An Economic Analysis of Legal Reasoning and Democracy: The Saint Thomas More and Che Guevara Signaling Games

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Available at: https://works.bepress.com/juan_javier_del_granado/81/
An economic analysis of legal reasoning and democracy:

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Juan Javier del Granado¹ and Jesse Bull²
ABSTRACT

Under the general assumptions of democratic theory, legislatures have positive legitimacy to make law because of the power of the people who elected them. Throughout the world, however, unelected judges also make law. What, if anything, gives such judges positive legitimacy to make law? This paper demonstrates, through two superficially simple game-theoretic examples, 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? This paper demonstrates that the court system allows a single individual to act collectively with other similarly situated individuals spread out through time. This paper argues that 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.
1. INTRODUCTION

At the dawn of the new century, 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 economic, political and legal fabric that knits us together into national societies and a global economy has been slow and unsteady. Today economic analysis is incapable of understanding even the rudiments of the democratic legitimacy of the rule of law. Well into the 21st century, the state of the world hangs together by weft threads spun together by 17th century political philosophes. Per the general assumptions of democratic doctrine, lawmaking supremacy belongs in elected parliaments or legislatures, rather than in unelected courts. Yet in practice, throughout the world—in the common-law system as well as in the civil law tradition—an undeniable amount of lawmaking power is wielded by unelected courts. Why is so much lawmaking power put in the hands of democratically unaccountable judges? Perhaps the majority's power, which legitimizes statutory law, also legitimizes case law.

We must bring much-needed conceptual 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. Supranational courts are needed to organize an ever-more interconnected world. Thus, can legal scholars in this new century continue to pretend that legislative governance is legitimate while judicial governance isn't? Can legal scholars continue to speak of the “democratic deficit” of courts? Can they continue to delegitimize the courts’ vital role in protecting basic individual rights as countermajoritarian and antidemocratic exercises of power? Can politicians and people continue to believe that referendums outweigh other representational mechanisms of democratic politics? A system of constitutional (supra-majoritarianly 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 doctrinal clarity when we seek to understand the current political and legal state of the world.

In this paper, 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 (Posner 1990, p. 9), this paper asks the question of where is ultimate might to be found, considering that 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 is unassailable, despite a plethora of legislation in the 20th century, despite codification since the 19th century and judges hiding their powerful and creative role in developing the law, 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 is unassailable, no matter how much Charles-Louis de Secondat Montesquieu (1748) denied it, when he asserted famously that judges are merely “mouthpieces of the letter of the law; passive beings, incapable of moderating either its force or rigor.” 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. Despite an orgy of ostensible scholarship on both sides of the Atlantic, this poverty of thought distorts legal doctrine and is unwise at best and dangerous at worst.
The normative account of what legitimizes the lawmaking powers of majority rule seems a clear and well-settled doctrine. Its greatest exponent, Jean-Jacques Rousseau (1762), bravely stated, “the law is the expression of the general will.” 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 (See Dahl 1956). At least since the 1950s, after Kenneth Arrow (1951) published his impossibility theorem, scholars have known that it's 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.

What is left is the positive account: what James Madison (1810) called the “superior force of an interested and overbearing majority.” 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 (H.L.A. Hart 1961) or Grundnorm (Hans Kelsen 1934) to escape from the trap of circularity? Are we ever, then, to eliminate natural law from legal discourse? Almost 70 years ago, Lon Fuller (1940, p. 116) led the call for a revival of natural law. It has now been 50 years since Fuller's (1958) famous debate with Hart (1958). The problem with natural law is: Whose reason is reasonable? How can a legitimate, legal regime be conceived, in normative terms, when reasonable people differ about what is self-evident? 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 21st-century continue to rely primarily on the republican blueprints that were laid back at the end of the 18th-century?

Positive law and economics and positive political theory converge in a monograph by Robert Cooter (2000), a forward-looking economist on the faculty of Boalt Hall School of Law at the University of California at Berkeley. 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 (2001) 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.”

