2022

Courts as Auditors of Legislation?

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Abstract. Sources of law vary greatly across geography and human history. Some legal systems identify democratic lawmaking with political deliberation, while others rely on judicial process and judge-made law. This Essay argues that the normative problem of determining a hierarchy of legal sources may be usefully understood in terms of mechanism design, and that legislation and judicial precedent operate complementarily. If the ultimate policy objective is to create legal rules that reflect the "will of the people," judge-made law can function as an audit on the rules promulgated by elected legislatures. The two sources of law, working in conjunction, thereby correct the deficiencies inherent in either approach operating in isolation.

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Introduction

Legal theorists have long pondered the normative question of how laws ought to be made. The putative sources of law have varied greatly across geography and human history. Some legal systems identify lawmaking with political deliberation, such as legislation, whereas others have proceeded by a process of judge-made law, such as common law precedent.[1] Some legal systems have recognized lawmaking through historical practice, such as customary law,[2] whereas others allow lawmaking by agreement, such as treaty law.[3] Almost all legal systems employ a multiplicity of sources of law, and the majority of real-world legal systems today recognize all of the foregoing sources of legality—among others—to varying extents.[4] However, there have been few scholarly efforts to identify general principles organizing the sources of law into a coherent hierarchical structure.

This Essay argues that the normative problem of determining a hierarchy of legal sources may be usefully understood in terms of mechanism design. Specifically, the normative problem proposes that legislation and judicial precedent operate complementarily; assuming the normative objective that the citizenry ought to be governed by legal rules that reflect the "will of the people," judge-made law can function as an audit on the rules promulgated by elected legislatures. The two sources of law, working in conjunction, thereby correct the deficiencies inherent in either approach operating in isolation.

Part I of this Essay provides a brief historical and comparative background and review of the literature. Part II exposits a basic constitutional political economy framework to assess the advantages and limits of alternative techniques of lawmaking. It argues that from an institutional design point of view, courts may be in a better position to capture and effectuate the will of the people in their casuistic adjudication of real-world disputes than elected legislators operating in the abstract. In

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[1] The difference between the role played by legislation and judicial precedents in civil law and common law traditions is well known among comparative legal scholars. *See, e.g.*, Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 869, 871–73 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[2] *See* Lisa Bernstein & Francesco Parisi, *Introduction*, *in* CUSTOMARY LAW AND ECONOMICS, at ix, xii (Lisa Bernstein & Francesco Parisi eds., 2014); Francesco Parisi & Daniel Pi, *The Emergence and Evolution of Customary International Law*, *in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW 155, 155–56 (Eugene Kontorovich & Francesco Parisi eds., 2016).

[3] *See* Francesco Parisi & Daniel Pi, *The Economic Analysis of International Treaty Law*, *in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW, *supra* note 2, at 101, 101–04.

[4] *See generally* Geoffrey Sawer, *The Western Conception of Law*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 14, 46–47 (René David ed., 1975).

other words, the Part analyzes reasons why it may be better for courts not to defer to rules enacted by the legislature. Part III addresses counterarguments to that proposition. After reviewing the main theoretical arguments on the so-called "efficiency of the common law hypothesis,"[5] Part III considers some recent challenges to the hypothesis, which identify the dangers of systematic ideological bias in judicial decision-making.

I. Background

A central problem in analytical jurisprudence has been the search for a general theory of legality: *What makes a social practice "law"?* The earliest writings on the subject sought to ground legality in morality, arguing that the normative force of positive laws is obtained derivatively from the normative force of moral laws.[6] However, in its various formulations, legal positivism has rejected this contention, locating legality in contingent social facts such as the capacity to impose coercive force,[7] social convention,[8] principles of shared purpose,[9] claims of authority,[10] and institutional facts.[11]

There exists a broad, albeit not quite universal,[12] consensus among philosophers today that legal positivism has prevailed in the grand historical debate, although the follow-up question—*which version* of

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[5] Francesco Parisi, *The Efficiency of the Common Law Hypothesis*, *in* 1 THE ENCYCLOPEDIA OF PUBLIC CHOICE 195, 195 (Charles K. Rowley & Friedrich Schneider eds., 2004).

[6] *See* 2 THOMAS AQUINAS, THE SUMMA THEOLOGICA, qq. 90–96, at 1–75 (Fathers of the English Dominican Province trans., Benziger Bros. 1915); Elizabeth Asmis, *Cicero on Natural Law and the Laws of the State*, 27 CLASSICAL ANTIQUITY 1, 3 (2008); Tony Burns, *Aristotle and Natural Law*, 19 HIST. POL. THOUGHT 142, 147–48 (1998).

[7] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 122, 237 (2nd ed., London, Spottiswoode & Co. 1861); *see also* Michael Freeman & Patricia Mindus, *Preface* to THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE, at v, v (Michael Freeman & Patricia Mindus eds., 2013).

[8] H. L. A. HART, THE CONCEPT OF LAW 56, 100, 116, 257 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

[9] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17, 44–45 (1977). Dworkin is sometimes characterized as an opponent of legal positivism. However, his views are difficult to characterize neatly within the positivism versus natural law debate, and for present purposes, it is not unfair to classify his position as broadly positivistic; Dworkin grounds his theory on the purposive intentions of a political community, which is at least arguably a contingent social fact.

[10] JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28–30 (2d ed. 2009).

[11] Neil MacCormick, *Law as Institutional Fact*, *in* AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM 49, 49 (1986).

[12] There has been a slight resurgence of interest in natural law theories. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 417–18 (2d ed. 2011); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 25 (2006).

positivism offers the best account of legality—remains an active arena of intramural controversy.[13] For present purposes, it suffices to observe that the candidate *sources of law* are constrained to the realm of broadly construed social facts.

