INTRODUCTION: MECHANISM DESIGN, PATH DEPENDENCE AND LAW

Twenty years into the dawn of a new millennium, time seems to slide by evermore quickly and we find that our intellectual paradigms shift accordingly. In the field of law and economics, scholars have yet to recognize one such major shift: the passing of the discipline from transaction-cost economics to mechanism design theory. That we have not recognized this major change in paradigm within our field[1] is due in part to the multitude of theoretic developments currently underway within the economic approach to law. Scholars are, accordingly, confused about the direction in which the field is moving.

I. Insurgency of Mechanism Design

William H. J. Hubbard believes that behavioral economics is a major paradigm shift in law and economics.[2] He offers up an extended metaphor. He claims that the move from neoclassical economics to behavioral economics is comparable to the shift from Newtonian physics to quantum mechanics.[3] Rather than debate his claims, we wish to put forward an alternative view of the future of the field of law and economics. Mechanism design theory has been called the "engineering side of economics."[4] If called on to put into a few

[1] Thomas Samuel Kuhn first introduced the concept of 'paradigm shift' so central to contemporary discourse in the early 1960s in his book *The Structure of Scientific Revolutions* (1962).

[2] "Quantum Economics, Newtonian Economics, and Law," 2017 *Michigan State Law Review* 425 (2017).

[3] His comparison fails to acknowledge that the development of quantum mechanics in physics is closely allied, in terms of intellectual history, to the development of game theory in economics. As we explain *infra*, John von Neumann set about to update the mathematics used in neoclassical economics along the lines of quantum mechanics.

[4] Eric S. Maskin, lecture delivered at IX World Knowledge Forum in Seoul, South Korea, on October 16, 2008; Leonid Hurwicz claims, in *Designing Economic Mechanisms* 1 (2006), to have first developed mechanism design theory as a useful benchmark and common

words what is mechanism design theory, we could say it as an attempt to generalize (partially) game-theoretical approaches through reverse mathematics.[5] Matthew Jackson notes: "The theory of mechanism design takes a systematic look at the design of institutions and how these affect the outcomes of interactions. The main focus of mechanism design is on the design of institutions that satisfy certain objectives, assuming that the individuals interacting through the institution will act strategically and may hold private information that is relevant to the decision at hand."[6] Today, law and economics scholars are wont to speak of 'asymmetric information'[7] and 'incentive compatibility'[8] rather than of the hackneyed 'transaction costs' of yesteryear. Today, the Myerson-Satterthwaite Theorem in mechanism design theory[9] provides an intriguing counterpoint to the Coase Theorem in transaction-cost economics.[10] Further, many who use game-theoretic models to better understand the law would note the informational concerns of such settings in practice.[11] In the

language for comparing alternative economic systems against the backdrop of the socialist calculation debate of the 1950s.

[5] 'Reverse mathematics' was developed by philosophers who wished to grasp the connection between mathematics and logic. So, they went backwards. Instead of deducing theorems from given axioms —as mathematicians had been doing since Euclid in the fourth century B.C.—, they asked which axioms were needed to prove specified theorems, rather than the other way around. See John Stillwell, *Reverse Mathematics: Proofs from the Inside Out* (2018).

[6] *Mechanism Theory* (2003).

[7] See George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," 84 *Quarterly Journal of Economics* 488 (1970).

[8] See Hurwicz, "On informationally decentralized systems," in Charles Bartlett McGuire and Roy Radner (editors), *Decision and Organisation: A Volume in Honor of Jacob Marschak* (1972).

[9] Roger B. Myerson and Mark A. Satterthwaite, "Efficient Mechanisms for Bilateral Trading," 29 *Journal of Economic Theory* 265 (1983).

[10] Ronald H. Coase, "The Problem of Social Cost," 3 *The Journal of Law and Economics* 1 (1960); reprinted in *The Firm, the Market and the Law* 95-156 (1988). Coase himself sharply criticized George J. Stigler's formulation of the Coase Theorem —which had done so much to make Coase famous—, *The Theory of Price* 113 (Third edition, 1966). Stigler had not simplified Coase's analysis; it was simple. See Robert D. Cooter, "The Cost of Coase," 11 *The Journal of Legal Studies* 1 (1982).

