Jurisdictional Competition and the Evolution of the Common Law

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USC Center in Law, Economics and Organization Research Paper No. C07-4
USC Legal Studies Research Paper No. 07-2

CENTER IN LAW, ECONOMICS AND ORGANIZATION RESEARCH PAPER SERIES and LEGAL STUDIES RESEARCH PAPER SERIES

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Abstract

This paper explores the role jurisdictional competition played in the development of the common law. For most of English legal history, there were several courts with overlapping jurisdiction. In addition, judges received fees on a per case basis. As a result, judges had an incentive to hear more cases. The central argument of this article is that, since plaintiffs chose the forum, judges and their courts competed by making the law more favorable to plaintiffs. Courts expanded their jurisdictions to give plaintiffs more choices, made their procedures cheaper, swifter and more effective, and developed legal doctrines which made it difficult for defendants to prevail. Of course, jurisdictional competition was not without constraints, most importantly Parliament and Chancery. This paper tries to show how important features of the common law, including the structure of contract law, can be explained as the result of competition among courts and the constraints on that competition.

Starting in 1799, statutes took fees away from the judges. The hypothesis that competition induced a pro-plaintiff bias is tested by quantitative analysis of judicial decisionmaking before and after those statutes.

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DANIEL KLERMAN*

> The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavored to draw to itself as much business as it could….. [E]ach court endeavored, by superior dispatch and impartiality, to draw to itself as many causes as it could. 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 endeavoring to give, in his own court, the speediest and most effectual remedy, which the law would admit, for every sort of injustice.
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> Adam Smith, *The Wealth of Nations*, 241-42 (1776; repr. University of Chicago Press, 1976).

> Imagine a system in which there are several courts, public or private, with overlapping jurisdictions, and the judges are paid out of litigant fees, and therefore have a direct pecuniary interest in attracting business…. [I]t might seem that competition would lead to an optimal set of substantive rules and procedural safeguards. But this is incorrect. The competition would be for plaintiffs, since it is the plaintiff who determines the choice among courts….
>
> Left unexplained … is the actual pattern of competition in the English courts during the centuries when 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. Why it did not emerge (assuming it has not simply been overlooked by legal historians) presents an interesting question for further research.
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> William Landes and Richard Posner, "Adjudication as a Private Good," 8 *Journal of Legal Studies*, 235, 254-5 (1979).

Historians explain the development of the common law in many ways. Some emphasize the internal logic of legal concepts,[1] while others focus on external factors, such

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[1] See, eg,: Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (1997).

as political, social, or economic conditions.[2] A few point to the influence of philosophy[3] or other legal systems.[4] For many, the institutional structure of the legal system is of paramount importance, whether it be the role of juries,[5] the changing dynamics of pleading and post-trial motions, or innovation by lawyers in the service of their clients.[6] Among the institutional factors which influenced legal development, many historians point to competition among courts as an agent of legal change.[7] While references to jurisdictional competition are common in the literature, no one has rigorously analyzed the implications of competition for the evolution of the common law. That is the goal of this article.

The main argument of this article is that, since plaintiffs chose the forum, courts competed by making the law more favorable to plaintiffs.[8] Courts expanded their jurisdictions to give plaintiffs more choices, made their procedures cheaper, swifter and more effective, and developed legal doctrines which made it difficult for defendants to prevail. This dynamic, this article will attempt to show, was an important engine of legal change in England from the twelfth century to the nineteenth.

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[2] See, eg,: Morton Horwitz, *The Transformation of American Law* (1977).

[3] See, eg,: James Gordley, *The Philosophical Originals of Modern Contract Doctrine* (1991).

[4] See, eg,: R H Helmholz, 'Assumpsit and *Fidei Laesio'* in R H Helmholz**,** *Canon Law and the Law of England* (1987).

[5] See, eg,: John Langbein, 'Historical Foundations of the law of Evidence: A View from the Ryder Sources' (1996) 96 *Columbia Law Review* 1168; Daniel Klerman, 'Was the Jury Ever Self-Informing?' in Maureen Mulholland and Brian Pullan (eds), *Judicial Tribunals in England and Europe, 1200-1700: The Trial in History* (2003) vol 1.

[6] See, eg,: S F C Milsom, *Historical Foundations of the Common Law* (2nd ed, 1981).

[7] See, eg,: J H Baker, *Introduction to English Legal History* (4th ed, 2002) 40-47; A H Manchester, A *Modern Legal History of England and Wales 1750-1950* (1980) 129; Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (2000) 25-26; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) xiv; Todd Zywicki, 'The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis' (2003) 97 *Northwestern University Law Review* 1551; Adam Smith, *The Wealth of Nations* (first published 1776, 1976 (ed) University of Chicago Press) 241-42; Adam Smith, *Lectures on Jurisprudence* (first published 1776, 1978 (ed) Oxford University Press) 281-82, 423-25. The author thanks Todd Zywicki for providing the citations to Adam Smith.

[8] William Landes and Richard Posner, 'Adjudication as a Private Good' 8 (1979) *Journal of Legal Studies* 235, 253-59. The author thanks Todd Zywicki for calling attention to this analysis of competition.

Of course, jurisdictional competition was not without constraint. If it were, the law might have become outrageously pro-plaintiff. That it did not is testament to the existence of constraints, chief among them Parliament and Chancery.[9]

Jurisdictional competition presumes that courts want to hear more cases. It is less than obvious that modern judges so desire. They might prefer fewer but more interesting cases, or more leisure.[10] Until the nineteenth century, however, English judges had strong incentives to hear cases. In addition to the power and prestige which accrue to judges in all ages, English judges derived much of their income from fees paid by litigants. The more litigants patronizing a particular court, the richer its judges.[11]

Beginning in 1799, statutory reforms took fees away from the judges. By comparing judicial decisionmaking before and after these statutes, it is possible to test empirically whether fee competition affected the development of the law. Statistical analysis of three newly created datasets provides results which are consistent with the hypothesis that competition resulted in a pro-plaintiff bias.

Many lawyers will find the assertion of a pro-plaintiff bias in the common law absurd. Most law students are taught that the common law was pro-defendant. It is a commonplace of the first-year curriculum that doctrines such as privity of contract and the fellow-servant rule made it nearly impossible for plaintiffs to prevail. This view of the common law overlooks one crucial fact. These pro-defendant doctrines were developed in the nineteenth century, after reforms had taken fees away from the judges and thus dampened competition among courts.[12]

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[9] See Section II.
[10] Richard Posner, 'What do Judges Maximize?' in Richard Posner**,** *Overcoming Law* (1995).
[11] See Section II.B
[12] See Section IV.

Some readers will find echoes in this argument of contemporary American debates over corporate law.[13] Just as state revenue from incorporation fees may encourage states to mold corporate law to attract more corporations, so, this article suggests, revenue from court fees encouraged English courts to mold the common law to attract more cases. Some scholars argue that competition for corporate chartering leads to efficient corporate law, because managers, who choose the place of incorporation, have incentives to maximize firm value.[14] In contrast, there is no reason to believe that competition among courts should have led to efficient law, because plaintiffs, who chose the forum, had no incentive to prefer efficient law. Rather, plaintiffs preferred law which granted them higher recoveries, more often, more swiftly, and at lesser expense. Although Parliament and Chancery provided checks against excessively pro-plaintiff law, they were unlikely to generate efficient law. Chancery had an incentive to produce excessively pro-defendant law, and, to the extent that legislation (or the threat of it) provided a key constraint on competition between courts, common law is unlikely to have been more efficient than statute law.[15]

Although this article argues that jurisdictional competition is an important and under-appreciated factor in legal development, it certainly does not argue that competition is the sole factor. As the work of numerous historians has demonstrated, doctrinal, institutional, philosophical, economic and other explanations have enormous power.[16]

Section I surveys the literature on the effect of jurisdictional competition on the

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[13]Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (1991) 212-227; Roberta Romano, *The Genius of American Corporate Law* (1993); Lucian Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1992) 105 *Harvard Law Review* 1435; but see Marcel Kahan and Ehud Kamar, 'The Myth of State Competition in Corporate Law' (2002) 55 *Stanford Law Review* 679.

[14]Easterbrook and Fischel, above n 13; Romano, above n 13.

[15]The view that the common law is efficient and that statutes are less so is associated with Richard Posner. His view, however, is based largely on nineteenth-century doctrine. Richard Posner, *Economic Analysis of Law* (6th ed, 2003) 252. There is therefore no necessary contradiction between Posner's view and the thesis of this essay, which focuses on English justice before 1800.

[16]See: Karsten, above n 1; Horwitz, above n 2; Gordley, above n 3; R H Helmholz above n 4, Langbein, above n 5; Milsom, above n 6; Baker, above n 7; Manchester, above n 7; Harris, above n 7**.**

development of English law. Section II describes in the institutional background and presents some examples of the pro-plaintiff bias. Section III uses game theory and positive political theory to analyze the effects of jurisdictional competition more rigorously and to generate empirically testable predictions. Section IV describes and presents the results of three tests of the predictions generated in the previous section. Section V discusses some additional related issues.

I LITERATURE

Judicial fee income and jurisdictional competition are well known to historians of English law. Nevertheless, they have never been analyzed in depth. The dominant position is probably that jurisdictional competition produced better law. This was the opinion of Adam Smith, as evidenced by the quote at the beginning of this article.[17] It is also implicitly the position of J. H. Baker, probably the most respected living historian of English law. Consider the following passage:

> It can hardly be coincidence that so much of the reform was initiated under Sir John Fyneux, who presided over the court [King's Bench] from 1495 to 1525 when its fortunes were at their lowest ebb. He appointed his son in law John Rooper as chief clerk in 1498, and the Rooper family made its fortune from the office between then and its retirement in 1616. Cynics might criticise the judges and clerks for making the court a family business; they undoubtedly had more than a professional interest in the success of the procedures under their control. But they had no monopoly, and they thrived only by satisfying litigants and the profession at large.[18]

First, it should be noted that this passage makes no general claims about jurisdictional competition or its effects, but rather, as is common for historians, analyzes a single court in a single period. Baker characterizes the changes wrought by Judge Fyneux and chief clerk Rooper as satisfying "litigants" generally, rather than plaintiffs specifically. This overlooks

[17] Adam Smith, *The Wealth of Nations* (first published 1776, 1976 (ed) University of Chicago Press) 241-42; Adam Smith, *Lectures on Jurisprudence* (first published 1776, 1978 (ed) Oxford University Press) 281-82, 423-25.

[18] Baker, above n 7, 44.

the crucial fact that it was the plaintiff who chose the court. It thus misses the insight that frequent invocation of a new legal doctrine or procedure indicates that it satisfied plaintiffs and their lawyers, not "litigants and the profession at large." Baker seems to suggest that the innovations introduced around 1500 were salutary, because the legal market was competitive (King's Bench "had no monopoly") and because the innovations introduced by Fyneux and Rooper resulted in "satisfied" customers ("litigants and the profession at large"). As through the operation of Adam Smith's "invisible hand," he seems to imply, the private interests of Fyneux and Rooper coincided with the public interest of litigants.[19]

Other writers, such as Jeremy Bentham, and Australian historian, Bruce Kercher, have suggested that competition had a negative effect, because it encouraged judges to create complicated, time-consuming procedures which multiplied the opportunities for fees.[20] Still other historians, most prominently Brian Simpson, have scoffed at the idea that judges were influenced by competition or fee income.[21]

At least three scholars have suggested that competition produced a pro-plaintiff bias. Landes and Posner briefly suggested as much in 1979. The relevant sections are quoted at the beginning of this article. In the mid-1980s, Clinton Francis published two articles on eighteenth and nineteenth century contract law which argued that jurisdictional competition produced a pro-creditor (and hence a pro-plaintiff) bias.[22] The work of these three scholars relating to the effects of jurisdictional competition has been largely forgotten.[23] Clinton

[19] For another discussion in a similar vein, see Ibid 40-41. In other places, Baker is more careful to note that a change favored plaintiffs. Baker, __ 217. On the other hand, even here Baker is not making a general statement about the effect of competition.

[20] Jeremy Benthan, ___; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) xiv.

[21] A.W.B. Simpson, *A History of the Common Law of Contract*: *The Rise of the Action of Assumpsit*, 295-99 (1975)

[22] "The Structure of Judicial Administration and the Development of Contract Law in Seventeenth Century England," 83 Columbia L. Rev. 35 (1983); "Practice, Strategy, and Institution: Debt Collection in the English Common Law Courts," 80 Northwestern L. Rev. 807 (1986).

