, by contrast, sat only in the mornings and often disposed of cases at a leisurely pace. See *supra* notes \_\_\_\_-\_\_\_\_ (describing practice of common law courts not to meet in the afternoon). By contrast, law merchant court was held twice per day, before and after dinner. BASILE, *supra* note, at 60.

<sup>205</sup> Burdick, *supra* note, at 40. Often the customs reflected the nature of the merchants themselves. Rather than a “pledge of faith” as under the ecclesiastical law, for example, the merchants instead pointed to the “wetting of a bargain,” i.e., buying a drink to memorialize a deal, as an important evidentiary act. See Scrutton, *General Survey*, *supra* note, at 10. The reliance on commercial custom in the *lex mercatoria* would later provide the impetus for Karl Llewellyn’s advocacy of the incorporation of commercial custom into Article 2 of the UCC.

<sup>206</sup> See CARTER, *supra* note, at 255.

<sup>207</sup> See 1 HOLDSWORTH, *supra* note, at 311.

resolutions of disputes.<sup>208</sup> The courts of various fairs maintained information networks that made possible the transnational enforcement of judgments. As a result, an unpaid judgment from a fair held in England, for instance, could be enforced against a merchant in a piepowder court in Italy. The failure to perform the judgment resulted not only in punishment to the merchant, but the exclusion of the merchant's fellow countrymen from the fair.<sup>209</sup>

The courts of the Staple also provided their own set of arbitral courts to resolve disputes arising in the markets of the most important articles of commerce in England, such as wool, woolfells, leather lead, and tin.<sup>210</sup> Under the "Statute of the Staple," enacted in 1353, common law courts were specifically prohibited from hearing disputes arising from contracts made on the staple markets and the staple courts were expressly instructed to apply the law merchant and not the common law.<sup>211</sup> The jurisdiction of the staple court was broad exclusive, including claims concerning debt, covenant, and trespass under its head, and excluding the king's courts in all cases but freehold or felony.<sup>212</sup> 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.<sup>213</sup> As Holdsworth summed up the situation in the era of the flourishing law merchant, "With the merchant, his courts and his law the common law had little concern."<sup>214</sup> In part, this was because of the incompetence of the common law courts to deal credibly with commercial disputes.<sup>215</sup> To understand the common law of England, especially prior to the

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<sup>208</sup> See 5 HOLDSWORTH, *supra* note, at 98.

<sup>209</sup> See 5 HOLDSWORTH, *supra* note, at 98, 107.

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

<sup>211</sup> See CARTER, *supra* note, at 261; see also Holdsworth, *Development*, *supra* note, at 302. For a general overview of the Courts of Staple, see Bernard Edward Spencer Brodhurst, *The Merchants of the Staple*, in 3 SELECT ESSAYS, *supra* note, at 16. The Statute of the Staple provided, in relevant part, "All merchants coming to the staple, their servants and household, shall be ruled by mercantile law (*la lei marchand*) 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." The Statute of the Staple, 1353, 27 Edward 3, ch. 8 (quoted in BASILE, *supra* note, at 129). Some recent commentators have argued that, notwithstanding its language, the Statute of Staple did not actually deprive the common law courts of jurisdiction over these disputes but that the Statute simply empowered the staple markets to establish *additional* locations for adjudicating disputes. See Charles J. Reid, Jr., *Book Review*, 53 BUS. REV. 835, 837 n.2 (1998).

<sup>212</sup> Holdsworth, *Development*, *supra* note, at 302.

<sup>213</sup> PLUCKNETT, *supra* note, at 636.

<sup>214</sup> Holdsworth, *Development*, *supra* note, at 303.

<sup>215</sup> Holdsworth, *Development*, *supra* note, at 316 (detailing cases that illustrated "the incompetence of the Common Law Courts to deal with the [commercial] jurisdiction which they claimed").



eighteenth century, therefore, it is crucial to understand the history of the law merchant as a rival jurisdiction to the common law.<sup>216</sup>

Through the leadership of Coke and Mansfield the law merchant was eventually incorporated into the common law.<sup>217</sup> Under Coke's lead, the common law began to chip away at the jurisdiction of the law merchant courts over commercial disputes beginning in the seventeenth century, by increasingly looking to merchant custom as a source of legal understanding.<sup>218</sup> Mansfield completed the revolution in the commercial jurisprudence of the common law courts by incorporating the law merchant into the common law.<sup>219</sup> In so doing, Mansfield overthrew the common law's encrusted and dysfunctional precedent regarding economic relations among merchants to try to increase the common law's control over commercial law.<sup>220</sup> The law merchant had proven itself responsive to the innovations and needs of commercial practice, whereas the common law remained loyal to archaic doctrines from an earlier age of commerce and earlier technologies. Mansfield largely adopted the law merchant's rules on everything from rules of evidence to the substantive rules of negotiable instruments in response to competitive pressures from the law merchant court system.<sup>221</sup> Modern conceptions of partnership and other business forms originated in the law merchant,<sup>222</sup> as did warranties of quality and the fellow-servant doctrine.<sup>223</sup> In addition, Mansfield made substantial use of special

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<sup>216</sup> See S.F.C. Milson, *Introduction*, in 1 SIR FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* at p. xxiii, xxvii (1968). In fact, it has been argued that the phrase "*lex terrae*" in Magna Carta did not refer only to the common law, but to all of the other jurisdictions in the kingdom, "including ecclesiastical law, admiralty law, martial law, the law of nations, the law merchant, natural law, and ... 'the law of the state.'" BASILE, *supra* note, at 139 (quoting Sir Francis Ashley).

<sup>217</sup> Some doctrines were incorporated directly into the common law, others were incorporated indirectly, passing first through other courts such as Star Chamber, Admiralty, or Equity, before finally passing into the common law. See 5 HOLDSWORTH, *supra* note, at 135.

<sup>218</sup> See Scrutton, *General Survey*, *supra* note, at 12-13.

<sup>219</sup> Scrutton, *General Survey*, *supra* note, at 13; see also DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* 449-53 (1999) (discussing Mansfield's commercial law jurisprudence).

<sup>220</sup> See FIFOOT, *supra* note, at 93-117 (describing Mansfield's commercial law jurisprudence); PLUCKNETT, *supra* note, at 657-70 (describing absorption of merchant law rules into the common law); Bruce L. Benson, *To Arbitrate or Litigate: That Is the Question*, 8 EUROPEAN J. OF L. & ECON. 91, 125 (1999); HOGUE, *supra* note, at 248 ("It was the achievement of Mansfield to incorporate the law merchant into the common law and the fashion what had been a body of special customary law into general rules within a larger system"). Mansfield is often called "the founder of the commercial law" of England. Holdsworth, *Developments*, *supra* note, at 331; see also CARTER, *supra* note, at 270.

<sup>221</sup> See BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 225-26 (1990). This dynamic continues today, as the inefficiencies and unworkable doctrines of national legal systems has led most cross-border commercial traffic to be governed by systems of commercial arbitration rather than country-specific legal systems. *Id.* See also discussion at *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>222</sup> See Burdick, *supra* note, at 48; 5 HOLDSWORTH, *supra* note, at 110. An extensive list of the various legal concepts that originated with the law merchant is provided by Berman. See BERMAN, *LAW & REVOLUTION*, *supra* note, at 349-50.

<sup>223</sup> 5 HOLDSWORTH, *supra* note, at 110-111. Walsh observes that a claim for damages for a breach of warranty was recognized under the law merchant some two centuries before the common law. See WALSH, *supra* note, at 366.

merchant juries as a mechanism for bringing merchant custom into the common law and making it a basis for an integration of merchant practice into the common law.<sup>224</sup> Still other law merchant concepts found their way into the common law through the initial mediation of the Chancery Court, as the Chancery sought to draw business to itself in the great competition with the common law courts.<sup>225</sup>

The stricter form of the incorporation thesis has been questioned in recent years.<sup>226</sup> For current purposes, however, quibbles over the direct historical lineage of the law merchant into the common law are largely beside the point. There is little question that at the very least the law merchant courts innovated in the realm of commercial law well-before the common law recognized many of these concepts and that the competition between these courts drove the common law under Coke to innovate to preserve its market share. Moreover, it is evident from the historical record that Lord Mansfield was clearly aware of the law merchant and many of its principles. In responding to this interjurisdictional competition, therefore, the rivalry had the effect of driving the common law toward efficiency.

Finally, standing behind the common law was the Court of Chancery. It was well-understood that in part the inflexibility and lack of creativity was justified by the recognition that any undue hardship caused by the common law's rigor could be ameliorated by the equitable remedies available in Chancery. In the name of predictability and consistency, common law therefore adopted bright-line rules that occasionally worked hardship on litigants.<sup>227</sup>

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<sup>224</sup> See FIFOOT, *supra* note, at 104-05.

<sup>225</sup> See Burdick, *supra* note, at 50. One commentator argues that following the eventual demise of the law merchant as an independent court, but for Mansfield's correction of "the illiberal policy of the common lawyers," merchants would have likely gravitated toward the Chancery to resolve their legal issues. See A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 250-51 (1986) (reprint of 1902 edition).