Over the last 40 years, a veritable cottage industry of public choice scholarship has sprouted up. From an interest-group perspective, this literature seems to delegitimize society's chief lawmaking institutions. The focus of much of this scholarship is on the agency problems endemic in core legislative institutions comprised of elected representatives (see Daniel A. Farber and Philip P. Frickey [1991], for a valuable though somewhat outdated survey,) and in core judicial institutions comprised of unelected judges (see Maxwell L. Stearns 1995). Rather than repeat this literature, we skirt agency problems. Society's chief lawmaking institutions can be modeled without elected representatives or unelected judges. Recall a Swiss popular assembly or an Athenian popular court. By removing the agents of power, we reveal that substratum of power relations that lies beneath society.
This paper 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, in section 2 of this paper, we first develop a game-theoretic model of the purely positive legitimacy of statutory law. This part of the paper 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 paper—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 and graphically represented in the extensive form, do we attempt, in section 3 of this paper, to model the purely positive legitimacy of case law, which we advance as the Saint Thomas More signaling game.

Close to 60 years ago Edward Hirsch Levi (1949), who later served as Dean of the University of Chicago Law School, published his highly influential booklet on legal reasoning. Yet no Chicago professor, other than Cass Sunstein about 10 years ago, has picked up the intellectual gauntlet thrown down. Let's get one thing straight—every lawyer knows that judges make law. At the outset, we make clear that while judge-made law is ubiquitous throughout the world, it is also minimalist and casuistic. As Sunstein (1993, 1996) notes distinctly, case law proceeds in small, incremental steps: 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 (see Richard A. Posner and William M. Landes 1975; William F. Shughart II and Robert D. Tollison 1998). Here courts are asked to apply a legislatively-created right to facts undoubtedly contemplated by the legislature as a standard. Henry Melvin Hart, Jr. and Albert Martin Sacks of the Harvard Law School famously defined a standard as “a legal direction which can be applied only by making, in addition to a
finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience.” What is more, Courts may fashion such standards into rules, “a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of facts (Hart and Sacks, 1994, p. 139-40). Yet courts also—all the time—incrementally extend or stretch law, that is, create and apply judicially-created rights, to fit new factual situations that no legislature has contemplated.

Case law is fact-specific. When judges decide cases, their decision cannot be abstracted from the facts of a case. Nor can a reason or principle necessarily be induced. We 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 N. Cardozo (1922). Even more recent analyses of legal reasoning miss the mark completely, when they consider that the holding of a case is anything more than the narrow decision of a fact-specific case. Thus, at Boalt Hall School of Law at the University of California at Berkeley, Melvin Eisenberg submits: “Courts often announce rules to govern issues that are at best tangential to a resolution of the dispute before them” (1988, p. 3). And, at the University of Virginia, 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 then necessary to decide the particular case” (2009, p. 56). Such reasons are 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. Rather, the holding of a case is inseparable from its report of the facts, with a decision. Oliver Wendell Holmes, echoing the words of Rudolf von Jhering, famously put it, when he said that experience is the life of the law, not logic.⁴
Also at the outset, we make clear what our methodology is. Rational choice assumptions do not present a problem in this paper 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 5th century, Augustine (1929, bk. 22), 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 (law and religion) to impose direction upon life. Augustine was aware of the insights of a neo-Platonist philosopher, Plotinus, who worked out of human choice as a complex union of autonomous and heteronomous elements. Edmund Burke (1790) would turn the same doctrine in the 18th century into an argument on the necessity to respect the continuity of traditions, institutions and cultural practices of a people—the inheritance of dead generations, due to generations yet unborn. Burke’s contribution is an argument from a perspective of bounded rationality against the abstract programs of the French revolution to uproot traditional values and institutions.

In both 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 paper assumes that Homo sapiens are intelligent, resilient, adaptable, organized animals which exhibit both all elomimetic and agonistic behavior. Even though incommensurate alternatives cannot be sorted out by reason when disputes over rivalrous goods break out, this paper argues that communication is still possible even as the outbreak of violence 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. It turns out “the law” is nothing more than politics over time.
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, non-abstract (concrete, ripe) injury may be repeated across the temporal dimension. Our point is if oracles were possible, legislatures and not judges should consult them. In this sense, this paper departs radically from the literature that attempts to take account of the preferences of future generations.\textsuperscript{5}

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-centered 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-centered 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. However, 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. Well, yes. In both game-theoretic models in this paper, the players are assumed to have the cognitive capacity to recognize in probabilistic, not deterministic, terms the considerable potential for similar, or worse, situations—that 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 that will avoid unnecessary violence, as we will see, even without engaging others in any type of rational dialogue.

