

JURISDICTIONAL COMPETITION AND THE EVOLUTION OF THE COMMON LAW: A HYPOTHESIS

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This essay presents some ideas which the author expects will be the focus of his attention over the next few years. Research, however, has only just begun. Statements in this article should be treated as hypotheses subject to confirmation, amendment or rejection.

Historians explain the development of the common law in many ways. Some emphasize the internal logic of legal concepts,¹ while others focus on external factors, such as political, social, or economic conditions.² A few point to the influence of philosophy³ or other legal systems.⁴ For many, the institutional structure of the legal system is the central, whether it be the role of juries,⁵ the changing dynamics of pleading and post-trial motions, or innovation by lawyers in the service of their clients.⁶ Among the institutional factors which influenced legal development, many historians point to competition among courts as an agent of

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

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

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

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

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

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

legal change.⁷ While references to jurisdictional competition are common in the literature, no one has rigorously analyzed the implications of competition for the evolution of the common law. That is the goal of this essay.

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

Of course, jurisdictional competition was not without constraint. If it were, the logical outcome would have been that each court offered to give any plaintiff the defendant's entire wealth upon filing of a complaint, without hearing or legal argument. That this absurd state of the law never materialized is testament to the existence of constraints, chief among them Parliament and Chancery.⁹

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

Many lawyers will find the assertion of a pro-plaintiff bias in the common law absurd. Most law students are taught that the common law was pro-defendant. It is a commonplace of the first-year curriculum that doctrines such as privity of contract and the fellow-servant rule made it nearly impossible for plaintiffs to prevail. This view of the common law overlooks one crucial fact. These pro-defendant doctrines

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

⁸ William Landes and Richard Posner, 'Adjudication as a Private Good' 8 (1979) *Journal of Legal Studies* 235, 253-59. The author thanks Todd Zywicki for calling attention to this analysis of competition. Landes and Posner think it a puzzle that 'blatant plaintiff favoritism' did not emerge and suggest that '[w]hy it did not emerge (assuming it has not simply been overlooked by legal historians) presents an interesting question for further research'. *Ibid* 255.

⁹ See Section III.

¹⁰ Richard Posner, 'What do Judges Maximize?' in Richard Posner, *Overcoming Law* (1995).

¹¹ See Section II.

were developed in the nineteenth century, after reforms dampened and eventually eliminated competition among courts.¹²

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

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

Part I of this essay contains background on the structure of English justice. Part II explores the pro-plaintiff bias with the aid of several examples. Part III discusses constraints on the development of absurdly pro-plaintiff law, focusing on Parliament and Chancery. Part IV argues that jurisdictional competition may have helped reduce corruption. Part V explores changes in the nineteenth century which dampened and eventually eliminated competition and discusses the resulting pro-defendant evolution of the law. Part VI outlines some of the many issues that

¹² See Section V.

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

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

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

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

remain for future research.

I THE STRUCTURE OF ENGLISH JUSTICE BEFORE THE NINETEENTH CENTURY

For most of the last thousand years, England was home to a multiplicity of courts. The most fundamental distinction lay between royal courts and non-royal courts. Non-royal courts included manorial courts (run by lords for tenants on their manors), honorial courts (run by lords for their vassals), ecclesiastical courts (run by the church), and local courts (run by boroughs, hundreds and counties). Royal courts were divided between common law courts and non-common law courts. The three common law courts were King's Bench, Common Pleas, and Exchequer. The most important royal, non-common law court was Chancery, sometimes known as the court of equity, but there were others, including Star Chamber, Admiralty, and the Court of Requests.¹⁷

Manorial and seigniorial courts generally had jurisdiction over cases in which their tenants or vassals were defendants. Similarly, local courts had jurisdiction over defendants in their localities. Manorial, seigniorial, and local courts were also limited by their inability to try criminal cases, civil cases involving more than 40 shillings, or cases involving freehold land (except pursuant to royal writ). Ecclesiastical courts had jurisdiction over internal church affairs, matrimonial disputes, contracts involving a 'pledge of faith' (until the fifteenth century), and probate. Common Pleas technically had a monopoly over land and debt cases, although, as will be discussed below, King's Bench was able to break that monopoly in the late medieval and early modern periods. In the middle ages, King's Bench had jurisdiction primarily over criminal cases and trespasses (torts), although, through the use of fictions, it was able to greatly expand its caseload. Exchequer's jurisdiction was originally limited to disputes over amounts owed to the royal treasury, although, like King's Bench, it was able to greatly expand through the use of fictions. Chancery's most important jurisdiction involved trusts and contracts.¹⁸

Cases in the common law courts were ordinarily initiated by writ. That is, the plaintiff (or his attorney) had to go to Chancery and purchase a piece of paper ordering the sheriff to start the proceedings.¹⁹ As we shall see, this requirement allowed Chancery to constrain the common law courts for most of the middle ages. In special circumstances, a plaintiff might initiate suit with a bill. A bill was a complaint drafted by the plaintiff or his attorney and did not require Chancery involvement.²⁰ As will be discussed below, through creative expansion of the circumstances in which litigation might be initiated by bill, the constraint imposed by Chancery's power over writs became ineffective in the early modern period.

¹⁷ Theodore Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 83-100, 176-98.

¹⁸ Baker, above n 7, 37-52, 97-134.

¹⁹ *Ibid* 53-59.