[23] A Westlaw search revealed only one reference to Landes and Posner's prediction of "plaintiff favoritism." Todd Zywicki, "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis"

Francis no longer publishes in legal history, and Landes and Posner have never returned to the issue.

II Institutional Background and Descriptive Evidence

A. *The Court System*

For most of the last thousand years, England was home to a multiplicity of courts. The most fundamental distinction lay between royal courts and non-royal courts. Non-royal courts included manorial courts (run by lords for tenants on their manors), honorial courts (run by lords for their vassals), ecclesiastical courts (run by the church), and local courts (run by boroughs, hundreds and counties). Royal courts were divided between common law courts and non-common law courts. The three common law courts were King's Bench, Common Pleas, and Exchequer. The most important royal, non-common law court was Chancery, sometimes known as the court of equity, but there were others, including Star Chamber, Admiralty, and the Court of Requests.[24]

By the seventeenth century, non-royal courts were of relatively little importance. King's Bench could stop proceedings in these courts by issuing writs of "prohibition." In addition, manorial, seigniorial, and local courts were limited by their inability to try criminal cases, civil cases involving more than 40 shillings, or cases involving freehold land (except pursuant to royal writ). Ecclesiastical courts had jurisdiction over internal church affairs, matrimonial disputes, and probate, but had lost or given up the right to decide contract cases. Because of their limited powers, this article will pay little attention to non-royal courts.

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97 *Northwestern University Law Review* 1551, 1607-8 (2003). The reference to plaintiff favoritism is in a discussion which also includes discussion of a prior version of this article.

[24]Theodore Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 83-100, 176-98.

Although in the medieval period, the three common law courts – King's Bench, Common Pleas, and Exchequer-- had distinct jurisdictions, by 1600 their civil jurisdictions were largely coextensive. Nearly any case involving property, contract or tort could be brought in any of the three courts. Chancery's most important jurisdiction involved trusts and contracts.[25]

In nearly all cases, the plaintiff chose the court. There were only a few exceptions. Cases in non-royal courts could sometimes be removed by the defendant into royal courts. In this way, the royal courts could gain cases at the expense of non-royal courts by making the law more favorable to defendants.[26] This pro-defendant bias does not seem to have been very prominent, because cases could not be removed from one royal court to another. A defendant in a common law court could, however, petition in Chancery for an injunction ordering the plaintiff not to continue his common law suit. This possibility was a major constraint on the development of excessively pro-plaintiff law. King's Bench, however, had a countervailing power through the writ of habeas corpus. Chancery enforced its decrees through imprisonment. King's Bench, however, could use the writ of habeas corpus to free defendants from prison. By doing so, it imposed limits on Chancery's ability to constrain it.[27]

Each court was free to develop its own law. The development of judge-made common law amply demonstrates this freedom. Courts defined and expanded their jurisdictions, developed new procedures, and introduced doctrinal innovations without asking permission from Parliament or any other authority. In fact, this is a defining characteristic the common law system. Until the mid-nineteenth century, there was no system of appeals by which one set of courts could comprehensively review the decisions of

[25]Baker, above n 7, 37-52, 97-134.
[26]Robert Palmer, *The County Courts of Medieval England, 1150-1350* (1982) 229-32.

others. This is important, because a system of appellate review might have constrained inter-court competition by imposing uniformity.[28] The only real constraints on common law rule-making were Chancery's power to issue injunctions (discussed above), the King's and after 1701 Parliament's power to remove judges, and the power of Parliament to pass statutes which were valid notwithstanding common law decisions to the contrary.

B. *Judicial Compensation*

The idea that jurisdictional competition resulted in law more favorable to plaintiffs presumes that judges had an incentive to hear more cases. Judges' incentive to hear more cases could have come from many sources. In many times and places, judges are motivated by the power and prestige which comes from the ability to decide. This motivation can be recast in a public-spirited vein. A judge who believes his own decisions to be just will want to ensure that as many cases as possible come before him. In addition, before the nineteenth century, English judges received a large fraction of their income from fees. Although they also received a salary, they were free to augment it by fee income. Fees were a regular part of the judicial process. At every stage of a case, litigants paid a fee. Some of these fees were paid to court staff, who thereby also acquired an incentive to augment the court's caseload, while other fees were paid directly to the judges.[29] Even fees paid to other court officials might benefit the judges, especially the chief judge, because the chief judge usually had the authority to appoint court officials. When staff fee income was large, the chief judge could and did sell the right to be a court official and thus effectively appropriated a

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[27]See, eg,: *Courtney* v *Glanvil*, Croke Jac (1615) 343, 79 ER 294.

[28] There was a limited system of appellate review through "proceedings in error" that involved King's Bench, *ad hoc* courts, and The House of Lords. This system was severely limited by the fact that appeals could be based only on the record (primarily the pleadings) rather than evidence produced at trial. See Section V.E for more details.

[29]Marjorie Blatcher, *The Court of King's Bench, 1450-1550: A Study in Self-help* (1978) 34-46, 144-45, 151-53; Baker, above n 7, 41, 44; Fees in the Royal Courts, *An Exact Table of Fees of the Courts at Westminster* (London 1760); Daniel Duman, *The Judicial Bench in England 1727-1875: Reshaping of a Professional Elite* (1982) 111-16; A H Manchester, A *Modern Legal History of England and Wales 1750-*

portion of the fees paid to judicial staff.[30] In addition, a judicial officer might be a relative of the chief judge, in which case fees paid to the officer would indirectly benefit the chief judge. One famous instance of such nepotism involved Chief Judge Fyneux of the King's Bench, who appointed his son-in-law, John Rooper, chief clerk ('prothonotary') of his court.[31] During the period when Fyneux and Rooper ran the King's Bench, the court introduced many procedural and substantive improvements which increased its caseload.[32]

A 1798 Parliamentary report provides valuable insight into fees in the late eighteenth century:

Table 1. Judicial Salaries and Fees, 1797

	Salary	Fees	Total Judicial Income	Fees as a % of Total Judicial Income
Chancellor	£5000	£5870	£10870	54%
Chief Justice King's Bench	4000	2399	6399	37%
Puisne Judges King's Bench (avg.)	2400	554	2954	19%
Chief Justice Common Pleas	3500	2025	5525	37%
Puisne Judges Common Pleas (avg.)	2400	294	2694	11%
Chief Baron Exchequer	3500	323	3823	8%
Puisne Barons Exchequer (avg.)	2400	356	2756	13%
Average	2892	1121	4014	28%

Notes. All amounts rounded to the nearest pound. There were three puisne (non-chief) judges on each common law court. The figures in the table are averages of the puisnes for each court. Each puisne had the same salary, and fees varied by at most 2% for the puisne judges of King's Bench and Common Pleas, and at most 17% for puisne barons of the Exchequer.

Source: Great Britain, *Twenty-Seventh Report from the Select Committee on Finance, &c.: Courts of Justice* (1798), p. 27.

The Table suggests that fee income was substantial. It provided several hundred pounds of income for puisne judges, and several thousand pounds of income for the Chancellor, and chief justices of King's Bench and Common Pleas. These sums were significant components of total judicial income. For the judges with the fattest fee income, fees composed more than a third of their total official compensation. For most of the other

1950 (1980) 81, 129. The author thanks James Oldham for calling his attention to and providing a copy of *An Exact Table*.

[30]Duman, above n _, 116-21; Manchester, above n 7, 102-4.

[31]Baker, above n 7, 44.

judges, fees provided between ten and twenty percent of their incomes. Fee income was also large in an absolute sense. One pound in 1797 would be worth about $100 today, so average fee income would have been over $100,000 per year.

There are no comprehensive data on fee income before 1798. There are some hints, however, that fees provided a greater percentage of judicial income in prior centuries.

Table 2. Judicial Salaries and Fees, 16th and 17th Centuries

	Salary	Fees	Total Judicial Income	Fees as a % of Total Judicial Income
Puisne judges of King's Bench and Common Pleas. 1524-25 (avg.)	£120	£248	£368	67%
James Whitelock, puisne judge King's Bench. 1627	155	820	975	84%
Thomas Rockeby, puisne judge King's Bench. 1689-1698 (10yr avg.)	1000	574	1574	36%

Sources. Edward Foss, *The Judges of England* (1857), vol. 5, p. 99; Sir William Holdsworth, *A History of English Law* (1956), vol 1 pp. 254-55; Foss, *Judges*, vol. 7, pp. 298-99

These figures are probably much less reliable than those presented above, but they do suggest that fees were a substantially larger component of income in the sixteenth and seventeenth centuries.

C. *Examples of the Pro-Plaintiff Bias*

That the common law exhibits a pro-plaintiff bias is an empirical proposition. Section IV discusses some strategies for testing the proposition more rigorously and presents some encouraging results. This section provides some examples, which, it is hoped, provide some plausibility to the empirical tests.

Contract disputes were the most common type of cases in early modern England,[33] but the defendant had practically no defenses at common law. Duress was limited to situations where the defendant had been imprisoned or threatened with serious bodily injury at the

[32]Ibid 43-44. Blatcher, above n _, 145-46, 149-50.

time the contract was entered into.[34] Fraud was limited to forgery of a written instrument, tampering with a written instrument, or misreading a written instrument to an illiterate defendant.[35] The only other defense was incapacity, usually that the contracting party was underage or insane.[36] Beyond these, there were no defenses. Mistake, for example, was no defense, whether unilateral or mutual.[37] Nor was unconscionability.[38] Penalty clauses were fully enforceable.[39] If a debtor repaid a loan but forgot to have the sealed bond canceled or to get a written receipt, prior repayment was no defense, so the creditor could procure double satisfaction.[40] The paucity of contract defenses made the law very favorable to plaintiffs.

This pro-plaintiff bias was partially checked by Parliament. For example, statutes in 1696 and 1705 greatly constrained creditors' ability to enforce penalty clauses.[41] The second of these statutes also barred recovery when the debtor had paid but failed to procure a written receipt of payment.

Chancery also provided an important constraint. As a separate court, Chancery had the power to issue injunctions against ongoing proceedings in the common law courts. This power provided an important check on the pro-plaintiff bias in the common law. Through its injunction power, Chancery could, in effect, transform a defendant in a common law court into a plaintiff in Chancery. As a result, in order to attract injunction business, Chancery had an incentive to develop law favorable to defendants in common law actions.

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[33]Baker, above n 7, 67-68.

[34]D. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 71-72, 208, 252.

[35]Ibid 20, 72; Baker, above n 7, 324.

[36]Ibbetson, above n _, 71, 208.

[37]Ibid 72, 226; Baker, above n 7, 353.

[38]Ibbetson, above n _, 144, 252.

[39]Ibid 29, 150. This may surprise some modern scholars who generally assume that non-enforcement of penalty clauses was part of the common law. Nevertheless, it should be noted that Chancery and English statutory law were the source of the rule against penalty clauses. See below text at notes _, _. Chancery decisions and early statutes, however, are sometimes considered part of the common law, which may explain the confusion.

[40]Ibbetson, above n _, 21; Baker, above n 7, 324-25.

For example, if a debtor who had repaid a written loan but failed to procure a written receipt or cancellation of the loan instrument was sued in Common Pleas, that court was likely to rule against him. Nevertheless, the debtor could petition Chancery for an injunction.[42] Chancery had an incentive to grant the injunction, because those who petitioned for an injunction would, like any claimant, pay a fee to the court. In addition, once the creditor was sued in Chancery, he too would have to pay fees. A Chancery injunction would prohibit the creditor from proceeding in Common Pleas to collect the debt. Over time, Chancery developed a series of legal doctrines governing the issuance of such injunctions. These doctrines form the basis of the contract defenses we know today, including mistake, unconscionability, and the rule against penalties.[43]

Another example of the pro-plaintiff bias relates to oral contracts. In the middle ages, Common Pleas had a monopoly on debt cases and decided oral debt cases by a pro-defendant method called "compurgation," in which the debtor was released from liability if he could find eleven people who would swear that he (the debtor) was in the right. Starting in the fifteenth-century, King's Bench began to compete for cases involving oral promises by allowing such cases to go to a jury rather than compurgation using *indebitatus assumpsit* writs. Juries, however, were perceived as excessively pro-plaintiff, because they were willing to hold defendants liable on trumped-up evidence. In response, Parliament passed the Statute of Frauds (1677),[44] which made most important categories of unwritten contracts unenforceable

Other examples could easily be provided, including the medieval expansion of royal jurisdiction over land, tort, and contract, the substitution of jury trial for wager of law in a

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[41]8 & 9 Will. III c 11 s 8; 4 Anne c 16 s 1; Baker, above n 7, 325-26; Ibbetson, above n _, 150, 214, 255.
[42]Baker, above n 7, 102-3, 106.
[43]Ibbetson, above n _, 72-73, 150, 208-10, 213-14, 226-27.

wide array of actions, early modern pleading, the writ of ejectment, the creation of causes of action for restitution and unjust enrichment, and the Bill of Middlesex.