H. L. A. Hart's *The Concept of Law* exposits the most influential positivist theory of law, the broad strokes of which are relatively uncontroversial.[14] Hart's central thesis is that every legal community adopts secondary rules (i.e., meta-rules for determining what primary rules governing conduct are "law") that determine what rules count as "law" within that legal system ("rules of recognition"), how rules can be changed ("rules of change"), and how and to whom rules should be applied in disputes ("rules of adjudication").[15]

The interrelationships between rules of recognition, rules of change, and rules of adjudication are not exhaustively explored in *The Concept of Law*.[16] It seems that the structures of the three categories of secondary rules can in some instances transmute into structures which could have interesting implications for classes of legal systems.[17] For example, it is arguable that in a "pure" common law system, rules of recognition and rules of change may be subsumed—or at least merge—with rules of adjudication.[18] At any rate, the standard interpretation of Hart's secondary rules privileges rules of recognition hierarchically over rules of change and rules of adjudication, for the reason that rules of change and rules of adjudication must be *recognized* if they are to be legal rules.[19]

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13 *See, e.g.*, Brian H. Bix, *Legal Positivism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 29, 29 (Martin P. Golding & William A. Edmundson eds., 2005); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 140, 162–63 (1982); Owen M. Fiss, *The Varieties of Positivism*, 90 YALE L.J. 1007, 1007–09 (1981).

14 Leslie Green, *Introduction* to HART, *supra* note 8, at xv, xv–xvii. We do not mean to imply that Hart's theory of law is "uncontroversial," but merely that the taxonomic division between primary and secondary rules is relatively unobjectionable to *most* legal theorists, although some may question whether the distinction is conceptually useful. *But see* Eric Colvin, *The Sociology of Secondary Rules*, 28 U. TORONTO L.J. 195 (1978) (discussing the distinction between the primary and secondary rules); K.-K. Lee, *Hart's Primary and Secondary Rules*, 77 MIND 561 (1968) (same).

15 HART, *supra* note 8, at 94–99.

16 *See generally* HART, *supra* note 8.

17 *See, e.g.*, K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, 25 NETH. Y.B. INT'L L. 3, 7–8 (1994) (applying Hart's secondary rule categories to international law concepts).

18 *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 142–43 (6th ed. 2012).

19 *See* HART, *supra* note 8, 96–97. European legal scholars may recognize a resemblance between Hart's rule of recognition and Hans Kelsen's concept of "Grundnorm." HANS KELSEN, PURE THEORY OF LAW 193–95 (Max Knight trans., 1967). This frequently observed association can be a useful shortcut for readers unfamiliar with Hart (or Kelsen), however the comparison is sometimes overstated. *See* BIX, *supra* note 18, 63–65.

Hart understands rules of recognition to be social facts, observable from the behavior of legal officials. The purpose of his conceptual analysis was to describe what it means for a law to be law; Hart expressly cabins off the question: What *should* the rules of recognition be?

Whereas scholarly investigations about what primary rules ought to be are prolific, there are comparatively few researchers investigating the optimal structure of secondary rules.[20] In any normative inquiry, the first question must be what the ultimate objective is.

In democratic states, it is assumed that the ultimate objective is that the law should reflect the will of the people.[21] To this end, legislation is typically given priority over judge-made law.[22] It is reasoned that legislators, elected by the citizenry and therefore politically accountable, are incentivized to represent the interests of their constituents.[23] However, the stylized models upon which this assumption is founded are often confounded in practice.

The proposition that legislation represents the will of the people better than other sources of law—such as judge-made law—is far from obvious. When looking at legal systems from a comparative law perspective, we see that in the course of history, a diversity of sources of law have enjoyed privileged status. In early legal systems, written

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[20] The principal areas where scholars have explored secondary rules from a normative perspective have been in international law, constitutional design, and the law of new technologies. *See, e.g.*, Marco Crepaldi, *Why Blockchains Need the Law: Secondary Rules as the Missing Piece of Blockchain Governance*, *in* SEVENTEENTH INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW: PROCEEDINGS OF THE CONFERENCE 189, 189 (2019); Ugo Pagallo, *The Legal Challenges of Big Data: Putting Secondary Rules First in the Field of EU Data Protection*, 3 EUR. DATA PROT. L. REV. 36, 36–38 (2017); Theresa Reinold, *The 'Responsibility Not to Veto', Secondary Rules, and the Rule of Law*, 6 GLOB. RESP. TO PROT. 269 (2014); Wellens, *supra* note 17.

[21] This assumption is usually subject to constraints to check a "tyranny of the majority." *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 246–47 (Francis Bowen ed., Henry Reeve trans., Cambridge, Sever & Francis 3d ed. 1863). This is not however relevant to our present discussion, and for the sake of simplicity, we assume away this wrinkle in our normative analysis.

[22] *See* HART, *supra* note 8, at 101 ("In our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a 'tacit' exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place. Again, as in the simple case, the existence of such a complex rule of recognition with this hierarchical ordering of distinct criteria is manifested in the general practice of identifying the rules by such criteria.").

[23] Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 770–71 (2021); *cf.* Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 23–24 (1948) (discussing that individuals vote in accordance with their preferences in circumstances of group decision-making, such as selecting representatives). *But see* Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41, 54–55 (1929) (noting that in the competition between political parties for votes, parties will take ambiguous platform stances as to not lose potential votes).

legislation was employed with great parsimony, and greater importance was assigned to custom and judicial precedent.[24] Written sources of law had a purely "declaratory" nature because they simply codified previously existing customary or judicial rules.[25] Even in the twentieth century, many legal systems were still rife with too many gaps in their written law to rely on legislation as the chief source of primary rules.[26] Consequently, custom and judicial precedent occupied dominant positions in the source-of-law hierarchy for those legal systems as a matter of practical necessity. However, as the volume and comprehensiveness of statutory law in a legal system grew, the balance between these sources of law were no longer compelled by considerations of practical necessity. Yet, even when statutory law can serve as a primary source of law, it does not follow that it should.

A. *Lawmaking Through Politics*

The acceptance of politically enacted rules was neither a natural nor uncontested consequence of the emergence of the modern states. In the nineteenth century, the German Historical School remained skeptical of the idea of law as a product of political authority.[27] The will of the people, they argued, could not be adequately transmitted through the top-down mechanism of politically enacted statutes. Rather, bottom-up customs and practices, spontaneously generated by the populace, were thought to better express the will of the people. In their view, legal systems should evolve over time in an organic manner without centralized interference from the authorities. Adherents of the German Historical School observed that like the evolution of language, a community's interests are ever-changing, and its shifting concerns are directly reflected in its evolving customs and social norms.

