CHAPTER THREE:
THE PROVINCE OF THE RULE OF LAW[1167]

Twenty years into the dawn of a new millennium, the progress we have made in certain fields is fast and inexorable, and artificial intelligence, quantum computers and genetic engineering are all on the horizon. Yet, our understanding of the political and legal fabric that knits us together into national societies and a global economy has been slow and unsteady. Today, political theory is incapable of understanding even the rudiments of democratic legitimacy under the rule of law.

I. The Rule of Law, Not of Men

Well into the twenty-first century, the state of the world hangs together by weft threads which were spun together by eighteenth-century political philosophers. Per the general assumptions of democratic theory, law-making supremacy belongs in elected parliaments or legislatures, rather than in unelected courts. Yet in practice, throughout the world —in the common law as well as in the civil law— an undeniable amount of law-making power is wielded by unelected courts. Why is so much law-making power put in the hands of democratically unaccountable judges? Could it be that the majority's power, which legitimizes statutory law, also legitimizes case law?

We must bring much-needed clarity to the subject if we are to avoid illegitimate acts of legislative or judicial overreaching and ensure democratic accountability under the rule of law. Moreover, supranational courts are needed to organize an ever-more interconnected world. Thus, can legal scholars in this new century continue to pretend that legislative gov-

[1167] This Chapter is an extended version of a paper delivered at the I Annual Dual Meet between the University of California, Berkeley, School of Law and the Universidad Nacional Autómona de México, Instituto de Investigaciones Jurídicas held at Mexico City, Mexico in September, 2018.

ernance is legitimate while judicial governance is not?[1168] Can they continue to delegitimize the courts' vital role in protecting basic individual rights as counter-majoritarian and antidemocratic exercises of power?[1169] Can people and politicians continue to believe that referendums outweigh other representational mechanisms of democratic politics? A system of constitutional —supermajoritarianly enacted— checks and balances in most nation-states vests, in the unelected courts, the authority to stand up for individual rights against the elected legislature, and vests, in the elected legislature, the authority to decide policy matters against the unelected courts. Yet, from the commonly accepted outlook of legal positivism, we face an almost absolute lack of doctrinal clarity when we seek to understand the current political and legal state of the world.

In this Chapter, we demonstrate, through two superficially simple game-theoretic models, that the majority's power legitimizes both statutory law *and* case law. It turns out "the law" is nothing more than politics over time. In the might-makes-right social order assumed by legal positivists,[1170] this Chapter asks the question of where is ultimate power to be found, considering that political coalitions of people are notoriously unstable. May the "rule of law" turn out to be nothing other than synchronic processes of ballot-counting rectified by diachronic processes of legal reasoning by analogy? Let's see.

Such a significant part of the whole sweep of the legal order is judge-made law. As an argument, this point is unassailable, despite a plethora of legislation in the twentieth century,[1171] despite the drive toward codification since the nineteenth century and judges hiding their powerful and creative role in developing the law,[1172] somewhere behind the smoke and mirrors of the interstices of legislation, or in the shadowings or penumbras emanating from constitutional provisions. As an argument, this point is unassailable, no matter how much Montesquieu denied it, when he asserted famously that judges are merely "mouthpieces of the letter of the law; passive

[1168] David Marquand, *Parliament for Europe* (1979); Giandomenico Majone, "Europe's Democratic Deficit: The Question of Standards," 4 *European Law Journal* 5, 15 (1998).

[1169] See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

[1170] Richard A. Posner, *The Problems of Jurisprudence* 9 (1990).

[1171] Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

[1172] Edward A. Tomlinson, "Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law," 59 *Louisianna Law Review* 101 (1997).

beings, incapable of moderating either its force or rigor." [1173] How can we go on without a model to explain the legitimacy of case law, when case law is ubiquitous throughout legal history and continues to be a source of legal creativity in the common law system as well as in the civil law tradition?[1174] Despite the endless outpouring of ostensible scholarship on both sides of the Atlantic, this poverty of thought distorts legal doctrine, is unwise at best and dangerous at worst.

The normative account of what legitimizes the law-making powers of majority rule seems a clear and well-settled doctrine. Its greatest exponent, Jean-Jacques Rousseau, bravely stated, "the law is the expression of the general will."[1175] Today's scholars use more up-to-date terms like 'collective preferences'; yet to speak about 'the will of the people' (popular will,) or for that matter about 'the preferences of the majority' (majoritarian preferences,) is incoherent and pointless because collective preferences do not even exist at all. Coalitions of people are made up of different, and sometimes even contradictory groups, which temporarily come together to engage in collective action.[1176] At least since the 1950s, after Kenneth Joseph Arrow published his impossibility theorem,[1177] scholars have known that it is impossible to devise a transitive and nondictatorial mechanism that would effectively aggregate the divergent preferences of individuals into an ordinal ranking of social preferences. This result irreparably dooms any hope that a collective or discursive rationality could lend a normative sense of legitimacy to law.[1178] (Moreover, not all voters reveal their true preferences, which, in any case, cannot be aggregated.)[1179]

1173 *De l'esprit des lois*, book 11 (1748).

1174 Of course, the truism that judges make law begs the question: How do they make law?

1175 *Du contract social, ou, Principes du droit politique*, book 11 (1762).

1176 See generally Robert A. Dahl, *A Preface to Democratic Theory* (1956).

1177 *Choice and Individual Values* (1951).

1178 Note that Eric A. Posner, and E. Glen Weyl's proposed quadratic voting system departs from Arrow's assumption of ordinal preferences, "Voting Squared: Quadratic Voting in Democratic Politics," 68 *Vanderbilt Law Review* 441, 443 note 3 (2015); *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 80-126 (2018). This Chapter points up an alternative correction to rule by tyranny of the majority which steers clear of ballot counting.

1179 Allan Gibbard. "Manipulation of Voting Schemes: A General Result," 41 *Econometrica* 587 (1973); Mark A. Satterthwaite, "Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions," 10 *Journal of Economic Theory* 187 (1975).

What is left is the positive account: what James Madison called the "superior force of an interested and overbearing majority."[1180] Surely this cannot be the case. It seems odd and contradictory that the legitimacy of the law —the obligation to obey the law— could be anything but normative. Even purely positive law doctrines give the impression of reintroducing Natural law by the back door, when they explain the legitimacy of law through a rule of recognition[1181] or *Grundnorm*[1182] to escape from the trap of circularity? Are we ever, then, to eliminate Natural law from legal discourse? Almost 80 years ago, Lon Fuller led the call for a revival of Natural law.[1183] It has now been 60 years since Fuller's famous debate with Herbert Lionel Adolphus Hart.[1184] The problem with Natural law is: How can a legitimate, legal regime be conceived, in normative terms, when reasonable people differ about what is self-evident? Whose reason is reasonable? If the obligation to obey the law can be divorced from normative concerns, what is entailed in a purely positive account of the legitimacy of statutory law and of case law? Can the (perhaps supranational) institution building that will follow in the twenty-first century continue to rely primarily on the republican blueprints that were laid back at the end of the eighteenth century?