III THEORY

This section attempts to analyze more rigorously the implications of jurisdictional competition using game theory and positive political theory. It first analyzes competition between courts under the assumption that competition was unconstrained by Parliament or other institutions. It then models the effects of Parliamentary constraint.

A. *Jurisdictional Competition*

This subsection section attempts to justify a relatively simple proposition: when plaintiffs choose the forum and judges receive fees, jurisdictional competition gives judges incentives to make pro-plaintiff law. This proposition leads to the following testable prediction:

> **Prediction 1.** When judicial fees are taken away, the common law will become less pro-plaintiff.

Although, to some, this idea seems so obvious that it requires no extended discussion, the issue is actually complex, because a pro-plaintiff rule might lead to less litigation than a more pro-defendant rule. The pro-plaintiff rule might lead to less litigation for two reasons: it might give potential defendants greater incentives to avoid liability-creating activities, thus reducing the number of disputes, or the pro-plaintiff rule might be so clear that it induces more cases to settle out of court.

This subsection proceeds in two parts. First, it presents two numerical examples to illustrate the pro-plaintiff bias. Then it enriches the discussion by considering the choice

[44] *Statute of Frauds 1677* (UK) 29 Car II, c 3; Simpson, above n _, 298-99; Baker, above n 7, 349-50; Ibbetson, above n _, 203; Philip Hamburger, 'The Conveyancing Purposes of the Statute of Frauds' (1983) 27

between rules and standards. The Appendix presents a formal model which generalizes the examples and justifies the prediction, first assuming that judges care only about fee income, and then considering the implications of judicial preferences about the content of legal rules.

i. Two examples illustrating the pro-plaintiff bias

Consider first a very simple situation. Two courts, King's Bench (KB) and Common Pleas (CP) care only about their caseloads (and attendant fee income)[45] and have a choice between two rules, one pro-plaintiff (pro-π) and the other pro-defendant (pro-Δ). The rules need not be pro-plaintiff or pro-defendant in any absolute sense, but only relative to each other. The pro-plaintiff or pro-defendant character of each rule is judged at the time the plaintiff files suit. The pro-plaintiff rule is the one which gives the plaintiff a higher expected recovery. Such a rule may not, of course, favor plaintiffs *ex ante*, at the time the parties are contracting or at the time they are choosing precautions that might avoid the tort, because the pro-plaintiff rule may adversely affect contractual terms or other pre-litigation behavior. Because of the way the pro-plaintiff rule is defined, if one court has chosen the pro-plaintiff rule and the other court has chosen the pro-defendant rule, the plaintiff will always choose the court which has chosen the pro-plaintiff rule. If both courts have chosen the same rule (whether it is the pro-plaintiff rule or the pro-defendant rule), plaintiffs are assumed to be indifferent and choose randomly between the two courts. Because both parties can anticipate that the plaintiff will, if possible, file suit in a court which has chosen the pro-plaintiff rule, they can anticipate that the pro-plaintiff rule will apply to any dispute which arises, as long as at least one court has chosen that rule. On the other hand, if both courts have chosen the pro-defendant rule, parties will anticipate that that rule will apply to

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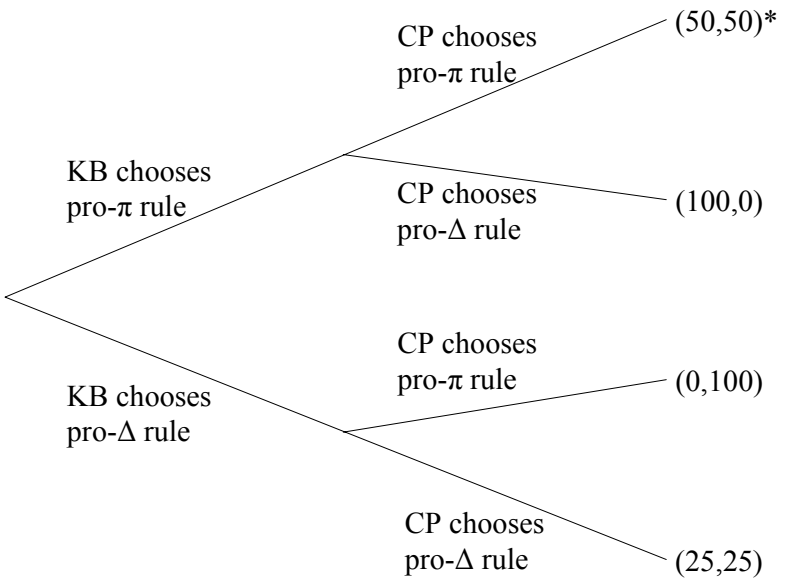
American Journal of Legal History 354, 372.

any dispute. For the purposes of this first example, it is assumed that the pro-plaintiff rule leads to more litigation. If at least one court has chosen the pro-plaintiff rule, the total caseload is 100 cases. If both courts have chosen the pro-defendant rule, the total caseload is 50 cases. For simplicity, it will be assumed that King's Bench (KB) has the first opportunity to choose the rule. That is, it receives the first case which presents an opportunity to decide the applicable law. Nothing changes if the order were reversed and Common Pleas (CP) chose first. The resulting strategic situation can be depicted as follows:

Figure 1. Jurisdictional Competition where Pro-plaintiff Rule Increases Caseload



First note the payoffs. If at least one court has chosen the pro-plaintiff (pro-π) rule, the total caseload is 100. If both courts have chosen that rule, then plaintiffs randomize between the two courts and each court receives 50 cases. On the other hand, if one court has chosen the pro-plaintiff (pro-π) rule and the other has chosen the pro-defendant (pro-Δ)

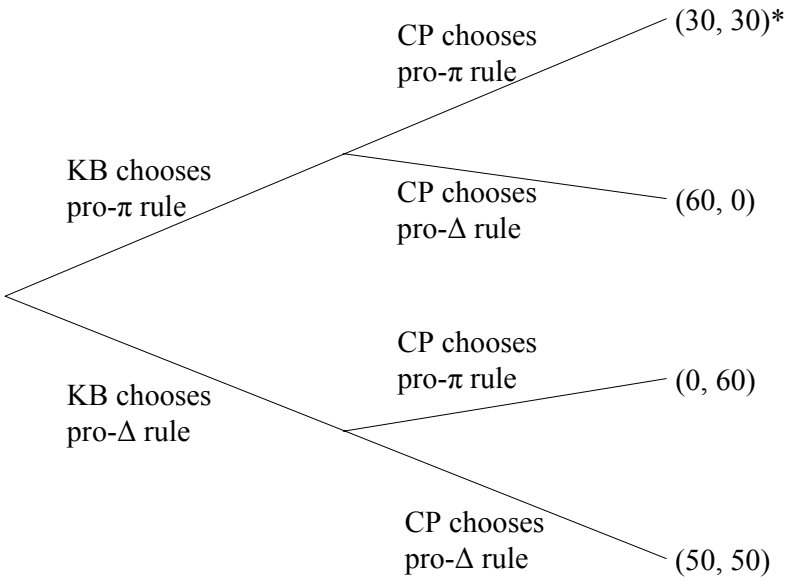
[45] This assumption is clearly false and is relaxed in the formal model in the Appendix. Nonetheless, this assumption clarifies the mechanism leading to the pro-plaintiff bias which operates in a similar way even when judicial preferences and ideology are taken into account.

rule, the court which has chosen the pro-plaintiff rule receives all 100 cases. If both courts have chosen to pro-defendant (pro-Δ) rule, the total caseload is only 50 cases, and since plaintiffs randomize between the two courts, each court receives only 25 cases.

It is apparent that in this situation both courts will choose the pro-plaintiff rule. That is the sole subgame perfect Nash equilibrium, and, in fact, choosing the pro-plaintiff rule is a strictly dominant strategy. If King's Bench (KB) were to choose the pro-defendant (pro-Δ) rule, it could anticipate that Common Pleas (CP) would choose the pro-plaintiff (pro-π) rule, because doing so would increase Common Pleas's caseload from 25 to 100. That would leave King's Bench with zero cases, because all plaintiffs would choose to file suit in Common Pleas, because Common Pleas had chosen the more pro-plaintiff rule. On the other hand, if King's Bench were to choose the pro-plaintiff rule, it could anticipate that Common Pleas would also choose that rule, because doing so would increase Common Pleas's caseload from 0 to 50. If both courts chose the pro-plaintiff rule, they would each get 50 cases, but if King's Bench chose the pro-defendant rule it would receive zero cases. Because King's Bench would prefer to have 50 rather than zero cases, it will choose the pro-plaintiff rule.

Now consider the possibility that the pro-plaintiff rule decreases the total amount of litigation by 40 percent. Such a situation is depicted in Figure 2:

Figure 2. Jurisdictional Competition where Pro-plaintiff Rule Decreases Caseload by 40%



As before, note the payoffs. If both courts choose the pro-defendant rule, then the total caseload is 100, which is split evenly between the two courts. On the other hand, if at least one court chooses the pro-plaintiff rule, the total caseload goes down by 40% to 60 cases. Those 60 cases all go to one court (if the two courts have chosen different rules) or are divided equally between the two courts (if both have chosen the pro-plaintiff rule). This situation might represent the choice between a simple pro-plaintiff rule (which generated relatively little litigation) and a complex or ambiguous pro-defendant rule or standard (which generated more litigation).

Note that in this situation the judges would maximize their joint utility by both choosing the pro-defendant rule, because doing so would maximize the total caseload. Nevertheless, it is in their individual self-interest for each to choose the pro-plaintiff rule, because of the strategic nature of their interaction. If King's Bench chose the pro-defendant rule, it would be in the interest of Common Pleas to choose the pro-plaintiff rule, because it

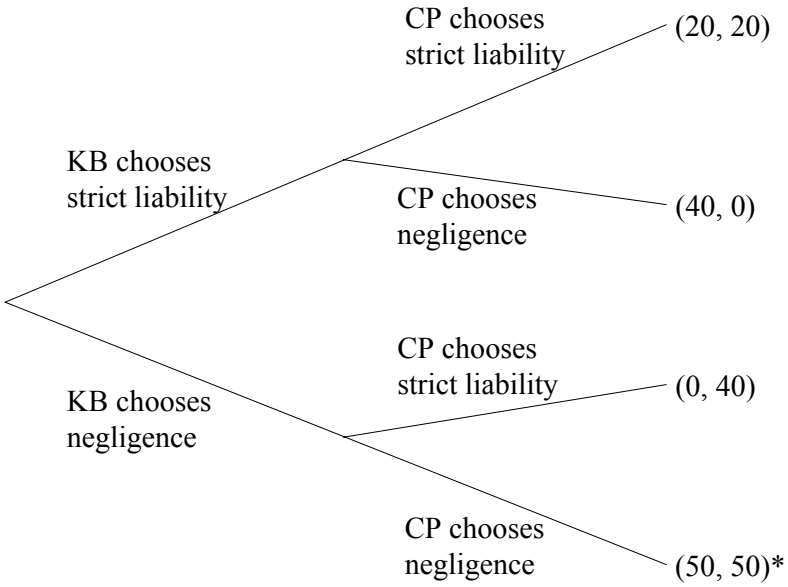
is better to receive all of the smaller caseload (60 cases) than half of the bigger caseload (50 cases). Similarly, if King's Bench chose the pro-plaintiff rule, Common Pleas will choose that rule is well, because it is better to get half the caseload (30 cases) than nothing (0 cases). Given that King's Bench can anticipate that Common Pleas will choose the pro-plaintiff rule, it is in the interest of King's Bench to choose that rule as well, because it is better to get half of the smaller caseload (30 cases) than nothing (zero cases).

ii. Rules versus standards

One might think that courts which were motivated by fee income, and thus by caseload, would prefer standards to rules because it is usually thought that standards produce more litigation than rules. Because rules are clearer than standards, it is easier for people to conform their actions to the rule and thus not violate the rule in the first place. In addition, because rules are clearer, even if a dispute arises, the parties are more likely to settle out of court. Nevertheless, the argument that judges motivated by fee income would prefer standards to rules is misguided, because it ignores the strategic interaction between the courts. While it is true that a monopolistic court could maximize its caseload by choosing standards rather than rules, competition between courts gives each an incentive to choose clear rules.