[11] See, *exempli gratia*, Joel Watson's game theory text. In *Strategy: An Introduction to Game Theory* (2013), he notes the unrealisticall strong assumptions and acknowledges value in the idea, saying: "Still, however, Coase's point sets a useful benchmark for a discussion about optimal legal structure and policy." He then states: "I would argue that the message should be less about property rights and more about information, the freedom to contract, and the existence of a reliable and inexpensive external enforcement system." See pages 238-240 for a fuller development of Watson's take on this point.

context of a court deciding a nuisance dispute case, Judge Posner highlights the informational concerns.[12]

Perhaps we have not recognized this major change in paradigm, because it has occurred almost imperceptibly. Already, at the end of the 1980s, when Robert D. Cooter and Thomas S. Ulen brought out their second-generation law and economics manual,[13] they were not only "more eclectic in accepting philosophical and humanistic traditions of legal thought"[14] —as they claimed at the time—, but they also began to apply the insights of game theory to the field.[15] At the beginning of the 1990s, a new set of analytical tools became available to law and economics scholars. These tools were related to the expansion in economics of the analysis of strategic interaction. The approach had been developed in the 1940s and 50s, when John von Neumann[16] —and John Forbes Nash Jr. after him—[17] looked at the practitioners of mainstream economics with intellectual contempt for employing, slide rule in hand, in the middle of the twentieth century, the mathematical methods belonging to the Newtonian mechanics of the seventeenth century. Facing the blackboard with a piece of chalk, they attempted to update the mathematics employed in economics with the probabilistic methods of quantum mechanics.[18]

From its beginnings, the new perspective that opened up shattered the lofty scientific aspirations of mainstream economists and, in particular, of the members of the Chicago school.[19] For this reason, Milton Friedman put up a fierce (and stubborn) resistance to the introduction of the approach in mainstream economics —something that is not widely known—. He appreciated that game theory runs counter to the basic methodological postulates of the 'Ordinalist Revolution' that had defined the field in the

12 Richard A. Posner, *Economic Analysis of Law* (Fifth edition, 1997). See also Iljoong Kim and Jaehong Kim, "Efficiency of Posner's Nuisance Rule: A Reconsideration," 160 *Journal of Institutional and Theoretical Economics* 327 (2004).

13 *Law and Economics* (1988).

14 Gary Minda, "The Jurisprudential Movements of the 1980s," 50 *Ohio State Law Journal* 599, 607 (1989).

15 Douglas G. Baird *et alii* continued the task in *Game Theory and the Law* (1994).

16 Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* 6, 45, 147 (1944).

17 Nash, "Equilibrium points in n-person games," 36 *Proceedings of the National Academy of Sciences* 48-49 (1950); "Non-Cooperative Games," 54 *The Annals of Mathematics* 286 (1951).

18 See Philip Mirowski, "What Were von Neumann and Morgenstern Trying to Accomplish?" in Eliot Roy Weintraub (editor), *Toward a History of Game Theory* (1992).

19 In the interest of full disclosure, one of us is a Chicago-trained lawyer and economist.

1930s and 40s.[20] Game theory reduces the strategic and contingent decisions of rational actors —which occur in time— to the atemporal realm of mathematics. This reduction proves to be overly complex for economists from an analytical point of view.[21] To further the analysis of strategic interaction —of far-reaching importance in our day—, economists work at the edge of what can be modeled mathematically. The application of game theory, seen in this light, is a complex and uncertain matter.[22] As it is, empirical work drawn from experimental economics shows that the models of game theory routinely yield inaccurate (if not erroneous) predictions.[23] Nonetheless and in spite of these difficulties, game theory is in marked expansion.

This is how we arrive at the second paradigm of the economic analysis of law, constituted by the analytical approach commonly called 'mechanism design theory'[24] —for which Myerson, together with Hurwicz and Maskin, early in this century, were awarded the 2007 prize in economics in memory of Alfred Nobel—.[25] This offshoot of game theory attempts to generalize it and, thus, represents a further step in the analysis of strategic interaction. The traditional methodology of game theorists is to describe a given game —a description of the strategic situation with the players, the order of play, the strategies and the payoffs defined—, and then proceed to cal-

---

20 Von Neumann himself saw this development with mounting worry when he reintroduced cardinal utility and, even, the interpersonal comparison of utilities, in order to come up with a general solution to bilateral zero-sum games. He admits this much in a letter to Morgenstern (October 16, 1942), cited by Mirowski, "What Were von Neumann and Morgenstern Trying to Accomplish?," at 142.