Positive law and economics and positive political theory converge in a monograph by Robert D. Cooter.[1185] He employs economic methodology to address the strategic problems that institutional, especially constitutional, design must solve. Yet he ignores the constitutional dimension of individual rights, as they are defined by the case law of higher courts. Rather, he treats individual rights as matters of public policy for a constitutional convention to decide. In response, Eric A. Posner explains about public choice theories of constitutional rights: "There are no such theories, not in Cooter's book and not elsewhere in the literature… It may be that public choice, and rational choice in general, have nothing distinctive to say about constitutional rights."[1186]

1180 *The Federalist, on the new Constitution*, No. 10 (1810).

1181 See Hart, *The Concept of Law* (1961).

1182 See Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934).

1183 Lon Fuller, *The Law in Quest of Itself* 116 (1940).

1184 Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593 (1958); Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harvard Law Review* 630 (1958).

1185 *The Strategic Constitution* (2000).

1186 "Strategies of Constitutional Scholarship," 26 *Law & Social Inquiry* 529 (2001).

Over the last 40 years, a cottage industry of public choice scholarship has sprouted up. From an interest-group perspective, this literature seems to delegitimize society's chief law-making institutions. The focus of much of this scholarship is on the agency problems endemic in core legislative institutions comprised of elected representatives,[1187] and in core judicial institutions comprised of unelected judges.[1188] Rather than repeat this literature, we will skirt agency problems altogether. Society's chief law-making institutions can be modeled without elected representatives or unelected judges.[1189] By removing the agents of power, we will reveal that substratum of power relations that lies beneath society.

This Chapter attempts to model the majority's power to legitimize both statutory law *and* case law. The legitimacy of case law, it turns out, is related —but not identical— to the legitimacy of statutory law. Accordingly, we first develop a game-theoretic model of the purely positive legitimacy of statutory law. This part of the Chapter will only make explicit the suppositions that underlie much well-settled positive political theory regarding democracy. We acknowledge the obvious. There is nothing new in this part of the Chapter —no philosophy, theory, insight, perception, or pronouncement— that hasn't been, in some shape or form, expressed by someone else before, and, for that matter, just as surely will be again. Only after this model is made explicit as the Che Guevara signaling game (discussed *infra* in Section II) and graphically represented in the extensive form, do we attempt, to model the purely positive legitimacy of case law, which we advance as the Saint Thomas More signaling game (discussed *infra* in Section III.)

Let's get one thing straight: Every lawyer knows that judges make law. Yet, what is case law and how does it differ from statutory law? Close to 70 years ago Edward Hirsch Levi, who served as dean of the University of Chicago Law School, published his highly influential booklet on legal reasoning.[1190] Yet no Chicago professor, other than Cass Sunstein about 20 years ago, has picked up the intellectual gauntlet thrown down. At the outset, we make clear that while judge-made law is ubiquitous throughout the world, it is also minimalist and casuistic. As Sunstein notes distinct-

1187 For a valuable though somewhat outdated survey, see Daniel A. Farber and Philip P. Rickey, *Law and Public Choice: A Critical Introduction* (1991).

1188 See Maxwell L. Stearns, 1995. "Standing Back from the Forest: Justiciability and Social Choice," 83 *California Law Review* 1309 (1995).

1189 Recall a Swiss popular assembly or an Athenian popular court.

1190 *An introduction to legal reasoning* (1949).

ly, case law proceeds in small, incremental steps.[1191] Moreover, it construes rights narrowly, through case-by-case decisions, unlike statutory law which defines policy matters broadly. Certainly, legislatures can make durable statutory law because the courts enforce those statutory standards.[1192] Here courts are asked to apply a legislatively-created right to facts undoubtedly contemplated by the legislature as a standard. Courts may further narrow such standards into rules, "a legal direction which requires for its application nothing more than a determination of the happening or nonhappening of physical or mental events—that is, [a determination] of facts."[1193] Yet courts also —all the time— incrementally extend or stretch statutory law, that is, create and apply judicially-created rights, to fit new factual situations that no legislature has contemplated.

Case law is narrowly fact-specific. When judges decide cases, their decision cannot be abstracted from the facts of the case. Nor can a reason or principle necessarily be induced through legal reasoning. Let us, once and for all, break free of the distinctively rationalist vocabulary of legal process that has beguiled generations of civil-trained lawyers and even prominent common law judges such as Benjamin Cardozo.[1194] More recent analyses of legal reasoning also miss their mark, when they consider that the holding of a case is anything more than the narrow decision of a fact-specific case. Melvin Aron Eisenberg submits: "Courts often announce rules to govern issues that are at best tangential to a resolution of the dispute before them."[1195] And Frederick Schauer agrees: "Because a reason is necessarily broader than the outcome that it is a reason for, giving a reason is saying something broader than necessary to decide the particular

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1191 See "On Analogical Reasoning," 106 *Harvard Law Review* 517 (1993); "Incompletely Theorized Agreements," 108 *Harvard Law Review* 1733 (1995); "Problems with Rules," 83 *California Law Review* 953 (1995); *Legal Reasoning and Political Conflict* (1996); "The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided," 104 *Harvard Law Review* 4 (1996); *One Case at a Time: Judicial Minimalism on the Supreme Court* (2001); "Minimalism at War," 2004 *Supreme Court Review* 47(2004); "Burkean Minimalism," 105 *Michigan Law Review* 353 (2006); "Second-Order Perfectionism," 75 *Fordham Law Review* 2867 (2007).

1192 See Richard A. Posner and William M. Landes, "The Independent Judiciary in an Interest-Group Perspective," 18 *Journal of Law and Economics* 875 (1975); William F. Shughart II and Robert D. Tollison, "Interest Groups and Courts," 6 *George Mason Law Review* 953 (1998).

1193 Henry M. Hart Jr. and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 139-40 (1994).

1194 *The Nature of the Judicial Process* (1922).

1195 *The Nature of Common Law* 3 (1988).

case."[1196] Such reasons are —let us be clear— *obiter dicta* and not case law. Case law is not about extracting any coherent *ratio decidendi* from a case. Nor do judges solemnly set out the *ratio decidendi* of cases. The Latin terminology mucks things up. Rather, the holding of a case is inseparable from its report of the facts, with the decision. Oliver Wendell Holmes Jr., echoing the words of Rudolf von Jhering, famously put it, when he said that "experience is the life of the law, not logic."[1197]

Also at the outset, we must make clear what is our methodology. Rational choice assumptions do not present a problem in this Chapter when we model rational, calculating, optimizing behavior across the temporal dimension. Criticisms in terms of the underlying assumptions of human knowledge and cognitive capacity are at least as old as the model of rational choice itself. In the fifth century, Augustine, who articulated the doctrine of free choice and autonomy as the self who is a law unto himself, also articulated the doctrine of heteronomy, as the self's need for systems of external authority —religion and law— to impose direction upon life.[1198] Augustine was aware of the insights of a neo-Platonist philosopher, Plotinus, who worked out human choice as a complex union of autonomous and heteronomous elements. Edmund Burke would turn the same doctrine in the eighteenth century into an argument on the necessity to respect the continuity of the traditions, institutions and cultural practices of a people— the inheritance of dead generations, due to generations as yet unborn.[1199] Burke's contribution is an argument from a perspective of bounded rationality against the abstract programs of the French Revolution to use 'Reason,' with a capital letter, to uproot traditional values and institutions.