²⁰ *Ibid* 41.

Until the mid-nineteenth century, there was no system of appeals by which one set of courts could comprehensively review the decisions of others. This is important, because a system of appellate review might have constrained inter-court competition either by imposing uniformity or by constraining the expansion of jurisdiction. There were, however, two limited forms of review: prohibitions and proceedings in error.

King's Bench had the power to issue writs of prohibition to non-royal courts and to royal non-common law courts other than Chancery. Such writs forbade the recipient court from hearing particular cases and enabled King's Bench to circumscribe the jurisdiction of all courts except Common Pleas, Exchequer, and Chancery.²¹

Proceedings 'in error' were another limited form of judicial review. By this method, King's Bench had the power to review cases from most courts, except Exchequer and Chancery. Cases from King's Bench and Exchequer were reviewed by *ad hoc* courts composed mostly of judges from other courts, and ultimately by the House of Lords. Chancery decision were not reviewed by any other court. Proceedings in error, however, were very circumscribed, because the reviewing court could examine only the official legal record. Since the legal record did not include evidence presented at trial and was often obscured by unreviewable legal fictions, proceedings in error did not provide an effective constraint on the separate development of law and procedure in each court.²² As will be discussed below, however, proceedings in error probably did encourage one of the distinctive features of English law – the proliferation of legal fictions – because fictions enabled courts to expand their jurisdictions without correction by proceedings in error.²³

This article will focus on King's Bench, Common Pleas, and Chancery. These were the most important courts. Other courts are less interesting for the study of competition, because (with the exception of Exchequer) they were subject to prohibitions from King's Bench. Thus, King's Bench could draw business away from them not only by providing plaintiffs with more favorable law, but also by forbidding them to hear whole classes of cases. Nevertheless, competition for cases indisputably within their jurisdictions could and did result in law more favorable to plaintiffs. Exchequer could easily have been given more attention here, as its history has broad similarities with those of the other common law courts,²⁴ but, in the interest of brevity, it will be given little attention.

²¹ Ibid 135-38.

²² Ibid 137-38.

²³ See: below text at notes 42, 45-46.

²⁴ Baker, above n 7, 47-49.

II THE PRO-PLAINTIFF BIAS

The idea that jurisdictional competition resulted in law more favorable to plaintiffs presumes certain background facts, including that judges had an incentive to hear more cases, that the plaintiff chose the forum, and that judges had a certain amount of latitude to shape the law. This section will first substantiate those assumptions and then give a few examples of how the law evolved with a pro-plaintiff bias.

Judges' incentive to hear more cases could have come from many sources. In many times and places, judges are motivated by the power and prestige which comes from the ability to decide. This motivation can be recast in a public-spirited vein. A judge who believes his own decisions to be just will want to ensure that as many cases as possible come before him. In addition, before the nineteenth century, English judges received a large fraction of their income from fees. Although they also received a salary, they were free to augment it by fee income. Fees were a regular part of the judicial process. At every stage of a case, litigants paid a fee. Some of these fees were paid to court staff, who thereby also acquired an incentive to augment the court's caseload, while other fees were paid directly to the judges.²⁵ Even fees paid to other court officials might benefit the judges, especially the chief judge, because the chief judge usually had the authority to appoint court officials. When staff fee income was large, the chief judge could and did sell the right to be a court official and thus effectively appropriated a portion of the fees paid to judicial staff.²⁶ In addition, a judicial officer might be a relative of the chief judge, in which case fees paid to the officer would indirectly benefit the chief judge. One famous instance of such nepotism involved Chief Judge Fyneux of the King's Bench, who appointed his son-in-law, John Rooper, chief clerk ('prothonotary') of his court.²⁷ As will be discussed below, it was during the period when Fyneux and Rooper ran the King's Bench that it introduced the Bill of Middlesex, an innovation which greatly expanded the court's jurisdiction, made its procedures swifter and cheaper, and freed the court from the constraints that Chancery had previously imposed through its control of original writs.²⁸

Another prerequisite for the pro-plaintiff bias was that the plaintiff chose the court. This assumption was largely, but not always, true. Cases in non-royal courts could sometimes be removed by the defendant into royal courts. In this way, the royal courts could gain cases at the expense of non-royal courts by making the law more favorable to defendants.²⁹ This pro-defendant bias does not seem to have been very

²⁵ Marjorie Blatcher, *The Court of King's Bench, 1450-1550: A Study in Self-help* (1978) 34-46, 144-45, 151-53; Baker, above n 7, 41, 44; Fees in the Royal Courts, *An Exact Table of Fees of the Courts at Westminster* (1760); Daniel Duman, *The Judicial Bench in England 1727-1875: Reshaping of a Professional Elite* (1982) 111-16; A H Manchester, *A Modern Legal History of England and Wales 1750-1950* (1980) 81, 129. The author thanks James Oldham for calling his attention to and providing a copy of *An Exact Table*.

²⁶ Duman, above n 25, 116-21; Manchester, above n 7, 102-4.

²⁷ Baker, above n 7, 44.

²⁸ Ibid 43-44. Blatcher, above n 25, 145-46, 149-50.