The choice between rules and standards is partly addressed by the situation discussed above in Figure 2, which analyzed the situation in which the pro-plaintiff rule reduces litigation by 40 percent. Nevertheless, the reasoning there applies only if the pro-plaintiff rule reduces litigation by less than 50 percent. If the rule reduces litigation by more than 50 percent, then the argument that competition induces standards has some plausibility. Figure 3 illustrates such a situation, using strict liability as an example of a pro-plaintiff rule and negligence as an example of a pro-defendant (or less pro-plaintiff) standard.

Figure 3. Jurisdictional Competition where Pro-plaintiff Rule Decreases Caseload by 60%

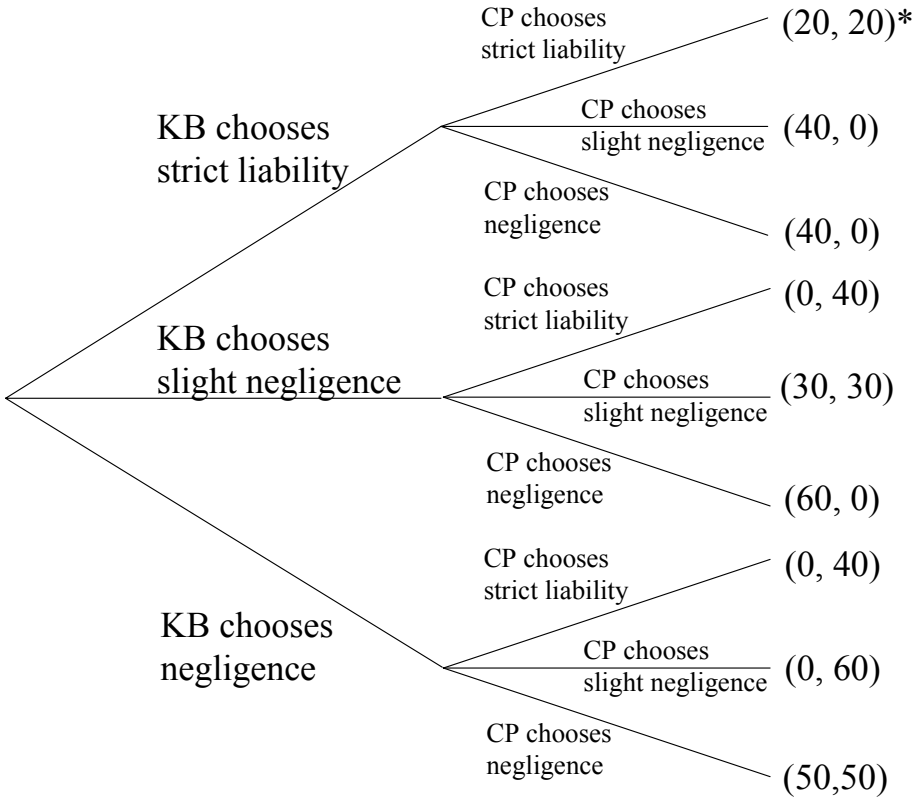


In this situation, the courts will choose negligence. That is, in the only subgame perfect Nash equilibrium, both courts choose the pro-defendant standard rather than the pro-plaintiff rule. If King's Bench chooses negligence, Common Pleas will also choose negligence, because it is better to get half of the much larger caseload (50 cases) than all of the much smaller caseload (40 cases). Because, in contrast to the situation illustrated in Figure 2, the rule reduces litigation by more than 50 percent, it is no longer in Common Pleas's interest to choose to pro-plaintiff rule (strict liability). If King's Bench chooses strict liability, it is in Common Pleas's best interest to also choose strict liability, because it is better to get half of a small caseload than no cases of all. In choosing between strict liability and negligence, King's Bench will choose negligence, because, if it chooses negligence it can anticipate that Common Pleas will also choose negligence, in which case King's Bench will receive 50 cases, which is better than the 20 cases it can anticipate if it

chooses strict liability, because if King's bench chooses strict liability, it can anticipate that Common Pleas will do so as well.

The foregoing analysis would seem to suggest that there is merit to the argument that competitive courts might choose standards over rules, at least when the rule produces less than half as much litigation as the standard. Nevertheless, this result is an artificial consequence of forcing the courts to choose between a rule and a single standard. One of the properties of standards is that they come in many gradations. A court chooses not just between strict liability and negligence, but also between negligence, gross negligence, and slight negligence. To take a more modern example, in constitutional cases, courts choose between strict scrutiny, intermediate scrutiny, rational basis scrutiny, and variations thereof. Once one takes into account several possible standards, the incentive to choose the pro-plaintiff rule reemerges. This phenomenon is illustrated in Figure 4 below, which takes as its starting point the choice between negligence and strict liability illustrated in Figure 3 above, but then introduces a third possibility, slight negligence, which is intermediate between (ordinary) negligence and strict liability, both in plaintiff preference and in the amount of litigation it generates:

Figure 4. Jurisdictional Competition with Two Possible Standards



In this figure, slight negligence, like the pro-defendant rule in Figure 2, results in 40 percent fewer cases than negligence, and strict liability results in 60 percent fewer cases, as in Figure 3. Strict liability is the most pro-plaintiff, slight negligence is intermediate, and negligence is the most pro-defendant. In the sole subgame perfect Nash equilibrium, both courts choose strict liability, the pro-plaintiff rule. If King's Bench chooses negligence, it will receive zero cases, because it can expect that Common Pleas will choose slight negligence. If King's Bench chooses slight negligence, it will receive zero cases, because it can anticipate that Common Pleas will choose strict liability. On the other hand, if King's Bench chooses strict liability, it will receive 20 cases, because it can anticipate that Common Pleas will also choose strict liability. Therefore, the only plausible outcome of

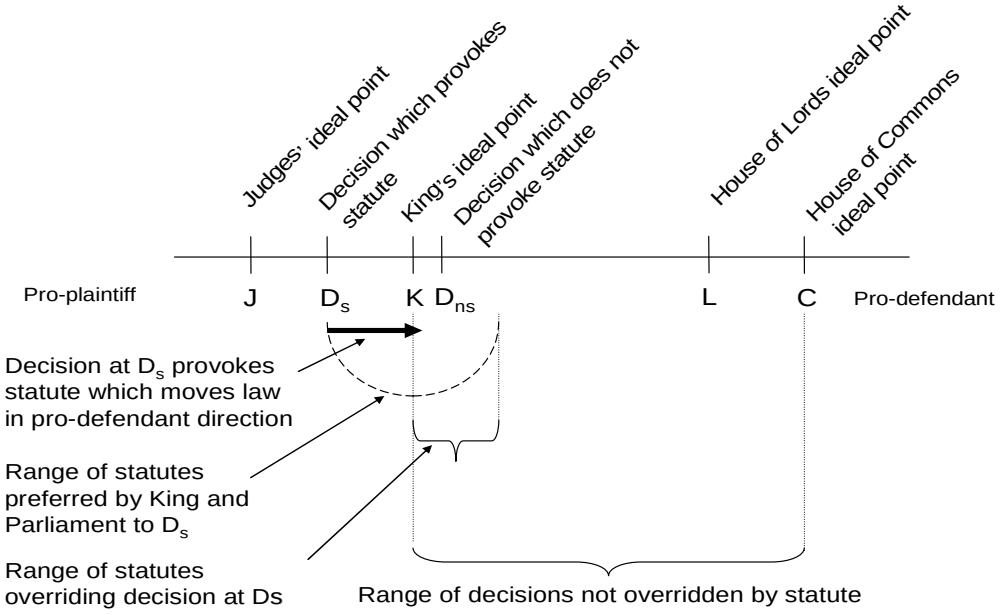
this game is that both courts choose strict liability, the pro-plaintiff rule. The introduction of an intermediate standard, slight negligence, changes the choice (illustrated in Figure 3) between strict liability and negligence and disrupts the equilibrium in which both courts choose the negligence standard. The most important change is in the bottom part of Figure 4. If King's Bench chooses negligence, it can no longer count on Common Pleas doing the same. Although Common pleas would still prefer negligence to strict liability (assuming King's Bench has chosen negligence), Common Pleas prefers slight negligence to (ordinary) negligence, because slight negligence produces more cases. This disrupts the negligence equilibrium, illustrated in Figure 3, which existed when Common Pleas was assumed not have the option to choose slight negligence.

B. *Legislative – Judicial Interaction*

The previous analysis assumed that judicial competition was unconstrained. This subsection considers the fact that judicial decisions could be overturned by statute. Consider the spatial model below.[46]

[46] See, e.g., William Eskridge, 'Overriding Supreme Court Statutory Interpretation Decisions,' 101 Yale L. J. 331 (1991); Emerson Tiller & Pablo Spiller, 'Strategic Instruments: Legal Structure and Political Games in Administrative Law,' 1 J. Law, Economics & Organization 349 (1999).

Figure 5. A Spatial Model of Legislative – Judicial Interaction



The line represents possible decisions on a particular legal issue. Decisions more favorable to the plaintiff are farther left on the line; decisions more favorable to the defendant farther right. Points *K*, *L*, and *C* represent the ideal points of the King (or Queen, when sovereign), House of Lords and House of Commons respectively. The ideal point is the decision each would favor if it could decide the issue unilaterally. As is conventional, the preferences are assumed to be "single peaked" and symmetric, which means that each prefers decisions closer to its ideal points to those farther away. The relative position of *K*, *L* and *C* is irrelevant, as long as there is some difference between at least two of them. That is, the predictions below are not dependent on the King being more pro-plaintiff than the House of Lords or Commons, or the House of Commons being more pro-defendant. And, of course, the positions, both relative and absolute, might have been different for different issues. The ideal points are likely to have been determined by the merits and politics of each issue, rather than by a desire to favor plaintiffs or defendants.

If the judges' ideal point, *J*, were always in the range between *K* and *C*, then there would never be a statute overturning a common law decision, because a statute requires the assent of both houses of Parliament and the King, and any statute (except one which simply confirmed the court's decision) would move the law farther from the ideal point of the King or at least one house of Parliament. Since we know that Parliament sometimes passed statutes overturning common law decisions, it is reasonable to place *J*, the judges' ideal point, outside the range between *K* and *C*. In theory, the judges' ideal point could be either to the left of *K* (pro-plaintiff) or to the right of *C* (pro-defendant). Nevertheless, because judges had pro-plaintiff incentives from fees which neither Parliament nor the King had, it is reasonable to assume that *J* was to the left of *K,* that is, that the courts were pro-plaintiff.

Judges, however, realized that if they made decisions at *J*, they would be overturned by Parliament. As a result, courts aimed to make decisions which were as close to their ideal point as would be tolerated. That is, they tried to make decisions which were as pro-plaintiff as possible, but still within the range that Parliament would not overturn. If judges knew the precise location of *K*, *L* and *C*, they would choose a decision at *K*. Unfortunately, perfect prediction was impossible. Sometimes judges would err or wanted to be sure that their decision would not be overridden, and would make a decision that was more pro-defendant than necessary, such as D_{ns}. Such decisions would not provoke statutory override. On the other hand, sometimes judges would err and make a decision that was more pro-plaintiff than Parliament and the King would tolerate, such as D_s. If so, both Houses of Parliament and the King would prefer a statute which moved the law at least modestly in a pro-defendant direction. So a decision at D_s would provoke a statute which moved the law in a pro-defendant direction. The statute can further be predicted to fall within the range indicated in Figure 5, but the precise location of the statute is not important to the analysis.

Of course, it is also possible that judges would make a decision to the right of *C*, and Parliament and the King would respond with a pro-plaintiff decision. This, however, would be rare, as such a decision would require either an extremely large miscalculation by the judges about Parliament's and the King's ideal points or that the judges' ideal point was more pro-defendant than King and Parliament, in spite of the incentives provided by fees. This analysis suggests the following prediction:

> **Prediction 2**. When courts receive fees and thus have an incentive to be more pro-plaintiff than legislators, most statutes will move the law in a pro-defendant direction.