In both of our game-theoretic models, the players are assumed to be rational decision-makers maximizing their payoffs and endowed with cognitive capacity to understand the rules of the games as well as the other players. This Chapter assumes that homo sapiens are intelligent, resilient, adaptable, organized animals which exhibit both allelomimetic and agonistic behavior. Even though incommensurate alternatives cannot be sorted out by reason when disputes over rivalrous goods break out, this Chapter argues that communication is still possible even as the outbreak of vio-

1196 *Thinking like a lawyer: a new introduction to legal reasoning* 56 (2009).

1197 *The Common Law 1* (1881). For an excellent general discussion of case law, see Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005).

1198 Bernhard Dombart (editor), *Sancti Aurelii Augustini de Ciuitate Dei libri XXII* (1929).

1199 *Reflections on the Revolution in France* (1790).

lence seems imminent and inevitable. Homo sapiens communicate without resorting to hooting, strutting, ground-thumping, or chest-beating. Law is the outward manifestation of the signaling system of credible threats of violence in human populations.

Let's be quite clear and upfront about what we propose. Legal reasoning by analogy, as carried out by courts, is not an exercise in divination, but an empirical judgment that an imminent, nonabstract, concrete, ripe, injury may be repeated across the temporal dimension. Our point is that if oracles were possible, legislatures and not judges should consult them. In this sense, our Chapter departs radically from the literature that attempts to take account of the preferences of future generations.[1200]

Judges look to the facts of a present situation and make a probabilistic inference by analogy that an empirical judgment from past similar-fact cases may apply in probabilistic terms and have a bearing to future similar-fact cases. The perspective is present-centred because judges use only information available in current-state knowledge, and their decisions are primarily controlled by the immediate situation before them. Nonetheless, judges are radically past- and future- as well as present-oriented. They do not ignore or deny things in the immediate situation. However, they also combine their present-centred perspective with a kind of long-term, future-oriented approach to legal reasoning, as well as making a veritable dogma of the past. Judges rule in the present, revere the past and, at the same time, think about the future. They are not seers because their vision of the future reflects past or present experience rather than developing a vision of life different from the past or present. Judges' own experience in handling multiple cases with similar facts gives them a sense of the recurrence, or continuity, of human experiences. In the judicial mind, the cyclical view of time prevails. How-

[1200] See Anthony D'Amato, "What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility," 84 *American Journal of International Law* 190 (1990); R. George Wright, "The Interests of Posterity in the Constitutional Scheme," 59 *University of Cincinnati Law Review* 113 (1990); G. F. Maggio, "Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources," 4 *Buffalo Environmental Law Journal* 161 (1997); Lisa Heinzerling, "Environmental Law and the Present Future," 87 *Georgetown Law Journal* 2025 (1999); Aaron-Andrew P. Bruhl, "Justice Unconceived: How Posterity Has Rights," 14 *Yale Journal Law & Humanities* 393 (2002); John Edward Davidson, 2003. "Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing Upon Future Generations," 28 *Columbia Journal of Environmental Law* 185 (2003). Richard A. Epstein injects a different perspective into this debate, "Justice Across the Generations," 67 *Texas Law Review* 1465 (1989).

ever, in the actual labyrinth of life, judges also learn that recurrence cannot be trusted, as every case may be different. Reasoning by analogy is an innate human ability with a lengthy history in law.[1201] Well, yes, in both game-theoretic models in this Chapter, the players are assumed to have the cognitive capacity to recognize in probabilistic, not deterministic, terms the considerable potential for similar, or worse, situations —which are presently before them, and which may have occurred in the past— to recur in the future.

The point of the debate over the legitimacy of both statutory law and case law, as a purely-positive matter, is to distinguish those signals that are credible threats of violence from instances of strategic deception. Society must decide whether to heed the signal or to ignore it and attack. The point of signaling is to get information across[1202] which will avoid unnecessary violence, as we will see, even without engaging others in any type of 'rational dialogue.'

In this Chapter, we argue that politics and law are attempts, from within liberal theory, to make a place for different and incommensurable ways of life. How does a liberal regime allow its citizens to pursue their diverse aims? How can we find freedom in an intrusive, dominating, relentlessly coercive society? We show how incommensurate pluralism in society is possible despite the legitimate overbearing coercive order under the rule of law.

A strong incommensurability thesis embodies the idea that there is a sharp, unbridgeable gap between different rational discourses about, and views of, the world and the good. When we say that conceptual schemes and values are incommensurable, we mean that they are incomparable by any rational measure. There exists no purely rational framework for making social choices about which ways of life are preferable. Society is pluralistic. A strong incommensurability thesis abandons our comfortable illusions that the various monisms that imprison the varieties of human experience and human thought in a single ideology or creed, may make social coherence possible. The existence of incommensurable concepts of the good, and the consequent need to make choices between them, undermines the Enlightenment faith in a rational morality. Values are in conflict. A divided, pluralistic society is a tumultuous scene of competing views of order,

[1201] See Stein on Marcus Antistius Labeo's use of analogy in Roman law, "The Relations Between Grammar and Law in the Early Principate: The Beginnings of Analogy," in *Atti Del II Congresso Internazionale della Societa Italiana di Storia del Diritto* 757 (1971).

[1202] See Michael Spence, "Job Market Signaling," 87 *The Quarterly Journal of Economics* 355 (1973); John C. Harsanyi, "Games with Incomplete Information Played by 'Bayesian' Players," 14 *Management Science* 159-182, 320-334, 486-502 (1968).

of vastly different if not outright contradictory modes of comprehension, of different moral and religious traditions, of differing standpoints or conceptual schemes, of overlapping and contradictory objectives and interests.

II. Che Guevara Signaling Game

To model the legitimacy of statutory law, we present a game-theoretic approach. Consider the following interaction, which we will refer to as the Che Guevara signaling game, played between faction (F) and everyone else (E). F's type is private information and is not observed by E. Faction's type is either a synchronic majority, which is realized (selected by Nature) with probability p, or a synchronic minority, which is realized with probability $1 - p$. More formally, we say that the set of players is denoted by $N = \{F, E\}$, and F's type space is denoted by $\Theta_F = \{\text{majority, minority}\}$.