21 To appreciate the complexity involved in game theory, recall the remark attributed to physicist Murray Gell-Mann, "Imagine how hard physics would be if electrons could think," cited by Scott Page, "Computational models from A to Z," 5 *Complexity* 36 (1999).

22 For an account of the difficulties to be come across in applying game theory, see David Kreps, *Game Theory and Economic Modelling* 91-132 (1990).

23 In particular, decision-making under conditions of risk and uncertainty contradicts the predictions of expected utility theory. Maurice Allais, "Le comportement de l'homme rationnel devant le risque: critique des postulats et axiomes de l'école Américaine," 21 *Econometrica* 503 (1953); "The Foundations of a Positive Theory of Choice Involving Risk and a Criticism of the Postulates and Axioms of the American School," in Allais and Guy Hagen (editors), *Expected Utility Hypotheses and the Allais Paradox* 27 (1979).

24 For a general description, see Myerson, "Mechanism design," in John Eatwell *et alii* (editors), *The New Palgrave: Allocation, Information, and Markets* 191-206 (1989). For an introduction, see Tilman Börgers, *An Introduction to the Theory of Mechanism Design* (2015).

25 Later, Lloyd S. Shapley and Alvin E. Roth were awarded the 2012 prize for their related work in market design. See Roth, "What have we learned from market design?" 118 *Economic Journal* 285 (2008).

culate the optimal set of strategy profiles from which the players should choose in order to predict behavior in the game.[26] Mechanism design theorists proceed inversely, as in reverse mathematics. They begin by settling on a socially desirable outcome, and then proceed to design the rules of the game to give the players the incentives to reach it. Typically, the practical problems studied involve situations in which a party (or parties) has private information so the socially desireable outcome depends on information that the mechanism designer does not directly observe. Instead, the outcome specified by the mechanism depends on the statements or actions of the parties. Since payoffs or preferences over outcomes may depend on the players' private information or types, the mechanism is said to specify a 'game form.'

Traditionally, in mechanism design models, players make statements, called messages, about their private information. While often modeled as being cheap statements, in the sense that players are unconstrained in what they say, there have been studies of settings where the statements a player can make are constrained in a way that depends on her private information.[27] More recently there has been work incorporating hard evidence into mechanism design type models.[28] We take a fairly broad view of mechanisms. The usual analysis involves the mechanism designer or external enforcer committing to a decision rule that maps messages to public actions taken by the enforcer.[29]

---

[26] Game theorists commonly employ any number of techniques to find solutions. Among these are the iterated elimination of strictly dominated strategies, rationalizability, Nash equilibrium, and subgame perfect Nash equilibrium, Bayes Nash equilibrium, and perfect Bayesian equilibrium.

[27] In their seminal paper, "Partially Verifiable Information and Mechanism Design," 53 *Review of Economic Studies* 447 (1986), Jerry Green and Jean-Jacques Laffont studied state-dependent message spaces and showed when the revelation principle holds in that setting.

[28] Bull and Watson, "Hard Evidence and Mechanism Design," 58 *Games and Economic Behavior* 75 (2007), studied a setting with both cheap messages and hard evidence, which exists in some contingencies and not in others. Their analysis showed that when the condition of evidentiary normality does not hold dynamic mechanisms are needed. When it holds, static mechanisms are sufficient, and an abstract-declaration model where players name their type as in Green and Laffont's model is sufficient. Jesse Bull, "Mechanism Design with Moderate Evidence Cost," 8 *B.E. Journal of Theoretical Economics* 1 (2008), considers a setting with costly evidence disclosure.

[29] *Exempli gratia*, in situations where a jury updates, on the basis of evidence disclosed, its belief that a defendant is guilty, there is no precommitment to a decision rule by the jury. However, in this setting there are similar issues for the institutional design to attain a socially desireable outcome. In such a setting, Bull and Watson provide a rationale for a judge to exclude relevant evidence as is provided under Rule 403 of the Federal Rules of Evidence,