²⁹ Robert Palmer, *The County Courts of Medieval England, 1150-1350* (1982) 229-32.

prominent, because cases could not be removed from one royal court to another. A defendant in a common law court could, however, petition in Chancery for an injunction ordering the plaintiff not to continue his common law suit. As will be discussed in the next section, this possibility was a major constraint on the development of excessively pro-plaintiff law. King's Bench, however, had a countervailing power through the writ of habeas corpus. Chancery enforced its decrees through imprisonment. King's Bench, however, could use the writ of habeas corpus to free defendants from prison. By doing so, it imposed limits on Chancery's ability to constrain it.³⁰

A final requirement for effective jurisdictional competition was each court's freedom to develop its own law. The development of judge-made common law amply demonstrates this freedom. Courts defined and expanded their jurisdictions, developed new procedures, and introduced doctrinal innovations without asking permission from Parliament or any other authority. For some, this is a defining characteristic of the common law system. As discussed in the previous section, no system of appellate review existed to impose uniformity or restrict each court's freedom to develop new procedures and doctrines. Nevertheless, as will be discussed in the next section, Parliament and Chancery provided some constraints.

That the common law exhibits a pro-plaintiff bias or trend is an empirical proposition. Section VI discusses some strategies for testing the proposition more rigorously. This essay, however, can only provide examples. The next few pages discuss three examples in depth: the paucity of contract defenses, *indebitatus assumpsit*, and the Bill of Middlesex. Other examples could easily be provided, including the medieval expansion of royal jurisdiction over land, tort, and contract, the substitution of jury trial for wager of law in a wide array of actions, the speedy procedures provided by the possessory assizes, early modern pleading, the writ of ejectment, and the development by Common Pleas and Exchequer of fictions similar to the Bill of Middlesex.

A *The Paucity of Contract Defenses*

Contract disputes were the most common type of cases in early modern England,³¹ but the defendant had practically no defenses at common law. Duress was limited to situations where the defendant had been imprisoned or threatened with serious bodily injury at the time the contract was entered into.³² Fraud was limited to forgery of a written instrument, tampering with a written instrument, or misreading a written instrument to an illiterate defendant.³³ The only other defense was incapacity, usually that the contracting party was underage or insane.³⁴ Beyond these, there were no defenses. Mistake, for example, was no defense, whether

³⁰ See, eg.: *Courtney v Glanvil*, Croke Jac (1615) 343, 79 ER 294.

³¹ Baker, above n 7, 67-68.

³² D Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 71-72, 208, 252.

³³ *Ibid* 20, 72; Baker, above n 7, 324.

³⁴ Ibbetson, above n 32, 71, 208.

unilateral or mutual.³⁵ Nor was unconscionability.³⁶ Penalty clauses were fully enforceable.³⁷ If a debtor repaid a loan but forgot to have the sealed bond canceled or to get a written receipt, prior repayment was no defense, so the creditor could procure double satisfaction.³⁸ The paucity of contract defenses made the law very favorable to plaintiffs.

B *Indebitatus assumpsit*

For most of the middle ages, the Court of Common Pleas had a more extensive and more profitable jurisdiction than the Court of King's Bench. Most importantly, Common Pleas had a monopoly on land cases and cases initiated by writ of debt. In contrast, King's Bench's principal civil jurisdiction was over trespass (tort) cases, and even these it shared with Common Pleas.³⁹ As will be discussed below, through the use of the Bill of Middlesex, the King's Bench was able to gain some of the cases which previously would have been brought by writ of debt in Common Pleas. Nevertheless, debt litigation in King's Bench retained most of the same rules as in Common Pleas. Debt actions were among the oldest common law actions, and they retained many features characteristic of earlier times. If the plaintiff/creditor had a deed (written document recording the debt), then the creditor prevailed almost automatically, unless the plaintiff had written proof that the loan had been repaid. In contrast, if the creditor did not have a deed, then the dispute was settled by 'wager of law'.⁴⁰ Under this procedure, the defendant could prevail if he and eleven 'oath helpers' swore that the defendant was in the right. This procedure was extremely pro-defendant, because the oath helpers were chosen by the defendant. As a result, a defendant willing to perjure himself or suffering from self-serving bias could prevail, regardless of the strength of the evidence against him. Even the difficulty of finding eleven unscrupulous friends was reduced by the ready availability of oath helpers for hire.⁴¹

King's Bench remedied this pro-defendant slant to contract litigation through expansion of its trespass jurisdiction. Disputes in trespass actions were always resolved by jury trial rather than wager of law. During the middle ages, the action of trespass was primarily used for what would now be characterized as torts. Nevertheless, by construing breach of a promise as a tort, King's Bench was able to take jurisdiction over much contract litigation in fifteenth century. By the sixteenth century, if a creditor alleged that the debtor, after having received a loan, made a

³⁵ Ibid 72, 226; Baker, above n 7, 353.

³⁶ Ibbetson, above n 32, 144, 252.

³⁷ Ibid 29, 150. This may surprise some modern scholars who generally assume that non-enforcement of penalty clauses was part of the common law. Nevertheless, it should be noted that Chancery and English statutory law were the source of the rule against penalty clauses. See below text at notes 51, 59. Chancery decisions and early statutes, however, are sometimes considered part of the common law, which may explain the confusion.

³⁸ Ibbetson, above n 32, 21; Baker, above n 7, 324-25.

³⁹ Baker, above n 7, 38.

⁴⁰ Ibid 321-25; Ibbetson, above n 32, 20-21, 32.