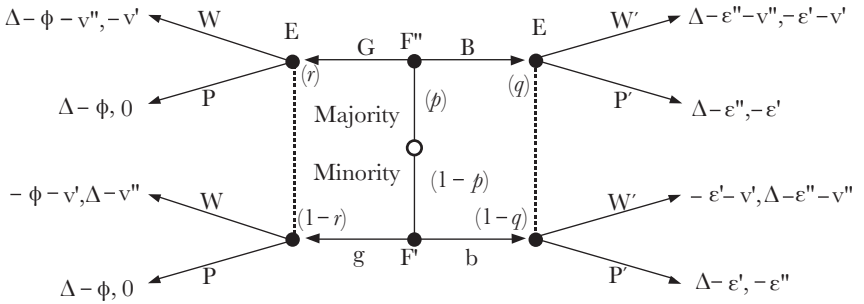
The relative strength of F and E depend on whether F is a synchronic majority or minority. As F observes its type, it knows its own relative fighting ability, which implies it knows that of E. However, as E is uninformed of F's type, E does not know its own relative fighting ability or that of F. We use F' to denote the minority F and F'' to denote the majority F. After observing its type, F chooses between two costly actions that potentially convey information to E. F can choose either a ballot count or a guerrilla foco. The ballot count is denoted by B for the majority F and b for the minority F, and entails a cost of campaigning for the election. We assume that this cost is higher for the minority than it is for the majority, and denote these costs by ε' and ε'', respectively, and assume $\varepsilon' > \varepsilon''$. The guerrilla foco is denoted by G for the majority F and g for the minority F, and entails the same cost for either type, which is denoted by ϕ. We assume that $\varepsilon' > \phi > \varepsilon''$.

Following this choice by F, E can choose either war or peace. As noted above, E does not observe F's type, but does observe F's choice of ballot count or guerrilla foco. Following the guerrilla foco, E's choice of war is denoted by W and E's choice of peace is denoted by P. Similarly, following the choice of ballot count, E's choice of war is denoted by W' and E's choice of peace is denoted by P'.

It is costly to wage war, and we assume that this cost to the majority is less than it is to the minority. This is treated symmetrically so whichever player is the majority bears a cost of v'' to wage war, and the minority bears a cost of v' to wage war, where $v' > v'' > 0$. We denote by Δ the present value of the rival resource for which E and F are competing. We assume that $\Delta >$

ϕ, ε', ε'', v''. Following either choice of action by F, waging of war by E leads to whichever player is the majority (if F is a majority then E is a minority) receiving Δ. However, if E chooses peace, for either action choice of F, F receives Δ. The motivation for this when F has selected the guerrilla foco is that an unchallenged guerrilla foco takes over. In the case of the ballot count, it is assumed that F can rig the election, which fits with the assumption that $\varepsilon' > \varepsilon''$.

The extensive-form representation of this game is given below. We use r to denote E's updated belief that F is a majority following the selection of a guerrilla foco, and we use q to denote E's updated belief that F is a majority following the selection of a ballot count.



We now consider perfect Bayesian equilibria of this game. There are two possible separating equilibria, which provide a signaling interpretation to F's choice of action. These are described in the following two results.

Proposition 1: When $-\phi - v' > \Delta - \varepsilon'$, there is a perfect Bayesian equilibrium of this game has F playing Bg, which results in belief $r = 0$ and $q = 1$ for E, and E plays WP′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to r and q. Note, for r = 0, W is E's optimal action since $\Delta - v'' > 0$ by assumption. Also, for q = 1, P′is optimal for E since $v' > 0$. F″strictly prefers to play B because deviating to G will yield $\Delta - \phi - v''$, which, since $\phi > \varepsilon''$and $v'' > 0$, is less than the value from playing B of $\Delta - \varepsilon''$. Similarly, F′strictly prefers to play g because deviating to b will yield $\Delta - \varepsilon'$, which, by assumption, is less than the value from playing g of $-\phi - v'$. *Q.E.D.*

Proposition 2: When $\phi < \varepsilon'' + v''$ and $\Delta - \phi < -\varepsilon' - v'$, there is a perfect Bayesian equilibrium of this game has F playing Gb, which results in belief $r = 1$ and $q = 0$ for E, and E plays PW′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to r and q. Note, for $r = 1$, P is E's optimal action since $v' > 0$ by assumption. Also, for $q = 0$, W′ is optimal for E since $\Delta - v'' > 0$. F″ strictly prefers to play G because deviating to B will yield $\Delta - \varepsilon'' - v''$, which, since $\phi < \varepsilon'' + v''$, is less than the value from playing G of $\Delta - \phi$. Similarly, F′ strictly prefers to play b because deviating to g will yield $\Delta - \phi$, which, by assumption, is less than the value from playing g of $-\varepsilon' - v'$. *Q.E.D.*

We suggest that the assumptions and result of Proposition 1 fit with the behaviour of Che in Bolivia. There, although he was in the minority, he chose to stage a guerrilla foco. Jon Lee Anderson goes into some detail about the relish with which, upon gaining power in Cuba in the first months of 1959, the "real life" Ernesto 'Che' Guevara oversaw an estimated 550 executions of those considered enemies of the Cuban Revolution.[1203] Several books about the foco ascribe its failure in large part to the complete absence of popular support.[1204]

A ballot count may sometimes be viewed as objective and unambiguous, unlike a nucleus of determined fighters who take to the mountains and jungles and claim to speak on behalf of a majority of the people. However, we suggest, as our assumption indicates, that elections can be manipulated. To deny that a faction may cheat in an election is naïve. A faction strongly desiring to perpetuate an electoral fraud has many workable options, depending on the polling method in use. For example, the faction may cast votes in the names of dead persons not yet purged from a register, forage voting registers, list ineligible persons as eligible, use substitutes with forged identity documents to vote in place of registered voters. In some systems, a voter may vote more than once—either by going more than once to a polling place or by depositing more than one voting record during a single visit to a polling place. Additionally, a faction might print or distribute unofficial ballot slips already marked with choices and, somehow, smuggle these slips into the pile of votes already cast. The faction may be able to manipulate the counting process, or influence members of the electorate, for example,

[1203] Jon Lee Anderson, *Che Guevara: A Revolutionary Life* (1997).

[1204] See Matt D. Childs, "An Historical Critique of the Emergence and Evolution of Ernesto 'Che' Guevara's Foco Theory," 27 *Journal of Latin American Studies* 593 (1995).

harassing, threatening, bribing, or intimidating, voters. Voters may be prevented from voting by violence or disorder near polling places.

Yet perpetuating a wholesale electoral fraud may be an expensive undertaking for a faction. Moreover, the irregularities and cheating during voting may destroy public acceptance of the announced results; the cost for the faction may arise, not only from the cost of perpetrating the fraud, but from the public's reaction.