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[24] Customary law avoids the interface of third-party decisionmakers (such as legislators and judges) and is derived directly from the observation of the behavioral choices of the subjects of the law. *Customary* Law, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012). In this sense, customary law is the most direct expression of the will of the people. In a customary law setting, the group of lawmakers coincides with the subjects of the law, so political agency problems are generally absent from such a process of law formation. *See id.* For a discussion on a different set of problems that affect the process of customary law formation, see Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994); Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17 SUP. CT. ECON. REV. 279 (2009); and Vincy Fon & Francesco Parisi, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 BYU INT'L L. & MGMT. REV. 201 (2006).

[25] A. M. Mackey, *Judge-Made Law*, 2 OKLA. L.J. 193, 194–95 (1903).

[26] *Id.* at 197–98.

[27] KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 144–47 (Tony Wier trans., 2d rev. ed. 1992).

In contradistinction to the German Historical School, nineteenth-century French political and legal theorists embraced the enlightenment ideal of democratic governance; their paradigmatic trust in political decision-making fostered an increased focus on the primacy of statutory law.[28] Rational jurisprudence conceived the creation of systems of law informed by legal science and the development of laws by a central authority based on a recognition of the common needs of the people. Written law was no longer considered a mere articulation of customary practices (or of a divine or monarchic will), but as the product of reasoned political deliberation. It was the task of legislative bodies to *create* the law, rather than merely to *identify* preexisting legal norms.

The French rationalist approach has largely prevailed. Throughout the course of the twentieth century, legal systems in liberal democratic states accorded even-greater priority to laws passed through legislative processes, subordinating other sources of law.[29] But for some limited constitutional constraints on lawmaking, democratic legislatures became the sovereign lawmakers.[30] Such unbounded legislative powers were typically justified by the constitutional principles of separation of powers and a general trust in legislative organs as faithful agents and political representatives of the people.[31]

In the United States, the primacy of legislation *qua* rule of recognition can be inferred from the principle of "judicial deference."[32] The doctrine obliges courts to shun lawmaking and defer to the authority of the legislature. In a recent article, Adam Shelton and Anthony Sanders surveyed the terms employed by American courts when referencing

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[28] *E.g.*, *id.* at 141–42.

[29] *E.g.*, Jurgen C.A. de Poorter, *Constitutional Review in the Netherlands: A Joint Responsibility*, UTRECHT L. REV., March 2013, at 89, 89, 92 (discussing the history of the Dutch Constitution that led to the adoption of legislative supremacy); A. J. Harding, *Parliament and the Grudnorm in Singapore*, 25 MALAYA L. REV. 351, 367 (1983) (arguing a simple legislative majority could alter even constitutional protections in Singapore); David Stratas, *The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency*, 42 QUEEN'S L.J. 27, 32–34 (2016) (discussing the role of legislative supremacy as a Canadian constitutional principle in the field of administrative law); H. ver Loren van Themaat, *Legislative Supremacy in the Union of South Africa*, 3 U. W. AUSTL. ANN. L. REV. 59, 66 (1954) (arguing that only an act of the legislature can disrupt the scheme of legislative supremacy inherited from the British government in South Africa).

[30] *E.g.*, Alan Greene, *Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom*, 18 INT'L J. CONST. L. 1166, 1169–70 (2020) (examining the sovereignty of the Parliament in the UK).

[31] *See* Geoffrey Brennan & Alan Hamlin, *On Political Representation*, 29 BRIT. J. POL. SCI. 109, 109–10 (1999); Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. R. 335, 336, 339, 345–46 (2009).

[32] *See* Adam Shelton & Anthony Sanders, *A Story of Judicial Deference to the Will of the People*, 15 N.Y.U. J.L. & LIBERTY 55, 57–58, 101–02 (2021).

judicial deference to legislation.[33] The authors find that the language courts use is unfailingly grounded on the proposition that legislation is a faithful representation of the will of the people.[34]

However, analysis of real-world practice has revealed that legislative processes often favor special interests at the expense of the majority. There are two theoretically distinct problems affecting the mechanisms of political representation. These problems are the focus of several important contributions to public choice and social choice literature. The public choice scholarship observes that political representation often suffers from pervasive principal-agent problems. Under plausible conditions, political representatives will not vote according to their constituents' preferences. Therefore, to ensure that legislators represent their constituents' preferences, collective decision-making procedures must be adopted to align incentives, or a monitoring regime must be instituted to ensure the accountability of political agents. Much of the public choice and constitutional design literature addresses these fundamental problems. In practice, however, the total elimination of agency problems is not feasible, resulting in at least some disconnect between legislation and the will of the people.

However, even if the agency problems were fully solved, there would nevertheless remain a second obstacle: the aggregation of individual preferences. Assuming the interests of politicians align with the interests of the people they represent, the legislative process may be viewed as a framework for bargaining between political agents on behalf of various factions in society. The question then becomes whether political bargaining can successfully generate a consensus among the various political factions, such that political outcomes can be legitimately and unambiguously identified as the will of the people. Yet social choice scholarship tells us that the mechanisms of democratic legislation can fail to aggregate the preferences of individuals in society in a variety of plausible settings.

These problems profoundly undermine the proposition that legislation reliably represents the will of the people.

B. *Lawmaking Through Adjudication*

Despite the ascendancy of statutory law in modern legal systems, judicial precedent remains the principal source of law in a number of

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[33] The terms surveyed include: "will of the people," "judicial restraint," "will of the majority," "deference/defer to the political branches," "defer/deference to Congress," "second guess the legislature," "highly deferential," and "unelected judges." *Id.* at 63–64.

[34] *Id.* at 100–02.

domains, particularly tort law.[35] Whether lawmaking through adjudication reflects the will of a population depends on the setup of the legal system in question. There has historically been a substantial difference between the role of judicial precedents in the common law and civil law traditions, reflecting structurally distinct rules of recognition.[36] In civil law systems, legislation and custom are considered the primary sources of law, whereas judicial decision-making is traditionally the principal source of law in common law systems.[37]

Over the past century, however, there has been a general convergence toward legislation as the primary source of law globally.[38] As the breadth of statutory codes gradually expanded, reliance on precedent ceased to be a practical necessity.[39] In this setting, contemporary legal systems—including common law jurisdictions—developed a variety of doctrines to determine the role of courts in the presence of legislation, dividing the

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[35] For example, in the United States, contract law, tort law, and property law are still principally governed by common law precedents. *E.g.*, Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123.