⁴¹ Baker, above n 7, 74.

subsequent promise to repay it (in Latin *indebitatus assumpsit*), failure to repay a loan could be brought within the King's Bench's jurisdiction. The allegation of a subsequent promise was an incontestable legal fiction. That is, the judges would not allow the defendant to 'traverse' it or try to prove that there had been no subsequent promise. The *indebitatus assumpsit* procedure offered substantial advantages to a creditor/plaintiff who had not put the loan in writing, because the dispute would be resolved by jury rather than wager of law. In fact, as discussed below, juries were considered so easily manipulated by creditors, that it was believed that unscrupulous plaintiffs were defrauding defendants by suing on non-existent debts.⁴²

C *The Bill of Middlesex*

The last example of the pro-plaintiff bias, the development of the Bill of Middlesex, is also the most complex, because it requires an understanding of medieval procedure. Nevertheless, it is probably the most important, because it resulted in a swifter, cheaper, more effective procedure for nearly all kinds of actions and because it freed King's Bench from restraints previously imposed by Chancery's control of original writs.

As mentioned above, for most of the middle ages, the Court of Common Pleas had a monopoly on land cases and cases initiated by writ of debt. Since land was the basis of most wealth and since property was the most complex branch of law, this jurisdiction was very profitable, both to the court and its lawyers. In contrast, King's Bench had jurisdiction principally over criminal cases, which generated relatively little revenue, and over cases initiated by writ of trespass, ie, cases which today would be characterized as tort. Before the industrial revolution, tort cases were relatively few and unimportant. And even the jurisdiction over trespass cases was shared with Common Pleas. King's Bench also had jurisdiction over proceedings in error (see Part I), over prisoners in the custody of a King's Bench jail, and over any kind of case initiated by bill in the county where it was sitting, which was usually Middlesex. Even this last font of jurisdiction was not large, however, because Middlesex at this time did not include the city of London, the commercial center of England.⁴³

As a result of its limited jurisdiction and of the increasing number of cases drawn away by conciliar courts, King's Bench heard fewer and fewer cases in the fifteenth century, and its judges and clerks suffered a corresponding decline in income.⁴⁴ In response, the chief clerk (the prothonotary) developed the Bill of Middlesex, which simultaneously increased the court's jurisdiction, lowered costs to the plaintiff, and freed the court from the constraints imposed by Chancery's control over original writs. A plaintiff employing this procedure would bring a fictitious bill against the

⁴² Ibid 341-50; A W Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 298-99.

⁴³ Baker, above n 7, 41-43; Blatcher, above n 25, 111-37, 158-9.

⁴⁴ Baker, above n 7, 40; Blatcher, above n 25, 19-20.

defendant alleging that the defendant had committed a trespass in the county of Middlesex. As a result of this bill, the defendant would be arrested and, if he or his friends could afford it, bailed. Since the defendant was now in the custody of a King's Bench jail (or out on bail, which was interpreted to have the same result), the plaintiff could use a second bill to bring any kind of action against the defendant, even cases which would otherwise have been outside the jurisdiction of King's Bench. This second bill contained the plaintiff's true complaint against the defendant. Although the original bill alleging a wrong in Middlesex usually had no grounding in fact, the defendant never had a chance to challenge it. Arrest and/or bail preceded pleading, and as soon as the defendant was in custody, the plaintiff would drop the original bill. The only purpose of the bill alleging trespass in Middlesex was to get the defendant in custody, so that the plaintiff could take advantage of King's Bench's plenary jurisdiction over those in custody.⁴⁵ In addition, the procedure could not be attacked in a proceeding in error, because the original bill was dropped and because factual allegations more generally were not subject to review.

In addition to removing most limitations on the jurisdiction of King's Bench the Bill of Middlesex procedure made lawsuits cheaper and faster, because the plaintiff no longer had to go through the trouble and expense of purchasing a writ from Chancery.⁴⁶ This was a profound boon to plaintiffs, and for the purposes of this essay, the Bill of Middlesex's most important effect. In addition, because the procedure relied solely on actions initiated by bills rather than writs, it eliminated Chancery's role in the initiation of litigation. The Bill of Middlesex procedure thus removed the constraint Chancery had previously been able to exercise by restricting the kinds of writs it would issue.

D Prior Scholarship

Although this essay may be the first to attribute the paucity of contract defenses to jurisdictional competition, the role of jurisdictional competition in *indebitatus assumpsit* and the Bill of Middlesex has been recognized for some time.⁴⁷ Nevertheless, previous historians have not noticed that the outcome of jurisdictional competition was law more favorable to plaintiffs. To illustrate the approach of prior historians, this section analyzes two sections from J H Baker's *Introduction to English Legal History*. This book was chosen, because it is a synthesis of the best legal-historical scholarship, and because Baker is among the most respected legal historians. Similar quotations from other sources could easily be provided.

⁴⁵ Baker, above n 7, 41-42; Blatcher, above n 25, 121.

⁴⁶ Jones suggests that the Bill of Middlesex also saved plaintiffs money by allowing the drafting of pleadings and other matters to be deferred until after it was clear that the defendant would respond. N G Jones, 'The Bill of Middlesex and Chancery, 1556-1608' (2001) 22(3) *Legal History* 1, 15.

⁴⁷ Baker, above n 7, 40-44; J H Baker, 'New Light on Case' (1971) 29 *Cambridge Law Journal* 213, 217; Blatcher, above n 25.