As is typical for a new paradigm in the economic analysis of law, mechanism design theory is still going through a process of acceptance which has not been fully consolidated. Today, law and economics scholars remain wedded to outdated conceptual or mental models. They remain invested in the methodology of transaction-cost economics, as if nothing new had occurred in the field since the 1990s.[30] Others such as Hubbard are exploring the implications of behavioral economics for law and economics.[31] Yet their behavioral analyses depart from rational choice theory. As Fred Sanderson McChesney reminds us, "Behavioral economics puts its procedural emphasis on laboratory experiments, whose purpose seems principally to test the reality of [mainstream] assumptions, but not their predicted outcomes."[32] Economists should not pretend that their models register the imprint of any given reality. The reality is always more complicated. Economists should avoid the intellectual trap of confusing their conceptual or mental schemes or models —the theories and hypotheses they hold up— with reality. The core of this methodological stance, clearly discernible in Friedman's essay on economic methodology,[33] led him to consider that economic models are nothing more than abstractions or heuristic devices which serve to make predictions. The success of a theory is based on the accuracy with which it can predict outcomes.

In the field of mechanism design theory, the revelation principle was an important development.[34] Economists were able to greatly simplify

"Statistical Evidence and the Problem of Robust Litigation," 50 *RAND Journal of Economics* 974 (2019). We consider such analysis to be in the spirit of mechanism design.

30 Guido Calabresi's recent book abides by the methodology of transaction-cost economics, without even mentioning game theory, *The Future of Law and Economics: Essays in Reform and Recollection* (2016).

31 Christine Jolls *et alii*, "A Behavioral Approach to Law and Economics," 50 *Stanford Law Review* 1471 (1998); Cass R. Sunstein (editor), *Behavioral Law and Economics* (2000); Richard H. Thaler and Sunstein, "Libertarian Paternalism Is Not an Oxymoron," 70 *University of Chicago Law Review* 1159 (2003); "Libertarian Paternalism," 93 *American Economic Review* 175 (2003); *Nudge: Improving Decisions About Health, Wealth, and Happiness* 4-6 (2008); Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* 19-138 (2018).

32 "Behavioral Economics: Old Wine in Irrelevant New Bottles?" 21 *Supreme Court Economic Review* 50 (2013).

33 "The Methodology of Positive Economics," in Friedman (editor), *Essays in Positive Economics* 3-43 (1953).

34 See Myerson, "Incentive compatibility and the bargaining problem," 47 *Econometrica* 61 (1979); "Optimal coordination mechanisms in generalized principal-agent problems," 11 *Journal of Mathematical Economics* 67 (1982); "Multistage games with communication," 54 *Econometrica* 323 (1986); *Game theory: analysis of conflict* 257-58 (1991).

the search for optimal mechanisms which had to be taken up to implement a socially desirable outcome. They could, without loss of generality, restrict their attention to a small subset of game forms, called 'direct mechanisms.' Once a direct mechanism was found, economists could translate it back to indirect mechanisms with its properties. Also important for mechanism design was the parallel development of implementation theory.[35] Economists were able to escape from the problem of multiple suboptimal equilibra in designing mechanisms.

In a setting of multiple equilibria, we find that history is inescapable in considering the design of legal institutions. The models of rational choice theory must, in any case, be corrected, amended, or supplemented, with the analyses of area studies. This is so because, in a Bayesian game setting where agents have cuasilinear preferences with transferable utility —we allow, out of intellectual honesty—, economists cannot know out-of-hand the set of incentive-compatible or truthful mechanisms, which are computationally tractable, individually rational, and budget balanced, as well as being strictly Pareto efficient or maximizing social welfare, apart from those disclosed through the comparative method in the field of legal history.

A watershed moment for the new paradigm of mechanism design theory in law and economics was the publication in 2018 of E. Glen Weyl and Eric A. Posner's *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*. Yet even in that work both authors have no alternative but to fall back in order to consider legal institutions taken from history. At the beginning of the twenty-first century, they propose nothing short of overhauling the content of property and replacing it with "partial common ownership" based on the mechanism of the *ἀντίδοσις* (exchange) of property of Athenian tax law.[36] In the fifth century B.C., this mechanism allowed wealthy Athenian citizens to allocate a *λειτουργία* (undertaking for the people) between themselves.[37] Under the procedure, the citizen called on to pay for anything —from equipping a trireme for a year to underwriting dramatic productions— could challenge an allegedly wealthier citizen to choose between the undertaking or exchanging his property with the challenger.[38]

---

35 See Maskin, "Nash equilibrium and welfare optimality," 66 *Review of Economic Studies* 23 (1999).

36 *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, at 55.