In this paper, 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 and incommensurate 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. 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 tumultuous scene of competing and incommensurable views of order, 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.
To model the legitimacy of statutory law, we present a game-theoretic approach. Consider the following interaction, which we'll 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 $\epsilon'$ and $\epsilon''$, respectively, and assume $\epsilon' > \epsilon''$. 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 $\phi$. We assume that $\epsilon' > \phi > \epsilon''$.

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 $\Delta$ the present value of the rival resource for which E and F are competing. We assume that $\Delta > \phi, \epsilon', \epsilon''$. 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 $\Delta$. However, if E chooses peace, for either action choice of F, F receives $\Delta$. 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 $\epsilon' > \epsilon''$.

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 the 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 \(q\). 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 \(q\). 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 behavior of Che in Bolivia. There, although he was in the minority, he chose to stage a guerrilla foco. Jon Lee Anderson (1997) goes into some detail about the relish with which, upon gaining power in Cuba in the first months of 1959, the “real life” Che Guevara oversaw an estimated 550 executions of those considered enemies of the revolution. Several books about the foco ascribe its failure in large part to the complete absence of popular support, see Matt D. Childs (1995).

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 election 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, 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 key feature for elections to be meaningful is that manipulation of an election 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 Thomas More 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 (2008). See also Chris Sanchirico and George Triantis (2008).6 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 guerilla foco, E knows that the faction is a minority and wages war against the faction. It’s important to note that the minority faction does not find it advantageous to try to act like it’s 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 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

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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 (see Georges Gachnochi and Norbert Skurnik 1992) 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 (1973, 1981, 1992) spent much of his life arguing the opposite. Furthermore, history does not have powers of reason, despite the importuning of Georg Wilhelm Friedrich Hegel (1807). 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, in the next section. 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” as a kind of rhetorical flourish. Was Grant Gilmore (1977, pp. 105-06) right to hold 30 years ago that rule-of-law
ideals are more rhetorical than real? 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,” 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” rings hollow as a thin and well-worn platitude.
3. SAINT THOMAS MORE SIGNALING GAME

Despite the rapid expansion of statutory law in the 20th century (see Guido Calabresi 1982), legislatures did not create most of the rules of private law; judges did—Roman law and English common law are judge-made. A great deal of public law is also judge-made—the federal and constitutional doctrine of the United States of America in the 19th and 20th 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 in the 16th and 17th centuries (see del Granado 2010). For that matter, much of the public law being created in the European Union in the last 60 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 (David Lieberman, 2002, pp. 239-40). Moreover, to function well, core legislative institutions comprised of elected representatives must be supplemented by other, non-elected bodies, like courts. Again, we remove the agents of power altogether. Our analysis does not require Kings or Queens, ministers, magistrates, or judges of any kind. We attempt a pure agonistic, ludic distillation of the human struggles that lie beneath case law.

To model the legitimacy of case law, we present a game-theoretic approach. Consider the following interaction, which we'll 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 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 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 $\lambda'$ and $\lambda''$, 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 $\mu$. 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 $\Delta$ the present value of the rival resource for which E and F are competing. We assume that $\Delta, \mu, \lambda', \lambda''$. 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 $\Delta$. However, if E chooses peace, for either action choice of F, F receives $\Delta$. 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 $-\mu - v' > \Delta - \lambda'$, 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 $q$. $F''$ strictly prefers to play L because deviating to M will yield $\Delta - \mu - v''$, which, since $\mu > \lambda''$ and $v'' > 0$, is less than the value from playing L of $\Delta - \lambda''$. Similarly, $F'$ strictly prefers to play m because deviating to b will yield $\Delta - \lambda'$, which, by assumption, is less than the value from playing m of $-\mu - v'$. Q.E.D.
Proposition 4: When $\mu > \lambda'' + v''$ and $\Delta - \mu < -\lambda' - v'$, 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 $q$. F' strictly prefers to play M because deviating to L will yield $\Delta - \lambda'' - v''$, which, since $\mu > \lambda'' + v''$, is less than the value from playing M of $\Delta - \mu$. Similarly, F' strictly prefers to play L because deviating to m will yield $\Delta - \mu$, which, by assumption, is less than the value from playing m of $-\lambda' - v'$. 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 of Succession. To those assembled at the scaffold, he said that he died “the King’s good servant, but God’s servant first” (see David Halpin, 2001.)