<sup>226</sup> Legal historians dispute whether the law merchant in England offered only expedited procedures, different substantive rules, or both. Recent legal historians have also questioned whether there was in fact an independent set of law merchant courts, or whether this was merely the application of merchant custom in the common law courts. The discussion in the text will follow the traditional view, one which seems to continue to gain the allegiance of the majority of legal historians, from Holdsworth, to Maitland, down to Harold Berman. Revisionists include such notables as Professor James Rogers and J.H. Baker. Rogers, although acknowledging that the "incorporation" thesis remains the dominant belief among legal historians and that law merchant courts developed speedier and streamlined procedures for resolving disputes, argues that the common law's commercial jurisprudence was "home grown." In this article, I will adopt the traditional view while rendering no independent assessment of Professor Roger's critique one way or the other. See JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW 20 (1995) ("In the standard accounts of the history of commercial law, the law merchant is usually taken to have been a body of substantive law based on mercantile custom, distinct from the common law applied in the central courts. Although this view has won nearly universal acceptance among writers on commercial law, the evidence shows that it is quite inaccurate."). Baker notes that "it might seem absurdly heretical to question the almost universally accepted history" of the incorporation thesis, but nonetheless concludes that Lord Mansfield's eighteenth-century commercial law innovations and the recognition of merchant custom arose internally from the common law, rather than being incorporated from the law merchant courts. See J. H. Baker, *The Law Merchant and the Common Law Before 1700*, in THE LEGAL PROFESSION AND THE COMMON LAW 341, at 343(1986).

<sup>227</sup> Baker details a number of the harsher common law doctrines. See BAKER, INTRODUCTION, *supra* note, at 87. It should be noted, however, that although harsh, some of these rules may not have been as irrational as they appeared at first glance. For instance, the rule that forced debtors to pay twice if they failed to have

Nonetheless, this hardship was not the end of the story, as it was well-recognized that individuals could resort to equity to prevent the injustice. Baker writes, “[I]f 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.”<sup>228</sup> Equity provided a defense where, for instance, a bond was wholly or partially satisfied but not recovered by the debtor. Equity also provided relief in situations of contractual mistake and created the equity of redemption primarily for situations of mistake or bad faith.<sup>229</sup> Given the widespread recognition of the interaction between common law and equity at the time, it would be inaccurate to end one’s analysis by merely pointing out the absurdity of some of the common law’s rules. Exceptions from the common law’s harsh rules was to be sought in Chancery.

In principle, the Chancery court could act whenever the operation of the common law would work an injustice. Thus, Chancery was available in cases of fraud, forgery and duress, for which no relief was available at common law.<sup>230</sup> This mandate was often construed broadly. For example, Chancery could intervene on the basis of the inadequacy of the common law remedy available to a party for a breach of contract, not just because of the inadequacy of the common law conception of contract. This allowed the Chancery court to act to award specific performance of a contract, a remedy unavailable at common law.<sup>231</sup> For a time in the fifteenth and sixteenth centuries the common law courts feared that Chancery’s flexibility and procedural advantages would allow the Chancery courts to displace the common law courts as the dominant legal institutions of England, and in fact, the common law courts lost a substantial number of cases to Chancery.<sup>232</sup> Spurred by this competition, the common law courts responded by designing procedural and substantive innovations “which would win back the patronage of the litigants and the lawyers who advised them.”<sup>233</sup> For instance, Coke’s impetus for introducing the law merchant into the common law was in large part a response to the Chancery’s earlier successes in doing the same.<sup>234</sup>

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their bond cancelled upon repayment may not have been a simple-minded rule that sought to avoid “destroying certainty and condoning carelessness.” *Id.* at 88. Instead, it was likely an attempt to advance the concept of negotiability in commercial notes. Moreover, simply because the common law did not offer a remedy does not mean that individuals lacked recourse. Relief may have been, and generally was available in Chancery. *See infra* at note 229. This again points out the mistake of examining the common law in isolation from its larger context of courts. Again, these equitable defenses were later merged into the common law when Chancery was abolished.

<sup>228</sup> *See* BAKER, INTRODUCTION, *supra* note, at 272.

<sup>229</sup> *See* 1 HOLDSWORTH, *supra* note, at 244.

<sup>230</sup> *See* 1 HOLDSWORTH, *supra* note, at 243-44.

<sup>231</sup> *See* 1 HOLDSWORTH, *supra* note, at 243.

<sup>232</sup> *See* BAKER, INTRODUCTION, *supra* note, at 36. A dramatic recitation of the struggle between common law and equity is provided by Holdsworth. *See* 1 HOLDSWORTH, *supra* note, at 247-51.

<sup>233</sup> *See* BAKER, INTRODUCTION, *supra* note, at 37. Those courts most threatened by the competition from Chancery, such as the King’s Bench, also responded the most dramatically with procedural and substantive improvements. *Id.*; 2 HOLDSWORTH, *supra* note, at 456 (noting that the “competition of chancellor” awakened “even the most conservative common lawyer to the necessity of endeavouring to meet [the] demands” of a economically dynamic society).

<sup>234</sup> *See* Burdick, *supra* note, at 50; BASILE, *supra* note, at 146-47 (describing growth of commercial cases in Chancery and competition with Admiralty courts for business). Because Chancery and the law merchant

Although the competition from other courts to the common law was in the realm of personal law, such as contracts and torts, students of the law will recognize that the Chancery courts played a powerful role in generating improvements to the law of real property as well. In particular, the development of such vehicles as equitable trusts provided individuals with dramatic legal innovations that made it easier for them to execute their legal affairs. It should not be surprising that the great innovation in property forms thus arose during an era of robust interjurisdictional competition between the common law and chancery.<sup>235</sup> Absent the competition from Chancery, there was no dynamic at work to drive the common law toward innovation in property forms leading the common law to stagnate. This likely explains the otherwise puzzling *numerous clauses* doctrine of the common law, which limits the forms of property rights that can be designed in real property.<sup>236</sup> Cases involving the ownership and transfer of real property were the sole jurisdiction of the common law courts. Monopolies generally exercise their monopoly power by restricting supply. In the context of real property law, this predicted supply restriction could plausibly take the form of restricting the number of property forms available to individuals. Competition, by contrast, should have the effect of increasing supply over the monopoly rate of provision. This seems to be what occurred during the era of a flourishing competition between common law and Chancery law, when Chancery developed a number of fictions to evade the common law's monopoly. Through the Statute of Uses the common law was able to "capture . . . the more important of those uses, which had become a new species of property under the fostering hand of the Chancellor."<sup>237</sup> Thus, by imitating the Chancery innovations—and by increasing the forms of property available under the common law—the common law was able to maintain its market share. By contrast, the reinstatement of a monopoly court system brings with it a traditional restriction of supply—in this context reflected in the *numerous clauses* doctrine.

In turn, the common law courts were actively competing with these courts; for example, it appears that the eventual demise of the vibrancy of the local courts was a result of being out-competed by the common law.<sup>238</sup> In response to the vibrancy of the merchant law courts, common law judges developed the notion of *assumpsit* as a mechanism for adjudicating contract claims that fell outside the traditional "procedural shackles" of debt and covenant that had stymied the development of the common law.<sup>239</sup> *Assumpsit* allowed the common law for the first time to develop a coherent mechanism for developing a true contract doctrine.<sup>240</sup> At

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were both grounded in concepts of justice and equity, rather than law, it proved much easier for Chancery to digest the law merchant into its processes than it later did for the common law. See CARTER, *supra* note, at 263.

<sup>235</sup> See 1 HOLDSWORTH, *supra* note, at 239.

<sup>236</sup> See Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerous Clauses Principle*, 110 YALE L. J. 1 (2000).

<sup>237</sup> See 1 HOLDSWORTH, *supra* note, at 241.

<sup>238</sup> See VAN CAENEGEM, *supra* note, at 33. The greatest competitive advantage of the common law courts was its adoption and regular use of juries. See *id.* at 62-84. See also 1 POLLOCK & MAITLAND, *supra* note, at 203 (describing demise of local courts as result of free choice of litigants).

<sup>239</sup> Baker, *Law Merchant*, *supra* note, at 354.

<sup>240</sup> See 5 HOLDSWORTH, *supra* note, at 117.

other times, however, this competition was not so benign.<sup>241</sup> 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.<sup>242</sup> Nevertheless, the Admiralty courts expressly rejected the strict pleading requirements of the common law courts, following procedures much more similar to those of the law merchant courts.<sup>243</sup> Similarly, the Reformation predictably narrowed the independent jurisdiction of the ecclesiastical courts on issues of contract law. As for the law merchant, Baker observes that reasons for its decline is not wholly clear. In large part, it appears to have been a victim of the creeping power of the common law courts, which imposed its own bureaucratic practices and asserted the right to hear appeals from the law merchant courts. Eventually, this creeping legalization of the law merchant courts undermined the flexibility and speed that had attracted merchants to the law merchant courts in the first place.<sup>244</sup>

Regardless of the reason, over time, and especially under Coke's leadership, the common law eventually came to displace these competing jurisdictions and to assert control over the commercial law of England. Although this increased the power of the King and the common law judges, Holdsworth observes that to "the litigant [it] meant much inconvenience. To the commercial law of this country it meant slower development. But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future which consolidated the victories won in the political contests of the 17<sup>th</sup> century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity."<sup>245</sup> Similarly, Plucknett observes, "It is therefore not unfair to say that Coke's influence made for the establishment of a supreme common law, and for the abolition or severe restriction of all other forms of law in the country. His triumph therefore introduced a certain narrowness and conservatism which stood in the way of reform."<sup>246</sup>

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<sup>241</sup> See BASILE, *supra* note, at 161.