[36] The supremacy of written law over other sources of legal order is not a universal characteristic of all modern legal systems. Comparative legal scholars usually distinguish between civil law and common law systems. *See* J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 433 (2019). The distinction is based on a dichotomous conception of legal traditions. Systems of the civil law tradition give greater weight to written and statutory sources of law. These systems are historically derived from a legal tradition that recognized the authority of a comprehensive body of written law (e.g., the Roman *Corpus Juris*) and were not relying on the casuistic evolution of case-by-case decision-making in the absence of a coherent skeleton of codified law. *See* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 701–07 (2000). This dichotomous distinction, while useful as a preliminary classificatory tool, should not be overestimated. During the last several decades, legal systems of the world have converged toward a middle ground. In the civil law tradition, the dogmas of supremacy of legislation over case law have gradually given way to a more balanced conception of sources of law, where statutes and case law happily coexist with one another. *See, e.g.*, Ben Deoorter & Francesco Parisi, *Legal Precedents and Judicial Discretion*, *in* 2 ENCYCLOPEDIA OF PUBLIC CHOICE 343, 343–47 (Charles K. Rowley & Friedrich Schneider eds., 2004). Likewise, in the common law tradition, the proliferation of legislative intervention has gradually corroded the traditional dominance of judge-made sources. *See id.*

[37] *See* Entrikin, *supra* note 36, at 443. Historically, the common law and civil law approaches to judicial precedent share a foundation in customary law. Despite previously held beliefs to the contrary, scholars have established that it was not until the mid-nineteenth century that the common law rule of precedent developed into a formal rule of stare decisis. *See* Tetley, *supra* note 36, at 702. As a general trend, common law jurisdictions are bound by a single court decision, whereas some civilian and mixed jurisdictions require a continuous line of precedents before recognizing a rule of "*jurisprudence constante*," which courts will follow as an authoritative secondary source of law. Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519, 520–24 (2006).

[38] *See* Entrikin, *supra* note 36, at 437, 441–42, 441 n.366, 448.

[39] *See id.* at 434, 443, 480 & n.519, 486.

legislative and judicial spheres into distinct domains. In general, the separation of powers has been a feature of most constitutional systems of the Western legal tradition. This principle accords special importance to the independence of the judiciary as a means of ensuring fair and impartial adjudication of legal disputes and requires judges, unlike elected officials, to be systematically shielded from political and economic influences.

As a matter of institutional design, two mechanisms can be employed to ensure judicial independence. The first is bureaucratization of the judiciary, whereby judges are selected and promoted according to apolitical standards of performance. The second is political appointment with the elimination of accountability to appointing political bodies.[40] The first approach has been adopted in most civil law jurisdictions,[41] while the second approach is characteristic of the U.S. federal judiciary.[42] Ostensibly, the premise is that judges untethered from political and financial incentives would be free to adjudicate in accordance with the will of the people.

This premise is not straightforwardly obvious. Critics of judicial independence have often charged that judges—being unelected and unaccountable—are an obstacle to the democratic process and thwart the wishes of the legislature. On the other hand, Professor William Landes and Judge Richard Posner examined the role of an independent judiciary in interest group purchase from an economic perspective, arguing that an independent judiciary can actually invigorate democratic processes.[43] Their analysis demonstrates that politically unaccountable judges insulate the law from the vicissitudes of popular whim. By enforcing validly enacted laws, the judiciary can ensure the integrity of the constitutional process by imposing prohibitive costs on interest group purchase of judicial decisions.

Interest group lobbying neither inherently promotes nor obstructs the will of the people. In the legislative context, it can be a vital mechanism for communicating the concerns of diverse constituencies to their representatives. However, Landes and Posner argue that interest groups would be reluctant to purchase policy programs if they thought the desired legislation would not endure for a significant period of time.[44] Investments in research, analysis, and raising public support for a proposal

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[40] *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 225–29 (2000).

[41] *See, e.g.*, R.I. CONST. art. X, §§ 4–5.

[42] *See* U.S. CONST. art. III, § 1.

[43] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879, 886–87 (1975).

[44] *See id.* at 880–84.

are costly, and interest groups will be less likely to bear that cost, if they fear that their legislative successes would be threatened by momentary repeal. Interest groups desire stability before making valuable investments in legislative purchase. Yet in the absence of an enforceable contract, interest groups must rely on other mechanisms to provide assurance that their efforts will persevere against possibly hostile future legislatures.

The threat of immediate repeal is generally mitigated by the high transaction costs associated with the cumbersome process of enacting legislation.[45] However, interest-group purchase of court decisions can circumvent the legislative process, exploiting the interpretative leeway inherent to the realization of linguistic expressions. Granting judges life tenure and scrutinizing potential conflicts of interest tends to preclude direct purchase of judicial decisions. However, there exists a second avenue through which a legislature could circumvent the legislative process to nullify prior legislation. If courts were mere agents of the legislature, then sitting representatives might force a de facto repeal by pressuring courts to interpret statutory language against the intentions of prior legislatures.[46] However, if courts were independent, then they would be free to interpret legislation in accordance with the intent of the enacting legislature. Insulating courts from the fickleness of political fashion could therefore have a stabilizing effect on legislation. In turn, this would tend to encourage interest group investments in legislative purchase. On the other hand, an independent judiciary can also increase the expected cost of legislative purchase by declaring laws unconstitutional or interpreting them in a way that reduces the benefits of the groups that paid for the law.[47]

Landes and Posner also consider the role of the independent judiciary in interpreting the Constitution. Judicial independence has two purposes in this context. First, it establishes "ground rules for a system of interest-group politics" enforced by the independent judiciary.[48] Second, the

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[45] *Id.* at 883.

[46] *Id.* at 885–86.

[47] Some questions have been raised in the literature regarding the actual level of independence of the judiciary. After all, in the U.S. legal system, Congress does have powers, such as appropriations of funds, creation of new judgeships, and rewriting jurisdiction by which they might compel judicial acquiescence. *See* U.S. CONST. art. I, § 8; *id.* art. III, § 2. However, self-interested judges can increase their independence by rendering predictable decisions in accord with the original meaning of the statute. According to Landes and Posner, this increases the value of the judiciary to the current legislature because its members know that the courts will enforce the contracts they make. Landes & Posner, *supra* note 43, at 885–87. According to the authors, the structure of the judiciary—life tenure, rules against ex parte contact, and impeachment for accepting bribes—also prevents interest groups from influencing judges directly. *Id.*

[48] Landes & Posner, *supra* note 43, at 892.