Consider Baker's assessment of Sir John Fyneux, Chief Judge of King's Bench and one of the key figures in the development of the Bill of Middlesex and *indebitatus assumpsit*:

It can hardly be coincidence that so much of the reform was initiated under Sir John Fyneux, who presided over the court [King's Bench] from 1495 to 1525 when its fortunes were at their lowest ebb. He appointed his son in law John Rooper as chief clerk in 1498, and the Rooper family made its fortune from the office between then its retirement in 1616. Cynics might criticise the judges and clerks for making the court a family business; they undoubtedly had more than a professional interest in the success of the procedures under their control. But they had no monopoly, and they thrived only by satisfying litigants and the profession at large.⁴⁸

Note that Baker characterizes the changes wrought by Fyneux and Rooper as satisfying 'litigants' generally, rather than plaintiffs specifically. This approach is common among legal historians and overlooks the crucial fact that it was the plaintiff who chose the court. It thus misses the insight that frequent invocation of a new legal doctrine or procedure indicates that it satisfied plaintiffs and their lawyers, not 'litigants and the profession at large'. Baker seems to suggest that the innovations introduced around 1500 were salutary, because the legal market was competitive (King's Bench 'had no monopoly') and because the innovations introduced by Fyneux and Rooper resulted in 'satisfied' customers ('litigants and the profession at large'). As through the operation of Adam Smith's 'invisible hand', he seems to imply, the private interests of Fyneux and Rooper coincided with the public interest of litigants.

Similarly, consider the following passage:

The legal disputes of the later sixteenth century then took on the appearance of an internecine struggle for business between the common-law courts themselves, in which Magna Carta might seem to be the charter of liberties of disgruntled officers of the Chancery and Common Pleas. The outward appearance, however, should not deceive us into forming an exaggerated impression of hostility. The principal competitors were not judges or officers themselves but the litigants and their lawyers, shopping for the most advantageous forum. If the King's Bench personnel had a private stake in furthering this amplification of their jurisdiction, they were at the same time meeting strong popular demand.⁴⁹

As in the previous quote, Baker refers to 'litigants' generically as those who 'shopp[ed] for the most advantageous forum'.⁵⁰ He thus misses the fact that King's Bench had to cater to plaintiffs, not defendants, in order to become the preferred forum. Similarly, by noting in defense of King's Bench that it was 'meeting a

⁴⁸ Baker, above n 7, 44.

⁴⁹ *Ibid* 40-41.

⁵⁰ In other places, Baker is more careful to note that a change favored plaintiffs. Baker, above n 47, 217. On the other hand, even here Baker is not making a general statement about the effect of competition.

strong popular demand', Baker seems again to be making a market analogy. If a seller in a competitive market enriches himself by generating strong demand for its product, that is not a problem, but rather a sign that the invisible hand is working to generate better, cheaper products. It is unlikely that defendants would have reached the same conclusion. As will be discussed in the next section, the innovations of King's Bench were not without their detractors. *Indebitatus assumpsit*, in particular, was widely seen as overly favorable to plaintiffs and provoked Parliamentary override.

III CONSTRAINTS ON THE DEVELOPMENT OF EXCESSIVELY PRO-PLAINTIFF LAW

Although jurisdictional competition resulted in a number of doctrines and procedures favorable to plaintiffs, English law did not become absurdly pro-plaintiff. Claimants still had to present a plausible cause of action, and defendants had opportunities to present their side of the dispute. The existence of some defendant protections suggests that jurisdictional competition was subject to constraint. This section will focus on the constraints imposed by legislation and by Chancery. Other constraints included legal culture, the judges' sense of justice, collusion among courts, and the king's ability to appoint and remove judges.

A Legislation

Legislation provided a key constraint on the development of pro-plaintiff law. Although Parliament was hardly a broadly representative body until the nineteenth century, it did provide a forum in which the general welfare could be considered. When competition led to excessively pro-plaintiff law, Parliament could intervene. In fact, one of the ways the author hopes to show the pro-plaintiff bias of judge-made law in a more rigorous, quantitative way is by contrasting judge-made law to statute law. For now, however, this essay will again rely on a few examples. The easiest examples are the legislative responses to the three examples discussed in the previous section.

As will be discussed below, Chancery provided the primary antidote to the paucity of contract defenses. Legislation, however, played a role. For example, statutes in 1696 and 1705 greatly constrained creditors' ability to enforce penalty clauses.⁵¹

Indebitatus assumpsit, which allowed creditors to prevail more easily on unwritten contracts, led directly to the Statute of Frauds (1677).⁵² That statute made the most important categories of unwritten contracts unenforceable.

⁵¹ 8 & 9 Will III c 11 s 8; 4 Anne c 16 s 1; Baker, above n 7, 325-26; Ibbetson, above n 32, 150, 214, 255.

⁵² *Statute of Frauds 1677* (UK) 29 Car II, c 3; Simpson, above n 42, 298-99; Baker, above n 7, 349-50; Ibbetson, above n 32, 203; Philip Hamburger, 'The Conveyancing Purposes of the Statute of Frauds' (1983) 27 *American Journal of Legal History* 354, 372.