<sup>242</sup> See PLUCKNETT, *supra* note, at 660 n.2.

<sup>243</sup> See *id.* at 661; Holdsworth, *Development*, *supra* note, at 316.

<sup>244</sup> Baker, *Law Merchant and Common Law*, *supra* note, at 352; accord 1 HOLDSWORTH, *supra* note, at 335. Baker surmises that the judges of the common law may have increased their power because of a perception that the procedural informality and substantive flexibility of the law merchant system was inconsistent with the strictures of due process. See Baker, *supra* note, at 352-53. Burdick contends without elaborating that the common law judges made a practice of "enticing or coercing" their suitors into the courts of the common law." Burdick, *supra* note, at 44. On the other hand, many scholars question the purported demise of the law merchant, noting the continued importance of the law merchant in modern times, especially in international arbitration and the rise of arbitration and alternative dispute resolution. See Oliver Volckart and Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?* 65 S. ECON. J. 427, 432 (1999) (noting that almost 90% of all border-crossing commercial transactions contain an arbitration clause); Bruce L. Benson, *Arbitration in the Shadow of the Law*, 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 1998); Benson, *Spontaneous Evolution*, *supra* note, at 654-60; TRAKMAN, *supra* note.

<sup>245</sup> Holdsworth, *Development*, *supra* note, at 319.

<sup>246</sup> PLUCKNETT, *supra* note, at 284.

Thus, even though contract law in the common law courts remained relatively undeveloped during this period, it appears that this gap was filled by local courts, law merchant courts (the *lex mercatoria*), and ecclesiastical courts. Plucknett speculates that the strength of these competing legal system may explain why the common law remained so undeveloped. He writes, “It may be said with some fairness that the existence on the one hand of mercantile jurisdictions, and on the other of the spiritual courts which could bring moral pressure to bear, together with the remedies available locally, afford some explanation for the common law courts declining to expend their law of contract. . . . [T]he common law apparently felt that it could abstain with a clear conscience, knowing that the matter was already in the expert hands of the Church and the merchants . . . .”<sup>247</sup> By contrast, the common law itself developed a relatively inflexible, formalistic, and cumbersome regime.<sup>248</sup> The rigors of the forms of action undermined the coherent evolution of the common law system of contract, causing the common law to lag well behind these other legal regimes that provided the engine for reform of contract law. Church courts were also well ahead of lay courts in the evolution of modern rules of proof and procedure in contract disputes.<sup>249</sup> On the other hand, the absorption of these principles into the common law made possible improvement of the law by extending their reach all transactions, rather than limiting their application to just the individuals subject to the various specialized jurisdictions, such as merchants or shippers.<sup>250</sup>

This history also provides the answer to Landes and Posner's puzzle as to why competition among courts did not generate pro-plaintiff doctrine in the several courts of the land.<sup>251</sup> In fact, Landes and Posner acknowledge that the historical record appears to be inconsistent with the prediction of their model that courts would compete by generating pro-plaintiff rules.<sup>252</sup> “Why it did not emerge . . . presents an interesting question for further research.”<sup>253</sup> Indeed, in the *common law* courts, there was in fact much pro-plaintiff doctrine, such as a notable absence of defenses to contract and the like.<sup>254</sup> These courts were little more than debt collection courts that required little in the way of developed contract jurisprudence

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<sup>247</sup> See PLUCKNETT, *supra* note, at 636; see also BAKER, INTRODUCTION, *supra* note, at 272.

<sup>248</sup> *Id.*

<sup>249</sup> See MILSOM, *supra* note, at 25.

<sup>250</sup> See Holdsworth, *Developments*, *supra* note, at 330 (describing law merchant foundation of negotiability principle for bills of exchange and later extension through the common law to all persons); see William Cranch, *Promissory Notes Before and After Lord Holt*, in 3 SELECT ESSAYS, *supra* note, at 72, 74 (same).

<sup>251</sup> Landes & Posner, *supra* note, at 253-54.

<sup>252</sup> *Id.* at 255 (“Left unexplained by this analysis is the actual pattern of competition in the English courts during the centuries when the judges were paid out of litigant fees and plaintiffs frequently had a choice among competing courts. There is evidence of competition among the courts through substantive and procedural innovation, but none (of which we are aware) of the kind of blatant plaintiff favoritism that our economic analysis predicts would emerge in such a competitive setting.”). Daniel Klerman has recently challenged this conclusion, arguing that history suggests that competing jurisdictions did, in fact, lead the common law to develop pro-plaintiff rules, and that this tendency was not eliminated until the Crown asserted a monopoly over the English legal system. See Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, (working paper presented at George Mason University School of Law, March 19, 2001).

<sup>253</sup> Landes and Posner, *supra* note, at 255.

<sup>254</sup> See Klerman, *supra* note.

and responded in kind. In the *other* courts, however, such as the *lex mercatoria*, ecclesiastical, and Chancery courts, a far different dynamic was at work. In those courts legal disputes were characterized by a high degree of reciprocity. Because merchant law was rooted in the customs of traders, this reflected the reciprocal nature of inclusive customs. Merchants could never predict which side of a dispute they would be on, as a result they did not favor either pro-plaintiff or pro-defendant rules. Instead, they favored efficient rules that minimized the transaction costs of conducting transactions. Nor would the ecclesiastical courts have been expected to provide pro-plaintiff rules. Rather, the rules provided in these courts reflected the influence of canon and Roman law. Canon law doctrines reflected the influence of equitable considerations rooted in Church teachings, thus the law was required to be fair, equitable, and reasonable, thereby limiting the ability of Canon law courts to compete on pure pro-plaintiff doctrine. Roman law reflected a heritage similar to that of the law merchant, a body of law that evolved through reciprocity based interactions in Rome. The Chancery courts reflected many of these same influences.

In addition, in many of these interactions the parties had a preexisting relationship amenable to private contractual ordering, such as for products liability, medical malpractice, or some other relationship. Traditionally, these were understood as relations of a contractual nature and would thus be driven by the logic of the evolution of contract law, not tort.<sup>255</sup> It has only been in recent decades that tort law has expanded to fill the areas traditionally governed by contract law. Moreover, as noted, most of the disputes in question arose from conflicts between two individuals, not an institutional repeat player. Under these conditions, reciprocity norms would tend to govern the evolution of legal doctrine, not rent-seeking norms. Moreover, pure stranger conflicts were likely very rare in the evolution of the common law, thus the relevant margin on which courts would have been competing by producing legal doctrine would have been in the far more common situation where a preexisting relationship existed.

Perhaps most crucial was that even though parties faced few formal constraints on where to bring their suits, in fact this choice was usually made *ex ante* rather than *ex post*. To be sure there is no evidence of widespread use of choice of law or choice of forum clauses written into contracts. But there were clearly-established norms and expectations as to which court would hear a lawsuit that arose under a given contract. Thus, there were a set of default expectations as to which court would hear a given case to which parties tacitly adhered. For merchants, for instance, it was expected that the law merchant would hear disputes that arose unless some other court (such as common law) was expressly specified.<sup>256</sup> This set of assumptions about the default courts that would hear a given case meant that forum choice was

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<sup>255</sup> Landes and Posner recognize that if this condition is met, then competition among courts may work fine. *See id.* at 258 (“The general conclusion is that we can expect more efficient rules of contract and commercial law (including corporation law, which is also based on consensual arrangements) than of tort or criminal law, because parties to contracts face a competitive supply of court systems.”).

<sup>256</sup> *See* BASILE, *supra* note, at 24 (noting that within the 5 sites where the law merchant functioned, “mercantile law is always to be upheld unless both parties openly and expressly agree on the common law”); *id.* at 27 (where plaintiff and defendant disagree about which law should prevail, “he who demands mercantile law should always be heard, whether he is the plaintiff or defendant. And the plea should be brought to conclusion according to mercantile law . . .”).

in fact *ex ante* and made when the parties would be uncertain as to which would be the possible plaintiff or defendant under a subsequent suit. Once a given forum was implicitly chosen *ex ante*, breach of the agreement was enforced by the threat of ostracism against merchants who refused to allow the case to be heard in the agreed-upon forum or to fail to abide by the judgment of the court.<sup>257</sup> Ostracism from the merchant community effectively ended the offending merchant's career.<sup>258</sup> By making the choice of forum an *ex ante* choice, this promoted beneficial forum-shopping for efficient law and discouraged forum-shopping for law that systematically favored one party over another.

This also explains why there was a tendency toward efficiency, rather than random drift between efficiency and inefficiency, as predicted by previous models.<sup>259</sup> Earlier scholars focused on the incentives of litigants to push the law toward efficiency or inefficiency. And it is true that where there is weak precedent, litigants do in fact lack such an incentive and random drift may result. But in a polycentric legal order, *judges*, not litigants were the residual claimants for the results of legal doctrine. Because judges were paid from legal fees, they would maximize their fees when business increased. And, as the foregoing analysis has demonstrated, a particular court maximized its business through the provision of efficient legal rules, giving judges an incentive to push for efficient rules. As a result, random drift would not result; instead, there would be an incentive for judges to favor efficient rules because they could capture the benefits that accrued from them.