37 Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* 65 (2006); Brooks Kaiser, "The Athenian Trierarchy: Mechanism Design for the Private Provision of Public Goods," 67 *Journal of Economic History* 445 (2007).

38 See Demosthenes, *Against Phaenippus* (359 B.C.)

The mechanism gave everyone an incentive to be truthful despite the burdens of the tax being levied.[39]

The intellectually-honest law and economics scholar can no longer afford to think in a strictly linear and discursive fashion. Her thought must become circular and recursive. Faced with the failure of past efforts to formulate a unidimensional methodology in the social sciences, she is more likely to use a mix of eclectic strategies. That new, more open attitude is evident in the work of the historian of the common law —and critic of the Coasian method— Alfred William Brian Simpson, who recommends that we combine the lateral glance of Archilochus' proverbial fox, who knows many shallow, trifling things, with the frontal view of the hedgehog, who contemplates a single vast, marvelous panorama spread out to the horizon.[40]

Accordingly, in this book, we combine the abstract and rarefied models of rational choice theory with the more concrete and localized analyses of area studies. We attempt to promote an understanding of economic theory in nontechnical terms, and broaden the approach we take in order to stretch a collaborative bridge between academic domains. Like Weyl and Posner's book, our approach is not an exercise in the narrow mechanism design theory found in the technical economics literature. Rather we employ a broader approach which integrates reverse game-theoretic analyses, and adapts them to the interdisciplinary field of law and economics to which we aim to contribute.[41]

II. Path Dependence and Legal History

Now, if history matters, legal history matters even more.[42] Legal institutions are both context-dependent and contingent, that is to say, they are path-

[39] In the middle of the twentieth century, Arnold C. Harberger would propose the same mechanism as a measure to thwart tax avoidance, see "Issues of Tax Reform for Latin America," in *Fiscal Policy for Economic Growth in Latin America: Papers and Proceedings of a Conference Held in Santiago, Chile, December, 1962* (1965).

[40] See "'Coase v. Pigou' Reexamined," 25 *The Journal of Legal Studies* 53 (1996); "An Addendum: [A Response to Law and Economics and A. W. Brian Simpson by R. H. Coase]," 25 *The Journal of Legal Studies* 99 (1996); *Reflections on 'The Concept of Law'* 125 (2011).

[41] As noted above, we consider Bull and Watson, "Statistical Evidence and the Problem of Robust Litigation," an example of this type of broader mechanism design approach.

[42] The legal profession is "in thrall to history," as Richard A. Posner reminds us, see "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship," 67 *University of Chicago Law Review* 573, 583 (2000).

dependent. Legal institutions cannot be understood without appreciating their particular history. John Bell explains: "Path dependence focuses attention on the way in which legal rules are embedded not only in a network of concepts but also in a network of practices and organizations that together make up the institutions of law in a particular legal system."[43] In economics 'path dependence' refers to how history is able to —and does— shape economic structures.[44] This idea applies the conventional wisdom that once you move down a certain path, it is hard to change course.[45] Where conventional history offers the law student or legal scholar little more than a "never-ending series of social contexts,"[46] we integrate legal history into a wider narrative arc through law and economics which offers a (mostly) comprehensive exposition of the interface between law and life and touches on matters of importance to the legal system.

In this book, we explore the links between the common law in the United States of America and the private law of the formally-dead Roman Empire, which tends to be associated with civil law. Law and economics is our bridge between what seem like two fundamentally different legal traditions. Understanding how a system of private law works is relevant for economic liberalization.[47] Private law must play a larger role as policymakers reduce government regulations and restrictions in the marketplace, where private-sector actors and decision-makers are front and center.

---

43 "Path Dependence and Legal Development," 87 *Tulane Law Review* 787, 809 (2013).

44 *Exempli gratia*, consider the market dominance of the ubiquitous 'QWERTY' keyboard (named for the first six letters on the second row of keys in the mechanical typewriter.) Paul David, "Clio and the Economics of QWERTY," 75 *American Economic Review* 332 (1985); Stan Liebowitz and Stephen E. Margolis, "Path dependence, lock-in, and history," 11 *Journal of Law, Economics, and Organization* 205 (1995). Christopher Latham Sholes had rearranged the original alphabetical order back in the 1870s to reduce the bars' jamming when typists struck the keys at "even moderate speed." Darren Wershler-Henry, *The Iron Whim: A Fragmented History of Typewriting* 156 (2007). Today, jamming is not a mechanical problem with electronic keyboards, but his rearrangement of keys remains standard. *Idem*, at 153.