The mechanism design for elections to be meaningful is that manipulation of an election by a minority faction must be sufficiently costly to discourage the manipulation. In well-functioning democracies, this is the case. While some may prefer to view elections in such countries as being impervious to manipulation, it is just that elections can be manipulated at a very large cost. In our discussion of the Saint Thomas More signaling game, we apply a similar view to legal proceedings. This line of thought follows the view of the scope for forgery of a piece of evidence found in Jesse Bull.[1205] (In this literature on costly evidence production, it is assumed that forgery or evidence tampering is possible but producing a forged piece of evidence is costlier than producing the same document when it exists. For example, consider a receipt, which shows that payment has been made by a buyer. When payment was made, it is quite inexpensive for the buyer to present the receipt. However, when the buyer did not pay, producing a receipt will be much more expensive because it must be forged.) Under the assumption of Proposition 1, it is prohibitively costly for the minority faction to choose the ballot count, and the manipulation of the vote that it knows ahead of time that it will do, should it choose the ballot count. So instead, the minority faction chooses the guerrilla foco. So, when E sees that the faction has selected the ballot count, E knows that the faction is a majority and chooses peace. Similarly, when E observes that the faction has selected the guerrilla foco, E knows that the faction is a minority and wages war against the faction. It is important to note that the minority faction does not find it advantageous to try to act like it is the majority and choose the ballot count. This is because the cost of manipulating the ballot count is prohibitively high. This is reflected in the assumption that $-\phi - v' > \Delta - \varepsilon'$, which implies that $\varepsilon' > \phi + v' + \Delta$. We suggest that an important function

[1205] "Mechanism Design with Moderate Evidence Cost," 8 *Contributions in Theoretical Economics* number 1, article 15 (2008). See also Chris William Sanchirico and George Triantis, "Evidentiary Arbitrage: The Fabrication of Evidence and the Verifiability of Contract Performance," 24 *Journal of Law, Economics, and Organization* 72 (2008).

of government is to ensure that manipulating an election is a very costly endeavor.

Legal legitimacy is a concept that can be given purely positive content. Questions about coercion, and free will, arise about what people can avoid. To make an analogy with Natural law, we reconcile ourselves to something undesirable but unavoidable and subordinate or yield our will or reason to a higher power, such as God. Moreover, this submission and surrender of our will to the higher authority of the all-powerful majority is more like a stoic posture towards fate than a variation of the Hostage Identification Syndrome,[1206] whereby people accept the domination of their erstwhile oppressors, because becoming a hostage is strategic and temporary, rather than unavoidable and permanent.

The legitimacy of law does not involve, nor does it require, a normative justification. Nor does it require a normative, communicative, rational discourse to form part of the democratic decision-making process. Jürgen Habermas spent much of his life arguing the opposite.[1207] Furthermore, history does not have powers of reason, despite the importuning of Georg Wilhelm Friedrich Hegel.[1208] Rather than stay committed to the centrality of dialogue and debate in democracy and the rule of law, let us recognize politics and law for what they are: attempts to reconcile our discordant, incommensurable values and interests.

The perfect Bayesian separating equilibrium of Proposition 1 is not tyrannical, although it is dictatorial—as we will also demonstrate in the Saint Thomas More signaling game (see *infra* in Section III.) The rule of tyranny is the opposite of the rule of law; it is rule by illegitimate dictatorial commands. In the next section, we complete our examination of performance signaling of legitimate, dictatorial legal regimes in human populations. The purely positive legitimacy of statutory law, it turns out, is related (but not identical) to the purely positive legitimacy of case law.

Again, and again, in everyday parlance, we thrust forward the phrase 'the rule of law, not of men' as a kind of rhetorical flourish. Was Grant Gilmore right to hold 40 years ago that rule-of-law ideals are more rhetori-

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[1206] Georges Gachnochi and Norbert Skurnik, "The paradoxical effects of hostage-taking," 44 *International Social Science Journal* 235 (1992).

[1207] *Legitimationsprobleme im Spätkapitalismus* (1973); *Theorie des kommunikativen Handelns* (1981); Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen (1992).

[1208] Georg Wilhelm Friedrich Hegel, *System der Wissenschaft: erster Theil, Die Phänomenologie des Geistes (1807)*.

cal than real?[1209] The economic analysis of legal reasoning brings an unexpected benefit: an entirely new approach to that fundamental and highly visible phrase 'the rule of law, not of men'—a concept that is notoriously hard to define. The rule of law captures for us the legitimacy of "the law," as opposed to nonlaw. We can define the concept of the rule of law in positive, not normative, terms using economic methodology, with greater precision than ever before. Otherwise, the "rule of law, not of men" rings hollow as a thin and well-worn platitude.

III. Saint Thomas More Signaling Game

Despite the rapid expansion of statutory law in the twentieth century,[1210] legislatures did not create most of the rules of private law; judges did—Roman law and English common law are judge-made, as *infra* we discussed in Chapters One and Two. A great deal of public law is also judge-made: *Exempli gratia*, the federal and constitutional doctrine of the United States of America in the nineteenth and twentieth centuries; the large body of public law developed by courts in the administrative system of the crown of Castile in the Americas and the Philippines (The laws of the Indies) in the sixteenth and seventeenth centuries.[1211] For that matter, much of the public law being created in the European Union in the last 70 years is also judge-made law.

We must model the purely-positive legitimacy of law and lawmaking in a way that accurately reflects what everyone knows about the legal system: Both legislators and judges do make law and always have. Case law carries the same force of law as statutory law; it is "the law" for us, not "no law" as Jeremy Bentham would have us believe.[1212] Moreover, to function well, core legislative institutions comprised of elected representatives must be supplemented by other, nonelected bodies—like courts. Again, we remove the agents of power altogether.[1213] We attempt a pure agonistic, ludic distillation of the human struggles that lie beneath case law.

1209 *The Ages of American Law* 105-06 (1997).

1210 Calabresi, *A Common Law for the Age of Statutes*.

1211 See Juan Javier del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI* 261-77 (2010).

1212 David Lieberman, *The Province of Legislation Determined* 239-40 (2002).

1213 Our analysis does not require kings or queens, ministers, magistrates, or judges of any kind.

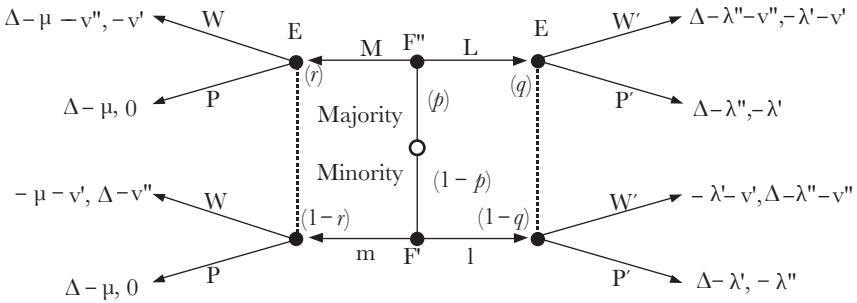
To model the legitimacy of case law, we present a game-theoretic approach. Consider the following interaction, which we will refer to as the Saint Thomas More signaling game, played between faction (F) and everyone else (E). F's type is private information and is not observed by E. Faction's type is either a diachronic majority, which is realized (selected by Nature) with probability p, or a discrete and insular minority, which is realized with probability $1 - p$. More formally, we say that the set of players is denoted by $N = \{F, E\}$, and F's type space is denoted by $\Theta_F = \{\text{majority, minority}\}$.