When the common law courts swallowed-up these other courts, this had the effect of transferring this preexisting body of law directly into the common law. Rather than a piecemeal acceptance of these doctrines, the common law took entire bodies of law, that had grown up in an environment of reciprocal interactions. This direct incorporation of these entire bodies of law accounts for the sudden appearance of systematic and coherent bodies of law during a brief period in the eighteenth and nineteenth centuries. It also accounts for why the competition among courts generated efficient law, rather than pro-plaintiff law. As the jurisdiction of the royal courts expanded over time, eventually many of the doctrines first developed in these rival courts were absorbed into the common law courts.<sup>260</sup> It was during this period that the common law first adopted the distinction between contract and tort, a distinction that had long prevailed in the law applied in Chancery, Admiralty, Star Chamber, and other royal courts.<sup>261</sup> Notions of unjust enrichment and quasi-contract prevailed in numerous other courts well before being received into the common law, albeit in an altered form.<sup>262</sup> The fundamental concept of negotiability in bills of exchange emerged among merchants as early as the thirteenth century; the

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<sup>257</sup> See Benson, *Spontaneous Evolution*, *supra* note, at 649-50.

<sup>258</sup> *Id.*

<sup>259</sup> See discussion at *supra* note 38.

<sup>260</sup> Holdsworth, *Developments*, *supra* note, at 319 n.1 (enumerating various modern legal doctrines that were developed in rival courts well before their adoption by the common law courts).

<sup>261</sup> Berman & Reid, *supra* note, at 461.

<sup>262</sup> Berman & Reid, *supra* note, at 467; see also FIFOOT, *supra* note, at 131-32 (describing merchant basis of quasi-contract as exception to consideration doctrine).



common law did not recognize the doctrine until 1603.<sup>263</sup> The concept of respondeat superior, the idea that employers are vicariously liable for the harm caused by the negligence of their employees, was incorporated into the common law from the maritime law of the Admiralty courts and the law merchant.<sup>264</sup> Berman and Reid note that other developments in the common law in the early eighteenth-century reflect the powerful influence of courts such as the law merchant and maritime courts.<sup>265</sup>

The discussion here should be qualified in one respect, however, in that it may overstate the differences between the royal courts on one hand and other competing courts. Through the use of legal fictions, it appears that there may have been some changes going on in the current law that were not fully recognized until later dates. As previously noted, legal fictions had long been used by courts seeking to expand their jurisdiction, as well as to evade archaic modes of proof.<sup>266</sup> Beginning in the seventeenth century, however, the courts started using fictions to change the *substantive* laws as well.<sup>267</sup> Through the use of fictions, such as the action of “special assumpsit,” the common law courts expanded their jurisdiction to take account of a wide variety of contracts that previously had been subject to the jurisdiction of the Chancery, Admiralty, High Commission, and Star Chamber. Baker argues, for instance, that the recognition of a claim in *assumpsit* merely gave the common law courts an express mechanism for hearing cases that they were deciding already under different procedural headings.<sup>268</sup> Similarly, the common law courts lacked the power to hear cases entered into with traders from other countries; nonetheless, by engaging in jurisdictional fictions the common law was able to assert jurisdiction over the growing commercial practice.<sup>269</sup> Although this served to “unify[ ] the English law of contract,” it also hardened contract law doctrines, depriving it of the flexibility that characterized the contract law of the other courts.<sup>270</sup>

Subject to this slight qualification, the history of the English common law suggests that those who examine only the body of law developed in the royal courts prior to the nineteenth

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<sup>263</sup> Holdsworth, *Development*, *supra* note, at 304. Rogers forcefully argues that importance of negotiability, and therefore the role of the law merchant in spurring legal innovation, has been traditionally overemphasized by Holdsworth and others. See ROGERS, *supra* note. Holdsworth identifies several other key common law concepts that can be traced to law merchant origins. See Holdsworth, *Developments*, *supra* note, at 327.

<sup>264</sup> Berman & Reid, *supra* note, at 461.

<sup>265</sup> *Id.*

<sup>266</sup> See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text; see also Berman & Reid, *supra* note, at 459.

<sup>267</sup> See Berman & Reid, *supra* note, at 459. For more on the use of fictions in the common law, see HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 16 (1<sup>st</sup> ed. 1917).

<sup>268</sup> Baker, *Law Merchant*, *supra* note, at 366-67.

<sup>269</sup> See Holdsworth, *Developments*, *supra* note at 315 (“The common law had not in the past claimed jurisdiction over contracts made or offences committed abroad, and probably not over contracts made and offences committed in ports *intra fluxum et refluxum maris*. Such jurisdiction was not coveted. By supposing these contracts or offences to have been made or committed in England the Common law Courts assumed jurisdiction’ and thus by a ‘new strange poetical fiction,’ and by the help of ‘imaginary sign-posts in Cheapside’ they endeavoured to capture jurisdiction over the growing commercial business of the country.”).

<sup>270</sup> Berman & Reid, *supra* note, at 461.

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

Thus, the market for law created by the polycentric nature of the historic common law gave rise to a pro-efficiency dynamic of market competition. As Rowley concludes, "The competitive nature of early common law evolution inevitably provided a powerful impulse for the law to reflect the interests of the litigants and, in this sense, to be efficient. For exit, and to a lesser extent voice, were available weapons to those who became disenchanted with the writs and their court interpretations."<sup>271</sup> At the same time, this nonhierarchical and decentralized institutional structure insulated the common law from rent-seeking pressures and constrained judges. Judicial agency costs only became a real problem after the centralization of the legal system and the demise of competing legal jurisdictions. Prior to that time, the ability of parties to "vote with their feet" constrained judicial power to pursue their personal preferences. Thus, it may be that this need to constrain judicial discretion through stricter *stare decisis* was a response to the breakdown of the traditional mechanism for constraining judges. Given this interdependent relationship between rules of precedent on one hand and the structure of the court system on the other, Judge Kozinski may not be correct in his intuition, "It is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm."<sup>272</sup> To be sure, the nature of precedent has changed since the Nineteenth Century, but this because the nature of the court system has changed as well. The demise of a polycentric legal order in fact suggests a need for a doctrine of *stare decisis* as a mechanism to control judicial discretion in the absence of the opportunity of parties to choose their court. The common law emerged from this dynamic process of competition, as entrepreneurial competitors created new legal doctrines and copied successful innovations from one another. This helped to create efficiency in the common law and insulate it from public choice influences.

## 2. The American Experience: *Swift and Erie*

Through the nineteenth century, the United States had a legal regime similar to the polycentric legal order in England. Under the doctrine of *Swift v. Tyson*,<sup>273</sup> which prevailed until *Erie Railroad v. Tompkins*,<sup>274</sup> the United States had a similar system of competing courts

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<sup>271</sup> Rowley, *supra* note, at 371.

<sup>272</sup> Hart, 266 F.3d at 167.

<sup>273</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>274</sup> 304 U.S. 64 (1938).

with overlapping jurisdictions. Although similar, the systems were not identical, leading to different evolutionary paths. Under *Swift* common law cases in diversity actions could be brought either under the common law of a particular state or general federal common law, thereby generating overlapping common law jurisdictions for the same act. Traditional mythology has held that this created an incentive for forum-shopping by plaintiffs seeking plaintiff legal rules, and that as a result, Justice Brandeis rejected the *Swift* doctrine in *Erie*, ruling that can be no general federal common law.<sup>275</sup> The conclusion that *Swift* should have been abandoned on those grounds is questionable on for several reasons.<sup>276</sup> Despite the similarities between England and the United States, however, there were some important differences between the English polycentric system and the American system under *Swift v. Tyson* that eventually created several problems with the American system. Nonetheless, there is ample evidence that availability of competing courts under *Swift* explains much of the evolution toward efficient legal doctrines in the United States in the Nineteenth Century. Moreover, *Erie*'s abandonment of *Swift* and its replacement with a less-competitive regime has reduced a power constraint on rent-seeking behavior in the state courts that has led to many of the problems in common law doctrine in recent years.

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

Recent scholarship has suggested that *Erie* was not animated by excessive forum shopping, but was intended to prevent individuals from escaping inefficient and burdensome state regulation that was generally animated by the influence of special interests.<sup>277</sup> Federal courts were hostile to progressive state laws that interfered with common law principles of freedom of contract, and relied on time-honored common law principles to strike down those regulations.<sup>278</sup> Brandeis, being a progressive, was disturbed by this development and sought to

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<sup>275</sup> *Erie*, 304 U.S. at 78. This historical argument obviously mirrors the more theoretical argument of Landes and Posner discussed above.

<sup>276</sup> Clearly I will not attempt a comprehensive analysis of the *Erie* debate in this paper. As Judge Henry Friendly observed almost 40 years ago, "If a considerable pond of ink about *Erie* had already accumulated in 1945, this has now become a rather large lake." See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). Since then, the lake has expanded into a sea, if not an ocean. I will seek to add but a few drops to this watershed, as it relates to the themes of this article.

<sup>277</sup> The historical record is ambiguous on the degree of nonuniformity between private law applied in state and federal court, nor is it clear whether nonuniformity was more pronounced in some areas of law rather than others. Compare Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 881-86 & n.23 (1931) (concluding that there was no substantial problem of nonuniformity) with Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 524-30 (1928).