Constitution confers specific protective legislation on powerful interest groups willing to purchase interpretation of such provisions in their favor.[49] For example, broad interpretation of the First Amendment is a form of protective legislation purchased by publishers. Under this theory, the Constitution's purpose, supported by the independent judiciary, is to protect groups powerful enough to obtain interpretation of a constitutional provision or special interest legislation in their favor.

In its stabilizing role, the independent judiciary is an essential element in the struggle among interest groups. Ironically, in order to play this vital political role, Landes and Posner argue that courts cannot themselves be "political," but rather must be "above politics."[50] The courts function not by virtue of any special wisdom, integrity, moral insight, or commitment to principle, but simply by enforcing the legislative deals of earlier legislatures. By encouraging investments in legislative purchase through political processes, the courts promote lawmaking that better expresses the will of the people.

II. Three Goals in the Institutional Design of Lawmaking

The conventional division of governmental authority assigns lawmaking to the legislature, interpretation to the judiciary, and enforcement to the executive. Yet it would be a mistake to assume this tripartite structure to be a natural or inevitable division of powers. Public choice theory supplies a justification for the modern convergence toward the tripartite separation of powers. The public choice argument consists of two distinct lines of reasoning: the comparative advantage and the balance of power. Yet a cursory investigation of historical legal systems reveals considerable variation, amalgamation, and transformation of the modern constitutional form.

This Part reviews some of the main propositions advanced by constitutional political economy scholars on the relative merits and disadvantages of legislation versus judge-made law. It examines whether judicial lawmaking or judicial deference to legislative rules best effectuates the will of the people. In answering this question, this Part adopts a functionalist approach and considers three criteria to evaluate the desirability of different hierarchizations of sources of law: (A) the minimization of agency problems; (B) the minimization of direct and external rulemaking costs; and (C) the stability and transitivity of collective outcomes.

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[49] *Id.*

[50] *Id.* at 894 (internal citations omitted).

A. *Minimization of Agency Problems*

In a liberal democracy, the objective is assumed to be that the laws of a community should reflect the underlying preferences of the individuals subject to those laws. When the source of law is legislative, this requires collective-decision-making procedures that align the incentives of political representatives and the citizenry. When the incentives of representatives and their constituents are perfectly aligned, agency problems disappear. On the other hand, when the source of law is judicial precedent, this requires that judges anticipate the rules that private parties would have voluntarily chosen if they were able to choose the rules that governed their dispute ex ante. The optimal institutional boundaries of judicial deference will induce incentive alignment to minimize the extent of such agency problems.

B. *Minimization of Lawmaking Costs*

Next, in choosing between possible allocations of rulemaking powers, the mechanisms chosen for law creation should minimize the costs of collective decision-making and political bargaining. This cost minimization problem involves the evaluation of two different costs: (1) the direct costs of lawmaking, such as the cost of reaching a majoritarian consensus in a political context or the cost of litigation or adjudication in a judicial context; and (2) indirect or external costs of lawmaking, such as the cost imposed on a minority group by a majority coalition. Different levels of category (1) and category (2) costs are inherent in different processes of law formation.

1. Direct Costs of Lawmaking

Legislative and judge-made rules are characterized by different direct costs. In the legislative process, individual preferences are captured by the collective-decision-making process of political representation; this is an imperfect mechanism for aggregating individual preferences. Bargaining among political representatives is often costly due to strategic behavior (i.e., free riding, hold ups, and other collective-action problems) and the absence of enforcement mechanisms ensuring parties honor their agreements.[51] In this respect, legislation is likely to incur greater transaction costs than judicial lawmaking.

Yet direct costs are also present in judge-made law. Analogizing lawmaking to a production process in the marketplace, the common law

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[51] Barbara Luppi & Francesco Parisi, *Politics With(out) Coase*, 59 INT'L R. ECON. 175, 183 (2012).

can appear to be quite inefficient. The common law process, shifting some lawmaking functions to the judiciary, empowers courts with the task of constructing and refining legal rules in the adjudication of specific cases. But courts can only rule on the factual scenarios that appear before them.

From a production point of view, casuistic law formation, proceeding in piecemeal fashion, fails to leverage the economies of scale and scope characteristic of legislative law formation. On the other hand, the common law process, relying on the adversarial efforts of real-world litigants, can cheaply access private information typically elusive to lawmakers. Because parties to a dispute have direct knowledge of the costs and benefits of alternative rules, courts may often have an informational advantage over centralized legislative bodies.

Courts also enjoy an informational advantage in observing the revealed preference of the parties with respect to applicable law. Modern legal systems generally provide default rules which apply when parties fail to choose alternative provisions to govern their relationships. When parties opt out of the law's default rules either by an ex-ante choice of differing rules or legal forum, they reveal their rule preferences. If courts observe similarly situated parties systematically opting out of the law's default rules, then they can infer those rules have failed their cost-minimization function under those circumstances. When parties routinely contract around the law, then there can be no clearer evidence that the law fails to embody the will of the people. In identifying these cases, courts will thus have a comparative informational advantage over legislatures.

2. External Costs of Lawmaking

Legislation and judge-made law are also subject to distinct external costs. Public choice theory has shown that the direct costs and external costs of legislation are negatively correlated.[52] The tradeoff between direct and external costs can be easily illustrated by contrasting two of the limited cases that arise in the voting context: unanimity and dictatorship. If legislation required unanimity, then external costs would disappear, since a unanimity rule grants every representative veto power; no represented constituency would ever have to endure burdensome laws imposed by a hostile majority. However, decision costs are very high under unanimity, a defect compounded by the fact that individuals are limited to expressing ordinal preferences (i.e., a vote is a discrete switch; it cannot

[52] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962), *reprinted in* 3 THE COLLECTED WORKS OF JAMES M. BUCHANAN 57–59 (1999).

communicate the intensity of preferences). Conversely, if legislation were determined by a dictatorship rule, then the external costs would be considerable, since a dictator can unilaterally impose costs on any member of society in order to satisfy his own preferences. Of course, the countervailing benefit of a dictatorship rule is that the direct costs of lawmaking are minimal; no political bargaining is necessary to enact legislation by fiat. However, such decisions are obviously unlikely to reflect the will of the general population. The choice of optimal voting rules thus constitutes a problem of cost-minimization under constraints. Unanimity and dictatorship rules represent unacceptable and extremum cases, implying that the optimum is an interior solution.