If judicial incentives change and the decision of unconstrained courts moves in the pro-defendant direction (as suggested by Prediction 1), then point *J*, the judges' ideal point, will move to the right. All other things being equal, this should result in fewer pro-defendant statutes. If point *J* moves in the range *K* to *C*, unconstrained decisions will fall within the range of decisions not overturned by statute, so statutes will be uncommon. If point *J* moves to the right of *C*, then unconstrained decisions will be more pro-defendant than Parliament and the King would tolerate, and statutes should be predominantly pro-plaintiff. This analysis suggests a third prediction:

> **Prediction 3**. When judicial incentives to be more pro-plaintiff are lessened or removed, the proportion of statutes moving the law in a pro-plaintiff direction will increase.

It should be noted that while Prediction 2 assumes that, when judges received fee income, they preferred significantly more pro-plaintiff rules than legislators and the king (e.g. *J* is to the left of *K*), Prediction 3 does not rely on that assumption. The third prediction would be true even if fee-taking judges were more pro-defendant than legislators, as long as the removal of fees moved the judges even farther in the pro-defendant direction.

One advantage of Predictions 2 and 3 over Prediction 1 is that they are not affected by selection bias in the cases that are litigated. That is, statutes respond to the legal rules themselves, not to litigation decisions about whether to sue or settle.

C. *Limitations of the Theory*

Although the models presented in this section help elucidate common law decisionmaking, they obviously simplify matters and do not represent historical reality in all its complexity. It is thus important to note a few of the many limitations of these models.

1) The jurisdictional competition model assumes only two courts. For most of the relevant period, there were three competing courts—King's Bench, Common Pleas, and Exchequer. The addition of a third court does not substantially change things. In fact, it strengthens the main results, as the pro-plaintiff equilibrium obtains in a larger set of circumstances. For example, if the pro-plaintiff rule reduces caseloads by a half to two-thirds, the pro-plaintiff rule is not an equilibrium with two courts, but it is with three.

2) The jurisdictional competition model assumes one-shot decisionmaking. This is obviously incorrect, as the courts had long-term repeated interactions. With repeated play, judges might be able to avoid the problems which competition produced. Nevertheless, the fact that judges often chose bright-line rules, which would reduce caseloads, and the fact that judges enforced arbitration agreements,[47] both of which were contrary to the judges' collective interest, suggests that the assumption of one-shot decisionmaking captures something important about the interaction between the courts.[48]

3) The jurisdictional competition model does not take into account litigants' incentives to settle and to frame issues strategically. This is potentially the biggest problem

[47] See Section V.A below.
[48] See above __.

with the model. Some strategies for mitigating this problem are discussed in the next section.

4) The jurisdictional competition model assumes judges are homogeneous. Of course, they were not. Introducing heterogeneity would complicate the model, without substantially altering the conclusions.

5) Prediction 2 (but not 3) assumes that unconstrained courts will make decisions that are more pro-plaintiff than Parliament. It is, of course, possible that judges had such strong pro-defendant preferences that, even with the pro-plaintiff incentives competition provided, their unconstrained decisions would still be more pro-defendant than Parliament's. On the other hand, since judges were chosen by the King and were generally recruited from the same social stratum as members of the House of Commons, it seems more likely that their intrinsic preferences were roughly in accord with Parliament's and the Kings, and that competition pushed them in a more pro-plaintiff direction. Of course, if the King understood the pro-plaintiff bias that competition induced, he might have deliberately chosen judges with pro-defendant intrinsic preferences, so that, taking into account jurisdictional competition, the judges would make decisions closer to the King's ideal point. On the other hand, there is no evidence that the King, or anyone else, perceived the pro-plaintiff bias fees induced. In addition, the decision to select a judge would ordinarily have turned on many other aspects of their background and preferences (experience in the King's service, intelligence, political preferences, etc.) so that, even if kings understood the pro-plaintiff bias and wanted to counteract it, it would have been difficult for them to select judges with pro-defendant intrinsic preferences to counteract the pro-plaintiff incentives of jurisdictional competition.

IV EMPIRICAL TESTS

The institutional structure described in Section II, which created jurisdictional competition, was radically transformed in the nineteenth century. Perhaps most importantly, statutes in 1799 and 1825 restricted royal judges to fixed salaries.[49] Instead of lining the pockets of judges, fees were now allocated to the Treasury. The 1799 statute took fees away from the puisne (i.e. non-chief) judges of King's Bench and Common Pleas, and from all of the Exchequer judges.[50] The 1825 statute took fees away from the chief judges of King's Bench and Common Pleas. These statutes were part of a broader shift in English governance by which nearly all officials were moved from fee-based compensation to salaries. This set of reforms was not motivated by analysis of the effect of fees on common law adjudication, but rather by general dissatisfaction with the fee system and sinecures.

It seems hardly a coincidence that the pro-defendant decisions for which the common law is notorious came soon after these statutes. For example, *Priestley* v. *Fowler*, and *Hutchison* v. *York, Newcastle and Berwick Railway Co*., which established the fellow-servant rule in England, were decided in 1837 and 1850.[51] These cases made it nearly impossible for an employee to prevail in tort against his employer when the negligence

[49] 39 Geo. III c. 90 (1799) (taking fees away from puisne judges of King's Bench and Common Pleas and all judges of Exchequer); 6 Geo. IV c. 82 (1825) (taking fees away from Chief Justice of King's Bench); 6 Geo. IV c. 83 (1825) (taking fees away from Chief Justice of Common Pleas.

[50] The 1799 statute took the fees away in a rather roundabout way. It gave the affected judges a salary increase, but also required them to report the amount received in fees to the Treasury every six months. The amount each judge received in fees was subtracted from his salary increase. The judges thus technically kept their fees. Nevertheless, since their fee income, which was smaller than their salary increases, was subtracted from their salaries, the net effect was the same as taking the fees away—judges no longer had any financial incentive to hear more cases.

[51] *Priestley v Fowler* (1837) 3 M & W 1; *Hutchison* v. *York, Newcastle and Berwick Railway Co*., 5 Ex 343 (1850). It is not argued here that prior to *Priestley,* employees had been able to recover and that *Priestley* changed the law. Rather, in *Priestley* the court faced a choice about what to do and decided upon a rule which led to fewer suits than a rule which held that employers were liable. In a recent analysis of the case, Kostal argues that "relevant common law was scant, ambiguous, and unevolved" and that distinguished lawyers and judges, including Baron Parke, could and did see the opposite result as justified by precedent. R W Kostal, *Law and Railway Capitalism, 1825-1875* (1994) 261, 267-68. Ibbetson also emphasizes that it was "judicial choices," not precedent, that led to the "invention of the 'fellow servant' rule." D J Ibbetson, "The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries" in Eljo J H Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (2001) 254, 256. In contrast, Epstein argues that the absence of relevant precedents "underscore[s] the uncompromising no-liability rule of the common law." Richard Epstein, "The Historical Origins and Economic Structure of Workers' Compensation Law"

which caused injury was caused by another employee (a "fellow servant") rather than directly by the employer. Similarly, *Winterbottom* v. *Wright* was decided in 1842. This landmark case established the privity doctrine, which barred consumers from suing the manufacturer of a defective product unless the manufacturer had sold directly to the consumer and the two were, in that way, in "privity of contract."[52] This doctrine delayed the development of product liability law for almost a century.

Similar pro-defendant developments occurred in contract law. Early modern cases clearly established the right of third-party beneficiaries to enforce contracts for their benefit. Nevertheless, in a series of nineteenth-century cases, King's Bench rejected the prior cases and held that the beneficiary could not sue, unless he or she had also paid the consideration.[53] Similarly, the famous case of *Hadley* v. *Baxendale*, decided in 1854, limited contract damages to those that were foreseeable, in spite of conflicting precedents.[54]

The statutory changes in 1799 and 1825 also permit a more quantitative approach to the hypothesis of a pro-plaintiff bias in the common law. If the desire to increase fee income was an important part of judicial motivation to increase caseloads, removal of those incentives should have led to measurable changes in the law. This section attempts to test that hypothesis in three ways: (1) by comparing all reported cases one year before and one year after the 1799 and 1825 statutes, that is comparing 1798 cases to 1800 cases, and 1824 cases to 1826 cases, (2) by comparing leading cases, as identified by modern historians, in the periods 1600-1798, 1800-1824, and 1826-1872, and (3) by comparing statutes changing the common law in the periods 1600-1798 and 1800-1872.

(1982) 16 *Georgia Law Review* 775, 778. Karsten's view is similar. Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (1997) 114-20.

[52] *Winterbottom v Wright* (1842) 10 M & W 109; Baker, above n 7, 417; Ibbetson, above n _, 173-74, 295. Ibbetson also notes the "judicial choice" involved in this case. Ibbetson, above n _, 254.

[53] See Baker, supra n. 7, pp. 354-55.

[54] See Ibbetson, p. _.

A. *Reported Cases 1798, 1800, 1824 and, 1826*

The simplest way to measure the impact, if any, of the 1799 and 1825 statutes taking fees away from the judges, is to compare all reported cases in the year before the statutory change to cases decided the year after. If fees induced the judges to decide cases in a more pro-plaintiff way, then the removal of fees might be reflected in more pro-defendant decisionmaking after the statutes.[55]

On the other hand, if reported cases were a complete or random sample of all litigated cases and if litigants adjusted their settlement behavior to the change in judicial decisionmaking, one might expect that the percentage pro-plaintiff would have been unaffected by the statutes. This, of course, is an application of the famous Priest-Klein selection hypothesis.[56] Because of the possibility of selection bias, this test of the pro-plaintiff hypothesis is not very strong. On the other hand, there are three reasons to think an effect might still be detectable. First, Priest and Klein predict no change only in the limit, as prediction errors and thus the amount of litigation go to zero. When there is prediction error and thus litigation, their theory and simulations predict that the percentage pro-plaintiff in litigated cases will vary with the decision standard, although the change in the percent pro-plaintiff in litigated cases will not be as large as the change in the settled cases, and thus might be too small to detect.[57] Second, if parties failed to predict the change in judicial decisionmaking caused by the removal of fees, an effect might still appear. Third, since cases which changed the law were more likely to be reported, analyzing all reported cases might indicate the direction in which the law was changing rather than merely the percent pro-plaintiff in ordinary litigation arising from factual ambiguities.

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[55] See Prediction I above.

[56] See George Priest & Benjamin Klein, "The Selection of Cases for Trial," 13 Journal of Legal Studies 1 (1984); Keith Hylton, 'Information, Litigation and Common Law Evolution,' (working paper 2005).

[57] Id. at 20-23.

Table 3 reports the percentage of reported cases which were decided for the plaintiff in the relevant years. Cases are categorized as pro-plaintiff if the plaintiff received all or most of what she had claimed, and pro-defendant if the defendant prevailed

Table 3. Reported Cases, 1798, 1800, 1824, 1826

	King's Bench		Common Pleas		All	
Year	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N
1798	56%	100	54%	69	55%	169
1800	40%	76	60%	73	50%	149
1824	43%	28	53%	19	47%	47
1826	35%	37	67%	18	45%	55
Difference between 1798 and 1800	-16%**		6%		-5%	
Difference between 1824 and 1826	-8%		14%		-2%	

Source: *English Reports on CD-ROM*..

Cases are categorized as "pro-plaintiff" or "pro-defendant" solely based on who won the particular case, not based on a more complex analysis of the case's precedential value. Cases where the plaintiff received some, but not all, of his or her claim, were categorized as 50% for the plaintiff. Cases "in error" were excluded, as the incentives for judges in these quasi-appellate cases were different. The 1798 and 1800 rows contain all reported cases, while the 1824 and 1826 rows represent the cases from only a single term..

** means that the one-tailed p-value was less than 0.025, and thus that the two-tailed p-value was less than 0.05.

The data do not lend themselves to any straightforward analysis. The only statistically significant change (two-tailed p-value 0.04) is the change in King's Bench from 1798 to 1800, where there was a sixteen point drop in the percentage of pro-plaintiff decisions. This drop accords with Prediction 1, that removal of fees would reduce the percentage of pro-plaintiff decisions. On the other hand, results for the other three changes – King's Bench 1824 to 1826, Common Pleas 1798 to 1800, and Common Pleas 1824 to 1826 – are not statistically significant and are of different directions. Pooling King's Bench and Common

Pleas cases together yields changes of the predicted sign, although lacking in statistical significance. Most probably, the inconclusive results reflect the selection-bias problem discussed above.