<sup>278</sup> See William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1096 (1993).

deprive the federal courts of this power. This is ironic, for as previously noted, the presence of overlapping legal jurisdictions was a source of freedom that allowed individuals to escape the clutches of special-interest oriented legal rules. Indeed, Justice Story implicitly recognized the importance of this issue in *Swift*, as his opinion in *Swift* was animated by the desire to allow the federal courts to develop the commercially-sophisticated and modern practices of the law merchant.<sup>279</sup> And, in fact, history clearly indicates that the body of commercial law developed in the federal courts during the *Swift* era was substantially superior to that in the state courts.<sup>280</sup> Because federal law was grounded in commercial custom it tended to produce efficiency-enhancing law.<sup>281</sup> By contrast, state law was provincial, ignorant, and dominated by the rent-seeking influences of local special interests.<sup>282</sup> By prohibiting competition between the state and federal legal systems within the same jurisdictions for the same acts, this competition was ended, leaving individuals subject to the regulation of the state. True, competition among different states continued, but this competition is limited and subject to judicial enforcement of choice-of-law clauses in contracts.

It was traditionally understood that the diversity jurisdiction of the federal courts was intended not only to serve as an alternative forum to protect out of state interests, but that it was intended to provide an alternative body of law to protect out of state interests, especially creditors.<sup>283</sup> In fact, it was generally understood that it would largely be pointless to provide an alternative forum to litigate cases if the court would still apply parochial state laws that could discriminate against out of state interests under the guise of facial neutrality.<sup>284</sup> As Justice Story observed in a different case, "[I]n controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature, I think that it can hardly be maintained, that the laws of a state, to which they have no reference, however, narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all of the objects for which the constitution has provided a national court."<sup>285</sup> Similarly, Tony Freyer observes, "The national

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<sup>279</sup> *Swift v. Tyson*, 41 U.S. 1 (1842). There is substantial commentary on the law merchant foundations of *Swift*. See Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT'L L. & POL'Y 807, 813 (1998); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1791 (1997); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1283-85 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517-20 (1984).

<sup>280</sup> TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 119 (1981).

<sup>281</sup> See RANDALL BRIDWELL AND RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 92 (1977).

<sup>282</sup> See Todd J. Zywicki, *Senators and Special Interests*, *supra* note, at 1019-21 (discussing the special interest roots of much progressive legislation).

<sup>283</sup> See FREYER, *supra* note, at 20 (noting that prior to *Swift*, "outright prejudice against out-of-state creditors" provided uncertainty in commercial relations).

<sup>284</sup> Freyer, *supra* note, at 83.

<sup>285</sup> *Van Reimsdyk v. Kane*, 28 F. Cas. 1062 (C.C. D. R.I. 1812), *reversed on other grounds sub nom. Clark v. Van Reimsdyk*, 13 U.S. (9 Cranch) 153 (1815), *quoted in* BRIDWELL & WHITTEN, *supra* note, at 81.

courts were established in order to protect the rights of citizens of different states and nations from unfavorable local *law*.”<sup>286</sup>

*Swift* created the opportunity for forum-shopping by giving plaintiffs and defendants the choice of whether to sue in state court or federal court in diversity cases. As Bridwell and Whitten observe, "This kind of 'forum shopping' was exactly what the diversity jurisdiction was designed to accomplish."<sup>287</sup> At the time this choice actually tended to vindicate the parties legitimate expectations by establishing a background of rules to govern the dispute. Like the *ex ante* expectation of forum choice under the English system, it was generally understood by the parties when they entered into a contract under the *Swift* system which court system would govern a subsequent dispute.<sup>288</sup> Where the exchange took place between individuals of different states, it was generally supposed that the general customary rules of merchants would apply. By contrast, where the exchange took place between individuals of the same state, it was generally understood that local law and custom would control, which might differ from general customary law. Indeed, *Swift v. Tyson* turned on the question of the negotiability of a bill drawn in Maine and accepted in New York, giving it an interstate character from the outset. As a result, Swift was entitled to rely on the fact that the general principles of the commercial world (i.e., the law merchant) would apply to govern disputes over the negotiability of the note, rather than the parochial rules of New York. Popularly-elected state judges consistently acted to deny the rights of out-of-state creditors; federal judges applying law merchant principles, by contrast, were able to enforce these contracts reliably.

In addition, Justice Story's opinion in *Swift* rests in part on the common law's distinction between the flexible concept of "precedent" that still prevailed in the nineteenth century on one hand and the more rigid concept of *stare decisis* that emerged in the common law in the twentieth century. Reminiscent of his English predecessors and contemporaries, Story writes, "[I]t will hardly be contended, that the decisions of courts constitute laws. They are, at most only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."<sup>289</sup> Judicial precedent does not become fixed as "law," therefore, unless it is enacted by the state legislature or has become so well-established through time and widespread acceptance of its reasonableness and usefulness that it is not likely to be overruled.<sup>290</sup> It follows, therefore, that just as a subsequent state judge could reconsider the decision of his predecessor, so too could a federal judge reconsider the decision of a prior state judge. It was the reason of the rule, not its authority, that bound subsequent judges.<sup>291</sup>

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<sup>286</sup> FREYER, *supra* note, at 32 (emphasis added).

<sup>287</sup> BRIDWELL & WHITTEN, *supra* note, at 91.

<sup>288</sup> See BRIDWELL & WHITTEN, *supra* note, at 5.

<sup>289</sup> *Swift*, 41 U.S. at 18.

<sup>290</sup> See Clark, *Federal Common Law*, *supra* note, at 1291.

<sup>291</sup> See BRIDWELL & WHITTEN, *supra* note, at 13 ("If the federal courts had been bound to follow all state judicial precedents under such a common law process, the nonresident in a diversity action would thus have been deprived of the independent forum the Constitution envisioned Congress might provide.").

Thus, Story's opinion does not rest in the belief that there is some "brooding omnipresence in the sky" always and everywhere that awaits judicial interpretation.<sup>292</sup> Rather, his opinion rests on the traditional common law distinction that isolated judicial decisions do not become binding principles of law until they have been tested repeatedly by courts and individual actors. The best law is that which is tested and sifted through time by many judges. The failure to grasp the essence of the opinion in *Swift* is thus more a reflection of the prejudices of twentieth-century scholars than the naiveté of Justice Story.<sup>293</sup>

To the extent that there is any validity to the traditional criticism of *Swift* that it permitted inefficient forum-shopping, these criticisms are clearly overstated. *Erie* itself was a case involving strangers. Even if such stranger cases may give rise to pro-plaintiff legal doctrines, this says nothing at all about whether interjurisdictional competition should be prohibited for situations where the parties have a preexisting relationship.<sup>294</sup> Even in modern society, many so-called "stranger" cases really aren't. Most product liability cases arise from consensual transactions. Moreover, there are likely to be preexisting relationships through insurance companies and other institutions that turn seemingly stranger-based conflicts into semi-contractual cases.<sup>295</sup> Thus, even if were thought necessary to limit jurisdictional competition where there is no preexisting relationship between the parties, this does not mean that such limits should be imposed where the parties can explicitly or implicitly consent *ex ante* to particular

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<sup>292</sup> In fact, Freyer observes that early in his legal career Oliver Wendell Holmes helped to edit the Twelfth Edition of Kent's *Commentaries on American Law*. Drafts of Holmes's work indicate that he seemed to agree with *Swift* as it related to at least on the point of commercial law, but disagreed with its extensions in subsequent cases. FREYER, *supra* note, at 86-87.

<sup>293</sup> In *Kuhn v. Fairmont Coal*, decided in 1910, the Supreme Court adhered to this distinction between settled principles of common law and judicial decisions that had stood the test of time and those judicial decisions that were still subject to reconsideration and analysis. Thus, Justice Harlan wrote there, "Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes also the law governing the courts of the United States sitting in that state." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 359 (1910). "But where the law has not been thus settled," Harlan adds, "it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence." *Id.* at n. < dagger > (quoting *Bucher v. Cheshire R. Co.*, 125 U.S. 555). In fact, in his dissenting opinion in *Erie*, Justice Butler continues to emphasize that the final authority of the validity of a common law rule is its compliance with tests of reason or long-standing utility. He wrote, "Whenever possible, *consistently with standards sustained by reason and authority constituting the general law*, this Court has followed applicable decisions of the state courts." *Erie*, 304 U.S. at 85 (Butler, J., dissenting) (emphasis added).

<sup>294</sup> *Swift* was conceived in a case of negotiable instruments, an area of law that is essentially contractual in nature and which is governed today by the Uniform Commercial Code. By the time of *Erie*, *Swift* had expanded dramatically to govern numerous areas of private law. See Jack Goldsmith and Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 687 (1998); see also Lessig, *supra* note, at 1792 (distinguishing contractual relations in *Swift* from tort law); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1475-76 (noting expansion of *Swift* beyond law merchant context); FREYER, *supra* note, at 69-72 (noting expansion of *Swift* doctrine beyond original contractual and law merchant roots); BRIDWELL & WHITTEN, *supra* note, at 96-97 (discussing expansion of *Swift*).