From a political economy perspective, the constitutional rules establishing fundamental rights protect individuals from potential externalities arising from majoritarian politics. Constitutional rules typically require supermajorities to enact, amend, or abrogate. When a right is protected at the constitutional level, it is clad in the armor of direct-decision costs. And although high direct-decision costs interfere with the realization of majoritarian preferences, majority opinions are often capricious and unstable. By securing a liberty against the mercurial dispositions of the mob, the law sacrifices moment-by-moment fidelity to the popular will for a more enduring commitment to a community's fundamental values, which are most susceptible to the danger of political externalities.

C. *Promoting Legal Stability*

A third goal in the institutional design of lawmaking is fostering stability (i.e., avoiding irrational and intransitive collective choices). As the prior literature observes,[53] when political cooperation fails and lawmaking mechanisms fail to generate Condorcet winners,[54] several legal institutions and doctrines can come to the rescue by minimizing instability and selecting among cyclical alternatives. Professor Robert Cooter explains how democratic constitutions stabilize by separating powers among the branches of government, guaranteeing individual

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[53] *E.g.*, COOTER, *supra* note 40, at 186; Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1274–76 (1994).

[54] A Condorcet winner is the option or candidate in a multi-alternative election that is preferred by a majority over every other candidate or option. FRANCESCO PARISI, THE LANGUAGE OF LAW AND ECONOMICS: A DICTIONARY 58–59 (2013). For example, if there are three alternatives, A, B, and C, and a majority of voters prefer A to B, and a majority of voters prefer A to C, then A is the Condorcet winner, even though A may not have been the first preference of a majority of the voters. *Id.*

rights and establishing a competitive framework for attaining political power.[55]

On the role of the judiciary specifically, Professor Maxwell Stearns studies the role of standing doctrines and stare decisis from an evolutionary perspective, arguing that the principles can mitigate legal instability in the absence of a Condorcet majority consensus.[56] The doctrine of stare decisis implies that courts should adhere to past legal precedents on issues of law. The doctrine aims to promote certainty, consistency, and stability in the legal system, and minimizes transaction costs in the courts.[57] Accordingly, adherence to prior judicial decision-making over deference to legislation will tend to encourage legal stability.

The three goals in the institutional design of lawmaking—namely (i) the minimization of agency problems; (ii) the minimization of direct and external rulemaking costs; and (iii) the stability and transitivity of collective outcomes—imply that courts are likely to be in a better position to assess and implement the will of the people through the adjudication of real-world disputes than are legislators contemplating rules in the abstract. Courts are better able to approximate what most private parties would have chosen for a rule, reducing agency problems. Courts can minimize the costs of decision-making through their better access to parties' preferences by observing litigants' strategies and legal arguments. Finally, courts can promote legal stability through adherence to stare decisis. There are thus at least three powerful general justifications for according courts an active role in lawmaking.

III. Judicial Deference or Judicial Scrutiny?

Though courts may be better situated to effectuate the will of people than political representatives in some circumstances, this conclusion is not without theoretical and practical challenges. The recent challenges do not generally dispute that judge-made law may be capable of achieving the three goals of the institutional design of lawmaking and that under plausible conditions judge-made law may be capable of selecting efficient

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[55] COOTER, *supra* note 40, at 211.

[56] Stearns, *supra* note 53, at 1260–81.

[57] A softer version of stare decisis followed in civil law and hybrid jurisdictions, *jurisprudence constante,* holds that judges should only consider themselves bound to follow a trend of consolidated and consistent decisions. Jean-Louis Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec, in* THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 13 (Joseph Dainow ed., 1974); *see also* James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent,* 54 LA. L. REV. 1, 15 (1993); Edouard Lambert & Max J. Wasserman, *The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law,* 39 YALE L.J. 1, 10 (1929).

rules. Rather, they contend that judge-made law may not truly reflect the will of the people, because courts face the risk of systematic ideological bias.

A. *Litigants as Auditors of Legislation*

The central claim of the efficiency of the common law hypothesis is that judge-made law generates a spontaneous and gradual convergence toward efficient legal rules. First intimated by Ronald Coase,[58] and later systematized and powerfully extended by Judge Posner,[59] the argument goes that the rules generated during adversarial adjudication tend toward efficiency through a process of evolutionary selection.[60]

There are two complementary strains of argument advancing the efficiency hypothesis. The "demand side" argument concerns private litigants' selection of efficient rules and the "supply side" argument concerns judicial selection of efficient rules.[61]

The "demand side" argument originates with Professors Paul Rubin[62] and George Priest,[63] who argue that the revealed preferences of utility-maximizing litigants drive the common law's tendency toward efficiency. Specifically, Rubin contends that parties are more likely to litigate inefficient rules than efficient ones.[64] The pressure for case law to evolve to efficiency, he argues, rests on the desire of parties to create precedent because they have an interest in establishing favorable rules for similar future cases.[65] When disputants have an interest in future similar cases

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58 *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 20–24 (1960).

59 *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2–6 (1993).

60 Some public choice theorists, such as Gordon Tullock, took a critical position against these efficiency claims, looking at the pervasive shortcomings of the process of lawmaking through litigation. *See* GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE 196–98 (1980); GORDON TULLOCK, THE CASE AGAINST THE COMMON LAW 35–44 (1997). For a review of these criticisms, see Richard A. Posner & Francesco Parisi, *Law and Economics: An Introduction*, *in* 1 LAW AND ECONOMICS ix–xlviii (Richard A. Posner & Francesco Parisi eds., 1997).

61 For discussions of economic analysis exploring the relationship between the "independent judiciary" and interest groups, see, for example, Landes & Posner, *supra* note 43.

62 Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 51–57 (1977).

63 *See, e.g.*, George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (arguing that "efficient rules will be more likely to endure as controlling precedents regardless of the attitudes of individual judges toward efficiency, the ability of judges to distinguish efficient from inefficient outcomes, or the interest or uninterest of litigants in the allocative effects of the rules").