The Bill of Middlesex procedure provoked at least three legislative attempts at suppression. In part these reactions were sponsored by officials connected with Common Pleas and Chancery, who were upset by the reduction in their own fees. By refining and slightly altering the procedure, however, King's Bench was able to preserve the Bill of Middlesex.⁵³

Of course, statutes were only effective to the extent that judges gave them effect. The statutory rule against the enforcement of penalties was narrowly construed.⁵⁴ Judicial interpretation of the Statute of Frauds softened, although it did not entirely blunt its impact.⁵⁵ And, as noted above, King's Bench was able to render ineffective legislation restricting the Bill of Middlesex. Other examples of judicial resistance to restrictive statutes could be multiplied.

B *Chancery*

The Chancery was the government department headed by the chancellor, a close royal advisor. The Chancery had custody of the great seal of England and thus performed many functions, including drafting and sealing royal charters, commissions, and grants of property. The Chancery also had had two important legal functions: (1) it provided the writs which, during the middle ages, were the principal means of initiating litigation in the common law courts, ie, King's Bench, Common Pleas, and Exchequer, and (2) it provided an additional forum, the court of equity, in which litigation could occur.⁵⁶ Both of these functions provided means for checking the development of excessively pro-plaintiff law.

Through its control of writs, Chancery could limit the types of cases which each of the common law courts could hear. Because Chancery collected a fee for each writ, however, it had an incentive to increase the scope and variety of writs. In this way, Chancery, rather than restraining the common law courts, encouraged their expansion. On the other hand, Chancery had relatively little incentive to allow the common law courts to have overlapping jurisdictions. Although the competition resulting from overlapping jurisdictions might have caused the common law courts to reduce their fees, thus increasing demand for writs, Chancery does not seem to have employed this strategy, perhaps because doing so would have forced the king to raise judicial salaries. Instead, the chancellor seems to have used his power over writs to retain the distinctions between the various courts' jurisdictions. Nevertheless, as discussed above, King's Bench was able to escape Chancery's control in the fifteenth century through the development of the Bill of Middlesex.⁵⁷

⁵³ Baker, above n 7, 45-46; Blatcher, above n 25, 142-43, 146.

⁵⁴ Ibbetson, 32, 214.

⁵⁵ Baker, above n 7, 350.

⁵⁶ Ibid 53-59, 97-103.

⁵⁷ Chancery, of course, attempted to suppress the Bill of Middlesex, which reduced both its control and its fee income. Jones, above n 46, 1-20; Blatcher, above n 25, 143.

As a separate court, Chancery had the power to issue injunctions against ongoing proceedings in the common law courts. This power provided an important check on the pro-plaintiff bias in the common law. Through its injunction power, Chancery could, in effect, transform a defendant in a common law court into a plaintiff in Chancery. As a result, in order to attract injunction business, Chancery had an incentive to develop law favorable to defendants in common law actions. This process can be seen most easily in contract cases. For example, if a debtor who had repaid a written loan but failed to procure a written receipt or cancellation of the loan instrument was sued in Common Pleas, that court was likely to rule against him. Nevertheless, the debtor could petition Chancery for an injunction.⁵⁸ Chancery had an incentive to grant the injunction, because those who petitioned for an injunction would, like any claimant, pay a fee to the court. In addition, once the creditor was sued in Chancery, he too would have to pay fees. A Chancery injunction would prohibit the creditor from proceeding in Common Pleas to collect the debt. Over time, Chancery developed a series of legal doctrines governing the issuance of such injunctions. These doctrines form the basis of the contract defenses we know today, including fraud, mistake, and the rule against penalties.⁵⁹

While this essay has emphasized Chancery's role as a check on the development of pro-plaintiff law, Chancery could also be a participant in the competition for plaintiffs. For example, it was Chancery which first made it easier for creditors without written documents to prevail. *Indebitatus assumpsit* can be seen, in part, as an attempt to compete for this aspect of Chancery's business. Similarly, Chancery procedure in the middle ages was faster, cheaper and more effective than common law procedure. The Bill of Middlesex can be seen as King's Bench's competitive response.⁶⁰

IV CORRUPTION

While this essay suggests that jurisdictional competition resulted in law favorable to plaintiffs, it does not claim that the English legal system was designed to do so. The various royal courts were created for reasons having nothing to do with competition, and they originally had distinct jurisdictions.⁶¹ Nevertheless, at some point king and Parliament must have realized that the courts had become competitors. As discussed above, they made some attempts to restrain this competition, but they largely acquiesced. They probably did so largely out of deference to the traditional way of doing things. They may also have acquiesced, because some effects of competition, such as quicker, cheaper justice benefited both plaintiffs and defendants. This section explores another possible defense of the system: it may have helped reduce corruption.

Corruption is one of the most difficult problems faced by pre-modern governments. It remains a major issue in the third world to this day. Even in the United States and

⁵⁸ Baker, above n 7, 102-3, 106.

⁵⁹ Ibbetson, above n 32, 72-73, 150, 208-10, 213-14, 226-27.

⁶⁰ Baker, above n 7, 39-43; Blatcher, above n 25, 24-33, 111-37.

⁶¹ Baker, above n 7, 38-39, 47-48, 97-108.

other parts of the developed world, corruption remains a problem, albeit a relatively minor one. Nevertheless, even in pre-modern times, the English judiciary had a relatively good reputation with respect to corruption.⁶² Jurisdictional competition may provide a partial explanation. For this purpose, it is helpful to divide corruption in the judicial system into four crude categories: (1) bribery by plaintiffs with meritorious cases, (2) bribery by plaintiffs without meritorious cases, (3) bribery by defendants with meritorious cases, (4) bribery by defendants without meritorious cases.