<sup>295</sup> See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 284-97 (1998); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 751-53 (1999); Stephen J. Ware, *Arbitration & Assimilation*, 77 WASH. U. L. Q. 1053 (1999).

jurisdictions. Indeed, as noted, *Swift* was developed in exactly this sort of case and was only later extended to govern cases like the facts in *Erie*.<sup>296</sup> One could easily distinguish cases like *Swift* versus cases like *Erie* if so inclined.<sup>297</sup>

*Erie* effectively created a series of territorial monopolies for the production of common law. In fact, unlike the polycentric nature of the traditional common law that constrained the ability to use legal doctrine to transfer wealth, *Erie* creates the conditions for effective forum shopping and for the production of pro-plaintiff rules. Thus, jurisdictions such as Alabama have established themselves as providing pro-plaintiff legal regimes within their geographical monopoly.<sup>298</sup> It is the current regime of geographical monopolies and unlimited choice of forum by plaintiffs that presents the real conditions for the development of pro-plaintiff legal rules. Absent competition between court systems, there is little reason to believe that the common law will evolve toward efficiency.

Nonetheless, a closer examination of the *Swift* regime suggests that the American regime was not quite as robust as the English regime. Most crucially, it appears that the federal courts in America did not act under quite as strong incentives to favor efficiency. First, they were not paid on the cases that they heard. As a result, they possessed a much greater incentive to shirk on their workload, which was eventually reflected in the massive backlogs of cases that eventually piled up in the federal courts in the waning years of the *Swift* regime.<sup>299</sup> Second, they faced no external constraints that forced them to adhere to norms of reciprocity in adjudication. The law merchant, for instance, drew his authority from the commitment to implement merchant custom. Ecclesiastical judges drew their authority from the commitment to act in compliance with equity and church teaching. Federal judges under *Swift* faced no such constraints. Thus, they had limited constraints and limited feedback on their decision-making. Third, the courts erroneously expanded the logic of the case beyond its proper boundaries, thereby allowing pernicious forum-shopping that tended to defeat legitimate expectations, rather than the beneficial forum-shopping contemplated by Story and which prevailed for most of the Nineteenth Century.

### 3. Summary

The polycentric legal order of the common law's institutional framework has been crucially important in understanding the rise and fall of efficiency in the common law. As Charles Rowley posits the dilemma, "Neither Hayek nor Posner has presented a convincing explanation as to why, or through what mechanism, the judiciary should be supportive of the law

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<sup>296</sup> See BRIDWELL & WHITTEN, *supra* note, at 97 (criticizing later cases for extending principle of *Swift* beyond its proper bounds).

<sup>297</sup> *Id.* at 121 ("It seems absolutely clear that tort law was vastly different in kind from the general customs of the commercial world, and that it should have been treated as a local matter to be controlled by state law as defined in state decisions."). Many of the criticisms of the expansion of *Swift* also are critical of the "public" law extensions of *Swift* rather than private law. For a discussion of those issues, see Michael G. Collins, *Before Lochner--Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000).

<sup>298</sup> See Zywicki, *Public Choice and Tort Reform*, *supra* note.

<sup>299</sup> FREYER, *supra* note, at 76.

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.’<sup>300</sup> During the formative era of the common law, the common law courts were just one of many courts in which litigants could have their claims heard. Each of these courts competed with one another for business, seeking to provide speedy, fair, and effective justice. This competition among courts led to innovation and incentives to provide efficient legal rules. Courts that attempted to turn the law into a mechanism of wealth redistribution were confronted by the inability to coerce unwilling parties to provide those wealth transfers. By contrast, the demise of polycentric law in England and the United States has increased the incentives and opportunities for rent-seeking. Litigants have limited ability to exit jurisdictions with inefficient legal regimes.

This historical inquiry also raises questions about *Erie*’s analysis of *Swift*. *Erie* and recent scholars have focused only on the evils of forum shopping; few have focused on the possible *benefits* of forum-shopping. Positive forum-shopping generated experimentation and produced laws conducive to economic efficiency and private ordering. By allowing exit from inefficient state regulation, *Swift* also created pressure for the production of efficient law and constrained the production of efficient law. To be sure, some of this competition persists today as a result of the ability to use choice-of-law clauses to exit a particular state’s inefficient legal regime.<sup>301</sup> But this ability to exit through choice-of-law is limited, most notably by the requirement of some sort of geographic contacts. By contrast, under the *Swift* regime, federal law and state law were operative within the *same* jurisdiction, greatly heightening the ability of parties to exit and the competition to produce efficient law. To be sure, there were forum-shopping evils, especially as *Swift* was expanded beyond its original scope. Nonetheless, by eliminating *all* forum-shopping between state and federal court, *Erie* effectively through out the proverbial baby with the bath-water, eliminating efficient as well as inefficient forum-shopping.

### C. *Doctrinal Tendencies of the Common Law*

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

In many ways the arguments for the efficiency of custom and contract flow from a common source, namely individuals designing their own rules to govern their affairs. Contractual bargains represent express individual choice to arrange affairs in a given way. Custom

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<sup>300</sup> Rowley, *supra* note, at 372.

<sup>301</sup> See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000).



represents implicit design and acquiescence of individuals in a pattern of affairs that emerges spontaneously, but otherwise is similar to contract. Moreover, the analysis intertwines with the previous arguments about weak precedent and polycentric law. As will be seen, the presence of competition among legal systems forced courts to provide laws conducive to private ordering and therefore rooted in custom. In turn, a custom-based legal system requires a legal system grounded on weak precedent rather than *stare decisis*, so as to preserve the flexibility of customary law.

## 1. Default Rules and Contract

Common law rules historically tended to be default rules, rather than mandatory rules. This meant that the parties could contract-around an inefficient common law rule, thereby designing a more efficient rule to govern the transaction.<sup>302</sup> The ability to contract-around inefficient rules has many important implications for efficiency. First, it reduces the incentives for parties to use the court system to try to obtain rules that redistribute wealth rather than promote efficiency. Although the winner in a given case may gain a windfall from the promulgation of an inefficient rule, this windfall will likely be a one-time-only boon. Parties can “exit” the inefficient legal rule by contracting-around it, reallocating the risk to the party who is in the best position to bear the risk.<sup>303</sup> When combined with the traditional ability to exit an entire court *regime* because of legal polycentrism, this ability to contract around inefficient rules substantially limited the opportunities for rent-seeking litigation. Where the parties can contract-around an inefficient rule there will be little incentive to seek inefficient rules or for judges to create such rules. Forcing the parties to contract-around the inefficient rule, however, requires the use of real economic resources that could otherwise be deployed to a higher-valued social use. The inefficient rule creates deadweight social loss that could be avoided by the promulgation of a more efficient legal rule. At the same time, the ability to contract-around the inefficient rule reduces its usefulness as a mechanism for redistributing social wealth on an ongoing basis. Thus, even if judges or interest groups seek to use the common law process to redistribute wealth, the ability to contract-around inefficient rules generally makes the common law a very cumbersome and inefficient mechanism for accomplishing the desired end.

Common law default rules also promote efficiency by enabling those with subjective or idiosyncratic preferences to draft their own tailor-made rules for their particular situations. Thus, even if the efficient rule is the rule that is preferred by most parties, there are other parties who would prefer some alternative arrangement. These parties have a “subjective” valuation that is distinct from the majority preferences.<sup>304</sup> Freedom of contract allows these parties to

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<sup>302</sup> Zywicki, *Unanimity-Reinforcing*, *supra* note, at 1002. Louis De Alessi & Robert J. Staaf, *The Common Law Process: Efficiency or Order?*, 2 CONST. POL. ECON. 107, 120 (1991).

<sup>303</sup> Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>304</sup> JAMES M. BUCHANAN, *Introduction: L.S.E. Cost Theory in Retrospect*, in L.S.E. ESSAYS ON COST (James M. Buchanan & G. F. Thirlby eds. 1981); JAMES M. BUCHANAN, *COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY* (1969); LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* (1963); Donald J. Boudreaux, et al., *Talk is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765 (1999); Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE WESTERN RESERVE L. REV. 961, 966-80 (1996).

design contractual arrangements that suit their purposes, while majoritarian default rules are suitable for most contracting parties.<sup>305</sup> Lord Mansfield's views were illustrative, "If the parties do not choose to contract according to the established rule, they are at liberty, as between themselves, to vary it."<sup>306</sup> Allowing these parties to tailor-make their own rules further enhances economic efficiency.

The modern common law system has eviscerated the ability of parties to contract-around inefficient rules, particularly as mandatory tort law rules have increasingly come to squeeze out contract default rules in many areas of society and the economy. Traditionally, the common law was conceived as a set of off-the-rack default rules that could be freely modified by the mutual consent of contracting parties. The whole point of strict products liability, by contrast, was to supplant this regime of default rules with a network of immutable rules that parties were specifically forbidden to contract around. In particular, courts reconceived contractual warranty cases as strict products liability cases. Thus, in *Henningsen v. Bloomfield Motors, Inc.* the New Jersey Supreme Court rules that cases involving personal injury from product use would no longer be governed by warranty law, even though warranty law had controlled such actions for 100 years. The New Jersey Supreme Court believed product warranties as tools for exploiting consumers and denied such warranties any future effect.<sup>307</sup>

The replacement of default warranty rules with immutable tort rules was advanced with *Greenman v. Yuba Power Products, Inc.* In *Greenman*, Chief Justice Roger Traynor articulated the standard of strict tort liability for personal injuries caused by products. Traynor rejected the idea that "helpless consumers" could freely bargain about warranty terms. Moreover, strict liability for manufacturers would provide insurance to injured victims who might not otherwise be covered by insurance. By contrast, Traynor argued, manufacturers were uniformly in a better position to control the risk of product defects and could obtain insurance, the cost of which could be spread among numerous other consumers. Finally, the revolution was complete in 1964 when the prestigious American Law Institute adopted the strict liability standard in the Restatement (Second) of Torts, section 402A.