64 Rubin, *supra* note 62, at 53–55.

65 *Id.* at 53.

and the current legal rule is inefficient, parties are more likely to engage in litigation. These (and similarly situated) parties will persist engaging in litigation until the rule is changed. By contrast, if the rule is efficient, then there is no common incentive to change it, so litigation over the prevailing rule will be less likely, and parties will be more likely to settle.[66] In case only one party has an interest in similar future cases, the incentive to litigate depends on the allocation of liability.[67] This evolutionary selection, according to Rubin, fails when parties are not repeat litigants, because neither party is interested in establishing more favorable rules.[68] In such situations, current legal rules may remain unchallenged, whether efficient or not.

Priest supports the claim that the common law tends to develop efficient rules independently of judicial interest in efficiency. Indeed, Priest argues that efficient rules will be selected even when judges are hostile toward them.[69] He parts with Rubin however on the cause of the common law's tendency toward efficiency, rejecting Rubin's argument that the convergence occurs only when potential litigants have an interest in similar future cases. Instead, he maintains that litigation is driven by the costs of inefficient rules rather than a conscious desire to establish favorable precedents.[70] Inefficient rules impose greater costs on the parties than efficient rules, thereby increasing the stakes in a dispute.[71] When the stakes are greater, litigation is more likely than settlement. Consequently, disputes arising under inefficient rules tend to be litigated more often over time than disputes arising under efficient rules.[72] An important corollary is that uncontested rules tend to be efficient because of their lower costs.[73] Because efficient rules are less likely to be reviewed, they tend to remain in force.[74] As inefficient rules are litigated more frequently, the recurrent review process increases the risk that they will be overturned.[75] If the inefficient rule is overturned and the new rule is efficient, then the rate of litigation over the rule will decrease, resulting in a stable efficient precedent. On the other hand, if the inefficient rule is overturned and the new rule is inefficient, then the rate of litigation will continue to be high, and the process will repeat until a stable efficient

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66 *Id.* at 53–55.

67 *Id.* at 55.

68 *Id.* at 56.

69 Priest, *supra* note 63, at 70–72.

70 *Id.* at 72–73.

71 *Id.*

72 *Id.* at 71–72.

73 *See id.* at 72.

74 *Id.*

75 Priest, *supra* note 63, at 72.

precedent is established. Thus, the legal system tends to perpetuate the selection of increasingly efficient legal rules.

The criteria for selecting disputes for litigation are important components of the theories advanced by Rubin and Priest.[76] Only disputes that are litigated can generate legal precedents. Disputes that do not lead to a filing or that are settled before final judgment have no impact on the evolution of law. Priest and Professor Benjamin Klein develop a model of the litigation process that explores the choice between litigating a dispute and resolving it through settlement.[77] Priest and Klein show that the set of disputes that proceed to litigation constitute neither a random nor a representative sample of all disputes.[78] They then derive a new selection hypothesis: when both parties have equal stakes in litigation, individual maximizing decisions of the parties create a strong bias favoring plaintiffs at trial (or appellants on appeal), regardless of the substantive law.[79]

To summarize the seminal arguments advancing the efficiency of the common law hypothesis: Judicial precedents tend toward efficiency, even when judges are hostile toward efficient rules. This efficiency is likely to better represent the will of the people, as the cases parties choose to litigate will tend to involve rules that the parties deem undesirable. In contrast, those rules that endure will tend to be those that the parties prefer to govern their interactions. Thus, courts may be in a better position to better reflect the will of the people through the evolution of case law.

B. *Judges as Auditors of Legislation*

In addition to examining the behavior of litigants, law and economics scholars have also investigated the role of judges in establishing efficient legal rules. Posner has written extensively on judicial decision-making and the incentives for judges to gravitate toward efficient rules.[80] In the federal system, law and economics has historically struggled to explain judicial

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[76] *See id.* at 65; Rubin, *supra* note 62, at 51–52.

[77] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1 (1984).

[78] *Id.* at 14–15.

[79] *Id.* at 17–20. When the assumption that both parties have equal stakes in the dispute is relaxed (e.g., where one party is a repeat player and has a stake in future similar cases), the rate of success in litigation begins to deviate from the hypothesized baseline, and the model predicts that the repeat player prevails more frequently. *See id.* at 24–28. Priest and Klein use data both from their own empirical investigations and from major empirical studies of the legal system since the 1930s. *Id.* at 30–54. While they caution against drawing conclusions from the data, largely due to measurement problems, their results nonetheless provide support to the selection hypothesis. *See generally id.*

[80] *See, e.g.*, Posner, *supra* note 59.

behavior in economic terms, in part because the federal judiciary is structured to remove judges from external political incentives. Posner argues that, as a result, appellate judges should be analyzed as ordinary, rational human beings whose incentives are driven by their desire to maximize leisure and income.[81] However, Posner posits that judges must derive utility in judging from something over and above leisure and money. Posner believes that an appellate judge's utility function typically includes preferences for a good reputation, prestige, and avoiding reversal.[82] Although he excludes from the judicial utility function a desire to promote the public interest (because he says such a preference cannot be assumed across the board for all judges), his model of judicial behavior shows that self-interested judges will ultimately function as instruments for the production of rules that promote the public interest.[83]

If, as shown by Rubin[84] and Priest,[85] inefficient rules are litigated more frequently, then leisure-seeking judges will want to establish efficient precedents to minimize their workload. Posner further suggests that this leisure-seeking behavior explains why judges adhere to stare decisis, albeit not rigidly.[86] With rigid adherence, judges would lose the utility they enjoy in the exercise of their discretionary power. Further, Posner suggests that voting on cases is one of the most important sources of judicial utility due to the deference judges' opinions receive by higher courts, lawyers, and the public.[87] The rate of reversal on appeal will tend to have a negative impact on a judge's reputation and on their chances of promotion to higher courts.[88] Borrowing the logic of Rubin and Priest,[89] if a case is decided under an inefficient rule, the probability that the decision will be appealed will be greater, subjecting lower court judges to the risk of reversal. Judges' self-interest in their career and reputation thus indirectly incentivizes the creation of (and adherence to) efficient rules and efficient reinterpretation of suboptimal legislation.

Posner's argument supplies a theoretical foundation for the proposition that judges—in addition to litigants—can play an important role as auditors of legislation. Their direct contact with the litigants provides judges a front-row seat, from which to observe the revealed preferences of the parties during litigation.

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81 *Id.* at 11–13.

82 *Id.* at 13–15.