45 For a review of the technical economics literature, see Joseph Farrell and Paul Klemperer, "Coordination and Lock-in: Competition with Switching Costs and Network Effects," in Mark Armstrong and Robert H. Porter (editors), 3 *Handbook of Industrial Organization* 1967, 1971-72 (2007).

46 Justin Desautels-Stein, "Structuralist legal histories," 78 *Law and Contemporary Problems* 37, 42 (2015); "A context for legal history, or, this is not your father's contextualism," 56 *American Journal of Legal History* 29 (2016).

47 Unfortunately, the literature on economic liberalization focuses on public-law variables. See, *exempli gratia*, Glen Biglaiser and David S. Brown, "The Determinants of Economic Liberalization in Latin America," 58 *Political Research Quarterly* 671 (2005).

In Chapter One, we argue that the admirable character of Roman law is its quality as a paradigmatic private-law system, which makes a decentralized society and market economy possible. Our discussion of classical Roman law illustrates how private law aligns incentives for people to exert efforts and share information. Roman private law also enables people who face not only resource constraints, but also incentive and information constraints, to act in their own self-interest and, when efficient, to act on behalf of others.

In Chapter Two, we update the old question, debated in law and economics literature, of whether the common law is efficient. Instead, we propose a new question: Is the common law exceptional?[48] That the common law is efficient is a given because it is a system of private law, though we must allow that this answer has only been recently proposed in the literature.[49] Whether the common law is exceptional is a separate question connected with this matter. Might we not be able to design another system of private law, within the tradition of Anglo-American common law and equity, which would be even more efficient? Instead of comparing, as modern business scholars have done,[50] the efficiency of the common law with the present-day civil law, with its own inefficiencies, we seek to outline through mechanism design theory what exactly are the origins and development of the present-day common law system in the United States, whether it is exceptional, and how we might further modernize it. The tradition of civil law only enters the discussion insofar as some aspects of classical Roman law offer up alternate possibilities in the design of private-law institutions.

Next, in Chapter Three, we turn to what mechanism design theory might have to say about the design of public-law institutions 'writ large.'[51] Under the general assumptions of democratic theory, legislatures have posi-

---

48 Francis H. Buckley discusses the rubric of 'exceptionalism' in the United States, see "An Exceptional Nation?" in Buckley (editor), *The American Illness: Essays on the Rule of Law* 43 (2013).

49 See Juan Javier del Granado and Matthew C. Mirow, "The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes," 83 *Chicago-Kent Law Review* 293, 304 (2008).

50 See Florencio López de Silanes *et alii*, "The Economic Consequences of Legal Origins," 46 *Journal of Economic Literature* 285 (2008); "Investor Protection and Corporate Valuation," 57 *Journal of Finance* 1147 (2002); "The Quality of Government," 15 *Journal of Law, Economics & Organization* 222 (1999); "Law and Finance," 106 *The Journal of Political Economy* 1113 (1998); "Legal Determinants of External Finance," 52 *Journal of Finance* 1131 (1997).

51 For an exploration of the mechanisms of democracy 'writ small,' see Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (2007).

tive legitimacy to make law because of the power of the people who elected them. Throughout the world, however, unelected judges also make law through the exercise of judicial review, an institution that has often involved the reification of individual rights in spite of majority preferences. What, if anything, gives such judges positive legitimacy to make law? The answer we provide may be surprising. We demonstrate that judges' positive legitimacy is based on the power of people. Courts' legitimacy has the same basis as legislatures'. Since the French Revolution, the ultimate arbiter in the social fight is the strongest faction, the majority. A group of people communicates its type to society at the ballot box. Based on the ballot count, society makes concessions to the terms dictated by the majority. Under what circumstances would an individual ever be able to dictate terms to society? We demonstrate that the court system allows a single individual to act collectively with other similarly situated individuals spread out through time. This group can communicate its type to society through legal reasoning. Courts are insulated from the political process because unelected judges are supposed to be beholden to a temporally-disconnected group, rather than to contemporaneous constituencies. Relevantly, we give a fresh answer to the age-old question of what is embodied in the phrase 'The rule of law, not of men.'