This inability to contract around rules has also imposed a forced uniformity on implied contractual terms, making it virtually impossible for idiosyncratic bargainers to contract around the rule. For instance, parties who place a high subjective value on a particular term or activity may simply be unable to acquire that product at any price because of the inability to make a binding contractual waiver of liability. This is the case even if the individual is knowingly assuming the risk of some particular activity. Thus, there is additional social loss in the form of the opportunity cost of foregone value-creating transfers that would otherwise be executed in

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<sup>305</sup> See Luis De Alessi & Robert J. Staaf, *Subjective Value in Contract Law*, 145 J. INSTITUTIONAL AND THEORETICAL ECON. 561 (1989); see also Charles J. Goetz, & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

<sup>306</sup> Quoted in FIFOOT, *supra* note, at 99.

<sup>307</sup> As such, their logic followed the intellectual framework pioneered by Friedrich Kessler, that such warranty contracts constituted "contracts of adhesion" and were the result of coercion by corporations rather than bargained-for consent. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

the presence of greater contractual freedom.<sup>308</sup> At the very least, the difficulty of drafting a contractual waiver of liability will substantially increase the cost of entering into a contract to partake of the activity. Not only will it be expensive to draft an adequate contractual waiver of liability, but these difficulties will tend to reduce the number of suppliers of the product, raising the costs of finding a trading partner.

Uniformity has its costs. Consider, for instance, the recent debate over requiring air bags in cars. For many years plaintiffs lawyers, most notably Ralph Nader, argued that the failure to install air bags in cars should be *per se* evidence of a design defect in cars. Finally, these efforts resulted in federal regulation requiring the installation of air bags. It soon became apparent, however, that air bags were not uniformly a safety-increasing innovation. The speed at which the air bags inflated proved to be dangerous to many children and smaller adults. As a result, the one-size-fits all approach to safety implemented by the requirement of mandatory air bags arguably ended being more dangerous overall than a contractual regime of allowing consumer choice in air bags.<sup>309</sup> America's tort law system is resolving this tension in its inimitable way – by suing automobile manufacturers in some cases for not installing airbags and in other cases for injuries caused by airbag deployment.<sup>310</sup> Punitive damages were requested in both cases.

The episode with air bags illustrates the dangers of one-size-fits-all thinking about safety and the value of freedom of contract for the minority of purchasers who may have different preferences or circumstances from the majority. By making it impossible to contract-out of this regime, one-size-fits-all tort law strangled the dynamic process of the common law that allowed for change and evolution in response to the needs of those governed by it. This dynamic regime was changed to a regime where all further changes would be required to go through judicial gate-keeping, thereby defeating the private ordering purpose of contract law. As Richard Epstein observes, through this process of tort law uniformity, “The system of product liability was stripped of its powers of self-correction. In essence, *Henningsen*, *Greenman*, and the Restatement (Second) of torts reserved to the courts a legal monopoly to fashion the relevant terms and conditions on which all products should be sold in all relevant markets.” He continues, “The centralization of power has the same consequences here that it had in other areas of government regulation. It leads to a legal regime that is unresponsive to changes in demand or technology. The judicial standard form becomes a Procrustean bed into which all private transactions have to fit at their peril.”<sup>311</sup> The once-flowing river of the common law that “works itself pure” has been replaced by a stagnant pool of judicially-imposed uniformity.

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<sup>308</sup> Robert J. Staaf, & Bruce Yandle, *Collective and Private Choice, Constitution, Statutes and the Common Law*, in ECONOMIC ANALYSIS OF LAW – A COLLECTION OF APPLICATIONS 254, 260 (Wolfgang Weigel ed., 1991).

<sup>309</sup> One automotive industry representative estimates that airbags save about 1,500 lives per year but kill two or three small children because of the way air bags must be installed in cars. See Debate, *Punitive Damages*, N.Y.L. SCH. L. REV. 585 (1997) (statement of Thomas Gottschalk).

<sup>310</sup> *Id.* at 585.

<sup>311</sup> Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202 (1989).

## 2. Custom

Traditionally the common law tended to enhance efficiency through its heavy reliance on custom and traditions, sifted by judicial reason, as sources of legal principles.<sup>312</sup> Customs that evolve over long periods of time through decentralized, voluntary, and inclusive institutional processes will usually be the source of sound legal principles. Customs that arise spontaneously through the voluntary interactions of many individuals over long periods of time will be subject to testing, feedback, and voluntary acceptance. Such customs have survived testing across the generations as well as by many people within a given community. They have stood the test of time and consensus and persons in a given community have incorporated those customs into their expectations and behaviors. Thus, there is reason to believe that customs that have survived this process of selection have embedded within them a certain tacit and unarticulated wisdom.<sup>313</sup> As the Ninth Circuit observed in *Hall*, "The common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance."<sup>314</sup>

Customary law is likely to be most reliable in situations where parties interact in a series of multiple, reciprocal arrangements and disputes.<sup>315</sup> In this evolutionary setting, custom is comparable to a contract. As with explicit contractual bargaining, where all parties are aware of a custom and participate in its development, there is reason to believe that the custom reflects consent, consensus, and the basis of individual expectations. Reciprocity makes it likely that any particular party will not always be on the same side in any given dispute, making that party more likely to favor a rule that favors efficiency overall rather than systematically favoring either plaintiffs or defendants. Repeat interactions makes it likely that over time the party will, in fact, be on both sides of the transaction over time, as well as reducing the likelihood that any particular interaction will be the final one. Thus, the history of the law merchant is accurately identified as a particularly fortuitous institutional arrangement for the generation of efficient legal rules.<sup>316</sup> Blackstone singled out the customs of merchants as an especially important area of

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<sup>312</sup> ALLEN, LAW, *supra* note; J.G.A. POCKOCK, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY, 202 (1971); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409 (1999) [hereinafter Pritchard & Zywicki].

<sup>313</sup> Pritchard & Zywicki, *supra* note 312. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (L. G. Mitchell ed. 1993); HAYEK, THE CONSTITUTION OF LIBERTY (1960); MICHAEL OAKESHOTT, *On Being Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 407 (1991); POCKOCK, *supra* note 312; Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501 (1989).

<sup>314</sup> *Hall*, 226 F.3d at 1167.

<sup>315</sup> "The key conditions are reciprocity and high frequency." Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. Legal Stud. 1 (1992). See also Todd J. Zywicki, "The Reciprocity Instinct" (working paper, George Mason University School of Law, October 1, 2001) (specifying conditions for "reciprocal altruism" to survive in nature).

<sup>316</sup> HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); Bruce Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983).

customary law.<sup>317</sup> But relations of reciprocity characterize many social and economic interactions.<sup>318</sup>

Customs and traditions that arise spontaneously from decentralized and repeated voluntary interactions will also tend to be relatively well-protected from public choice pressures from well-organized special interests.<sup>319</sup> For special interests to succeed in the task of using law to redistribute wealth to themselves, they require some point of pressure or leverage where they can compel other individuals to surrender wealth to them. Customs, however, arise spontaneously from the decentralized and voluntary interactions of many autonomous individuals. Unlike the positivist model that requires a sovereign issuing “top-down” commands, customary law offers a “bottom-up” process as legal rules emerge from the expectations and agreements generated by voluntary agreement and interaction.<sup>320</sup> Thus, there is no point of leverage on which a special interest can press to change the custom in the preferred manner. Moreover, because custom is fluid, attempts to change one element of a customary relationship will tend to be counteracted by other changes. By its very nature, therefore, custom will tend to be highly resilient and highly protected from public choice pressures. Because the common law traditionally was rooted deeply in the soil of custom, the common law was similarly resistant to interest-group pressures.<sup>321</sup>

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

Traditional common law theorists recognized that custom and contract are both rooted in the wellspring of individual consent. In turn, this reliance on individual consent reinforced both the idea of the common law as a spontaneous order as well as the notion of the common law as a mechanism for private ordering. Thus, John Selden, one of the most influential common law theorists placed heavy reliance on the importance of consensual obligations as the foundation for

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<sup>317</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75.

<sup>318</sup> Berman, *Western Legal Tradition*, *supra* note, at 757,

<sup>319</sup> Pritchard & Zywicki, *supra* note; Francesco Parisi, *Toward a Theory of Spontaneous Law*, 6 CONST. POL. ECON. 211 (1995).

<sup>320</sup> See Berman, “Western Legal Tradition,” *supra* note, at 757 (“[I]n the Western legal tradition, especially in its earlier phases, it has been taken for granted that law comes not only, and not primarily, from the law making power of the state but also, and primarily, from relationships created on the ground by individuals and groups in their interactions with each other. Not the state, not the governmental authorities, but people, the community, has been understood to be a primary source of law. . . . In the past it has been understood that customary law, unofficial law, is a primary source of state law, official law, and that one of the principal functions of state law is to enforce the rights and obligations that arise from customary law.”).