83 *Id.* at 19–22.

84 *See* Rubin, *supra* note 62, at 51.

85 *See* Priest, *supra* note 63, at 66.

86 Posner, *supra* note 59, at 19–22.

87 *Id.*

88 *Id.* at 15.

89 *See supra* notes 62–75 and accompanying text.

Litigants play the first role in communicating the will of the people, to the extent they choose to litigate inefficient cases. Once their disputes are brought before judges, the courts function as the auditors of legislation, ensuring that the legislation's realization reflects the will of the people.

C. *The Risk of Judicial Bias*

While some judges may be incentivized to create efficient rules reflecting the will of the people, that may not always be true as courts face the risk of systemic ideological bias in the cases brought before them. As we discussed in the previous section, Posner's model relies on the premise that judicial independence enables judges to vote their true values and freely express their judicial ideologies. That assumption makes several testable predictions about judicial behavior.

Professors Vincy Fon and Francesco Parisi build on the prior literature by considering a model in which judges are democratically drawn from an unbiased distribution of ideologies.[90] Their ideologies lead to differing propensities to extend the domain of legal remedies and legal intervention. The model stresses the importance of an often-overlooked condition: For a threat of litigation to be credible, the plaintiff's net judicial award must be positive.[91] The decision to file a legal claim is generally the plaintiff's choice, an asymmetry which will affect case selection. Whether plaintiffs choose to file suit will be determined by the likelihood of success in a specific court.[92]

Assuming that judges are ideologically heterogeneous, the behavior of rational litigants will generate a bias toward filing in pro-plaintiff, interventionist jurisdictions.[93] This means that pro-plaintiff and interventionist judges will tend to have more opportunities to hear decisive cases and establish new pro-plaintiff precedents than less interventionist judges.[94] Fon and Parisi's model differs from the prior

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[90] *See generally* Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003).

[91] *Id.* at 421.

[92] *Id.* at 422, 425–27.

[93] *Id.* at 427–29.

[94] *Id.* The selection hypothesis advanced by Fon and Parisi differs from Priest and Klein, Priest & Klein, *supra* note 77, and Professor Gillian Hadfield, Gillian K. Hadfield, *Biases in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992). Along the lines of Professors Rubin and Martin Bailey, Fon and Parisi develop an alternative model of legal evolution, which considers some important public choice components, such as the role of judges and ideology. *See* Fon & Parisi, *supra* note 90, at 419; Paul H. Rubin & Martin J. Bailey, *Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 807 (1994). While

literature in several important respects. Unlike Rubin,[95] their results do not rely on the parties' incentives to create efficient precedents. The selection of disputes is driven by the desire to maximize returns from litigation.[96] The net expected value of any given case depends not only on the merits of the case and the current state of the law, but also on the ideological disposition of the judge.[97] Thus, strategic case selection will tend to generate a strong bias toward filing cases in pro-plaintiff jurisdictions.[98] When a case's outcome depends on the extensive application of legislative solutions, or the creation of new forms of legal protection, interventionist judges will enjoy a greater opportunity to create new legal precedents than restrained judges.[99]

Thus, the interaction of judges and litigants may create an opportunity for adverse selection. The ideological distribution of judges may be unbiased, but the flow (and resulting stock) of judicial decisions may be ideologically biased, attenuating the expression of popular preferences. Interventionist judges will tend to exert an expansionist bias in judicial review and the interpretation of legislation. While courts may initially appear to be better situated to effectuate the will of the people as compared to legislatures, adverse selection can threaten to subvert the process modeled by Priest, Klein, and Posner.

Conclusions

While there is no universally recognized normative principle establishing the foundation of how laws should be made, in many jurisdictions that give primacy to lawmaking through political deliberation, courts exercise judicial deference under the premise that laws established through the political process better reflect the will of the people. However, in examining this idea from the broader constitutional political economy perspective, this Essay shows that courts may be in a better position to verify the extent to which a piece of legislation reflects the will of the people. This is done not by replacing the value judgments of judges with that of political lawmakers, but rather by utilizing the judicial process as an opportunity to carry out an "auditing" of legislative sources. Litigants serve as auditors of legislation, revealing their true

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Rubin and Bailey focus on the role of lawyers in changing the law, Fon and Parisi consider the role of judges' ideology. *Compare* Rubin & Bailey, *supra*, at 807, *with* Fon & Parisi, *supra* note 90, at 419.

95 *See* Rubin, *supra* note 62, at 51.

96 Fon & Parisi, *supra* note 90, at 421.

97 *Id.* at 422.

98 *Id.* at 427–29.

99 *Id.*

preferences and providing courts an informational advantage to voice the will of the people, as litigants are more likely to challenge inefficient rules than efficient rules. Thus, through choices of which cases to fully litigate in court, litigants may perpetuate increasingly more efficient rules, better reflecting the will of the majority. Additionally, judges can serve as auditors of legislation, as judges are driven by their individual incentives to create efficient rules and reinterpret suboptimal legislation. Several legal systems across the world separate the functions of supreme courts from those of constitutional courts for exactly this reason. Litigants or judges may, on their own initiative, "flag" a piece of legislation for violating a fundamental principle of the legal system or for going against principles of the Constitution. Special interest legislation is more likely to fall into this category because it may create unequal treatments under the law, favoring special interests or concentrated industries. Laws are then remitted to the constitutional courts to evaluate the existence of such defects and are eventually voided of their effect. Neither the remitting ordinary courts nor the adjudicating constitutional courts have power to modify and reformulate the content of the invalidated laws. Rather, with respect to the separation of powers, the piece of legislation is sent back to the political lawmakers to correct the problem and issue new rules.

However, as discussed in this short essay, the role of courts as auditors of legislation is not free from problems. While, theoretically, courts develop efficient rules reflecting the will of the people, recent literature has shown that courts may suffer from problems of adverse selection in litigation. Through plaintiffs' choice of where and when to bring legal claims, the docket of judicial decisions may be ideologically biased toward the continual expansion of legal rules and rights, despite an unbiased distribution of judges. Such an ideologically biased outcome of legal questions may be unable to express the diverse will of the people. Thus, courts may not always be in the best position to capture and reflect the true will of the people. Accordingly, there may be benefits to courts exercising judicial deference, particularly in instances where politically made rules can better account for a diverse set of beliefs.