Jurisdictional competition would clearly help to curb the first and fourth kinds of bribery. Plaintiffs would obviously prefer courts which did not demand bribes from them when they had meritorious cases. Courts would thus have an incentive to develop a reputation of not demanding bribes from plaintiffs with meritorious cases. Competition for plaintiffs should thus reduce this form of bribery, in much the same way that it led to reduction in costs more generally, as through the Bill of Middlesex. Similarly, plaintiffs would disfavor courts which had a reputation for accepting bribes from defendants with non-meritorious cases, because such courts would be more likely to rule against plaintiffs. Thus, competition for plaintiffs should have led courts to suppress this kind of bribery.

The effect of competition on the second kind of corruption is more complex. Competition for plaintiffs without meritorious cases might lead the courts to try to develop reputations for accepting bribes from such plaintiffs. Plaintiffs would obviously prefer a court which would throw such cases their way, even if it required a fee. Competition between courts for such plaintiffs might result in courts being willing to accept lower and lower bribes, thus increasing the number of cases corrupted by bribery. While this unsavory scenario is certainly possible, it overlooks the fact that the judges, through their control of doctrinal development, had the ability to redefine who had a meritorious case. Thus, rather than developing a reputation for accepting bribes from non-meritorious plaintiffs, a court's best strategy was simply to change the law to make more plaintiffs meritorious. As discussed in Part II, there is substantial evidence that judges did just that.

The analysis of the third kind of corruption – bribery by defendants with meritorious cases – is similarly complex. Plaintiffs would prefer courts which have a reputation for routinely demanding high bribes from meritorious defendants, as such a reputation would enhance the amount non-meritorious plaintiffs could extract in settlement. As with the third kind of corruption, however, a court's better strategy is simply to use its control over substantive law to leave defendants without the defenses which would make their cases meritorious. As discussed in Part IIIA, the history of contract law provides some support for this approach.

⁶² J H Baker, *The Reports of John Spelman* (1977) (Selden Society, vol 94) vol 2, 141-42.

V INSTITUTIONAL CHANGES IN THE NINETEENTH CENTURY

The institutional structure, described in Section 2, which created jurisdictional competition, was radically transformed in the nineteenth century. Perhaps most importantly, statutes in 1799, 1830 and 1832 restricted royal judges and their staffs to fixed salaries.⁶³ Instead of lining the pockets of judges and staff, fees were now allocated to the Exchequer or Treasury. It seems hardly a coincidence that the pro-defendant decisions for which the nineteenth-century judiciary is notorious came soon after these statutes. For example, *Priestley v Fowler*, which established the fellow-servant rule in England, was decided in 1837.⁶⁴ That case made it impossible for an employee to prevail in tort against his employer when the negligence which caused injury was caused by another employee (a 'fellow servant') rather than directly by the employer. Five years later, *Winterbottom v Wright* (1842) established the privity doctrine, which barred consumers from suing the manufacturer of a defective product unless the manufacturer had sold directly to the consumer and the two were, in that way, in 'privity of contract'.⁶⁵ This doctrine delayed the development of product liability law for almost a century.

Although the 1799, 1830 and 1832 statutes removed the pecuniary incentive to hear more cases, power and prestige might still have caused some competition. Other nineteenth-century statutes, however, ensured that jurisdictional rivalry would play a decreasingly important role. Legislation in 1854 established a true system of appeals, thus providing a mechanism for harmonizing and restraining the independent development of doctrine by each court.⁶⁶ Finally, the Judicature Acts

⁶³ 39 Geo III c 90 (taking fees away from puisne judges of King's Bench and Common Pleas and all judges of Exchequer); 11 Geo IV & Will IV c 58 (1830) (taking fees away from judicial staff); 1 & 2 Will IV c 35 (1832) (clarifying the 1830 statute); 2 & 3 Will IV c 116 (1832) (taking fees away from chief justices of King's Bench and Common Pleas).

⁶⁴ *Priestley v Fowler* (1837) 3 M & W 1. It is not argued here that prior to *Priestley*, employees had been able to recover and that *Priestley* changed the law. Rather, in *Priestley* the court faced a choice about what to do and decided upon a rule which led to fewer suits than a rule which held that employers were liable. In a recent analysis of the case, Kostal argues that 'relevant common law was scant, ambiguous, and unevolved' and that distinguished lawyers and judges, including Baron Parke, could and did see the opposite result as justified by precedent. R W Kostal, *Law and Railway Capitalism, 1825-1875* (1994) 261, 267-68. Ibbetson also emphasizes that it was 'judicial choices', not precedent, that led to the 'invention of the "fellow servant" rule', although he emphasizes the role of cases from the 1850s, rather than *Priestley*. D J Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' in Eljo J H Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (2001) 254, 256. In contrast, Epstein argues that the absence of relevant precedents 'underscore[s] the uncompromising no-liability rule of the common law'. Richard Epstein, 'The Historical Origins and Economic Structure of Workers' Compensation Law' (1982) 16 *Georgia Law Review* 775, 778. Karsten's view is similar. Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (1997) 114-20.