In a similar manner to Proposition 1 pertaining to the Che Guevara 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. See, for example, Robert Cooter and Daniel Rubinfeld (1989) and Gordon Tullock (1980). 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 enables legal reasoning to draw analogies from a concrete injury liable to be repeated over time. An ideological litigant—a discreet and insular minority—is unable to point to this type of particularized injury. At most, an ideological litigant may press home policy arguments.

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 non-mimicry 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 discreet and insular minorities, however much John Hart Ely (1980) insists that this function lies at the core of judicial responsibilities. As a positive matter, it is socially realistic to suppose that quite the opposite happens. Courts dispense with discreet and insular minorities—the term used by Justice Harlan Fiske Stone in “the Footnote” in United States v. Carolene Products Co. (304 U.S. 144, 152 n.4 [1938]). 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 Supreme Court, and against all courts and lawyers? Wasn't the French revolution provoked by the actions of the Parliament of Paris? Alexander M. Bickel's (1962) approach has led several generations of common law scholars astray, and misses the very point of legal reasoning across time, which works by analogy.

While the vigilant and courageous nonelected courts are required as an occasional counterpoise to the elected legislature, it is to promote durable statutory law (Judge Posner’s [1973] thesis) 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) 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 discreet 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 transaction costs of existing communications (upstream) as well as time paradoxes (see Derek Parfit's [1984] thought experiments), 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.

It is precisely empty cores, the relentless pattern of cycling in the world of politics, which prevent a discreet and insular minority—or a majority or even super majority 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 adverserial/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 agonsitic 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 agonsitic essentials, is a legitimate
dictatorial, nonrational 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 ascendency 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-fact, 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 (see, for example, the return to legal process jurisprudence in Ilya Somin 2004). 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’s not that legal process or constitutional principles define the role of legislatures or of courts. Constitutions are also very open-ended. It’s 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 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 super majorities.) 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?

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. 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 is forgotten and resurrected, assessed and reassessed, interpreted and reinterpreted, in the hands of the living generation.
3. A NEW, BETTER DEFINED, FORMALISM

Up to this point, public choice theory has lacked an adequate purely positive explanation of the mechanisms which generate legal rules narrowly defined: statute and common 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. Robert Cooter (1997) has successfully modeled morality as a punishment-induced equilibrium dependent on a signaling equilibrium, which he calls “consensus.” The problem with a “consensus” is that Cooter is right, a consensus is non-majoritarian. If a consensus is non-majoritarian, it must be kept within the bounds of informal enforcement.

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 rule of law itself is, at the heart of our Constitution, a delicate balance of synchronic and diachronic powers. Martin Shapiro (1998) 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. Courts act where legislatures are inactive. Per Justice Ginsburg (1992), courts open a (rational?)
dialogue with the legislature or parliament when they make deliberate, carefully measured movements and slow advances with adherence to procedures. 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 paper focuses on the other justiciability doctrines—standing, ripeness and mootness.

The astonishing result of this paper is that private individuals have the power to legislate. An oversimplified action-response 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 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 Friedman (2000, p. 13) wisely points out, it becomes a pessimistic assumption when applied to people who must act in someone else's interest. We have taken agency relationships and agency costs out of the equation in this paper—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).
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3 Of course, the truism that judges make law begs the question: how do they make law?

4 For an excellent general discussion of case law, see Lloyd L. Weinreb 2005.


6 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.