B. *Leading Cases Identified by Modern Historians*

Another way of measuring legal change is to look at important cases. The advantage of such cases is that they might avoid the selection bias problem. Important cases are those which decide new and important issues, and thus set important precedents for the future. Although parties will still settle and litigate such cases strategically, eventually cases posing significant new issues will be litigated, and the outcomes of such cases will reveal underlying biases and incentives in judicial decisionmaking, rather than simply strategic selection of cases for settlement or litigation.

Of course, identifying important cases is difficult and potentially subject to bias. In this section, I use citation in modern legal histories to select cases which, with the benefit of hindsight, had the greatest impact on the development of the law. As sources for this section, I used John Baker's *Introduction to English Legal History* (2004), David Ibbetson's *A Historical Introduction to the Law of Obligations* (1999), and Richard Epstein's *Cases and Materials on Torts* (2004). The first two choices need little explanation. John Baker is probably the most distinguished living English legal historian, and his *Introduction* is a comprehensive and scholarly synthesis. David Ibbetson's book is the most recent history of tort and contract and has been widely acclaimed. Use of Richard Epstein's torts casebook requires a little more justification. Richard Epstein is best known as a modern lawyer and

law professor. Nevertheless, he is also an accomplished historian,[58] and his casebook pays close attention pre-1900 English case law.

The Epstein casebook deals only with torts, and the Ibbetson text covers both tort and contract, as well as related topics such as unjust enrichment. Baker's *Introduction* covers the entirety English law, but for this subsection, I have examined only the tort and contract chapters.[59] I chose to focus on tort and contract for two reasons. First, these two subjects composed more than eighty percent of cases brought in the common law courts.[60] Second, the third major common law area, property, presents special problems, because the impact of doctrine on future plaintiffs is especially unclear. For example, it is impossible to say whether the rule in *Shelley's Case*[61]—that a grant to A of a life estate with the remainder in fee simple to A's heirs gives A a fee simple interest --will benefit plaintiffs or defendants. Its primary effect is probably on the drafting of deeds, and only secondarily on who will take possession under the deed and who will challenge it in court. In contrast, in tort cases, the effect of doctrine on plaintiffs and defendants is usually clear. Contract cases present some of the same difficulties as property cases, but it is usually easy to tell which party will benefit from a case -- for example *Slade's Case* expanding the enforceability of oral contracts will usually benefit plaintiffs, while *Hadley* v. *Baxendale*, restricting damages, will usually benefit defendants.[62] Of course, as noted above,[63] "benefit" to plaintiff or

[58] See, e.g., Richard Epstein, "For a Bramwell Revival," 38 Am. J. Legal History 246 (1994); Richard Epstein, "The Historical Origins and Economic Structure of Workers' Compensation," 16 Ga. L. Rev. 775 (1982).

[59] Chapters 18-26. Like Ibbetson's book, these chapters also include quasi-contract and unjust enrichment, which are therefore included in the statistics.

[60] Christopher Brooks, *Lawyers, Litigation and English Society Since 1450* (1998), 52.

[61] *Wolfe* v. *Shelley*, 1 Co. Rep. 88b (1581).

[62] Of course, *ex ante*, it is not clear that one side will benefit, as prices and other terms may adjust to reflect anticipated litigation outcomes. Nevertheless, when judged at the time litigation is initiated, it is clear which side benefits. For the purposes of this article, the time of suit is the relevant time frame. Benefit is measured in comparison to the previous state of the law (e.g. limited enforcement of oral contracts before *Slade's Case*) or the alternative rule argued to the court e.g. (full damages in *Hadley*).

[63] See __

defendant, for the purpose of this article, is measured at the time plaintiff files suit, not *ex ante*.

The cases analyzed come from the period 1600 to 1872. 1600 was chosen as the starting point, because it was clear by that time that the courts had jurisdictions that were almost completely overlapping, and thus the hypothesis of competition is most plausible from this point onward. 1872 is a logical end point, because the 1873 and 1875 Judicature Acts consolidated the courts and thus eliminated any possibility of competition between them.[64]

[64] *Judicature Act 1873* (UK) 36 & 37 Vict, c 66; *Judicature Act 1875* (UK) 38 & 39 Vict, c 77; Baker, above n 7, 50-51.

Table 4. Leading Cases Identified by Modern Historians, 1600-1872

	Baker		Ibbetson		Epstein		All	
	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N
1600-1798	76%	185	65%	136	61%	18	69%	296
1800-1824	70%	20	49%	34	33%	6	55%	56
1826-1872	57%	37	62%	103	34%	29	57%	143
1800-1872	62%	59	59%	139	36%	36	57%	202
Difference between 1600-1798 and 1800-1824	-6%		-16%*		-28%		-14%**	
Difference between 1800-1824 and 1826-1872	-13%		13%		1%		2%	
Difference between 1600-1798 and 1800-1872	-14%**		-6%		-25%*		-12%**	

** means that the one-tailed p-value was less than 0.025, and thus that the two-tailed p-value was less than 0.05.

* means that the one-tailed p-value between 0.025 and 0.05, and thus that the two-tailed p-value was between 0.05 and 0.10.

Cases cited by Baker and Epstein were coded primarily based on Baker's and Epstein's descriptions of their holdings. Where these descriptions were ambiguous, I read the cases themselves and coded them in accordance with their outcomes. The plaintiff or defendant orientation of a case in Ibbetson's descriptions was so frequently ambiguous that I always coded cases by reading them and coding their outcomes.

Cases decided by courts "in error" or by the House of Lords were excluded, as the incentives of appellate (or quasi-appellate) courts were different.

The last row includes cases from 1825, which are not included elsewhere in the table. As a result, the last row does not merely combine information in the prior two rows.

Where two sources (e.g. Baker and Ibbetson) both identified the same case, it was counted only once in the "All" column.

In all three texts, there was a drop in the percentage of cases which were pro-plaintiff after 1799. In Baker's *Introduction*, the drop between 1600-1798 and 1800-1824 was six percentage points; in Ibbetson, the drop was sixteen points, and in Epstein the drop was fourteen points. Although, taken alone, only the drop in Ibbetson is statistically significant, if one pools the cases from all three sources, the drop is fourteen points and statistically significant. Comparing the period 1600-1798 to the longer period, 1800-1872 confirms the idea that the drop seen immediately after 1799 was durable. In all three sources, the

percentage of pro-plaintiff decisions fell, and the drops are statistically significant for Baker, Epstein, and the three sources combined, although not for Ibbetson alone.

On the other hand, there is no evidence that the 1825 statute which took fees away from the Chief Judges of King's Bench and Common Pleas had any effect. The cases in Baker show a large, thirteen percentage point drop in the percent pro-plaintiff, but Ibbetson and Epstein show increases. Overall, there is a slight (two percentage point) increase in the percent pro-plaintiff. None of these changes is statistically significant. Most probably, the 1825 statute had little impact, because all cases in the examined reports were decided *en banc* by all four judges in the court. Since the chief was only one of the four, the change in his incentives had little effect. In addition, the 1825 statute had no effect on the Court of Exchequer, because fees from all its judges were taken away in 1799.

Taken together, the analysis of important cases as identified by modern historians, is consistent with Prediction 1. When fees were taken away from most judges, the proportion of doctrinally important cases in which the court ruled for the plaintiff fell seventeen percent, from sixty-nine percent to fifty-seven percent.

C. S*tatutes, 1600-1872*

As discussed above, Prediction 2 suggests that pre-1799 statutes should tend to change the law in pro-defendant ways, because the courts were biased in favor of the plaintiff. After 1799, Prediction 3 suggests that statutes should be less pro-defendant, and perhaps even pro-plaintiff. One problem is identifying the relevant universe of statutes. Most statutes deal with revenue or military concerns, and have no effect on the volume of litigation or judicial fees. One promising way of identifying the relevant statutes is to see which statutes are cited in modern works of English legal history. I have done this for three sources— tort and contract statutes cited in Baker's *Introduction to English Legal History*, statutes cited in Ibbetson's *Historical Introduction to the Law of Obligations*, and statutes

cited in A.W.B. Simpson's *A History of the Common Law of Contract* (1975). The first two sources were discussed above and need no further explanation. Epstein's casebook cites relatively few English statutes and thus could not be used again. Simpson is a leading legal historian and his history of contract law is widely cited, so analysis of statutes discussed in his book is illuminating.

As before, the period 1600-1872 was chosen for analysis. Unfortunately, the sources analyzed here cite only two statutes from the period 1800-1824, so that subperiod cannot be analyzed separately. Table 5 below presents the results:

Table 5. Statutes Affecting Tort and Contract, 1600-1872

	Baker		Baker w/o Copyright		Ibbetson		Simpson		All		All w/o Copyright	
	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N	% for plaintiff	N
1600-1798	60%	14	31%	8	10%**	10	20%**	12	41%	28	25%**	22
1800-1872	100%	8	100%	2	0%	1	0%	1	80%	10	50%	4
Difference between 1600-1798 & 1800-1872	40%**		69%*		-10%		-20%		39%**		25%	

** means that the one-tailed p-value was less than 0.025, and thus that the two-tailed p-value was less than 0.05.

* means that the one-tailed p-value was between 0.025 and 0.05, and thus that the two-tailed p-value was between 0.05 and 0.10.

For the first row, the null hypothesis was that the proportion was equal to fifty percent (a two-tailed test) or greater than fifty-percent (a one-tailed test). For the last row, the null hypothesis was that there was no difference between 1600-1798 and 1800-1872 (two-tailed) or that the proportion pro-plaintiff was lower in 1800-1872 than in 1600-1798 (one-tailed).

Statutory citations were identified using the Table of Statutes at the beginning of each book. Ibbetson's book does not a have Table of Statutes, so statutes were located by skimming the footnotes and by GooglePrint searches. The pro-plaintiff or pro-defendant character of the statute was identified using Baker, Ibbetson, or Simpson's description of the statute. Statutes which did not relate to contracts or torts, or which had no clear pro-plaintiff or pro-defendant bias, were excluded.

Where two sources (e.g. Baker and Ibbetson) both identified the same statute, it was counted only once in the "All" and "All w/o Copyright" columns.

The results in the table are broadly consistent with the predictions. Look first at the statutes in the Ibbetson and Simpson treatises. The pro-defendant character of legislation

before 1799 is manifest. Only ten or twenty percent of statutes were pro-plaintiff. For both, the percentage pro-plaintiff is significantly different from fifty percent, with p-values less than 0.05. The statutes cited in Baker's text are more ambiguous. If one looks at all the 1600-1798 statutes, a majority (60%) were pro-plaintiff, which is inconsistent with Prediction 1. When one looks more deeply, one notices that more than two-thirds of the pro-plaintiff statutes deal with copyright and are the legislative reaction to a single decision, *Donaldson* v. *Beckett*,[65] which held that there was no common law copyright. If copyright statutes are excluded, the percentage pro-plaintiff drops to 31%, which is consistent with the prediction of pro-defendant legislation before 1799, although 31% is not statistically different from 50%.

While the exclusion of copyright statutes may seem *ad hoc*, it actually provides further support for the hypothesis that common law decisions were ordinarily pro-plaintiff. The decision holding that there was no common law copyright was not made by one of the regular common law courts. In fact, King's Bench had held that there was common law copyright in 1769.[66] The issue came before Parliament only because the House of Lords held to the contrary in 1774.[67] While proceedings before the House of Lords were a part of the common law process, they were rare and were not subject to the same pro-plaintiff pressures as cases in King's Bench, Common Pleas, and Exchequer. Unlike the ordinary courts, where the plaintiff chose the forum, cases got to the House of Lords in proceedings "in error," which were like appeals in that the party which lost below initiated the proceedings. Since the party which lost below might be the defendant, even if the House of

[65] 4 Burrow 2408 (1774).
[66] *Millar* v. *Taylor*, 4 Burrow 2303.
[67] *Donaldson* v. *Beckett*, 4 Burrow 2408.

Lords wanted to increase its caseload (which is unlikely[68]), there is no reason to think it would do so by systematically favoring the plaintiff.

The figures for statutes since 1800 are also largely consistent with the prediction that when fees were taken away, courts shifted pro-defendant, so statutes would become more pro-plaintiff. The statutes cited by Baker are exclusively pro-plaintiff, and the difference between the pre-1799 and post-1799 statutes is statistically significant, whether copyright statutes are excluded or not. On the other hand, the number of post-1799 statutes cited by Baker is small, so the results should be interpreted with caution. Nineteenth-century statutes cited by Ibbetson and Simpson were pro-defendant, which is inconsistent with the prediction. On the other hand, they cite only a single statute each. Pooling together all the statutes cited by Baker, Ibbetson and Simpson, and excluding duplicate citations, there are sizable shifts in the pro-defendant direction (twenty-five or thirty-nine percentage points), although, because of the small numbers, only the shift which includes the copyright statutes is statistically significant.