The relative strength of F and E depend on whether F is a diachronic majority or insular minority. As F observes its type, it knows its own relative fighting ability, which implies it knows that of E. However, as E is uninformed of F's type, E does not know its own relative fighting ability or that of F. We use F′ to denote the minority F and F″ to denote the majority F. After observing its type to E. F can choose either a legal argument or martyrdom. The legal argument is denoted by L for the majority F and l for the minority F, and entails a cost of mounting a legal offensive or defense. We assume that this cost is higher for the minority than it is for the majority, and denote these costs by λ' and λ'', respectively, and assume $\lambda' > \lambda''$. Martyrdom is denoted by M for the majority F and m for the minority F, and entails the same cost for either type, which is denoted by μ. We assume that $\lambda' > \mu > \lambda''$.

Following this choice by F, E can choose either war or peace. As noted above, E does not observe F's type, but does observe F's choice of legal argument or martyrdom. Following martyrdom, E's choice of war is denoted by W and E's choice of peace is denoted by P. Similarly, following the choice of legal argument, E's choice of war is denoted by W′ and E's choice of peace is denoted by P′.

It is costly to wage war, and we assume that this cost to the majority is less than it is to the minority. This is treated symmetrically so whichever player is the majority bears a cost of v'' to wage war, and the minority bears a cost of v' to wage war, where $v' > v'' > 0$. We denote by Δ the present value of the rival resource for which E and F are competing. We assume that $\Delta > \mu, \lambda', \lambda'', v''$. Following either choice of action by F, waging of war by E leads to whichever player is the majority (if F is a majority then E is a minority) receiving Δ. However, if E chooses peace, for either action choice of F, F receives Δ. The motivation for this when F has selected the martyrdom is that if unchallenged martyrdom leads to the faction winning. In the case of the legal argument, it is assumed that F will be convincing regardless of its type, which fits with the assumption that $\lambda' > \lambda''$.

The extensive-form representation of this game is given below. We use *r* to denote E's updated belief that F is a majority following the selection of martyrdom, and we use *q* to denote E's updated belief that F is a majority following the selection of the legal argument.



Proposition 3: When − μ − v′ > Δ − λ′, there is a perfect Bayesian equilibrium of this game has F playing Lm, which results in belief r = 0 and q = 1 for E, and E plays WP′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to *r* and *q*. For r = 0, E's optimal action is W since Δ − v″ > 0, and, for q =1, E's optimal action is P′since − λ′ > − λ′− v′. F″strictly prefers to play L because deviating to M will yield Δ − μ − v″, which, since μ > λ″and v″ > 0, is less than the value from playing L of Δ − λ″. Similarly, F′strictly prefers to play m because deviating to b will yield Δ − λ′, which, by assumption, is less than the value from playing m of − μ − v′. *Q.E.D.*

Proposition 4: When μ < λ″+ v″and Δ − μ < − λ′− v′, there is a perfect Bayesian equilibrium of this game has F playing Ml, which results in belief r = 1 and q = 0 for E, and E plays PW′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to *r* and *q*. For r = 1, E's optimal action is P since v′ > 0, and, for q =0, E's optimal action is W′since Δ − v″ > 0. F″strictly prefers to play M because deviating to L will yield Δ − λ″ − v″, which, since μ < λ″+ v″, is less than the value from playing M of Δ − μ. Similarly, F′ strictly prefers to play l because deviating to m will yield Δ − μ, which, by assumption, is less than the value from playing m of − λ′− v′. *Q.E.D.*

Hence, in the assumption of Proposition 3, a minority Saint Thomas More embraces martyrdom. It is instructive to remember five centuries

ago Sir Thomas More, lord chancellor in one of England's most dangerous periods, amid the initial split between Catholics and Anglicans, or English Protestants, and the onset of the religious wars, embraced martyrdom rather than swear a false oath to King Henry VIII's Act Respecting the Oath to the Succession. To those assembled at the scaffold, he said that he died "the [k]ing's good servant, but God's servant first."[1214]

In a similar manner to Proposition 1 pertaining to the Che Guevara signaling game, we have assumed that the minority faction is able to, at a very large cost, manipulate the legal proceedings in a way that allows it to win. Here again, we suggest there is scope for manipulation, but in well-functioning societies the cost of doing so is quite high. This is in line with the influence-cost literature.[1215] As noted above, this also fits very well with the literature on costly evidence that allows for forgery. Here, the minority faction's cost of manipulating the legal hearing being prohibitively costly takes the form of $-\mu - v' > \Delta - \lambda'$, which implies $\lambda' > \mu + v' + \Delta$. We suggest that it is critically important to have a legal system that makes it very costly for an insular minority to make a convincing legal argument.

Unlike an ideologue bent on martyrdom, to bring a legal action, a litigant must show a concrete injury-in-fact. The justiciability doctrines —standing, ripeness, mootness, and the political question— must be strictly applied for case law to be legitimate. The doctrines of justiciability of standing in the common law system or *actio* in the civil law tradition must not conflate injury-in-fact with an injury to a zone of interests protected by statutory law. An injury can be both to a zone of interests defined as a matter of public policy and an actual injury sufficiently personal and concrete that a litigant could analogize from it. Courts make case law, which may shape new rights, or may extend legislatively-created rights to facts not previously considered by the legislature. The injury-in-fact requirement as a mechanism design enables legal reasoning to draw analogies from a concrete injury liable to be repeated over time. An ideological litigant —a discrete and insular minority— is unable to point to this type of particularized injury. At most, an ideological litigant may press home policy arguments.

1214 David Halpin, "Utopianism and Education: The Legacy of Thomas More," *British Journal of Educational Studies* 49 299 (2001).

1215 See, for example, Cooter and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes," 23 *Journal of Economic Literature* 1067 (1989) and Gordon Tullock, *Trials on Trial* (1980).

Legal argument is a performance signal because the litigant can demonstrate an actual or imminent injury-in-fact, and through reasoning by analogy unfolds a parable of horribles, alluding to other particularized instances of harm which preceded it or are likely to follow it. It should be noted that what makes a legal argument by analogy from long-standing precedents or particularized showings of future harm unduly expensive for ideological litigants is that their harm is more conjectural and speculative. Ideological litigants' legal arguments seem hardly real and not credible when made in the abstract, with unsubstantiated and potentially misleading allegations of fact, precisely because of the difficulty of looking around the temporal corner. Again, the nonmimicry constraints are both internal, and imposed from the outside by the receivers' reactions.