⁶⁵ *Winterbottom v Wright* (1842) 10 M & W 109; Baker, above n 7, 417; Ibbetson, above n 32, 173-74, 295. Ibbetson also notes the 'judicial choice' involved in this case. Ibbetson, above n 64, 254.

⁶⁶ *Common Law Procedure Act 1854* (UK) 17 & 18 Vict, c 125, ss 34-62; Baker, above n 7, 141-42.

of 1873 and 1875 consolidated the royal courts into a single body, thus eliminating competition altogether.⁶⁷

By eliminating jurisdictional competition and pecuniary incentives as factors in the development of the law, these nineteenth century statutes fundamentally altered judicial decisionmaking. Not surprisingly, historians of nineteenth and twentieth-century law emphasize the judge's political views, changes in the political, economic and social environment, and the internal development of doctrine. Nevertheless, historians should be cautious in assuming that these factors were as important in the pre-modern times. One of the key functions of the historian is to recognize how institutions operated in a fundamentally different way in former times. The dominance of intellectual, social, and doctrinal explanations for legal development may be the product of nineteenth-century reforms. Historians working on earlier periods, however, need to consider a very different institutional environment, in which pecuniary considerations and jurisdictional competition played a much larger role.

VI RESEARCH PLANS

As noted in the introduction, research on this project has only just begun. This section discusses four of the many outstanding issues requiring further investigation.

A Was there really a pro-plaintiff bias?

This article asserts that the common law had a pro-plaintiff bias, but the existence of that bias is controversial and requires substantiation. While this essay relies on examples, this methodology is problematic, especially since there are counter-examples, including the myriad of defenses in defamation law and the increasing restrictiveness of the writ of covenant.⁶⁸ To move beyond dueling examples, the author hopes to develop quantitative tests of the pro-plaintiff hypothesis. One promising avenue is to compare judicial decisions before and after the 1799, 1830 and 1832 statutes which took fees away from the judges and their staffs. If the hypothesis in this essay is correct, there should be a noticeable changes around those years. Another possibility is to examine statutes which overruled recent judicial decisions. Did they tend to change the law in pro-plaintiff or pro-defendant ways?⁶⁹

⁶⁷ *Judicature Act 1873* (UK) 36 & 37 Vict, c 66; *Judicature Act 1875* (UK) 38 & 39 Vict, c 77; Baker, above n 7, 50-51.

⁶⁸ Baker, above n 7, 440-42; Joseph Biancalana, 'Actions of Covenant, 1200-1330' (2002) 20 *Law and History Review* 1.

⁶⁹ See: William N Eskridge, Jr, 'Overriding Supreme Court Statutory Interpretation Decisions' (1991) 101 *Yale Law Journal* 331.

B *Arbitration and choice of forum clauses*

Most of the examples in this essay came from contract law. If there really was an inefficiently pro-plaintiff bias, however, parties should have tried to contract around it. There are two ways they might have done so – arbitration and choice-of-forum clauses. That is, parties might have agreed, before a dispute arose, to submit any future dispute to arbitration. Or they might have agreed that any litigation would take place in a particular court, perhaps Common Pleas. Such contractual clauses would have encouraged the courts to develop doctrines which maximized the mutual benefits from contracts, rather than simply favoring plaintiffs. The author has never seen a discussion of choice-of-forum clauses, and there seems to be some debate over the enforceability of arbitration clauses. Courts collectively would have had an incentive not to enforce such clauses, which would have reduced fee income by diverting cases to arbitration or other courts. On the other hand, each court might have had an incentive to enforce penal bonds conditioned on breach of an agreement to arbitrate or litigate in a particular forum. In addition, even if such clauses were not legally enforceable, reputation and other mechanisms might have led to compliance in many instances.

C *Alternative Explanations*

While this article argues for the importance of compensation and competition, there are other potential explanations for the patterns discussed here. Perhaps class or ideological biases can explain the results. Perhaps judges were pro-plaintiff in contract cases, because of a class-bias in favor of creditors. Perhaps they were pro-defendant in *Priestly* and *Winterbottom*, because of class-bias against employees and consumers. Alternatively, it is possible that the common law rigidly enforced contracts while Chancery developed defenses, because of the differing institutional competence. Perhaps defenses were too complex for the common law courts, which relied on lay juries, and required the sort of nuanced fact-finding which only Chancery's professional judging could provide.

D *How did the fee system work?*

While it is relatively clear that judges received fees, the details of the system are uncharted. How were fees distributed between chief and puisne judges? between judges and staff? between staff members? When did the fee system begin and how did it evolve? Did changes in the fee system affect legal evolution? Blatcher presents a tantalizing hint of the possible importance of the internal structure of courts. Why was the Bill of Middlesex developed in King's Bench rather than Common Pleas? Blatcher suggests part of the answer lies in the allocation of responsibility among court staff. In King's Bench, a single prothonotary (chief clerk) had the power and financial incentive to innovate. In Common Pleas, the prothonotary's responsibilities were split among three men, and change would also

have required the assent of an independent keeper of the seal.⁷⁰ Thus, collective action problems may have impeded innovation in Common Pleas.

VII CONCLUSION

This essay has presented a relatively simple hypothesis: that competition among courts led to a pro-plaintiff bias in the common law. This idea has the potential to help explain a number of doctrinal and institutional features of the common law. Much research, however, remains.

⁷⁰ Blatcher, above n 25, 109-10.