Taken together, the statutory analysis is largely consistent with Predictions 2 and 3. Statutes were overwhelmingly pro-defendant before 1799, and the proportion pro-plaintiff doubled after 1799.

V ADDITIONAL ISSUES

This section discusses a number of additional issues, some of which are topics for future research.

A. *Arbitration and choice of forum clauses*

Many of the examples in this article come from contract law. If there really was an inefficient pro-plaintiff bias, however, one might have expected parties to have contracted

[68] Whether the members of the House of Lords received fee income from cases is unclear, but even if they did, the fees would presumably be split among the many members of the body, most of whom were

around it. There are two ways they might have done so: arbitration and choice-of-forum clauses. That is, parties might have agreed, before a dispute arose, to submit any future dispute to arbitration. Or they might have agreed that any litigation would take place in a particular court, perhaps Common Pleas.

Choice of forum clauses, if widely used, would have encouraged the courts to develop efficient contract law, rather than pro-plaintiff doctrine, because rational parties would choose the court which had developed rules which maximized their joint surplus. I am unaware of any use of such clauses, or any litigation about them.

One reason such clauses might not have been used is that there was seldom any real disagreement between the courts. This is the prediction of the game theoretic analysis in Section III and the Appendix. In equilibrium, the courts almost always choose the same decision standard. The absence of disagreement between the courts also accords with the historical record, where each court usually adopted the innovations of the other. As a result, it would not usually have been worthwhile for contracting parties to include such clauses. Since they were used infrequently, if at all, courts had no incentive to develop efficient law. Of course, a court might have thought it could develop a competitive advantage by creating efficient law and then hoping parties would use forum-selection clauses to increase the caseload of that court. Even if a court could really have counted on widespread use of forum-selection clauses, this strategy, might not have been beneficial if, as is likely, efficient rules would have generated less litigation.

Enforcement of forum selection clauses might have been another potential problem, although probably not a fatal one. If the contract specified the Court of Common Pleas, but the plaintiff chose King's Bench, King's Bench would obviously have an incentive not to enforce the choice of forum clause. On the other hand, at least before 1696, contracting

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phenomenally wealthy and thus unlikely to be influenced by prospective fee income.

parties could have backed up their choice of forum clauses with a penalty bond stipulating large penalties for violation of the choice of forum clause. In that situation, if the plaintiff violated the choice of forum clause and brought the case in King's Bench, the defendant could sue on the penalty bond in Common Pleas. In that situation, Common Pleas would obviously have an incentive to enforce the penalty bond. If the amount of the penalty bond was sufficiently high (e.g. greater than the difference between expected damages in King's Bench and Common Pleas), the threat of penalty bond enforcement would give the plaintiff an incentive to obey the choice of forum clause and sue in Common Pleas in the first place.

The existence of arbitration, like the possibility of statutory override, could have constrained the pro-plaintiff bias. On the other hand, because of the transactions costs of drafting arbitration clauses and the costs of arbitration itself, there might have been a wide range of pro-plaintiff decisions that would not have provoked parties to resort to arbitration.

It is often said that the common law was hostile to arbitration, and this attitude is sometimes attributed to the judges' pecuniary interests. Some have argued that judges made arbitration agreement unenforceable, because arbitration would have reduced their incomes by diverting cases from the courts.[69] This analysis, is too simplistic. It overlooks competition between the courts. While the judges collectively would have had an interest in discouraging arbitration, each court might have seen it as in its own interest to enforce arbitration agreements. By enforcing arbitration agreements, such a court might reduce its own docket of cases on the merits, but it would gain arbitration enforcement cases that might otherwise have gone to one of the other courts. Courts thus may have faced a collective action problem. It might have been in their collective interest to void arbitration agreements, but in their individual interests to enforce them. Decisions on arbitration thus

[69] Bruce Benson, "An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States," 11 Journal of Law, Economics and Organization 479, 483 (1995).

provide an interesting window on the extent to which courts acted individually (e.g. competitively) or collectively (e.g. collusively or cooperatively).

In the medieval and early modern periods, arbitration agreements were usually enforced by penal bonds. That is, the parties entered into an agreement in which they agreed to arbitrate, each promising to pay some large sum as a penalty if it did not arbitrate or abide by an arbitration award. Such bonds, like most penal bonds, were enforceable. Even *Vynior's Case*, which is often cited as evidence of common-law hostility to arbitration because it held that either party could revoke the arbitrator's authority, held that the party which revoked the arbitrator's authority forfeited the bond amount.[70] Thus, as long as the parties stipulated a large enough penalty, arbitration agreements would be effective.

Unfortunately, the power of penal bonds to back up arbitration agreements was eviscerated by the 1696 and 1705 statutes mentioned above, which made penalty clauses unenforceable.[71] Nevertheless, as James Oldham has shown, even after these statutes, courts continued to enforce arbitration agreements using rules of court. Their ability to do so was bolstered by a 1698 statute,[72] but judges were already using rules of court to enforce arbitration agreements even before these statutes were passed. Although eighteenth and nineteenth-century decisions such as *Kill* v. *Hollister* (1746) are often cited as evincing hostility to arbitration, James Oldham has shown that the printed versions of these cases are inaccurate and that the actual decisions supported arbitration.[73]

B. *Collective Action Problems within Courts*

This essay has so far assumed that each court acted as a single unit, rationally maximizing its income. This is a grave simplification, as the courts were composed of

[70] 8 Coke Report 81b (1607).
[71] See , __
[72] 9 Will.III c. 15.

numerous individuals whose interests might conflict. Depending on the ability of certain actors to veto changes, reforms which might benefit the court as a whole, might be blocked by those whose incomes would be adversely affected.

Blatcher presents a tantalizing hint of the possible importance of the internal structure of courts. Why was the Bill of Middlesex (a procedural fiction which increased jurisdiction and reduced cost) developed in King's Bench rather than Common Pleas? Blatcher suggests part of the answer lies in the allocation of responsibility among court staff. In King's Bench, a single prothonotary (chief clerk) had the power and financial incentive to innovate. In Common Pleas, the prothonotary's responsibilities were split among three men, and change would also have required the assent of an independent keeper of the seal.[74] Thus, collective action problems may have impeded innovation in Common Pleas.

Similarly, practice in Common Pleas was restricted to serjeants, an elite subset of the bar. While this monopoly enriched the serjeants, it raised costs and thus gave King's Bench an advantage. In parallel fashion, the four sworn attorneys and sixteen side clerks had a monopoly of the common law business in Exchequer.[75] Although these practice restrictions impeded their courts' ability to compete, those who benefited fought to retain them.

C. *How did the fee system work?*

While it is relatively clear that judges received fees, the details of the system are uncharted. How were fees distributed between chief and puisne (non-chief) judges? between judges and staff? between staff members? When did the fee system begin and how did it evolve? Did changes in the fee system affect legal evolution? Did competition produce pressure to lower fees?

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[73] Henry Horwitz & James Oldham, "John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century," 36 Historical Journal 137 (1993): James Oldham, "Arbitration and Royal Courts in the 18th Century" (unpublished manuscript).

[74] Blatcher, above n _, 109-10.

D. *Procedure*

This article has focused on legal doctrine. Competition could also affect procedure. Does the evolution of common law procedure accord with the hypothesis of a pro-plaintiff bias?

E. *Quasi-Appellate Cases*

Although there was no true system of appeals before the mid-nineteenth century, proceedings "in error" provided a limited form of judicial review. By this method, King's Bench had the power to review cases from Common Pleas. Cases from King's Bench and Exchequer were reviewed by *ad hoc* courts composed mostly of judges from other courts, and ultimately by the House of Lords. Proceedings in error, however, were very circumscribed, because the reviewing court could examine only the official legal record. Since the legal record did not include evidence presented at trial and was often obscured by unreviewable legal fictions, proceedings in error did not provide an effective constraint on the separate development of law and procedure in each court. Nevertheless, they probably did encourage one of the distinctive features of English law – the proliferation of legal fictions – because fictions enabled courts to expand their jurisdictions without correction by proceedings in error.[76]

Courts in error had different incentives from King's Bench and the other ordinary common law courts. If they collected fees, which I suspect they did, they would have an incentive to favor appellants, who were the ones who chose whether to appeal. On the other hand, it would have been difficult to systematically favor appellants through doctrinal choice, because any doctrine would just change the nature of future appellate cases. Courts of error might favor uncertain rules, as they might provoke more litigation and more

[75] *First Report…. by the Commissioners appointed to inquire into the Practice and Proceedings of the Superior Courts of Common Law* (1829), 211.

appeals. In addition, since these quasi-appellate courts were often composed of judges from competing courts, appellate courts could facilitate collusion or allow one court to undercut the competitive position of a rival. In any case, there is little reason to predict a pro-plaintiff bias in proceedings in error. The decisions of such courts could thus provide a useful control for the trial courts analyzed in the bulk of this article.

F. *Alternative Explanations*

While this article argues for the importance of fees and competition, there are other potential explanations for some of the patterns discussed here. Perhaps class or ideological biases can explain the results. Perhaps judges were pro-plaintiff in contract cases, because of a class-bias in favor of creditors. Perhaps they were pro-defendant in *Priestly* and *Winterbottom,* because of class-bias against employees and consumers. Alternatively, it is possible that the common law rigidly enforced contracts while Chancery developed defenses, because of differences in institutional competence. Perhaps defenses were too complex for the common law courts, which relied on lay juries, and required the sort of nuanced fact-finding which only Chancery's professional judging could provide. While these explanations have some plausibility, they cannot explain the broad shifts in judicial decision-making around 1799.

One alternative explanation that can be rejected is that judges became more pro-defendant after 1799 because they generally favored business. Although such a hypothesis might be plausible in America,[77] early nineteenth-century English judges were drawn primarily from the gentry and had little sympathy with business. In fact, as Ron Harris has documented, some early nineteenth century decisions called into question the legality of a

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[76] See: text at notes _, _.

[77] Morton Horwitz, *The Transformation of American Law* (1977).

common form of business organization (the unincorporated company), thus potentially destroying millions of pounds (billions of dollars) of investment.[78]

VII Conclusion

This essay has presented a relatively simple hypothesis: that competition among courts led to a pro-plaintiff bias in the common law. This idea helps explain some important cases and historical patterns, is supported by quantitative analysis of decisionmaking before and after the 1799 statute which took fees away from the judges and thus dampened competition.

[78] Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (2000).

APPENDIX. A FORMAL MODEL OF JURISDICTIONAL COMPETITION

Of course, the examples in Section III.A not prove the pro-plaintiff bias. In particular, the argument in Figure 4 works only if the intermediate standard reduces litigation by less than 50 percent compared with the pro-defendant standard, and the pro-plaintiff rule reduces litigation by less than 50 percent compared with the intermediate standard. This subsection introduces a formal model which proves the pro-plaintiff bias more generally and makes explicit the conditions under which the bias occurs.

A. The Basic Model

Let d_i be a possible decision standard for a given set of cases, where i is a positive integer, $1 \leq i \leq N$, and N is a positive integer and $N \geq 2$. Let d_1 represents the most pro-defendant rule (e.g. no liability), d_N represents the most pro-plaintiff rule (e.g. strict liability), and intermediate values represent possible standards (gross negligence, ordinary negligence, strict liability etc.), with d_{i+1} representing a more pro-plaintiff decision standard than d_i. To simplify the notation, let $d_i < d_j$ mean $i<j$, $d_i>d_j$ mean $i>j$, and $d_i=d_j$ mean $i=j$. That is, more pro-plaintiff decision standards are "greater than" pro-defendant decision standards. Let d_{KB} represent the decision standard chosen by King's Bench, which, for convenience, I will assume chooses the rule first, and let d_{CP} represent the decision standard chosen by Common Pleas.

Let q denote the number of cases, where q is a nonnegative integer. Because parties rationally anticipate that the plaintiff will choose the court which has chosen the more pro-plaintiff rule, $q = q(\max(d_{KB}, d_{CP}))$. Assume only that $q(d_1) = 0$ and $q(d_{i+1}) > \frac{1}{2} q(d_i)$ for all $i<N$. The first assumption about q, that there is no litigation under the most pro-defendant rule (no liability) makes sense, because if the rule is no liability, there is no reason for there to be any litigation at all. The second assumption about q means that an incremental change in the decision standard never reduces the quantity of litigation by more than 50 percent.