The role of courts in the legal process is not to extend a mantle of protection over discrete and insular minorities, however much John Hart Ely insists that this function lies at the core of judicial responsibilities.[1216] As a positive matter, it is socially realistic to suppose that quite the opposite happens. Courts dispense with discrete and insular minorities—the term used by Justice Harlan Fiske Stone in "the Footnote" in *United States v. Carolene Products Co.*[1217] Judicial review is not "a counter-majoritarian force"; much less is it a "deviant institution" in democracy. There would be no positive justification for a counter-majoritarian institution in the political process. Would such an institution not instigate a revolution against it? Why have the Anglo-American people not plunged into an incarnate revolution against the United States Supreme Court, and against all courts and lawyers? Was not the French Revolution provoked by the actions of the Parliament of Paris? Bickel's approach has led several generations of common law scholars astray, and misses the very point of legal reasoning across time, which works by analogy.[1218]

While the vigilant and courageous nonelected courts are required as an occasional counterpoise to the elected legislature, it is to promote durable statutory law[1219] and to define and protect, by accretion of case law, the interests of a diachronic majority (the proposal we make.) In game-theoretical terms, the signal given by a diachronic majority is similar (but not identical)

1216 *Democracy and Distrust: A Theory of Judicial Review* (1980).

1217 304 U.S. 144, 152 note 4 (1938).

1218 See generally *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.*

1219 Posner and Landes' 1975 thesis, "The Independent Judiciary in an Interest-Group Perspective."

to the signal sent out by a synchronic majority. The legitimacy of statutory law, it turns out, is related (but not identical) to the legitimacy of case law. An enactment passed by the overwhelming majority of the people becomes a legitimate legal command because the outcome of the social struggle on that issue is predictable. Society simply submits to the inevitable domination of the majority to avert pointless bloodshed. In contrast, the sentence handed down after a court proceeding becomes an unqualifiedly legitimate legal command not because the result of the social struggle, but because the diachronic majority will put up a struggle even in the face of a possible crushing defeat or complete annihilation.

Let us explain why. If a discrete and insular minority were to attempt to dictate its preferences on the rest of society, the majority would simply crush it, that is, wipe it out of existence. The majority might decimate the faction, or even obliterate it and its lineage, that is, annihilate it from time.

Yet a diachronic majority is different. A diachronic majority is composed of people, who while sharing concrete interests, exist at different times in the past, present, and in the future (though future identities remain indeterminate.) Due to the technological barriers of existing communications (upstream) as well as time paradoxes,[1220] this group is unable to meet or assemble into coalitions. However, if each person puts up a present struggle (however unequal this struggle may be,) and in turn is annihilated, society is unavoidably faced with recurrent crises of violence over time. Unrelated injured parties reappear, willing to engage society to assert analogous interests. Strategically speaking, it is not individually unrealistic to expect that the injured parties find it rational to put up a fight where defeat would be otherwise certain, secure in the knowledge that a numerous group of people spread out through time, in turn, fight on a same issue. The diachronic majority dares to face off against everyone else because it is self-aware through the very same process of legal reasoning. This struggle takes place within reconstituted, present and imaginary time. One moment a diachronic faction seems to have self-immolated. The next it is reborn, like the Phoenix bird, literally rising out of its ashes. Accordingly, through legal reasoning by analogy, diachronic majorities can signal threats that are credible because of the recurrent violence that is expected over time. Through the jurisdictional activity of courts, society makes the necessary concessions to these analogous interests, to pre-empt these recurrent, violent disruptions and outbursts from breaking out.

[1220] See Derek Parfit's thought experiments, *Reasons and Persons* (1984).

It is precisely empty cores,[1221] the relentless pattern of cycling in the world of politics, which prevent a discrete and insular minority —or a majority or even supermajority for that matter— from maintaining itself over time. The byzantine politics of fluid allegiances between people, a Sisyphean hell of endless negotiation and re-negotiation, has a logic all its own. Today, ideological interest groups are part of the faction. Tomorrow, they ask themselves if a new faction will be unified enough to hold the political line.

We do not discount the costs of the recurrent violence expected from a diachronic majority over time. The value of the threat shortly decreases after society is swept over by violence. Yet to assume that recurrent violence regenerates this threat is not entirely socially unrealistic. Accordingly, we assume that the costs of recurrent violence to everyone else add up over time. We observe that recurrent violence only brings poverty and deprivation for everyone else.

The legal scholar may feel uncomfortable with the reductive assumptions of the model. We lump together the decision to bring a legal action and adjudication of the dispute *inter partes*. We make short shrift of the adversarial/inquisitorial distinction in legal process. We put aside the tripartite structure of dispute resolution. Our focus is rather on private/public law litigation *erga omnes*. In case lawmaking, the party structure is not bipolar, but rather multipolar, with plaintiff classes defined by a common individuated injury-in-fact standing against everyone else, or against a public defendant replacing private defendants. In case lawmaking, everyone has a stake in the case or controversy. Accordingly, a decision will have an effect beyond the parties directly involved. A legal norm created by a court is valid *erga omnes* (with prospective general effects.) In addition to the immediate effect *inter partes*, a given decision has a prospective effect because of the case's effect on other cases. We assume deference to precedent —though not necessarily excessive adherence to precedent or the doctrine of *stare decisis* (to stand by decisions and not disturb settled matters)— as part of the legal system. Without precedent, past/present pronouncements do not bind the present/future. We strip the legal process down to its bare agonistic essentials, and demonstrate that in social conflict over a rivalrous good, communication still happens between the parties. Moreover, legal argument, stripped down to its superficially simple agonistic essentials, is a legitimate dictatorial, nonrational

[1221] See Lester G. Telser, "The Usefulness of Core Theory in Economics," 8 *Journal of Economic Perspectives* 151 (1994); *Economic Theory and the Core* (1978).

command in that the receiver, who responds to the variable signal, consents to the terms the signaler dictates in exchange for peace.

Since the sacrifice involved in martyrdom, or engaging in any other strategic brinkmanship, such as a hunger strike, is quite high, even suicidal, a legal resolution handed down after a court proceeding has more threat value than dozens of hunger strikes. All in all, a clear and unambiguous legal argument is a performance signal of the diachronic majority backing for the judicial decision that is held to be law. Case law is legitimate in so far as the barely submerged threat of unavoidable recurrent violence is brought credibly to bear in the arena of social conflict. Society surrenders to the inevitable ascendancy of the diachronic majority, rather than live with recurrent violent disruptions and outbursts.