<sup>321</sup> BRUNO LEONI, FREEDOM AND THE LAW (3rd ed. 1991).

the moral authority of the law.<sup>322</sup> Selden believed that the most important rule of natural law was the absolute obligation of complying with one's contracts, both divine and with humans.<sup>323</sup> He also saw the obligations of customary law as having binding force, as he saw customary law as essentially consensual in nature.<sup>324</sup> Mansfield also recognized the customary basis of commercial transactions.<sup>325</sup>

The American experience again was similar. As Bridwell and Whitten observe, the defining characteristic of the federal court's commercial law jurisprudence under *Swift v. Tyson* was their willingness to rely on commercial custom to decide cases. State regulation often sought to further some defined public goal, whether for the public good or to benefit discrete special interests. By contrast, the federal courts deferred to the expectations of the parties under the contract, seeking to "discover" their intent and expectations. "[C]ommercial law was . . . customary law."<sup>326</sup> Indeed, the customary basis of law reinforced the federal court's authority over commercial law, "Under this view of the commercial law as custom, the function of the diversity jurisdiction in commercial cases should be apparent. In a customary law system in which the purpose of a grant of subject matter jurisdiction is to protect nonresidents from local bias, the intentions and expectations of the parties to every dispute had to be determined by a tribunal independent of the apprehended local prejudice."<sup>327</sup> Commercial custom was universal and consistent, thus the federal courts were the appropriate place to implement this uniformity.

The role of custom in the modern law has been greatly reduced. Traditionally courts were highly deferential toward custom. Custom, embedded in a network of private contract and a market, was seen as a powerful information-transmission and consent-ratifying institution. Custom was seen as an offshoot of contract, a collection of tacit understandings and agreements that implicitly allocated the parties' respective rights and obligations. But during the liability revolution of recent decades, custom has come to be viewed with the same jaundiced eye as freedom of contract, and as contract came under increasing attack, so did custom.<sup>328</sup> Rather than being a source of consent and tacit wisdom, custom increasingly was seen as a cartel-like mechanism for tortfeasors to foreclose recoveries by plaintiffs. Custom, it was suggested, did not arise spontaneously through voluntary interaction. Rather it was "created" by manufacturers and especially medical professionals and then "imposed" upon powerless and uninformed buyers. Thus, consumers were not really involved in the evolution of the custom and to the extent they appeared to be, their involvement was poorly-informed. As with contractual limitations on liability, therefore, it was essential for judges to intervene to second-guess the results of custom. Thus, custom has gradually moved away from being a per se defense regarding the reasonableness of precautions, becoming instead mere evidence of reasonableness.<sup>329</sup> Thus, some form of cost-benefit analysis is the prevailing standard, "leaving

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<sup>322</sup> Berman, *Origins*, *supra* note, at 1699.

<sup>323</sup> Berman, *Origins*, *supra* note, at 1699.

<sup>324</sup> Berman, *Origins*, *supra* note, at 1699.

<sup>325</sup> FIFOOT, *supra* note, at 99.

<sup>326</sup> BRIDWELL & WHITTEN, *supra* note, at 66; *see also id.* at 15.

<sup>327</sup> BRIDWELL & WHITTEN, *supra* note, at 67.

<sup>328</sup> *Discussion of Paper by Richard Epstein*, 10 CARDOZO L. REV. 2223, 2238 (1989).

<sup>329</sup> Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999).

custom with a subordinate role in the overall analysis.”<sup>330</sup> Although the roots of this transition lay in several cases in the early-twentieth century, compliance with custom remained a *per se* defense against liability in most jurisdictions during most of the twentieth century. In part, the durability of the defense may have resulted from the fact that “courts saw it as providing a salutary ‘policy’ check on potentially vast liability.”<sup>331</sup> During the 1960s and 1970s, however, the evidentiary rule governing custom gradually came to supplant the rule of treating compliance custom as a *per se* defense. Thus, the role of custom in tort law was diminished during the era of the liability revolution.

More fundamentally, modern lawyers and judges reject the notion that legal rules should be driven by custom and the spontaneously-generated practices of merchants, consumers, and private actors. Instead, the purpose of law is believed to be to satisfy articulated social goals, whether economic, social, or moral. Whereas the law previously was understood as purpose-independent inputs into individual action and the coordination of individual plans, today it is more accurate to see individual action and behavior as means to the accomplishment of prescribed social goals that the law is designed to accomplish. With this has come the belief that custom is valuable only if it serves some larger social goal beyond the coordination of the affairs of private individuals. As a result, law results from political struggle rather than the customs that emerge from private action.<sup>332</sup>

#### **D. Summary**

For purposes of exposition, the foregoing discussion has distinguished between various different elements of the historical institutional structure of the common law that contributed to its propensity to generate efficient rules. But it should be stressed that each of these elements was closely intertwined with one another and that they all contributed to the formation of a legal system that was quite distinct from the modern common law system. As noted, the practice of weak precedent prevailed during an era of a polycentric legal order and spontaneous order vision of the law predominated. Reflection demonstrates the interconnections between these elements.<sup>333</sup> A fully mature doctrine of *stare decisis* requires a formalized and hierarchical legal system, both to enforce vertical *stare decisis* through the enforcement by higher courts can be enforced against lower courts in the hierarchy as well as horizontal *stare decisis*, the requirement that later courts follow the rulings of today’s courts. *Stare decisis* cannot exist

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<sup>330</sup> Epstein, *The Path to the T.J. Hooper*, *supra* note.

<sup>331</sup> Hetcher, *supra* note, at 17.

<sup>332</sup> See Todd J. Zywicki, “Hayek versus Posner on the Economic Analysis of Law,” \_\_\_ REV. AUSTRIAN ECON. \_\_\_ (Forthcoming 2003); see also HAYEK, RULES AND ORDER, *supra* note, at 85 (“The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans.”); James M. Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483, 489 (1974) (“The working of ‘law,’ as an activity, is not guided by nor should it be guided by explicit criteria for ‘social improvement.’ Law, in this vision, is a stabilizing institution providing the necessary framework within which individuals can plan their own affairs predictably and with minimal external interferences.”).

<sup>333</sup> See Kempin, *Precedent*, *supra* note, at 32-33.

without a hierarchical court structure.<sup>334</sup> For instance, assume that the common pleas laid down a ruling. This case would not be binding on any other court in the system, such as ecclesiastical courts, law merchant, or the like. Similarly, the ruling of the common pleas would not be enforceable in the future in these other courts. In short, *stare decisis* of the modern type cannot exist in a polycentric legal order. Absent a developed concept of *stare decisis*, judges naturally gravitated toward a spontaneous order notion of law, looking for the concepts and logic in the law, rather than the authority of decided case.

Moreover, it is almost certainly no coincidence that the hardened notion of *stare decisis* emerged contemporaneously with the enactment of the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876.<sup>335</sup> These laws ended the polycentric legal order that had prevailed in England for some 600 years, uniting the common law courts and Chancery courts under one hierarchical umbrella. The creation of a hierarchical legal system also made possible for the first time a coherent application of the strict doctrine of *stare decisis*. In turn, this necessitated the creation of a formalized system of case reporting that stressed the decisions of judges and holdings in their cases, rather than the style of the Year Books. In turn, this motivated the intellectual revolution that moved from the spontaneous order or “declaratory” theory of law to a more positivist conception of the law. This also for the first time generated the contention that *stare decisis* was needed to constrain judges from overstepping their proper bounds. Absent *stare decisis*, it was feared, judges would use their power to impose their preferences on society. As noted, this concern was traditionally ameliorated by the fact that judges only had persuasive law-making authority because parties could choose to have their case heard in rival jurisdictions. The creation of a hierarchical legal system, however, enabled judges to issue rulings and then compel their enforcement on both current and future parties. This new and vast grant of power to judges raised concerns of judicial lawlessness, thereby putting greater weight on the importance of *stare decisis* in constraining judges.

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

#### IV. Conclusion

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<sup>334</sup> See Hart, 266 F.3d at 1175 (“The concept of binding precedent could only develop once two conditions were met: The development of a hierarchical system of appellate courts with clear lines of authority, and a case reporting system that enabled later courts to know precisely what was said in earlier opinions. As we have seen, these developments did not come about—either here or in England—until the nineteenth century, long after Article III of the Constitution was written.”).

<sup>335</sup> See 1 HOLDSWORTH, *supra* note, at 408.



Until the mid-Nineteenth century, the institutional and intellectual structure of the common law was very different from its modern form. Nor is this merely historical pedantry, because it was during this period that the essence of the common law was formed. In particular, the doctrines of the common law that were later recognized as the pro-efficiency doctrines, were laid down during this period. But they were laid down in a variety of different courts and were only later absorbed into the common law. Subsequent changes undermined the institutional framework that had supported the development of efficiency-enhancing common law rules. These institutional changes provided a necessary condition for the later deviation of the common law process away from efficiency and toward rent-seeking rules.

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

George Priest's model of legal evolution also rests on changes in the supply-side of the equation. Priest attributes the rising inefficiency of the common law in recent decades to the pursuit by judges of ideological and redistributive policy preferences. As this paper has demonstrated, for this to occur it first is necessary to have an institutional framework that permits high agency costs for judges such that they can pursue their personal preferences rather than serving the needs of the parties. The historic system of weak precedent, a polycentric legal order, freedom of contract, and customary law insured that judges would be unable to pursue their personal preferences at the expense of the public. As these factors changed over time, however, the legal system became more vulnerable to being directed by judges' ideological preferences, thereby creating opportunities for greater judicial control over the path of the law.

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