This assumption make sense, because there are a very wide range of possible decision standards, so for any decision standard, there will always exist a decision standard which is only slightly different and slightly more pro-plaintiff, and thus which should not produce a drastic change in the amount of litigation. This would be similar to an assumption of continuity, if one were to assume that decision standards formed a continuum rather than being discrete. Of course, the second assumption does not exclude the possibility that a shift in the pro-plaintiff direction might increase the amount of litigation. Note also that the assumption that $q(d_{i+1}) > ½\ q(d_i)$ implies that $d_i > 0$ for all $i > 1$.

Let q_{KB} and q_{CP} denote the number of cases received by each court, with the following properties:

$q_{KB} + q_{CP} = q$

$q_{KB} = 0$, if $d_{KB} < d_{CP}$

$= ½q$, if $d_{KB} = d_{CP}$

$= q$, if $d_{KB} > d_{CP}$

These properties formalize the idea, discussed above, that plaintiffs choose the court which has chosen the more pro-plaintiff rule and randomize if both courts have chosen the same rule.

For simplicity, assume that there is only one judge on each court, with each judge denoted by his court, KB or CP. Let λ denote the utility a judge receives from hearing a single case, where λ is any real number. Positive λ indicates that judges prefer a higher caseload, perhaps because they receive fee income or get prestige from deciding cases. Negative λ indicates they prefer a lower caseload, perhaps because they value leisure more than fee income or prestige, or because they receive no fee income at all. For simplicity, judges are assumed to be homogeneous, and their utility functions are $U_{KB} = \lambda q_{KB}$ and U_{CP}

$= \lambda q_{CP}$. Since it is assumed that there is only one judge per court, I will refer to judges and their courts interchangeably.

> **Proposition 1.** If judges choose only strategies which are subgame perfect Nash equilibria:
> (a) if $\lambda > 0$, then both courts choose the pro-plaintiff rule, that is, $d_{KB} = d_{CP} = d_N$.
> (b) if $\lambda < 0$, then both courts choose the pro-defendant rule, that is, $d_{KB} = d_{CP} = d_1$.
> (c) if $\lambda = 0$, then any combination of decision standards is possible.

Proof. (a) To fully understand why $d_{KB} = d_{CP} = d_N$, if $\lambda > 0$, one must specify the underlying equilibrium strategies, including those off the equilibrium path. KB's strategy is to choose d_N, and CP's strategy is to choose d_N, if KB has chosen d_N, and to choose d_j s.t $j>i$ and $q(d_j)$ is as large as possible, if KB has chosen d_i where $i<N$. This pair of strategies is a Nash equilibrium, because if KB and CP both choose d_N, then each judge receives utility $\frac{1}{2}\lambda q$. This utility is greater than zero, because λ and q are greater than zero. q is greater than zero, because $N>1$. If KB has chosen d_N, CP could not do better by changing the decision rule of his court, because any change would be in a pro-defendant direction (because $1 \leq i \leq N$), which would induce all plaintiffs to litigate in KB, thus reducing CP's caseload, and thus his utility, to zero. KB could not do better by changing the decision rule of his court to d_i, $i<N$, because CP's strategy would then be to choose a more pro-plaintiff rule, in which case CP would get all the cases, and KB's caseload and thus utility would be zero. This pair of strategies is subgame perfect, because if KB has chosen d_i where $i<N$, then CP's best strategy is to choose d_j s.t $j>i$ and $q(d_j)$ is as large as possible. Since $q(dj) \geq q(d_{i+1}) > \frac{1}{2}\, q(d_i)$ for all $i<N$, its caseload is sure to rise.

There are no subgame perfect Nash equilibrium strategies which do not lead both courts to choose $d_{KB} = d_{CP} = d_N$. This conclusion flows from the analysis above. There is no Nash equilibrium in which $d_{KB} = d_N$ and $d_{CP} \neq d_N$, because CP could always increase its caseload by choosing d_N. Similarly, there is no Nash equilibrium in which $d_{KB} \neq d_N$, because CP's best response to such a strategy is always to choose a more pro-plaintiff rule, in which case KB will receive no cases, which is worse than its payoff if it chooses d_N.

(b) To fully understand why $d_{KB} = d_{CP} = d_1$, if $\lambda < 0$, one must again specify the underlying equilibrium strategies, including those off the equilibrium path. KB's strategy is to choose d_1, and CP's strategy is to choose d_1 if KB has chosen d_1 and to choose any d_k, where $k<i$, if KB has chosen d_i where $i>1$. This pair of strategies is a Nash equilibrium, because if KB has chosen d_1, CP cannot do any better by choosing some other (more pro-plaintiff) decision standard, because if it were to do so it would get all of the cases, and the total caseload would be higher, because $q_1 < q_i$ for all $i>1$. Since $U = \lambda q$ and $\lambda < 0$, a higher caseload is less preferable. Similarly, KB could not do better by choosing d_i where $i>1$, because, CP would choose a more pro-defendant rule, leaving KB with all the cases, which is certainly worse than $\frac{1}{2}\, q(d_1)$. This pair of strategies is subgame perfect, because if if KB has chosen d_i where $i>1$, CP's best response is to choose a more pro-defendant decision standard, which will shift the entire caseload to KB, which, given $\lambda < 0$, is preferable.

(c) If $\lambda = 0$, judicial utility is always zero, because $U = \lambda q$. The choice of decision standard is irrelevant, so any pair of strategies is a subgame perfect equilibrium.

B. A Model with Judicial Preferences about the Content of the Law

The analysis so far, both in illustrations and in the formal model, has assumed that judges cared only about their caseloads. This section introduces a further consideration: judges also care about the content of the legal rules. Perhaps they care about fairness, social welfare, economic growth, adherence to precedent, predictability, ideology, the welfare of particular classes of people, the congruence of law with religious teaching, or other factors. Such preferences will be referred to as "intrinsic preferences," as distinct from judicial preferences relating to caseload (λ), which will be referred to as "caseload preferences." In particular classes of cases, intrinsic preferences may lead judges, setting aside caseload considerations, to favor a particular decision standard, perhaps a pro-defendant or pro-plaintiff rule or perhaps some particular standard. This subsection explores the implications of such preferences for judicial decisionmaking.

Let $v(d_i)$ be a judge's intrinsic preference function. Assume only (i) that $v(d_i)$ is single-peaked, and (ii) that if $v(d_i) + \lambda > 0$ and $v(d_{i+1}) + \lambda > 0$, then $(v(d_{i+1}) + \lambda)q(d_{i+1}) > \frac{1}{2}(v(d_i) + \lambda)q(d_i)$. By single peaked, I mean that (a) there is a decision standard, d_{i*} such that $v(d_{i*})$ is larger than $v(d_i)$ for all other *i*, (b) for all d_i, $i<i^*$, if there are any, v(d) is increasing, and (c) for all d_i, $i>i^*$, if there are any, v(d) is decreasing. The second assumption, as will be clearer after the judicial utility function is defined below, merely states that incremental changes in the decision standard do not drastically change judicial utility. This would be similar to an assumption of continuity, if one were to assume that decision standards formed a continuum rather than being discrete.

Now modify the judicial utility function to include intrinsic preferences as follows:

$$U_i = (v(d_i) + \lambda)q_i$$

Note that this formulation assumes that judges receive utility from their intrinsic preferences not merely by announcing them, but only by applying them in particular cases. That is, a judge gets no intrinsic utility from choosing a rule which is never applied, perhaps because

the judge of the other court has chosen a more pro-plaintiff rule, so all cases go to the other court.

> **Proposition 2.** If judges choose only strategies which are subgame perfect Nash equilibria:
>
> (a) if $v(d_i) + \lambda > 0$ for all $i > i^*$, then both courts choose the pro-plaintiff rule, that is, $d_{KB} = d_{CP} = d_N$.
>
> (b) if $v(d_i) + \lambda < 0$ for all *i*, then both courts choose the pro-defendant rule, that is, $d_i = d_{j,} = d_1$.
>
> (c) if $v(d_i) + \lambda$ is sometimes greater than zero and sometimes less than or equal to zero for all $i>i^*$, then both courts choose d_i such that $v(d_i) + \lambda > 0$ and $v(dj) + \lambda \leq 0$ for all $j>i$.
>
> (d) if v(d) is always increasing and $v(d_N) + \lambda >0$, then both courts choose the pro-plaintiff rule, that is, $d_{KB} = d_{CP} = d_N$.
>
> (e) if v(d) is always increasing and $v(d_N) + \lambda = 0$, then at least one court chooses the pro-plaintiff rule, that is, $d_{KB} = d_N$ or $d_{CP} = d_N$.

Proof. Because there are so many cases, a full proof would be very cumbersome, so I will give only the intuitions.

(a) If $v(d_i) + \lambda > 0$ for all $i > i^*$, then both courts choose the pro-plaintiff rule, because if both courts choose the pro-plaintiff rule, they split a positive number of cases and receive some positive utility. On the other hand, if one court chose something other than the pro-plaintiff rule, the other court would choose a more pro-plaintiff rule, thus leaving the less pro-plaintiff court with no cases and zero utility.

(b) If $v(d_i) + \lambda < 0$ for all *i*, then both courts choose the pro-defendant rule, because by doing so, their utility is zero, because $q(d_1) =0$. On the other hand, if one court were to choose something other than the pro-defendant rule, its caseload would be positive, and its utility would therefore be negative.

(c) If $v(d_i) + \lambda$ is sometimes greater than zero and sometimes less than zero for all $i>i^*$, then if both courts have chosen the same decision standard, a move by one court one notch in the pro-plaintiff direction increases that court's judicial utility, as long as $v(d) + \lambda > 0$, because it was assumed that if $v(d_i) + \lambda >0$ and $v(d_{i+1}) + \lambda >0$, then $(v(d_{i+1}) + \lambda)q(d_{i+1}) > ½(v(d_i) + \lambda)q(d_i)$. Thus, no pair of strategies is stable, as long as one court can choose a decision standard more pro-plaintiff than the other, as long as that more pro-plaintiff rule still satisfies $v(d) + \lambda > 0$. So, the only equilibrium is for both courts to choose the most pro-plaintiff decision standard for which $v(d) + \lambda$ it is still positive. That is, the courts choose d_i such that $v(d_i) + \lambda > 0$ and $v(dj) + \lambda \leq 0$ for all $j>i$.

(d) If v(d) is always increasing and $v(d_N) + \lambda >0$, then, for reasons similar to the pointed out in (c), the only stable equilibrium is for both courts to choose the most pro-plaintiff rule.

(e) If v(d) is always increasing and $v(d_N) + \lambda =0$, that means that $v(d_i) + \lambda < 0$ for all $i < N$. That means judicial utility is negative, except at d_N, where it is zero. If one court chooses d_N, it receives zero utility, which is the most possible in the situation. On the other hand, if one court has chosen d_N, then it does not matter what the other court does, because it will get zero utility whether it chooses a different standard (in which case it gets no cases) or d_N (in which case it will get half the cases, but its utility will still be zero, because $v(d_N) + \lambda = 0$).

A corollary to Proposition 2 is that if fees are large and are taken away from judges, λ will decrease significantly, and the decision standard will become more pro-defendant. This corollary justifies Prediction 1 above. Consider first the situation where initially $v(d) + \lambda > 0$ for all $i>i^*$, and then fees are taken away and thus λ decreases. If the decrease in λ is large enough, it will now be true that $v(d) + \lambda$ is sometimes greater than zero and sometimes less than or equal to zero for all $i>i^*$. The shift will change the decision standard from the pro-plaintiff rule --d_N as described in Proposition 2(a) -- to a less pro-plaintiff standard (as described in Proposition 2(c)). If λ continues to decrease, but $v(d) + \lambda$ is still sometimes greater than zero and sometimes less than or equal to zero for all $i>i^*$, then Proposition 2(c) predicts that if the change in λ is sufficiently large, the decision standard will shift in a pro-defendant direction. If λ decreases sufficiently, $v(d) + \lambda < 0$ for all *d*, and the decision standard will shift to the most pro-defendant rule (as described in Proposition 2(b)). Similarly, if $v(d)$ is always increasing and $v(d_N) + \lambda > 0$, the courts will choose the most pro-plaintiff rule (as described in Proposition 2(d)). As λ decreases, Propositions 2(e) and 2(b) predict that the decision standard will shift pro-defendant.