The primary requirement for a litigant to gain access to the courts, an injury-in-facte, is the rule of representation in the legal process, in the same manner that the ballot count obtained in an election is the rule of representation in the political process. The counter-majoritarian fallacy may lead some scholars into the sophomoric blunder of believing that society suffers from a democratic deficit, when the rule of law is the foundation of democracy. However, scholars who see through the counter-majoritarian fallacy should resist the siren calls of legal process jurisprudence.[1222] We can have no illusion that the ruthless exercise of power can be trammeled by the highest principles and procedural safeguards. Nor that reason and procedure are the essence of law. The only possible constraint on power is power. Where there is countervailing power, there is constraint.

Nor should we think that limited government depends entirely on a constitution's delegation of limited powers to it. Power remains with the people as a matter of social fact. Constitutions ought to clarify the limited role of government and the expansive scope of individual action, but it is not that legal process or constitutional principles define the role of legislatures or of courts. Constitutions are also very open-ended. It is the power itself that is self-defining. One person's power ends where another person's power begins. Coalitions of people in time are highly unstable. Today's majority is not the same coalition as tomorrow's. Certain temporally disconnected individuals who share actual, concrete, discrete, particularized interests wield

[1222] See, for example, the return to legal process jurisprudence in Ilya Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory," 89 *Iowa Law Review* 1287 (2004).

power. Rather than parliamentary or judicial supremacy, there is a delicate balance of powers under the rule of law.

We should not confuse democracy with elections or constitutions —second-order laws enacted by supermajorities—. The latter may be necessary conditions for a democracy, but they are insufficient in themselves. Raising up a democracy requires politically independent institutions. Unelected courts correct a collective action problem—that people disconnected through time are unable to act together. Core judicial institutions comprised of unelected judges, unlike core legislative institutions comprised of elected representatives, are insulated from the political process because unelected judges are supposed to be beholden to a diachronic majority, rather than to synchronic constituencies. In sum, a line of judicial decisions in concrete cases, not any constitutional convention, is the source of our individual rights as people. Why, therefore, shall we continue to be treated in public law to the ludicrous, yet disturbing sight, of constitutional conventions, which give ideological discontents of every stripe a perfect forum to haggle over abstract rights as matters of policy? Or worse, to the constitutions drafted by committees that Adrian Vermeule and Adriaan Lanni aptly call a "monstrosity."[1223]

Moreover, as is evident from our model, judges may create new case law as well as prospectively overrule earlier case law. *Stare decisis* (a policy of observing precedent if the facts of the cases are similar) is not an inexorable command even in the common law system. Certainly, Oona A. Hathaway is correct to claim that the "doctrine of *stare decisis*… creates the [common] law's path-dependent character."[1224] However, if a court believes a past ruling is unworkable, it will be overturned. In the civil law tradition, a line of decisions establishes case law; yet judges are freer to depart from prior holdings. There appears to be no conceptual difficulty for the legal positivist here. The declaratory theory of adjudication —steeped in the Natural law tradition— implies that judges retroactively overrule earlier case law. With a change in current-state knowledge, a synchronic majority may legislatively reconsider statutory law. With a change in current-state knowledge, a diachronic majority may reconsider case law. Legal reasoning

[1223] "Constitutional Design in the Ancient World," 64 *Stanford Law Review* 907, 920 (2012).

[1224] "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System," 86 *Iowa Law Review* 601, 605 (2001).

is forgotten and resurrected, assessed and reassessed, interpreted and reinterpreted, in the hands of the living generation.

IV. A New, Better-Defined Formalism

Up to this point, public choice theory has lacked an adequate purely-positive explanation of the mechanisms 'writ large' that generate legal rules narrowly defined: statutes and case law. Our entirely novel approach to statutory law and case law keeps within the parameters of legal positivism. There will always be public disagreement about what constitutes basic individual rights and liberties and shared community values. That is why we have politics and law in a democracy under the rule of law.

However, if agency problems are kept out of consideration, there is no need for political or legal morality. Law and morality should not be confused. Legal obligation and moral duty are two different things. "The law" is a law unto itself. Its purely positive legitimacy lies outside the realm of morality. Though all of us are adept moralizers—law is a very different matter. Cooter has successfully modeled morality as a punishment-induced equilibrium dependent on a signaling equilibrium, which he calls "consensus."[1225] The problem with a consensus is that Cooter is right, a consensus is nonmajoritarian. If a consensus is nonmajoritarian, it must be kept within the bounds of informal enforcement.[1226]

The only justification for coercive law must be grounded in the majority's purely positive power to legitimize. Insofar as democracy and the rule of law are built on the economics of violence, our sole justifications for these institutions remains purely positive.

The 'the rule of law, not of men' itself is, at the heart of our Constitution, a delicate balance of synchronic and diachronic powers. Martin Shapiro shows how courts avoid a head-on collision with the legislature or parliament through a preoccupation with concrete cases and the seamless web of incremental decision-making.[1227] Courts act where legislatures are inactive. Per Justice Ruth Bader Ginsburg, courts open a (rational?) dialogue with the legislature or parliament when they make deliberate, carefully measured

[1225] "Normative Failure Theory of Law," 82 *Cornell Law Review* 947 (1997).

[1226] See generally Eric A. Posner, "Social Norms, Social Meaning, and the Economic Analysis of Law," 27 *The Journal of Legal Studies* 765 (1998); *Law and Social Norms* (2000).

[1227] "The European Court of Justice: of Institutions and Democracy," 32 *Israel Law Review* 448 (1998).

movements and slow advances with adherence to procedures.[1228] Certainly, courts keep from engaging legislatures head-on by applying the political question doctrine, and the group of doctrines that lead courts to avoid constitutional issues whenever possible. This Chapter focuses on the other justiciability doctrines: standing, ripeness and mootness.

The astonishing result of this Chapter is that private individuals have the power to legislate. An oversimplified two-type, two-action game-theoretic model shows us how this legislation is possible. Individuals, under certain conditions, can dictate terms to the rest of society. Not only is legislation by private individuals possible, it is ubiquitous. Independent courts solve the collective action problem caused by the inability of parties spread across time to form coalitions to defend their efficient interests because of temporal paradoxes.

We offer a new modest formalism, which respects legal reasoning by analogy and democratic results as a branch of practical reasoning. True, rational choice is an optimistic assumption when applied to individuals who act for their own interest. Yet, as David D. Friedman wisely points out, it becomes a pessimistic assumption when applied to people who must act in someone else's interest.[1229] We have taken agency relationships and agency costs out of the equation in this Chapter, through a slight of hand. With agency costs, public choice perspectives teach us to be cautious. Perhaps, understanding the logic of the problem widens the scope for the economic analyst, and concedes less to the rule-of-law formalist (believer in legal reasoning and democracy.)

1228 "Speaking in a Judicial Voice," 67 *New York University Law Review* 1185 (1992).

1229 *Law's Order: What Economics Has to Do with Law and Why It Matters* 13 (2000).